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Clyde JAMES, Jr. *v.* STATE of Arkansas

CA CR 83-140 665 S.W.2d 883

Court of Appeals of Arkansas
Division I
Opinion delivered March 7, 1984
[Rehearing denied April 11, 1984.]

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Jack Skinner, for appellant.

Steve Clark, Atty. Gen., by: *Michael E. Wheeler,* Asst. Atty. Gen., for appellee.

GEORGE K. CRACRAFT, Judge. Clyde James, Jr. appeals from his conviction of one count of carnal abuse in the first degree as defined in Ark. Stat. Ann. § 41-1804 (Repl. 1977), a class C felony, and one count of sexual abuse in the first degree as defined in § 41-1808 (Repl. 1977), a Class D felony, for which he was sentenced to concurrent terms of 10 years and 6 years respectively. He advances six points of procedural error which he contends warrant reversal. We find no merit in any of them.

On October 1, 1982 the defendant was charged with the crime of first degree carnal abuse for engaging in deviate sexual activity with his seven year old daughter. In the second count he was accused of having committed the crime of sexual misconduct by engaging in sexual contact with his fifteen year old adopted daughter on that same day.

On January 26, 1983 the appellant filed a motion for

severance of offenses pursuant to A.R.Cr.P. Rule 22.2(a) which provides that where two or more offenses have been joined for trial solely on the ground that they are of the same or similar character and are not part of a single scheme or plan, the defendant shall have a right of severance. In his motion the appellant contended that these offenses were joined solely because they were of the same character and were not part of a single scheme. This motion was argued to the court on February 6, 1983. No record was made of that proceeding but in the record of a pre-trial hearing the next day, on a motion in limine and to suppress a confession, the following reference is made to it:

> THE COURT: Let's see, we argued the severance motions yesterday and I told you that I would rule on those after I heard the suppression, or what did I tell you yesterday?
>
> MR. SKINNER: Judge, I believe you said at that point you would overrule the motions, however, you would allow me to request the motions again after the suppression hearing and you might reconsider.
>
> THE COURT: I believe that's right.

The hearing continued on the motion to suppress the confession. No evidence as to the circumstances under which the two crimes were alleged to have been committed was offered. At the conclusion of that hearing the court denied the motion to suppress. Appellant's counsel then brought to the court's attention his motion for severance of offenses and the court announced that he adhered to his prior decision to deny it. Nothing further on this subject appears in the record.

On March 23, 1983 the trial was held on both counts contained in the information. Appellant contends that he was prejudiced by being forced into a single trial of two separate offenses which were not proved to be part of a single scheme or plan. He argues that, as the younger victim testified to one act of carnal abuse during "the summer of last year" and the older one to an act of sexual misconduct

"on the last Friday in July," there was nothing to show a single scheme. Appellant relies on *Teas* v. *State,* 266 Ark. 572, 587 S.W.2d 28 (1979) and A.R.Cr.P. Rule 22.2(a). We do not agree.

A.R.Cr.P. Rule 22.1(a) requires that a motion for severance of offenses be timely made before trial except where it is based on a ground not previously known. Rule 22.1(b) provides as follows:

> If a defendant's pretrial motion for severance was overruled, he may renew the motion on the same grounds before or at the close of all the evidence. *Severance is waived by failure to renew the motion.* [Emphasis supplied]

We note that the information alleged that the two acts occurred on the same day. The record is silent as to what was presented to the court when the hearing was held on that motion. We cannot conclude at that point that the court abused discretion by not granting the severance. The allegation that both offenses occured on the same day between members of the same household may well be indicative of a single scheme or plan. Our cases have held that there are circumstances under which separate crimes committed upon different individuals close in time may constitute a single scheme or plan within the meaning of A.R.Cr.P. Rule 22.2(a). *Ruiz and Van Denton* v. *State,* 273 Ark. 94, 617 S.W.2d 6 (1981).

At that point the two victims had not testified as to the circumstances under which the two crimes were committed and there was no evidence indicating that the two acts were not parts of a single episode. It was not until the testimony of the two girls was presented at the trial that the evidence on which appellant based his argument appears. The motion to sever the offenses was not renewed when these victims gave their testimony, at the close of all of the evidence, or at any subsequent time. Even if the evidence disclosed that the two offenses were not a part of a single scheme or plan, and were joined solely because they were of similar character, failure to renew the motion constituted a waiver of a right to

severance under the clear wording of A.R.Cr.P. Rule 22.1(b).

Appellant next contends that the trial court erred in not permitting him to testify about statements made to him by the police officers relating to a polygraph examination. At the *Denno* hearing the officers testified that during the course of their investigation of the charges of sexual abuse the appellant voluntarily agreed to submit to a polygraph test. During a pre-test interview appellant was advised of his *Miranda* rights and he signed a written waiver and consent to take the test. They testified that no test was administered because he voluntarily confessed to having committed the two offenses during the customary pre-test interview.

In his motion to suppress the confession appellant alleged that he had waived his right to remain silent solely because of statements of the officers which misled him as to the nature of the investigation. Although appellant did not testify at the *Denno* hearing, he sought an admission from the officers on cross-examination that they had told appellant they were not conducting a criminal investigation, but the polygraph test was for his own benefit and that of Social Services in finding a solution to his difficulties and to reunite him with his children. The officers denied making any such statements. Appellant does not appeal from the court's determination that the confession was voluntary.

At the trial the officer made no mention of the polygraph test on direct examination. On cross-examination he was asked if one had been administered. Before he answered the question the State objected. Appellant argued to the court that the purpose of his question was to attack the credibility of the officer because if he again stated that no test was administered, appellant would take the stand to contradict him. The court ruled that whether a polygraph test was administered was immaterial and mention of it was too prejudicial. He did permit full cross-examination of the officer regarding any misleading statements made to appellant. The officer again denied that the statement had been made. While it does not appear that the court's ruling on the question concerning the polygraph test is the basis for appellant's argument on appeal, it does have a direct

bearing on the argument he does make.

After the State concluded its case appellant stated that in view of the court's ruling on the admission of evidence about the polygraph he wished to proffer appellant's testimony that he had been induced to come to the Sheriff's office by promises that if he took a polygraph test it would aid him in an investigation being made by the Department of Social Services and facilitate the reuniting of his family. The court ruled that he could testify concerning any matters stated in the proffer except his reference to the polygraph. Appellant now argues that the purpose of this testimony was to attack the credibility of the officer and the court erred in excluding it.

While such inducing statements might have been material to the issue of the voluntariness of the confession, the evidence was offered not for that purpose but to impeach the witness. One may not cross-examine a witness about a collateral matter and then impeach him by proof of a contradicting statement. *Peters* v. *State,* 103 Ark. 119, 146 S.W. 491 (1912). *Odom* v. *State,* 259 Ark. 429, 533 S.W.2d 514 (1976). The test in determining whether the issue is a collateral one is whether the cross-examining party would be entitled to prove the issue as part of his case. *Vanderpool* v. *State,* 4 Ark. App. 93, 628 S.W.2d 576 (1982). Whether the officer made the statements attributed to him or whether a polygraph test was in fact administered were collateral matters. The court was correct in his ruling.

Appellant next contends that the trial court erred in ruling that if the defendant took the stand to attack the credibility of the police officer's testimony he would be subject to the same rules of cross-examination as any other witness. He relies on Unif. R. Evid. 608(b) which provides that where a witness, including an accused person, is examined only on matters relating to credibility he does not waive his privilege against self-incrimination. We do not address this argument because it was not raised in the trial court and may not be argued for the first time on appeal.

The appellant next contends that the trial court erred in

excluding evidence of the appellant's rehabilitation, subsequent to the commission of the crimes, through counseling. The court ruled this evidence was irrelevant. We agree.

A determination of the relevancy of evidence is within the trial court's discretion and we will not reverse its ruling absent a showing of an abuse of discretion. Unif. R. Evid. 401; *Jones* v. *State,* 277 Ark. 345, 641 S.W.2d 717 (1982). Some matters in mitigation of punishment are relevant and appropriate for a jury's consideration in arriving at punishment. In the circumstances of this case we cannot conclude that the trial court abused its discretion in determining that the proffered evidence was irrelevant for that purpose. Evidence in mitigation of punishment is such that although it does not constitute justification or excuse for the offense in question it may in fairness and mercy be considered as extenuating or reducing the degree of moral culpability. The evidence proffered here had no such tendency. It was offered for the stated purpose of obtaining a suspended sentence upon showing that *subsequent* to the commission of these crimes events had occurred which made it unlikely that the appellant would commit them again. It is the function of the jury to determine the issue of guilt or innocence and fix the appropriate penalty upon a finding of guilty. Although a jury may recommend mercy or the imposition of a suspended sentence, their recommendation is advisory only and is not binding upon the trial court. The trial court alone has the authority to impose a suspended sentence. *Clayton* v. *State,* 247 Ark. 643, 447 S.W.2d 319 (1969). We find no abuse of the trial court's discretion in excluding this evidence.

The appellant next contends that the trial court erred in refusing to give his proffered instruction on sexual misconduct as a lesser included offense of carnal abuse. Carnal abuse (Ark. Stat. Ann. § 41-1804) is defined as a person eighteen years old or older engaging in sexual intercourse or deviate sexual activity with another person not his spouse who is less than fourteen years old. Sexual misconduct is defined in Ark. Stat. Ann. § 41-1807 (Repl. 1977) as engaging in sexual intercourse or deviate sexual activity with another person not one's spouse who is less than sixteen years old. It

is a class B misdemeanor. While we agree that sexual misconduct is a lesser included offense of carnal abuse in the first degree we find no error in refusal to give the instruction. It is reversible error to refuse to give a correct instruction on a lesser included offense when there is testimony furnishing a reasonable basis on which the accused may be found guilty of the lesser offense. Where, however, there is no evidence tending to disprove one of the elements of the larger offense the court is not required to instruct on the lesser one because absent such evidence there is no reasonable basis for finding an accused guilty of the lesser offense. In this type of case the jury must find the defendant guilty either of the offense charged or nothing at all. *Bongfeldt* v. *State,* 6 Ark. App. 102, 639 S.W.2d 70 (1982); *Caton & Headley* v. *State,* 252 Ark. 420, 479 S.W.2d 537 (1972).

The uncontradicted evidence in this case disclosed that the victim was under the age of fourteen and that the appellant was twenty-seven years of age. There was no evidence from which the jury might find or infer that he was under the age of eighteen. We conclude that only in that event would an instruction on sexual misconduct have been required.

The appellant argues that as the victim was seven (under the age of fourteen) the actions of the appellant could have resulted in conviction under either statute. A review of our statutes, and the commentaries to them, that deal with sexual offenses to one beneath the age of consent leads to a contrary conclusion. Sexual activity with one under the age of eleven years is rape, a class Y felony, Ark. Stat. Ann. § 41-1803 (Supp. 1983). Such activity by one over eighteen years of age with another under fourteen is carnal abuse in the first degree, a class C felony, Ark. Stat. Ann. § 41-1804 (Repl. 1977), and by one over twenty with another under sixteen is carnal abuse in the third degree, a class A misdemeanor. It is clear from these various sections that the Legislature intended the age of the victim to control the severity of the penalty. In the enactment of the two degrees of carnal abuse the taking into account of the relative ages of the participants as well as the absolute age of the victim evidences an intent to exclude from their ambit such conduct

between contemporaries or near contemporaries. See Commentary to Ark. Stat. Ann. § 41-1808 (Repl. 1977).

The sexual misconduct statute was enacted to fill the gaps created by the age requirements of the two degrees of carnal abuse to cover those situations where the victim is eleven, twelve or thirteen years old and the offender is less than eighteen, or the victim is fourteen or fifteen years of age and the offender is less than twenty years old. See Commentary to Ark. Stat. Ann. § 41-1807 (Repl. 1977).

As there was no reasonable basis upon which the jury could find the accused was less than eighteen years of age, it could not have found him guilty of the lesser included offense and the court was not required to instruct on it.

At the conclusion of the closing arguments the trial court instructed the jury with respect to four verdict forms and instructed the bailiff to take them to the jury room. After the jury had retired appellant's counsel approached the bench and objected "for the record" to a comment of the prosecuting attorney during his argument. The trial court overruled the objection as being untimely made. We agree.

An objection must be made at the first opportunity to do so. *Earl* v. *State,* 272 Ark. 5, 612 S.W.2d 98 (1981). Furthermore, the trial court has the opportunity to judge and observe the prejudicial impact of closing arguments to a jury and is vested with broad latitude of discretion in supervising and controlling those arguments. Decisions based on that discretion will not be overturned unless there is a manifest abuse of it. *Perry* v. *State,* 277 Ark. 357, 642 S.W.2d 865 (1982). The appellant argues that the jury had not yet begun their deliberations and the court could have recalled them and admonished them not to consider those remarks. No request for recall or admonishment was made. Even if the objection had been made timely we cannot conclude that under the circumstances of this case appellant had demonstrated that the trial court abused this discretion.

Affirmed.

MAYFIELD and GLAZE, JJ., agree.

Ruth L. WILLIAMS *v.* STATE of Arkansas

CA CR 83-159 665 S.W.2d 299

Court of Appeals of Arkansas
Division II
Opinion delivered March 7, 1984

Wood Law Firm, by: *Steven R. Davis,* 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 charged with robbery. After a jury trial, she was convicted and sentenced as an habitual offender under Ark. Stat. Ann. § 41-1001 (Repl. 1977) to twenty-three years in the Arkansas Department of Correction. From that decision, comes this appeal.

On January 28, 1983, the appellant was detained by employees of a Safeway grocery store after she was observed placing six steaks under her clothing. In the ensuing melee,

the appellant was alleged to have bitten one of the employees and violently resisted her apprehension. She fled the store after breaking away from the employees and was arrested a short time later.

At the close of the State's case, the appellant moved for a directed verdict asserting that the State failed to prove that the appellant's resistance was close enough in time to her taking the steaks to constitute robbery as defined by Ark. Stat. Ann. § 41-2103 (Repl. 1977). The trial court denied the motion, and we think the trial court was right. Upon observing the appellant take the steaks, move down an aisle, and place them in her clothing, two employees sought to restrain her, but were met with violent physical resistance, which resulted in one of the employees suffering wounds from bites inflicted by the appellant. We believe that the evidence was sufficient to present a factual question for the jury.

The appellant urges us to adopt the reasoning stated in the dissent to *Jarrett* v. *State,* 265 Ark. 662, 580 S.W.2d 460 (1979), which argued that since the only force which was exerted was when police officers attempted to hand-cuff the suspect, the offense of robbery had not been committed. In the dissenter's view, the intent of the statute was not to proscribe such conduct. We do not agree. The clear legislative intent was to define robbery so as to cover situations where persons who have committed a theft choose to employ force to avoid arrest.

The appellant's second argument for reversal is that the trial court erred by refusing to instruct the jury on assault in the first degree as a lesser included offense of robbery. The appellant cites no authority for this theory, and we are unpersuaded. On the facts of the case at bar, the appellant probably could have been convicted of disorderly conduct, some degree of assault, or some degree of battery, but those offenses are not lesser included offenses of robbery. They are simply offenses of a different class. Our criminal code deals with situations where an act may be violative of more than one statute. See Ark. Stat. Ann. § 41-105 (Repl. 1977). For example, a forcible act of intercourse with one's child

under the age of eleven would support a conviction for rape or incest, but not both, and neither is a lesser included offense of the other, though several elements are the same. Since assault is not a lesser included offense of robbery, the trial court correctly refused the requested instruction.

Finally, the appellant argues that it was error for the trial court to allow the testimony of a rebuttal witness. The appellant asserts that because the rebuttal witness was the court's bailiff, and was present during the trial, it was error to allow him to testify on rebuttal. In *Williams* v. *State,* 258 Ark. 207, 523 S.W.2d 377 (1975), the Arkansas Supreme Court stated:

> The rule consistently applied by this court is that a violation by a witness of the rule of sequestration of witnesses, through no fault of, or complicity with, the party calling him, should go to the credibility, rather than the competency of the witness. *Harris* v. *State,* 171 Ark. 658, 285 S.W. 367; *Hellems* v. *State,* 22 Ark. 207; *Golden* v. *State,* 19 Ark. 590; *Pleasant* v. *State,* 15 Ark. 624. The power to exclude the testimony of a witness who has violated the rule should be rarely exercised. We have been unable to find any case in which this court has sustained the action of a trial court excluding the testimony of such a witness. While the witness is subject to punishment for contempt and the adverse party is free, in argument to the jury, to raise an issue as to his credibility by reason of his conduct, the party, who is innocent of the rule's violation should not ordinarily be deprived of his testimony. *Harris* v. *State, supra; Aden* v. *State,* 237 Ark. 789, 376 S.W.2d 277; *Mobley* v. *State,* 251 Ark. 448, 473 S.W.2d 176. Although the trial court has some discretion in the matter, its discretion is very narrow and more readily abused by exclusion of the testimony than by admitting it. *Harris* v. *State, supra. . . .*

It is clear from the record that the State sought the rebuttal testimony to impeach the credibility of the appellant's witness, Mr. Parker, who had testified that he always went peacefully when arrested. The trial court stated that, if

the violation of the rule was the only basis for the appellant's objection, it was going to allow the testimony. We suspect the trial court wondered, as we have, how such testimony was relevant or proper for impeachment purposes, but no other objection was voiced. We find no abuse of discretion, based on the stated objection, in allowing the rebuttal testimony.

Affirmed.

CRACRAFT and MAYFIELD, JJ., agree.

CURTIS COMMUNICATIONS d/b/a KLAZ RADIO
v. Ron W. COLLAR

CA 83-129 665 S.W.2d 301

Court of Appeals of Arkansas
Division I
Opinion delivered March 7, 1984

David L. Hale, for appellant.

R. L. Walloch, for appellee.

LAWSON CLONINGER, Judge. This is an action brought to recover sales commissions alleged to be due the appellee, Ron W. Collar, for radio advertisements sold while in the employment of appellant, KLAZ Radio. Appellee was a commission salesperson for appellant from May of 1979 until July 25, 1980, at which time he resigned his position. Appellee was compensated on a commission basis amounting to 15% of his gross sales collected by appellant within 60 days of billing. Appellee brought this suit, alleging that he was also entitled for sales made by him and collected within 60 days of billing, but collected after the effective date of his resignation. Appellant argued that it was their policy to not pay after the effective date of termination of employment regardless of when collections were made.

A jury trial resulted in a verdict finding the appellee entitled to commissions for collections after his resignation in the amount of $3,500.08 for which judgment was entered. Appellant now brings this appeal.

Its first point for reversal is that the verdict is contrary to a preponderance of the evidence presented at trial. However, this is not the correct standard from an appeal of a jury verdict. It is only when there is no substantial evidence to support a jury verdict or where fair minded men can only draw a contrary conclusion to that reached by the jury that an appellate court can set aside a jury verdict. *B. J. McAdams, Inc.* v. *Best Refrigerated Express, Inc.*, 265 Ark. 519, 579 S.W.2d 608 (1979).

In the instant case, there was a fact question presented regarding whether or not appellee was entitled to additional compensation. Collar and two other employees of appellant testified that it was their understanding that they would receive commissions if an account was billed and paid within two months, even after termination of employment. Two employees of appellant testified that the company policy had been that a salesman was paid on collections received through his last day of employment. This presented a fact question for the jury and there was substantial evidence to support the verdict.

Appellant's second point for reversal is that the instructions to the jury were confusing and erroneous in the statement of law in this case. Specifically, appellant alleges that plaintiff's jury instruction No. 6 was an erroneous instruction. There is no evidence in the transcript that appellant ever objected to the instruction, or that he proffered his own instruction. No party may assign as error the giving of an instruction unless he objects thereto before or at the time the instruction is given. Arkansas Rules of Civil Procedure, Rule 51. Further, a party's failure to offer an instruction of his own on the issue precludes him from raising the argument on appeal. *Baxter* v. *Grobmyer Bros. Construction Co.*, 275 Ark. 400, 631 S.W.2d 265 (1982).

Appellant's third point for reversal is that the court

erred in failing to instruct the jury on the statutory definition of wages. Appellant asked for an instruction based on Ark. Stat. Ann. § 81-1103(n) (Supp. 1983) which states in pertinent part:

> 'Wages' means all remuneration paid for personal services including commissions and bonuses and cash value of all remuneration paid, in any medium other than cash and all remuneration paid as 'back pay' in settlement of a claim or grievance involving a discharge. The reasonable cash value of remuneration paid in any medium other than cash shall be estimated and determined in accorance with the rules prescribed by the Director . . .

Appellant cites no authority for his argument that this should have been included in the instructions to the jury. As appellee points out, this definition of wages is only relevant when used in the text of the Employment Security Act. See Ark. Stat. Ann. § 81-1103, *supra*. There is no issue involved in this case which deals with the Employment Security Act. Further, appellant has not shown how he was prejudiced by refusal to give the instruction.

Appellant's fourth point for reversal is that the court erred in failing to grant the appellant's motion for a mistrial on the basis of misconduct of appellee's attorney. Specifically, appellant argues that it was prejudiced by appellee's attorney asking the witness, Debbie Gilstrap, if she remembered the radio station being sued on several occasions. Appellant argues that this was an obvious attempt to prejudice the jury against appellant. No authority is cited for this position. It is further argued that the trial judge neglected to instruct the jury to disregard counsel's prejudicial remarks. However, appellant did not ask the trial judge to admonish the jury. All it requested was a mistrial, which the trial judge refused. The granting of a motion for mistrial is an extreme remedy and has generally been held to be within the province of the trial court. *Gustafson* v *State*, 267 Ark. 830, 593 S.W.2d 187 (Ark. App. 1980).

Appellant's counsel, on re-direct examination, asked

the witness if all employees were treated the same upon termination. On re-cross examination, appellee's attorney asked if other employees had contended that they were entitled to wages which had not been paid. When the witness stated she could not remember, appellee's counsel asked, "You don't remember the station getting sued on several occasions on wages?" Appellant's counsel objected to the question which was sustained. Although we believe, as the trial judge did, that the question was prejudicial, we hold that he did not abuse his discretion in denying a mistrial, since the witness did not answer the question. Further, appellant's attorney invited the line of questioning when he asked the witness if all employees were treated the same upon termination.

Affirmed.

CORBIN and GLAZE, JJ., agree.

Jerrell ROBINSON *v.* STATE of Arkansas

CA CR 83-147 665 S.W.2d 890

Court of Appeals of Arkansas
En Banc
Opinion delivered March 7, 1984
[Rehearing denied April 4, 1984.]

Robert M. Abney, for appellant.

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

DONALD L. CORBIN, Judge. Appellant, Jerrell Robinson, was charged with two counts of theft of property, a class C felony. He was convicted and sentenced to four years in the Arkansas Department of Correction and fined $1,000.00. We reverse and remand for a new trial.

Appellant raises two points for reversal. In his first point appellant contends that the trial court erred in refusing to give appellant's requested instruction, AMCI 403, which in effect provides that the jury is allowed to decide whether certain witnesses are accomplices, and is then instructed that the defendant cannot be convicted based upon an accomplice's testimony unless it is corroborated by other evidence tending to connect the defendant with the commission of the offense.

"Accomplice" is defined in Ark. Stat. Ann. § 41-303 (Repl. 1977), as follows:

> (1) A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, he:
>
> (a) solicits, advises, encourages or coerces the other person to commit it; or
>
> (b) aids, agrees to aid, or attempts to aid the other person in planning or committing it; or
>
> (c) having a legal duty to prevent the commission of the offense, fails to make proper effort to do so.

Dwan Criner testified that he, Henry Sims, Sandra Sims, Catrina Jeffrey and appellant took appellant's car to Hargrove's Reservoir. Some of the group fished, but Criner was intoxicated and not feeling too well so he lay down in the car. While in the car, he saw appellant put two boat motors in the back of the car. He specifically denied taking the motors or having anything to do with it.

Henry Sims testified that he went fishing at Hargrove's Reservoir with Sandra Sims, Dwan Criner, Catrina Jeffrey and appellant in appellant's car. He stated that he, his sister Sandra and Catrina fished. He testified that when they arrived there were no boat motors in the car, but when they came back from fishing there were two in the trunk. Sims stated that he personally saw appellant get one of the motors and stated that appellant said he was going to take the motors to Pine Bluff and sell them.

Sandra Sims testified she had gone fishing with Catrina, Dwan, Henry and appellant in appellant's car. Once at the reservoir, only she, Henry Sims and Catrina fished. According to her testimony, appellant did not fish, and Criner lay in the car. She stated that when they got back to the car after fishing, one motor was in the back of the trunk and that appellant was toting another one to the car. She testified that "we didn't bring them [the boat motors] back" but that "Jerrell brought them back." She stated that they told appellant he shouldn't take the motors but he said he needed money. She further testified that he asked them to go to Pine Bluff but "we said no, you know, we didn't want to have nothing to do with it."

Catrina Jeffrey testified that she too went fishing with the above named persons at Hargrove's Reservoir. She stated that she didn't know anything about the motors until they were almost in Stuttgart. She then learned there were two in his trunk and that appellant had put them there. When asked how she knew that, she replied, "cause he said it."

Appellant alleges that the fact that the above named witnesses were with him during the commission of the offense is evidence that they were accomplices, thereby

entitling him to have the jury decide whether they actually were or not. Appellee responds by first noting the undisputed testimony was that although the four did ride with appellant to the reservoir, three of the four fished while appellant was apparently stealing the motors, and the fourth lay in the car, sick, while the theft was going on. All four witnesses testified that it was appellant who stole the motors, and there was no testimony by any of these witnesses to implicate any of the five persons who went to the reservoir except appellant. Their testimony was consistent with one another, with all four denying any part in the wrong doing. Under these circumstances appellee submits the fact that they rode with appellant to Hargrove's Reservoir and then fished while he stole the motors is insufficient to make their status a question for the jury to decide. Appellee further notes that appellant's contention that the witnesses were accomplices was not consistent with his defense that he did not go fishing at the reservoir with these four people and knew nothing about the theft of boat motors.

The defendant in a criminal case has the burden of proving that a witness is an accomplice whose testimony must be corroborated. *Lear* v. *State*, 278 Ark. 70, 643 S.W.2d 550 (1982). The term "accomplice" does not embrace one who had quilty knowledge or who is morally delinquent. It includes only one who takes or attempts to take some part, performs or attempts to perform some act, or owes some legal duty to the victim of the crime to prevent its commission. Mere presence, acquiescence, silence or knowledge that a crime is being committed, in the absence of some legal duty to act, concealment or knowledge or failure to inform officers of the law, is not sufficient to make an accomplice. *Hicks* v. *State*, 271 Ark. 132, 607 S.W.2d 388 (1980). It is well settled that where the evidence does not support an instruction, it should be refused. *Powell* v. *State*, 231 Ark. 737, 332 S.W.2d 483 (1960). One's status as an accomplice is a mixed question of law and fact and the issue must be submitted to the jury where there is any evidence to support a jury's finding that the witness was an accomplice. *Earl* v. *State*, 272 Ark. 5, 612 S.W.2d 98 (1981).

Upon our review of the record, we find there was

evidence from which the jury could have found the four witnesses to be accomplices. They were acquainted with appellant and were passengers in his automobile. Furthermore, each of the four testified he or she was with appellant at the scene of the alleged crime on or about the time the two boat motors were discovered missing and all failed to divulge this information until questioned by law officers. *Roleson* v. *State,* 277 Ark. 148, 640 S.W.2d 113 (1982), sets forth what test is to be applied to determine whether the jury is to be given an instruction as to an accomplice. *Roleson, supra,* cited *Burke* v. *State,* 242 Ark. 368, 413 S.W.2d 646 (1967), for the following proposition:

> The test, generally applied to determine whether or not one is an accomplice, is, could the person so charged be convicted as a principal, or an accessory before the fact, or an aider and abetter upon the evidence? If a judgment of conviction could be sustained, then the person may be said to be an accomplice; but, unless a judgment of conviction could be had, he is not an accomplice.

On the evidence presented here, appellant would not have been entitled to an instruction that the four witnesses were accomplices as a matter of law; however, their status as accomplices was in dispute and the court should have given AMCI 403. See *Earl* v. *State,* 272 Ark. 5, 612 S.W.2d 98 (1981). The determination of their status is clearly within the province of the trier of fact. Accordingly, the trial court erred in refusing to instruct the jury so as to allow it to determine the status of the four witnesses and we reverse and remand for new trial.

Appellant's final point for reversal alleges that the trial court erred in allowing the State to amend the information charging appellant with theft of property. The original information stated:

> The said defendant *on the 14th day of October, 1982,* in the Northern District of Arkansas County, did then and there unlawfully . . . (Emphasis added)

The information was amended to state:

> The said defendant *on or about the 14th day of October, 1982,* in the Northern District of Arkansas County, did then and there, unlawfully . . . (Emphasis added)

On the day of trial the State moved to amend the information over the objection of the appellant. Appellant argues that this amendment endangered his right to a fair trial and destroyed his defense wherein he was prepared to offer witnesses to show he was somewhere other than at the scene of the alleged crime on October 14, 1982. Pursuant to the authority of *Prokos* v. *State,* 266 Ark. 50, 582 S.W.2d 36 (1979), appellant may have been entitled to a continuance; however, it was not requested by appellant. The record reflects that the prosecutor had earlier advised defense counsel of his amendment and advised him that the State would not object to a motion for continuance. The prosecutor stated that defense counsel indicated to him that no continuance would be requested. In addition to the foregoing, Ark. Stat. Ann. § 43-1015 (Repl. 1977), provides that a statement in the information as to the time the alleged offense is committed is immaterial except where time is a material ingredient in the offense. See also, *Scoggins* v. *State,* 258 Ark. 749, 528 S.W.2d 641 (1975), and *Payne* v. *State,* 224 Ark. 309, 272 S.W.2d 829 (1954). We find no error here.

Reversed and remanded.

CLONINGER, J., dissents.

LAWSON CLONINGER, Judge, dissenting. I respectfully disagree with the majority. There was no issue for the jury to determine, because there was no evidence that the witnesses who were with appellant at the time of the offense were accomplices.

Where the evidence does not support an instruction it should be refused. *Powell* v. *State,* 231 Ark. 737, 332 S.W.2d 483 (1960). Moreover, it should be noted that appellant's contention that the witnesses were accomplices is not consistent with his defense. He admitted knowing the four

witnesses but specifically denied going fishing with them or going to the reservoir. His sole defense was that he was not there and did not steal the motors.

I would affirm the judgment of the trial court.

Robert B. DUNCAN *v* Bessie T. DUNCAN

CA 83-128 665 S.W.2d 893

Court of Appeals of Arkansas
Division I
Opinion delivered March 7, 1984
[Rehearing denied March 28, 1984.]

Herrod & Vess, by: *E. H. "Buzz" Herrod* and *Elizabeth Wood*, for appellant.

Martindale & Phillips, by: *Everett O. Martindale*, for appellee.

TOM GLAZE, Judge. This appeal arises from the property settlement provisions of a divorce decree entered in Pulaski County on March 3, 1983. The divorce came nearly two years after the first action was filed between these parties. In that initial action, the appellee, Bessie Duncan, filed for divorce and on January 7, 1982, during the pendancy of the suit, the parties executed a property settlement agreement. On May 21, 1982, appellee's complaint was dismissed and appellant filed for divorce in Pulaski County. Before that divorce action was concluded, appellee went to Florida, where she filed another divorce action on June 2, 1982.[1] However, on March 3, 1983, the Arkansas court awarded appellant a divorce and adjudicated the parties' property rights. Appellant urges the chancellor erred (1) in not considering the partial performance of the parties' previous property settlement agreement; and (2) in not stating the reasons for an inequitable division of marital property as required by Act 705 of 1979.

For his first point for reversal, appellant argues that because the parties had partially distributed their personal property prior to the hearing by the terms of their 1982 agreement, the chancellor abused his discretion in not upholding the agreement in its entirety. Appellant points to evidence of the parties' intent to carry out the terms of the agreement. Appellant also maintains that appellee relied on the contract for benefits and is therefore estopped to deny its validity. In our search of the record, however, we find that the issue of upholding the agreement was not raised below. The appellant's complaint for divorce, which was filed four-and-one-half months after the contract was executed, included no mention of the contract. In fact, the complaint provided, in part, "The parties own individually and jointly

[1]The question of whether jurisdiction lay in Arkansas or Florida was adjudicated below and is not an issue on appeal.

real and personal property which should be partitioned and divided as provided by law." Even though the property settlement agreement was introduced as an exhibit at the divorce hearing, the appellant did not ask the chancellor to enforce it. It is well settled that appellant cannot raise an issue for the first time on appeal. *Wilson* v. *Kemp*, 7 Ark. App. 44, 644 S.W.2d 306 (1982).

For his second point for reversal, appellant contends the chancellor erred in not stating reasons for an inequitable division of marital property as required by Act 705 of 1979. Both parties testified that after signing the property settlement agreement in January, 1982, they partially divided their jointly-held personal property. The most significant items included six $10,000 savings certificates which the parties divided evenly. At the time of the hearing, the appellant testified that he still had all his one-half, *i.e.* thirty thousand dollars, and that he had spent only a portion of the interest he had earned from his deposit. The appellee, on the other hand, testified that she had only seven thousand dollars remaining of her thirty thousand, and that she had spent the other twenty-three thousand dollars on living expenses for the year preceding the hearing. The chancellor ordered that all marital property be divided equally between the parties at the time of the divorce, thus requiring appellant to divide his thirty thousand dollars with appellee, and appellee to divide her seven thousand dollars with appellant. Appellant argues that the result of the chancellor's decree is that appellant received less than one-fourth of the savings certificates, while appellee received more than three-fourths of the certificates. We agree with appellant that such a result is inequitable and is prohibited in view of the chancellor's failure to set out in writing his reasons for an inequitable division of the parties' property. Ark. Stat. Ann. § 34-1214 (Supp. 1983) provides, in part:

> (A) At the time a divorce decree is entered:
>
> (1) All marital property shall be distributed one-half [1/2] to each party unless the court finds such a division to be inequitable, in which event the court shall make some other division that the court deems equitable taking into consideration (1) the length of the

> marriage; (2) age, health and station in life of the parties; (3) occupation of the parties; (4) amount and sources of income; (5) vocational skills; (6) employability; (7) estate, liabilities and needs of each party and opportunity of each for further acquisition of capital assets and income; (8) contribution of each party in acquisition, preservation or appreciation of marital property, including services as a homemaker; and (9) the federal income tax consequences of the Court's division of property. When property is divided pursuant to the foregoing considerations the court must state its basis and reasons for not dividing the marital property equally between the parties and such basis and reasons should be recited in the order entered in said matter.

In the case at bar, the chancellor ordered that all personal property be divided equally; he specifically included in his decree "all savings and investments held in the name of either party." Nonetheless, the chancellor failed to credit the parties with those savings which comprised marital property previously and voluntarily divided between them. In failing to do so, he clearly erred by departing from the equal division mandated by § 34-1214(A)(1), *supra.* If the chancellor had specific reasons for not equally dividing the parties' marital savings, he failed to state those reasons in compliance with § 34-1214, *supra. Cf. Glover* v. *Glover,* 4 Ark. App. 27, 627 S.W.2d 30 (1982) (Chancellor erred in ordering wife's one-half interest in marital home to be applied to net worth of family partnership in which she had only a one-fourth marital interest and further erred in awarding her one-fourth partnership interest to her husband).

The chancellor no doubt considered the parties' disparate positions; this is evidenced by his awarding $780 a month alimony to the wife to offset the obvious inequality in the parties' earning abilities. Therefore, we reverse only that portion of the decree which ordered a division of the savings certificates already divided by the parties and remand for the court to enter its order consistent with this decision.

Reversed and remanded.

CLONINGER and CORBIN, JJ., agree.

Bert VASQUEZ et al *v.*
Morris JUSTICE et al

CA 83-397 665 S.W.2d 896

Court of Appeals of Arkansas
Division I
Opinion delivered March 7, 1984
[Rehearing denied April 4, 1984.]

Barron, Coleman & Barket, P.A., by: *Ronald L. Eggers,* for appellant.

Wilson & McNee, P.A., by: *Mike Wilson,* for appellee.

TOM GLAZE, Judge. This case involves certain bills of assurance that appellants contend preclude appellees from constructing multifamily dwellings upon lots located in the Oakwood Subdivision to Jacksonville, Arkansas. The chancellor, adopting the Special Master's findings, rejected appellants' claim and dismissed their complaint that sought to enjoin appellees from building apartment structures on lots five through thirteen of the subdivision. Appellants raise seven points in this appeal, but upon careful study of each, we conclude none compels reversal of the trial court's decision.

While our decision turns upon a long-established rule of property, we first must review the events that led to this legal dispute.

Appellees, J. Albert Johnson and Sue Johnson, his wife, and Morris Justice and Lucille Justice, his wife, purchased the subject property in 1971 as tenants in common. In August, 1974, appellees Morris Justice and J. Albert Johnson filed a bill of assurance and plat, identifying the property as the Oakwood Subdivision and restricting it to single family dwellings.[1] This bill of assurance represented Phase I of the subdivision and covered only twenty of a total of twenty-nine lots, *viz.*, one through four and fourteen through twenty-nine. In January, 1975, the appellees successfully obtained a rezoning of the remaining nine lots, thus permitting them to construct multifamily structures on lots five through thirteen. However, on July 24, 1975, appellee Morris Justice filed a second bill of assurance (executed by him only), which purportedly restricted lots five through thirteen to single family dwellings. Before the second bill of assurance [hereinafter the Justice bill of assurance] was filed, only the appellees and the appellants, Ralph and Bertha Vasquez, owned lots in the subdivision. The other appellants purchased residential lots after the

[1]Although Sue Johnson and Lucille Justice did not sign the original bill of assurance, they signed a "Ratification and Confirmation of Bill of Assurance" to "ratify, confirm and affirm the provisions and conditions of the bill of assurance and plat . . . executed by our husbands as if we had executed the same at the same time." The ratification was signed August 23, 1983, and filed August 29, 1983. Its validity is not an issue on appeal.

Justice bill of assurance was filed although only appellant John Evans testified that when he purchased his lot (number 29), he was advised that all of the lots would be developed with single family dwellings. Nevertheless, all of the appellees executed (on October 28, 1977) and filed (on November 4, 1977) an amendment to the Justice bill of assurance, removing all restrictions on lots five through thirteen so those lots could be used for multifamily purposes. Appellees did not obtain building permits and commence construction of apartments until 1983 at which time appellants brought this action.

Appellees, of course, principally rely on the Justice bill of assurance and the single family restriction contained therein. That bill also includes a provision relating to the duration of the covenants and the method of amending or cancelling those covenants. The provision, in pertinent part, is as follows:

> All of the lots described herein and any interest therein shall be held and owned subject to and in conformity with the following restricting [sic] and covenants which, subject to being amended, or cancelled as provided hereinafter, shall be and remain in full force and effect for twenty-five years, to-wit:
>
> 1. No lot shall be used except for single family dwelling.
>
> . . .
>
> These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of 25 years from the date these covenants are recorded, after which time said covenants shall be automatically extended for successive periods of 10 years unless an instrument signed by a majority of the then owners of the lots has been recorded agreeing to change said covenants in whole or in part.

Appellants' primary contention on appeal is that the Justice bill of assurance by its terms was not subject to

amendment for twenty-five years. Appellants contend the Arkansas Supreme Court interpreted an identical provision in *White* v. *Lewis,* 253 Ark. 476, 487 S.W.2d 615 (1972), and determined the covenants were binding for twenty-five years. Consequently, appellants argue the appellees' amendment to the Justice bill, which excluded lots five through thirteen from the single family dwelling restriction, was futile.

We find it unnecessary to determine the validity of the amendment to the Justice bill of assurance because we find the Justice bill of assurance itself was invalid; accordingly, the restrictions contained therein are also unenforceable. As previously noted, Morris Justice was undisputedly the sole appellee who executed and filed the July, 1975, bill of assurance. No evidence was presented to indicate that Morris Justice was authorized under any theory to act for the other three owners. Nor is there any evidence that in any way indicates the Johnsons (or Lucille Justice) had knowledge that Morris Justice had unilaterally filed this second bill of assurance. The law is clear that one tenant in common cannot bind his cotenant by any unauthorized agreement or act in respect to the common property. *Friar* v. *Baldridge,* 91 Ark. 133, 120 S.W. 989 (1909) (citing Am. & Eng. Ency. Law (2d ed.) 672, 23 Cyc. 494). Thus, under the facts presented here, the Justice bill of assurance is invalid and as a consequence, the first bill of assurance filed with the original plat in August, 1974, governs these parties. That bill of assurance completely excluded the property that comprises lots five through thirteen which are the subject of this dispute. Those lots have never been restricted to single family dwellings by any valid bill of assurance. Therefore, we find the chancellor's decision that lots five through thirteen are not restricted to single family dwellings is not clearly erroneous or clearly against a preponderance of the evidence. Ark. R. Civ. Pro. 52(a). We affirm.

Affirmed.

CLONINGER and CORBIN, JJ., agree.

John JOHNSON d/b/a JOHNSON'S JEWELERS
v. STUCKEY & SPEER, INC.

CA 83-160 665 S.W.2d 904

Court of Appeals of Arkansas
Division I
Opinion delivered March 14, 1984

Brazil & Clawson, for appellant.

Blevins, Pierce & Stanley, for appellee.

GEORGE K. CRACRAFT, Judge. John Johnson, doing business as Johnson's Jewelers, appeals from an order granting summary judgment in favor of Stuckey & Speer, Inc. on an open account. The appellant maintains that the trial court erred in granting summary judgment as there were genuine issues of fact to be determined. We agree.

The appellee instituted this action to recover an indebtedness in the amount of $27,635.96 alleged to be due and payable. Attached to the complaint was an unitemized statement showing only that on March 27, 1981 the amount due was the total of a "Balance Forward" of $27,249.59 and a "Service Charge" of $386.37. The statement did not show the date or dates that the balance forwarded had been incurred or the period for which the service charge was made.

The appellant answered and raised the affirmative

defense that appellee was a foreign corporation not authorized to do business in this state and was therefore barred from bringing an action under the provisions of the so called "Wingo Act," Ark. Stat. Ann. § 64-1201 et seq (Repl. 1980), and that the contract forming the basis for appellee's complaint was usurious.

Thereafter the appellee filed a motion for summary judgment attaching to it the admissions of appellant that he had received all of the merchandise, that the principal balance was accurately computed, that all goods were accepted as conforming to the contracts, and that demand had been made for which payment had not been forthcoming. He denied only that the computations of interest were not usurious. Appellee further asserted that it was not barred under the "Wingo Act" because the indebtedness had been incurred in interstate commerce. Appellee submitted no supporting documents tending to establish where the contract had been executed, that the transaction was consummated wholly in interstate commerce, or that it was not otherwise "doing business" in this state.

The appellant answered that the transactions had not been interstate in nature but had been consummated by appellee's salesman who regularly called on businesses within this state to solicit orders. He again asserted his defense of usury but submitted to the court no affidavits or other data supportive of these positions.

Summary judgment is granted in accordance with ARCP Rule 56 which provides in part that such a judgment may be rendered where the pleadings, depositions, answers to interrogatories and admissions are on file together with supporting affidavits, if any, to show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Summary judgment is an extreme remedy which should only be allowed when it is clear that there is no issue of fact to be litigated. *Saunders* v. *Nat'l Old Line Ins. Co.*, 266 Ark. 247, 583 S.W.2d 58 (1979). The burden is on the moving party to demonstrate that there is no genuine issue of fact for trial and evidence submitted in support of the motion must be

viewed most favorably to the party resisting the motion. Where the movant makes a prima facie showing of entitlement to summary judgment the respondent must meet proof with proof upon a showing of a genuine issue as to a material fact. *Hughes Western World, Inc.* v. *Westmoor Mfg. Co.,* 269 Ark. 300, 601 S.W.2d 826 (1980); *Chick* v. *Rebsamen Ins.-Springdale,* 8 Ark. App. 157, 649 S.W.2d 196 (1983).

While the granting of the summary judgment by the trial court might have been sustained had there been no issue raised other than the defense of usury, the answer of the appellant brought into question the status of appellee under our "Wingo Act" which provides that all foreign corporations wishing to do business in this state must file specified documents with the Secretary of State. It further provides that those corporations who have not complied with the Act cannot enforce any contract made by it in our courts.

In *Miellmier* v. *Toledo Scale Co.,* 128 Ark. 211, 193 S.W. 497 (1917) it was held that a foreign corporation doing business within this state will be presumed to have complied with our statutes. In an action brought by a foreign corporation where its failure to comply with the statutes does not appear on the face of the complaint a defendant must plead that failure or it will not be available to him as a defense. Where that defense is raised the burden of showing its right to maintain the action is placed upon the corporation. *Widmer* v. *J.I. Case,* 243 Ark. 149, 419 S.W.2d 617 (1967). Here there was no proof in the record to show that this appellee had complied with the "Wingo Act" with regard to filing a certificate with the Secretary of State. Upon its failure to prove that it had complied with the Act, the appellee then had the burden to prove that the Act did not apply to the transaction in issue.

The Wingo Act applies only to those corporations "doing business" within this state and to contracts made within this state. It has no application to those contracts made and entered into outside this state and consummated in the channel of interstate commerce by a corporation

which is not otherwise doing business within the state. *The W.T. Raleigh Medical Co.* v. *Rose,* 133 Ark. 505, 202 S.W. 849 (1918); *Sunlight Produce Co.* v. *State,* 183 Ark. 64, 35 S.W.2d 342 (1931); *White River Valley Broadcasters, Inc.* v. *William B. Tanner Co.,* 487 F. Supp. 725 (E.D. Ark. 1979).

Our courts have had occasion to discuss those factors to be considered in determining the place of making contracts, whether a contract is interstate or intrastate in nature and whether a non-resident corporation is "doing business" in this state within the meaning of the "Wingo Act." *Uncle Ben's Inc.* v. *Crowell,* 482 F. Supp. 1149 (E.D. Ark. 1980); *National Distributors* v. *Simard,* 246 Ark. 774, 440 S.W.2d 31 (1969); *The W.T. Raleigh Medical Co.* v. *Rose, supra.*

We find nothing in the pleadings or supporting documents filed by appellee which would tend to establish where the contract was made; how the goods were delivered or that appellee was not "doing business" within this state. As appellee's right to maintain the action had been challenged, it had the burden of proving that the Wingo Act had no application to the transaction in issue. *Miellmier* v. *Toledo Scale Co., supra; Widmer* v. *J.I. Case, supra.* It failed to do so, and the application of the "Wingo Act" to the transaction remained an unresolved issue of fact.

Reversed and remanded.

CLONINGER and MAYFIELD, JJ., agree.

Brady SANDS *v.*
Ralph Edward STOMBAUGH

CA 83-425 665 S.W.2d 902

Court of Appeals of Arkansas
Division II
Opinion delivered March 14, 1984

Robert D. Stroud, for appellant.

Larry Dean Kissee, for appellee.

JAMES R. COOPER, Judge. In this workers' compensation case, the appellant challenges the Workers' Compensation Commission's finding that the appellee was an employee of the appellant and thus entitled to benefits for injuries he received while working for the appellant.

The appellant purchased a truck stop in April of 1982 and immediately began to remodel it for reopening the following month. The appellant was hiring new employees to operate the restaurant and to help with the remodeling. The appellee applied for work with the appellant as a cook. No openings were available for this position, but the appellee was persistent in his desire for employment. The appellant needed a cabinet built for the kitchen of his truck stop and the appellee, who professed to have carpentry skills, was given the job of constructing this cabinet. The appellant informed the appellee that the cabinet would have to be built so as to have an existing cabinet top fit it. The appellee measured the area where the cabinet was to be placed and left to pick up his tools and to purchase the materials for the job. Upon returning that same afternoon, the appellee began to build the frame for the cabinet. He worked on the back of his pickup truck. He completed the frame but found that it needed modifications so it would fit. He carried the cabinet frame back to his truck and either while altering the frame or cutting a bracket for another part of the kitchen, he suffered an injury to his hand.

The evidence in this case is not undisputed and there is some inconsistency in the testimony of the interested witnesses. There was a conflict in the testimony regarding the length of the appellee's employment, the anticipated method of payment, whether the appellee was asked to perform other jobs the day he was building the cabinet, and whether the appellee was to be retained by the appellant upon completing the cabinet.

On appeal, we review the evidence in the light most favorable to the Commission's decision and affirm if it is supported by substantial evidence. *Office of Emergency*

Services v. *Home Insurance 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. 1979).

The issue of whether, at the time of an injury, an individual was an independent contractor or an employee, depends on the facts of each case. *Franklin* v. *Arkansas Kraft, Inc.* 5 Ark. App. 264, 635 S.W.2d 286 (1982). In determining whether an injured person is an employee or an independent contractor for purposes of workers' compensation insurance, there are a number of factors to be considered. Some of these factors are:

(1) the right to terminate the employment without liability;
(2) the method of payment, whether by time, job, piece, or other unit of measurement;
(3) the right to control the means and the method by which the work is done;
(4) the furnishing, or the obligation to furnish, the necessary tools, equipment, and materials.

The right to control the method and manner of the work is the traditional test derived from the common law master and servant type cases where the liability of the master for torts of the servant was the issue. This test is often limited in the modern context of business and commerce and has recently shown signs of yielding to the more flexible relative nature of the work test as set out in *Sandy* v. *Salter*, 260 Ark. 486, 541 S.W.2d 929 (1976); and *Franklin, supra.* This test, first articulated by Professor Larson in his treatise on Workmen's Compensation Law, has gained approval for its more realistic approach to the issues related to a worker's status. The main consideration in this test is "the relationship between the claimant's own occupation and the regular business of the asserted employer." *Sandy*. Larson, *Workmen's Compensation Law*, § 43.51 (1973).

In the case at bar, the Commission specifically adopted the detailed findings of the administrative law judge. Although all of the findings may not preponderate toward a finding of an employer/employee relationship between the

parties, we find substantial evidence to support the Commission's decision. The fact that we might, faced with the same facts, have reached a contrary conclusion does not require reversal. This Court does not determine where the preponderance of the evidence lies. The conflicts in the testimony were for the Commission to resolve. As we pointed out in *Franklin, supra,* cases involving the independent contractor versus employee question are frequently very close, as in this one. A contrary decision would undoubtedly have been supported by substantial evidence, but we cannot say that fair-minded persons, with these facts before them, could not have reached the conclusion arrived at by the Commission. Therefore we must affirm. *Office of Emergency Services* v. *Home Ins. Co., supra; Bunny Bread* v. *Shipman, supra.*

Affirmed.

CORBIN and GLAZE, JJ., agree.

Donald A. McCORKLE *v.*
VALLEY FORGE INSURANCE CO. et al

CA 83-285 · 665 S.W.2d 898

Court of Appeals of Arkansas
Division I
Opinion delivered March 14, 1984

[redacted]

Lessenberry & Carpenter, by: *Thomas M. Carpenter,* for appellant.

Wright, Lindsey & Jennings, for appellee.

LAWSON CLONINGER, Judge. This case arises as the result of a fire which occurred at a home located at #3 Cottonwood, Little Rock, Arkansas, owned by Donald A. McCorkle, appellant, and his former wife, Jean McCorkle McKim. After a police investigation, it was determined that the cause of the fire was arson. The home was insured against fire loss by appellee, Valley Forge Insurance Company, in the amount of $78,750 for the real property coverage. Personal property was insured for up to $39,375. Further, the expenses for loss of use were reimbursable up to $15,750. McCorkle made a claim for one-half the real property damage, $36,119.31 for personal property loss, and $15,750 for additional living expenses he incurred. The insurance company answered that the policy was void *ab initio* because of McCorkle's misrepresentations regarding the value of the property and alleged that McCorkle had conspired to commit arson.

After hearing all the testimony, the chancellor ruled that appellee had failed to prove that McCorkle was involved in the arson and held that appellee was responsible for any deterioration of the property since the fire occurred. Further, the chancellor initially decided to award appellant $21,040 for personal property loss.

On December 29, 1982, the chancellor issued another letter stating that McCorkle was only entitled to $66,277 for

the damage to real property. He also said that he was changing his mind and awarding no damages for the personal property. Finally, the chancellor refused to award damages for additional living expenses. Judgment was not entered until April 14, 1983. Appellant now brings this appeal, and appellee has cross appealed.

Appellant's first point for reversal is that the trial court erred in failing to declare the house a total loss and award damages pursuant to Ark. Stat. Ann. § 66-3901 (Repl. 1980). In his letter opinion, the chancellor noted that two years had expired since the fire. He said that the insurance company was justified in refusing to settle because of the fact that arson was the cause of the fire and there was evidence presented to indicate McCorkle might be involved. The chancellor held, however, that since he had found McCorkle was not involved in the arson, that the fire did not result in a total loss and that the damages the day after the fire were $53,222, the insurance company was responsible for any deterioration which may have occurred. He refused to accept the deposition of Harvey Mixon, an appraiser, as credible. Mr. Mixon regarded the house as a total loss on January 15, 1981. The appraiser never went inside the house, however, and the chancellor was not convinced that the house was beyond repair. Appellant now alleges that the chancellor erred in holding that the house was not a total loss and that the chancellor arbitrarily awarded 10% repair cost increases for two years for an award of $66,277.

The findings of the chancellor will not be disturbed unless they are clearly against a preponderance of the evidence, and when the issue turns largely on the credibility of the witnesses, the appellate court will defer to the superior position of the chancellor. *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W. 2d 404 (1981).

The only Arkansas case which has touched on this issue is *Employer's Liability* v. *Mid-State Homes,* 250 Ark. 789, 467 S.W.2d 386 (1971). There the Arkansas Supreme Court reversed the finding of the trial court and held that where the insured homeowner took no steps to protect the insured property against additional damage for three years follow-

ing the fire and there was ample evidence that additional damage was sustained, the insurer was not liable for the total loss of the building at the time of trial but was only liable under its contract for the cost of repairing the building within a reasonable time after the fire. In *Employer's Liability, supra,* the policy provided for immediate notice of any loss and provided that the insured protect the property from further damage. On the facts, approximately fifteen months elapsed between the date of the fire and the proof of loss provided to the insurance company. There was an additional delay of approximately fourteen months between Employer's intervention and the trial, and there was a total delay of three years and four months between the date of the fire and the entry of the decree. The court held that the homeowner was negligent in not reporting and following up on his claim against Employer's. The court also held, however, that Employer's was also negligent in its failure to ascertain the amount of damage to the building and in its handling of the claim even after it had notice of loss. Hence the court held that the equities were evenly balanced between the parties and that the preponderance of the evidence regarding the cost of repairs within a reasonable time following the damage caused by the fire was found in the testimony of Casey Jones, a construction contractor. Therefore, the insureds were only entitled to judgment for his maximum estimate of $5,300.

In the instant case, the insurance policy excluded from coverage neglect of the insured to use all reasonable means to save and preserve property at and after the time of loss. Further, the policy had a provision for the homeowner's duties after a loss occurs. One of the duties was to protect the property from further damage, make reasonable and necessary repairs required to protect the property and keep an accurate record of repair expenditures. The chancellor found that the insurance company was responsible for the deterioration which occurred after the fire. However, he arbitrarily awarded a 10% repair cost increase because he refused to accept Mr. Mixon's testimony that the house was a total loss. Since we defer to the chancellor's superior position to judge the credibility of the witnesses, we must also disregard Mr. Mixon's testimony. We cannot, however,

sustain the chancellor's finding of a 10% repair cost increase because there is no evidence in the record to support it. Because there is no other evidence of deterioration of the property since the fire, we reduce the amount of damages to $53,222, representing the loss the day after the fire.

Appellant's second point for reversal is that the court erred in failing to sustain the owner's evaluation of his personal property and to award that amount of damage, specifically $36,119.31. The trial court had pointed out initially that appellant had proved his damages to personal property. The trial court even pointed out that there was no evidence to show the property was not worth what McCorkle stated. Yet in a second letter the trial court decided to award McCorkle no damages for his loss of personal property. It is a rule in Arkansas that testimony of the owner of personal property concerning the value of that property is sufficient evidence to prove value. *Farm Bureau Mutual Insurance Co.* v. *Cusick*, 235 Ark. 27, 356 S.W. 2d 740 (1962). However, a party seeking damages has the burden of proving the claim, and, if no proof is presented to the trial court that would enable it to fix damages in dollars and cents, the court cannot award damages. See *Winkle* v. *Grand National Bank*, 267 Ark. 123, 601 S.W.2d 559 (1980); *Mason* v. *Russenberger*, 260 Ark. 561, 542 S.W.2d 745 (1976).

In the instant case, Mr. McCorkle testified extensively regarding the destruction of personal property in the loss. Further, he introduced into evidence an itemized statement with regard to the replacement value of the personal property lost. This evidence, however, was refuted by appellant's ex-wife who alleged that many of the items listed were now in her possession and that the price listed for a part of the furniture was too high. The chancellor chose to believe Mrs. McKim and held that appellant's itemized statement was at best an exaggeration and at worst a fraud on the insurance company. We cannot say his decision is clearly against a preponderance of the evidence.

Similarly, appellant's third point for reversal is that the court erred in failing to award any damages to McCorkle for additional living expenses. In contrast, though, to the

owner's evaluation of his personal property, appellant did not offer any evidence which would enable the trial court to fix damages in dollars and cents. See *Winkle* v. *Grand National Bank, supra.* Appellant testified that for several months he stayed in a motel that charged him between $800 and $900 a month, without stating the number of months or the specific monthly charge. He did not have any invoice or cancelled check to prove the amount of those payments. In fact, he did not offer any specific evidence to justify his prayer for $15,750 in damages for additional living expenses. Appellant's only allegation is that he did incur expenses to maintain the standard of living he had enjoyed prior to the fire. It would have been an easy task for Mr. McCorkle to have provided the court with receipts or other evidence with respect to his living expenses. This he did not do and this point is without merit.

Valley Forge argues on cross appeal that the court erred in failing to find that arson was caused by the appellant or persons acting in concert with him. The incriminating evidence which was presented at trial is set out as follows:

1. The insurance coverage on the property was increased in October of 1979 by 40%, before the fire occurred in January of 1980.

2. The house was jointly owned by appellant and his ex-wife, and they had been ordered in October before the fire to sell the property within 60 days.

3. McCorkle had been sentenced to serve 15 years in the penitentiary for kidnapping, and it was alleged that he had no use for the house for several years.

4. Telephone records from a Jonesboro motel indicate that appellant called his answering service twice within a period of four minutes on midnight the night of the fire. Cross appellant argues that this should be considered as evidence of an attempted alibi by Mr. McCorkle.

5. The physical evidence indicated that newspapers

> soaked with diesel fuel had been stuffed inside cabinets, furniture, holes hacked in the walls, floors and ceiling. Further, neighbors had heard pounding noises eminating from his house the Sunday before the fire. A fire investigator testified that it would have taken the person who set the house up for the fire a long time to do his work.

The evidence, although circumstantial, was sufficient to support a finding that appellant was in fact guilty of arson. However, the chancellor found that the insurance company had failed to prove that McCorkle had committed arson and therefore McCorkle was entitled to recover. It is our opinion that the chancellor's decision on this issue was not clearly against a preponderance of the evidence.

Cross appellant also argues that the court erred in refusing to find that Mr. McCorkle attempted to defraud the insurance company and therefore the policy should have been void *ab initio*. The chancellor had found that Mr. McCorkle's inventory of personal property listed was at best an exaggeration and at worst a fraud upon the insurance company. He was unable to say, however, that Mr. McCorkle had intentionally perpetrated a fraud upon the insurance company and declined to hold the policy void *ab initio*. The insurance company attempted to show that many of the items which Mr. McCorkle had listed had been removed from the house by his ex-wife and cross appellee, Jean McKim. Further, Mrs. McKim testified that many of the items were bought at different places from which Mr. McCorkle had stated and at a lower price. However, Mr. McCorkle never stated what price he had paid for the articles but instead stated what their replacement cost would be. This evidence went undisputed.

Cross appellant finally argues that the chancellor erred in awarding damage to real property for the deterioration of the property from the time of the loss to the time of the trial. We agree, although for different reasons stated earlier in the opinion.

Accordingly, the decision of the chancellor is affirmed as modified.

MAYFIELD and CRACRAFT, JJ., agree.

J. B. SMITH *v.*
CHICOT-LIPE INSURANCE AGENCY, a Partnership

CA 83-152 665 S.W.2d 907

Court of Appeals of Arkansas
Division II
Opinion delivered March 14, 1984

John F. Gibson, for appellant.

W. K. Grubbs, Sr., for appellee.

TOM GLAZE, Judge. This appeal is from a jury verdict for $2,313.74 in favor of the appellee, which had filed an action against appellant on an open account. Appellee underwrote a number of various insurance policies for appellant, and the account which is the subject of this litigation covered these policies and other services furnished the appellant between December 25, 1975, and May 25, 1978. Seeking reversal of the decision below, appellant contends the trial court erred (1) in admitting certain business records into evidence, (2) in overruling appellant's motion for directed verdict, and (3) in instructing the jury incorrectly. From our review, we conclude that none of the appellant's arguments justifies the reversal of this cause.

Appellant first argues the court violated Rule 803(6) of the Uniform Rules of Evidence by admitting into evidence certain ledger cards reflecting appellant's account and the amount he allegedly owed the appellee. His argument is premised on the fact that the testimony qualifying the cards as business records was inadmissible because the witness was not qualified to verify appellant's account. We disagree. Under Rule 803(6), the custodian or other qualified witness can testify concerning business records. Here, the custodian (bookkeeper) did not testify, but appellee's managing partner, Ray Reese, did. Reese testified extensively regarding the ledger cards, demonstrating a knowledge of and detailed familiarity with the itemized transactions chronologically

listed on them. The trial judge has the discretion to determine the qualifications of witnesses and the admissibility of evidence, and upon our review of the record, we cannot say the judge abused his discretion in allowing Reese to testify concerning appellant's account. *See Cates* v. *State*, 267 Ark. 726, 728, 589 S.W.2d 598, 599 (1979).

In his second argument, appellant contends the appellee failed to establish that the appellant's account was unpaid. His contention centers on a premium finance note he signed for the purchase of insurance from the appellee; the appellee "recoursed" the note to a bank, and the loan proceeds were credited to appellant's account for that purchase. However, appellant still was required to pay the bank monthly on the note until it was satisfied. Later, appellant defaulted on the note; appellee paid the bank and charged the amount it paid on the note against appellant's account.

Because the appellee did not introduce the paid note into evidence, appellant claims appellee failed to show he was liable on the note. However, appellee sued appellant on his account, not on the promissory note. In fact, the account listed numerous insurance purchases and service charges and was not limited to the note the appellee paid in the amount of $3,990.07. After all payments made by appellant were credited to his account, it still reflected a balance due of $2,313.74, the amount awarded by the jury.

Appellee filed a verified complaint that set forth appellant's account and the payment due; by doing so, appellee made a *prima facie* showing under Ark. Stat. Ann. § 28-202 (Repl. 1979), on which a judgment could be satisfied. *See McWater* v. *Ebone*, 234 Ark. 203, 350 S.W.2d 905 (1961). Appellant never denied the correctness of the verified account by an affidavit or verified answer, although § 28-202 required him to do so in order to contradict such account. *See Cawood* v. *Pierce*, 232 Ark. 721, 722, 339 S.W.2d 861, 862 (1960). Nor did he offer any testimony after appellee presented its case. Instead, he moved for directed verdict. On these facts, the trial court was clearly correct in finding the appellee had proved the correctness of appellant's account

and in overruling appellant's motion for directed verdict. *See also Walden* v. *Metzler,* 227 Ark. 782, 301 S.W.2d 439 (1957).

Appellant's final argument, challenging a jury instruction, has no merit in view of our disposition of his second argument above. Appellant claims that any debt owed appellee resulted from the unpaid promissory note and that the trial court erred in instructing he could be found indebted to appellee on an account. The Courts instruction provided:

> If you find from the evidence in this case that the plaintiff (appellee) furnished the items on the account as alleged and there remains an unpaid balance owing thereon, then you will find for the plaintiff and against the defendant (appellant) for such unpaid balance.

As we already have noted, appellee's action was based on an open account, not on a promissory note. The foregoing instruction correctly reflects the basis on which appellee filed and proved its case. We affirm.

Affirmed.

COOPER and CORBIN, JJ., agree.

John HALL, III *v.* STATE of Arkansas

CA CR 83-164 666 S.W.2d 408

Court of Appeals of Arkansas
Division II
Opinion delivered March 21, 1984
[Rehearing denied April 18, 1984.]

[redacted]

Young & Finley, for appellant.

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

MELVIN MAYFIELD, Chief Judge. Appellant was convicted of incest and second degree battery. He was sentenced to ten years in prison for the incest and six years for the battery, with the terms to run consecutively. The charges arose from incidents between appellant and his six-year-old son.

Appellant lived in a house trailer alongside his parent's home. His son lived with him. The child's mother was in California. The boy testified that his daddy stuck his "weenie" in the boy's mouth, that a "weenie" was what his daddy went to the bathroom with, and that "he done it to me a bunch of times." The child's kindergarten teacher testified that he frequently came to school bruised and one time his whole ear was black. On another occasion, she discovered hog lice on the child. She took him to the gymnasium and had him take his clothes off and get in the shower. When he stepped out of the shower, she noticed that he was bruised from the neck down, back and front.

Appellant's ex-girl friend testified that she had seen the defendant hit the child, knock him across the room, make him stay in bed all day, and knock him down when he raised up or asked to get up. On cross-examination she was asked if she and the defendant were living together, if there were hard feelings when they broke up, and if she had made threats to him at that time. She answered that they did not live together, that she had not made threats, but that there were hard feelings. On redirect the prosecution inquired as to the

reason for the hard feelings. The witness replied that it was because of the way appellant treated the child and because appellant had asked her to perform oral sex on appellant. At this point, defense counsel asked that the court admonish the jury that this had "nothing to do with the case." His request was denied and this is one of the points of error on appeal.

The child testified that he did not remember being hit at appellant's ex-girl friend's house, and neither did he remember what had caused his ear to be black and sore. He said his daddy whipped him with a belt or a switch for being bad. The appellant testified and denied doing more than spanking the boy. He denied ever bruising the child or having oral sex with him. He said the child fantasized a lot, that the prosecutor and social workers were out to get him, and that his ex-girl friend and the kindergarten teacher were lying.

Appellant's first point of error is the ruling of the court denying his request to admonish the jury to disregard his former girl friend's statement about appellant asking her to perform oral sex on him. In support of this argument appellant cites *Philmon* v. *State,* 267 Ark. 1121, 593 S.W.2d 504 (Ark. App. 1980), a drug possession case, which held that it was error to allow a weapon to be introduced into evidence as it was not relevant in a possession case. Appellant also says that Uniform Evidence Rule 404(b) makes evidence of other crimes, wrongs, or acts inadmissible to prove the character of a person in order to show that he acted in conformity therewith in committing another crime. The state contends, however, that under the guidelines of *Parker* v. *State,* 265 Ark. 315, 578 S.W.2d 206 (1979), this evidence was proper on redirect examination.

In *Parker* the court said that the scope of redirect examination lies within the sound discretion of the trial court, and that a witness should be allowed full opportunity to explain matters brought out on cross-examination, or to rebut any discrediting effect they may have had, or to correct any wrong impression that may have been created on cross-examination, even though the evidence brought out on

redirect would not have been admissible on direct examination. Under the circumstances in the present case, we think the rationale of *Parker* is applicable here, and we find no reversible error in the court's ruling.

Appellant also argues that there was insufficient evidence to support the conviction of second degree battery. Ark. Stat. Ann. § 41-1602(1)(a) (Repl. 1977), provides that, "A person commits battery in the second degree if, with the purpose of causing physical injury to another person, he causes serious physical injury to any person." Serious physical injury is defined as "physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ." Ark. Stat. Ann. § 41-115(19) (Repl. 1977). The difference between the crime of second degree battery and the crime of third degree battery, as it relates to this case, is that third degree battery concerns "physical injury" rather than "serious physical injury." *See* Ark. Stat. Ann. § 41-1603 (Repl. 1977). Physical injury is defined as "the impairment of physical condition or the infliction of substantial pain." Ark. Stat. Ann. § 41-115(14) (Repl. 1977).

In *Harmon* v. *State*, 260 Ark. 665, 543 S.W.2d 43 (1976), the court affirmed a second degree battery conviction, saying it was an issue of fact as to whether the victim sustained "serious physical injuries." The injuries were described as "a broken leg, a fractured toe, bruised heel and pelvis." The victim was hospitalized for about a month, was in a leg cast and traction for two or three weeks of that time, and about a month and a half later was still walking with crutches. The case says that our Criminal Code scales batteries in degrees of first, second, and third, with the severity of punishment being based, in part, on the result of the battery *in terms of harm done to the victim..*

Harmon is the only case cited in the briefs. Apparently this facet of our Code has not been the subject of much appellate court attention. We have set out about the entire evidence regarding the injuries received by the victim in this case. Given the definitions of "physical injury" and "serious

physical injury," considering that the Commentary to § 41-1603 says that *first* degree battery comprehends only life-endangering conduct, and considering the second degree injuries described in *Harmon*, we are persuaded that the injuries in this case will support only the lesser included offense of battery in the third degree. As the state's brief points out, *Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977), holds that in this situation we may "reduce the punishment to the maximum for the lesser offense, reduce it to the minimum for the lesser offense, fix it ourselves at some intermediate point, remand the case to the trial court for the assessment of the penalty, or grant a new trial either absolutely or conditionally."

In *Scott* v. *State*, 1 Ark. App. 207, 614 S.W.2d 239 (1981) and *Griffin* v. *State*, 2 Ark. App. 145, 617 S.W.2d 21 (1981), we remanded for the trial court to assess the sentence and we follow that procedure here. The judgment of conviction of incest is affirmed. The judgment of conviction of battery in the second degree is reduced to battery in the third degree and remanded to the trial court for impositions of sentence consistent with the conviction of that crime.

Affirmed as modified.

CRACRAFT and COOPER, JJ., agree.

Plesse WARREN *v.* Lavern WARREN

CA 83-193 665 S.W.2d 909

Court of Appeals of Arkansas
Division II
Opinion delivered March 21, 1984

Davis & Cox, by: *James O. Cox,* for appellant.

No reponse filed.

DONALD L. CORBIN, Judge. Appellee, Lavern Warren, instituted this action by filing a complaint for divorce seeking a divorce, possession of certain items of personal property and one-half of her interest in the sale proceeds of real property owned by the parties as tenants by the entirety. Appellant, Plesse Warren, answered and filed a cross-complaint seeking an adjudication of property rights similar to that requested by appellee. Appellant later withdrew his cross-complaint and the court granted a decree of divorce to appellee. The trial court awarded appellee an equitable lien in the amount of $3,200.00 on the proceeds from the sale of real property owned by the parties as tenants by the entirety. We reverse and remand.

Appellant appeals from that provision of the decree awarding appellee an equitable lien against the sales proceeds of a tract of real property situated on Rye Hill which was purchased by the parties approximately two months subsequent to their marriage and sold prior to their separation. It is well settled that equity cases are tried *de novo* on appeal upon the record made in the trial court, and the issues are resolved on that record. However, we do not reverse the chancellor's findings unless they are clearly against the preponderance of the evidence, giving due regard to the opportunity of the chancellor to judge the credibility of the witnesses. A.R.C.P. Rule 52(a).

It is clear from the record that the parties purchased the Rye Hill property as husband and wife creating a tenancy by the entirety. Ark. Stat. Ann. § 34-1215 (Supp. 1983), provides that when a decree of divorce is rendered, any estate by the entirety shall be automatically dissolved unless the court order specifically provides otherwise, and in the division of the property the parties shall be treated as tenants in common. This statute is the only authority for dividing estates by the entirety, and it provides for the equal division of property without regard to gender or fault. *Warren* v. *Warren,* 273 Ark. 528, 623 S.W.2d 813 (1981).

In *Yancey* v. *Yancey*, 234 Ark. 1046, 356 S.W.2d 649 (1962), the Arkansas Supreme Court reversed a decree of the chancellor on a finding that the court had exceeded its authority in directing the appellant to give the appellee a quitclaim deed to his interest in the home held as an estate by the entirety. The Court stated as follows:

> . . . we have stated on several occasions that in event of a divorce, property held as an estate by the entirety shall be treated as a tenancy in common. The court may then do one of two things; it may place one of the parties in possession of the premises, or it may order the property sold and the proceeds divided.

Furthermore, in *Carr* v. *Carr*, 226 Ark. 355, 289 S.W.2d 899 (1956), the Court stated that "The couple's home was owned as a tenancy by the entirety and was correctly ordered sold, the proceeds to be divided equally."

In *Ramsey* v. *Ramsey*, 259 Ark. 16, 531 S.W.2d 28 (1975), the appellant appealed from the portion of a divorce decree relating to the division of property. The property involved consisted of promissory notes held as a tenancy by the entirety by the parties. The Court held that the chancellor erred in awarding one party a greater interest than the other in these notes and stated as follows:

> The fact that the consideration given for the property taken in the two names belonged to the husband only is of little, if any, significance where he is responsible for the property being taken in both names and the presumption is that there was a gift of an interest by the husband to the wife, even though the wife may have no knowledge of the transaction. (cites omitted).

In the instant case, we find it to be equally true that there is a presumption that there was a gift of an interest by appellee to appellant. The Court in *Ramsey, supra,* went on to state:

> The presumption is strong, and it can be overcome only by clear, positive, unequivocal, unmistakable, strong, and convincing evidence, partially because the

> alternative is a resulting trust the establishment of which, under such circumstances, requires that degree of proof. (cites omitted)

Upon our *de novo* review of the record, we cannot say that there was proof that appellee advanced the consideration of $3,200.00 and expected it to be held in a resulting trust. The mere loan of money for the purchase of property does not result in an equitable lien in favor of the lender. *Lowrey* v. *Lowrey*, 251 Ark. 613, 473 S.W.2d 431 (1971). Where the evidence does not show an agreement to give the lender a lien, or that the loan was acquired through trickery or fraud, then it is error to impress an equitable lien upon property as security for the loan. *Hunter* v. *Johnston*, 226 Ark. 792, 294 S.W.2d 49 (1956). Accordingly, we hold that the chancellor erred in awarding appellee an equitable lien against appellant's one-half interest in the Rye Hill property.

The decree imposing an equitable lien is reversed and remanded with directions to cancel the lien and divide the proceeds equally.

Reversed and remanded.

COOPER and GLAZE, JJ., agree.

Karen BIGGERS *v.* Philip BIGGERS

CA 83-367 666 S.W.2d 714

Court of Appeals of Arkansas
Division II
Opinion delivered March 21, 1984
[Rehearing denied April 18, 1984.]

David B. Horne, of *Kincaid, Horne & Trumbo,* for appellant.

Jones & Segers, for appellee.

TOM GLAZE, Judge. This is a custody case that involves the application of the Uniform Child Custody Jurisdiction Act (hereinafter the Uniform Act). On November 8, 1982, the trial court granted appellee, Philip Biggers, a default judgment, awarding him a divorce and the custody of the parties' two children, ages four and seven. Later the appellant, Karen Biggers, a Missouri domicillary, appeared specially in the divorce action, challenging the trial court's jurisdiction and requesting it to reconsider and to vacate its default judgment. Upon the trial court's refusal to do so, she filed this appeal wherein she contends the lower court lacked jurisdiction to make the custody award. We agree and therefore reverse.

At trial, Philip Biggers offered no testimony and for

purposes of this review, the facts are essentially undisputed. The parties were married and lived in Virginia until September, 1981, when they moved to Marshville, Missouri. Philip temporarily returned to Virginia to complete school but rejoined the family in Marshville in December, 1981. The Biggers separated in January, 1982. Philip moved to Springdale, Arkansas, and Karen and the children moved to Springfield, Missouri. During the first nine months in 1982, Karen retained physical custody of the children, but Philip had them for visitation purposes in April, July and August for a total of five weeks. On August 6, 1982, and unbeknownst to Karen, Philip filed for divorce in Arkansas and requested the court to award him custody of the children. Sometime prior to September 6, 1982, Philip told Karen that he intended to move the children to live with him, but Karen, at the time, was still unaware of the pending Arkansas action. He also informed his brother, Sam Biggers, of his plans for the children, stating, "No one was going to stand in his way." Sam encouraged Philip to go through the courts, but Philip indicated "he would not abide by any court order, that he wanted custody of the children and nothing could stop him." Sam, who lives in Springfield, Missouri, subsequently advised Karen to stay with friends "until the issue seemed to calm down." Apparently acting on that advice, she resided at five different homes between September 5, and October 2, 1982. On September 10, 1982, Karen filed a divorce action in Missouri; however, on October 2, before he was served in the Missouri action, Philip located Karen residing with the Willoughby family. Philip and his two younger brothers forceably entered the house, beat Mr. Willoughby, injured Karen and left with the children, taking them to Arkansas. As previously noted, Philip obtained the default divorce judgment and custody award on November 8, 1982, but Karen claimed she was unaware of such action until December, 1982.

Appellant argues (1) the Arkansas court lacked in personam jurisdiction to affect or divest her of custody of the children, and (2) appellee failed to obtain lawful service of process on appellant, thus rendering the court's order void *ab initio*. Specifically, appellant maintains that under *May* v. *Anderson*, 345 U.S. 528 (1953), her right to custody of the

children is personal, and a court must have in personam jurisdiction over her before terminating such a right. Because she has had no contacts with this State, appellant asserts the Arkansas court has no basis upon which it can exercise personal jurisdiction over her in this custody action. *Cf. Bunker* v. *Bunker,* 261 Ark. 851, 552 S.W.2d 641 (1977); and *Pawlik* v. *Pawlik,* 2 Ark. App. 257, 620 S.W.2d 310 (1981). She further argues the appellee failed in two respects to comply with Arkansas requirements for personal service by mail. In sum, she denies having any knowledge of the four complaints and summonses mailed her and contends she never refused service even though two envelopes were returned marked "refused." She also contends that because appellee obtained a default judgment, he was required to have the court appoint an attorney *ad litem,* and his failure to do so invalidated the court's decree.[1] *See Aldridge* v. *Watling Ladder Co.,* 275 Ark. 225, 628 S.W.2d 322 (1982).

While appellee argues against appellant's foregoing contentions, his primary argument is that appellant has subjected herself to the Arkansas court's jurisdiction, because even though she appeared specially before the lower court to challenge its jurisdiction, she also requested and was awarded affirmative relief — limited visitation rights with her children.[2] As a consequence, he urges the appellant waived all objections to the court's jurisdiction. Such an argument was advanced successfully in the case of *Holley* v. *Holley,* 264 Ark. 35, 568 S.W.2d 487 (1978). Although the *Holley* decision is distinguishable, we believe it is worthy of discussion. There the appellant (former wife) instituted an action against the appellee (former husband) under the Uniform Enforcement of Foreign Judgments Act to enforce payment of child support arrearages. Although appellee demurred to the court's jurisdiction of his person and of the

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[1]By per curiam order, the Supreme Court amended Rule 4(i) of the Arkansas Rules of Civil Procedure, excising this *ad litem* requirement in default judgment cases. *In Re: Amendments to the Rules of Civil Procedure,* 279 Ark. 470, 651 S.W.2d 63 (1983).

[2]After this cause was appealed, appellant also moved to change custody, but that request and its disposition, if any, by the trial court are not a part of this appeal.

subject matter, he counter-petitioned for a change in custody of the children or in the alternative, for substantial visitation rights. The Supreme Court held the appellee's request for relief placed him in a position of waiving all his objections to the court's jurisdiction.

Although there are similarities between the present situation and the one in *Holley,* one essential difference distinguishes the two. As pointed out by Justice Fogleman in *Holley,* the Arkansas court would have had jurisdiction and power to act in an action on a foreign judgment even in the absence of the Uniform Foreign Judgment Act. In the present situation, however, we are required to look to the Uniform Act to determine whether the Arkansas trial court had jurisdiction to decide the custody matter. *See* Ark. Stat. Ann. §§ 34-2701—2708 (Supp. 1983), and more particularly § 34-2703.

The Uniform Act changes prior custody jurisdiction law in that (1) it eliminates physical presence of the child as a jurisdictional basis in all but the most extreme emergency cases; (2) it establishes specific and limiting jurisdictional bases for initial decrees; and (3) it establishes even further jurisdictional limitations for the modification of existing decrees. *See* Uniform Child Custody Jurisdiction Act, 9 U.L.A. 116 §§ 3, 6 and 14 Commissioner's Notes (1979). The "home state" and "significant connection" bases are the two primary means by which an Arkansas court can acquire jurisdiction under the Uniform Act.[3]

Home state is defined in § 34-2702(5):

> (5) "[H]ome state" means the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent,

[3]Sections 34-2703(a)(3) and (4) set forth two other means, but they are inapplicable to the facts at bar and deal only with situations (1) when the child is present in the State and has been abandoned, abused or otherwise neglected, and (2) when the jurisdictional prerequisites in §§ 34-2703(a)(1)(2) and (3) do not exist in another state, or another state has declined jurisdiction and it is in the child's best interest to assume jurisdiction.

> for at least six (6) consecutive months, and in the case of a child less than six (6) months old. The state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period. . . .

Home state jurisdiction is described in § 34-2703(a)(1):

> (1) [T]his State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State. . . .

Finally, the significant connection basis is set forth in § 34-2703(a)(2):

> (2) [I]t 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. . . .

Applying the foregoing applicable provisions to the facts of this case, Missouri is clearly the home state of the parties' children. The children lived with their mother in Missouri for more than seven months prior to the filing of appellee's divorce action in Arkansas; and they were in Missouri nine or ten months before appellee served or attempted to serve the appellant with copies of such action. Thus, if the Arkansas court acquired jurisdiciton at all, it had to have done so because the appellee and the children had a significant connection with this State. *See* § 34-2703(a)(2)(i).

While the Uniform Act does not define "significant

connection," the Commissioners, in discussing this jurisdictional requirement in their Note to section 3, indicate that the interest of the child is served when the forum has optimum access to relevant evidence about the child and family, and that there must be maximum rather than minimum contact with the state. The Note further reflects that the submission of the parties to a forum, perhaps for purposes of divorce, is not sufficient (to establish that contact) without additional factors establishing closer ties with the State. *See* Uniform Child Custody Jurisdiction Act, *supra* § 3 Commissioner's Note; *cf. Jackson* v. *Jackson*, 390 So. 2d 787 (Fla. Dist. Ct. App. 1980).

Again, from our review of the record, we find the "significant connection" basis lacking; consequently, the Arkansas court simply had no jurisdictional basis upon which to act on the child custody matter. We first point out that the trial judge never made any finding regarding either the home state or the significant connection jurisdictional prerequisites. Instead, the judge assumed jurisdiction in this cause because the children were physically present in the State. However, as we mentioned previously, the physical presence of the child is not a prerequisite under the Uniform Act for jurisdiction to determine his or her custody. *See* Ark. Stat. Ann. § 34-2703(c) (Supp. 1983). Aside from the fact that a child's presence is not a jurisdictional requirement, the two children here were in Arkansas only because appellee abducted them from their residence in Missouri, their home state; and the purpose of the abduction was to afford appellee the opportunity to obtain a custody award of the children by an Arkansas court. Appellee's actions clearly contravene one of the primary purposes of the Uniform Act — to deter abductions and other unilateral removals of children undertaken to obtain custody awards. *See* § 34-2701(a)(5).

Turning to appellee's connection with Arkansas, we find his only contacts are that he now resides and works in this State. The children's contact with Arkansas included three visits to see their father and involved a total of five weeks over a period of nine to ten months — the time appellee had resided in Arkansas. In contrast, the parties'

last matrimonial domicile, albeit short, was Missouri. In fact, appellee selected Missouri as the family's domicile while he returned to finish school in Virginia. As we earlier noted, the children's home state was Missouri and that State also is where at least part of their extended family lives. Undoubtedly, the children's maximum contacts were in Missouri at the time the Arkansas action was commenced. Because Arkansas does not meet the jurisdictional requirements under § 34-2703, the trial court did not have authority to decide the child custody issue presented it by the appellee. Accordingly, we reverse and remand this cause with directions to the trial court to enter an order finding that it has no subject matter jurisdiction over the custody issue raised by the appellee, and that its earlier judgment should be amended to reflect such finding.

Reversed and remanded.

COOPER and CORBIN, JJ., agree.

Curtis Lee HOLLOWAY *v.* STATE of Arkansas

CA CR 83-149 666 S.W.2d 410

Court of Appeals of Arkansas
Division II
Opinion delivered March 28, 1984

William R. Simpson, Jr., Public Defender, and *Kelly Carithers*, Deputy Public Defender, by: *Carolyn P. Baker*, Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns*, Deputy Atty. Gen., for appellee.

MELVIN MAYFIELD, Chief Judge. The appellant was charged with burglary committed by entering a residence in Jacksonville, Arkansas, with the purpose of committing theft of property. He was tried by the judge without a jury, found guilty, and sentenced to five years in the penitentiary. His sole point on appeal is that the evidence is not sufficient to support his conviction. We agree.

A lady testified that on August 3, 1982, she took her daughter to the doctor and upon returning to her home she noticed that the kitchen window had been broken out and glass was "everywhere" inside the kitchen. She said her black and white portable television set was missing and that she had not given anyone permission to enter the house or take the television. The police were called, and they came to the house and made an investigation. The window above the kitchen sink was broken out and that area was dusted for fingerprints. There was one piece of the broken glass found on the ground outside the house and directly under the

kitchen window. The police lifted a latent fingerprint off this piece of glass and put it on a card which was appropriately labeled.

The officer conducting the investigation testified that he talked to the neighbors to find out whether they had seen anyone suspicious about the neighborhood, but they had not. The case remained open, and in October of 1982 the appellant was at the Jacksonville Police Department on an unrelated matter and was advised that he was a suspect in this matter. He was fingerprinted and the State Crime Laboratory made a positive identification of his right thumbprint as that of the person whose print was taken from the piece of glass from the house broken into August 3, 1982.

The fingerprints were introduced into evidence at the trial of this case. The chief latent prints examiner for the crime lab testified that the appellant's thumbprint was identical to that on the piece of glass. The appellant did not testify and the case was submitted upon the evidence outlined above. On appeal in criminal cases, whether tried by judge or jury, we will affirm if there is substantial evidence to support the finding of the trier of fact. *Phillips* v. *State*, 271 Ark. 96, 607 S.W.2d 664 (1980). The appellant concedes the rule, but says the evidence here falls short of the standard.

Substantial evidence is evidence that is of sufficient force and character that it will compel a reasonable mind to reach a conclusion one way or the other, but it must force the mind to pass beyond suspicion or conjecture. *Jones* v. *State*, 269 Ark. 119, 598 S.W.2d 748 (1980); *Pickens* v. *State*, 6 Ark. App. 58, 638 S.W.2d 682 (1982). The fact that evidence is circumstantial does not render it insubstantial. *Williams* v. *State*, 258 Ark. 207, 211, 523 S.W.2d 377 (1975). Substantial evidence, in a case depending upon circumstantial evidence, simply means that the proof must go beyond presenting the jury a choice so evenly balanced that a finding of guilt must rest, not on testimony, but on conjecture. *Rode* v. *State*, 274 Ark. 410, 625 S.W.2d 469 (1981), quoting from *Cassell* v. *State*, 273 Ark. 59, 616 S.W.2d 485 (1981).

In this case, when the victim returned home, the glass in her kitchen window was broken out and her television set was missing. The only evidence to connect the appellant with the crime was the piece of glass the police found on the ground, outside the house, with the appellant's thumbprint on it. In order to be guilty of burglary a person must enter or remain unlawfully in an occupiable structure of another person with the purpose of committing an offense punishable by imprisonment. Ark. Stat. Ann. § 41-2002 (Repl. 1977). We do not believe that the evidence here is sufficient to support a finding that the appellant was ever inside the victim's house or that he ever touched her television set. A finding that either occurred, it seems to us, would require a choice based more upon conjecture and supposition than upon evidence in the case.

Reversed and dismissed.

CRACRAFT and COOPER, JJ., agree.

FARM AIR CORPORATION *v.*
Doris READER, Widow of
Billy F. READER, deceased

CA 83-202 666 S.W.2d 717

Court of Appeals of Arkansas
Division II
Opinion delivered March 28, 1984

Bill Bristow and *Harry Ponder,* for appellants.

Frank Lady, for appellee.

MELVIN MAYFIELD, Chief Judge. Bill Reader was killed in an airplane crash on May 21, 1980, while working as a crop duster for Farm Air Corporation, an uninsured employer. His widow, Doris Reader, filed a claim in the Workers' Compensation Commission for dependency benefits and was awarded $126.00 per week.

The only issue on appeal is the amount of the award. It is Farm Air's contention that the deceased was a seasonal employee who had worked only three days the year he was

killed and that the Commission's award based on earnings for that short period was improper.

The appellant operated a flying service to apply various substances to soybeans, wheat, and rice. The work generally began around the second week in May when they started applying herbicides and continued until the middle of September when they finished applying fertilizer to rice fields. Occasionally there was some work in the late fall applying defoliants. Reader had worked as a pilot for the corporation since its inception in 1978. He earned 25% of the gross charges for the work he performed.

In 1980, Reader started working on May 19 and had flown five jobs when his plane crashed. There was testimony that his commission on these jobs would have been $376.50. This did not include the job he was flying at the time he crashed. The president of the corporation testified that he gave Mrs. Reader $300.00 for Mr. Reader's work on that job.

This case involves the application of the following portions of Ark. Stat. Ann. § 81-1312 (Repl. 1977):

> Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of accident, and in no case shall be computed on less than a full time work week in the employment. . . . If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the Commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

It is clear that the law judge based the amount of his award upon the amount earned by Reader during the three days he worked in 1980, and the Commission adopted the law judge's finding. The appellant argues that this was unfair to appellant and that the Commission should have applied the last sentence of the section to make a determination of Reader's average weekly wage by a method that was "just and fair" to all parties.

The appellant, however, is not very specific in its suggestions as to the method that would be "just and fair". Implied in its argument is the contention that whatever amount of earnings is used — whether those of the previous year or only those earned during 1980 — the amount should be spread out over a full year. In other words, if earnings for 1979 are used, the appellant would find the average weekly wage by taking the total amount that was earned in the approximately four months worked in 1979, and divide that amount by 52; and, if only the earnings for the three days in 1980 are used, the appellant would convert that into the amount that would have been earned in the four months that Reader expected to work in 1980, and would divide that amount by 52.

The only cases cited by appellant are *Travelers Insurance Co.* v. *Perry,* 262 Ark. 398, 557 S.W.2d 200 (1977) and *Ryan* v. *NAPA,* 266 Ark. 802, 586 S.W.2d 6 (Ark. App. 1979), neither of which is really on point. In *Travelers* the employee was not even a seasonal employee. At times he made himself available for work to Manpower, Inc., an organization that provided workers for employers who needed temporary help, but he had no contractual arrangement that required him to work or to be available for work. In *Ryan* the employee was a four-hour per day worker whose claim that she was required to be available for a full eight hours was rejected.

The appellee defends the Commission's award in this case on the basis of assumptions which it says the evidence would support. Thus the appellee argues that we should affirm because the Commission's decision is supported by substantial evidence. It is clear, however, that the appellee agrees with the Commission's refusal to spread Reader's seasonal earnings over a 52-week period and use that as the basis for the calculation of average weekly wage.

We recognize that there is force in appellant's argument, but we have concluded that the Commission's award should be affirmed. Our decision is based upon the following considerations.

First, we agree with the appellant's contention that the Commission could have used a better basis in making the determination of the employee's average weekly wage. Our problem, however, is the same problem that the appellant had in suggesting what method the Commission could have used under its "just and fair" authority that would be of help to appellant. The president of the appellant corporation testified that Reader was paid $13,101.68 for his work in 1979, that Reader started working around the first week in May that year, and that the flying season ended the last of August or first of September. There were 123 days in the full four-month period involved, of which 17 were Sundays, and since they did not work Sundays, that leaves 106 working days. Dividing 106 into $13,101.68, we get $123.60 per day. Using the six days worked per week, we get an average weekly wage of $741.60. It is conceded that Mrs. Reader is entitled to benefits of 35% of the average weekly wage, Ark. Stat. Ann. § 81-1315(c) (Repl. 1977), subject to the maximum weekly benefit of $126.00, Ark. Stat. Ann. § 81-1310(b)(A) (Supp. 1983). Since 35% of $741.60 would be greater than the maximum allowance, it is of no help to appellant for the Commission to base the average weekly wage on the 1979 earnings unless, as appellant has suggested, these earnings are spread out over the entire year.

At this point we are faced with the second reason that impels our affirmance. The appellee cites and relies upon *Gill* v. *Ozark Forest Products*, 255 Ark. 951, 504 S.W.2d 357 (1974). The employee in that case seldom worked a full five-day week. This was because of the nature of the timber industry in which he was employed. His work agreement was for a five-day week whenever work was available, but his employer made work available based upon weather conditions and the timber supply.

In determining the employee's average weekly wage, the Commission used the previous 52-week period, but ignored one week in which the employee worked only one day and 18 weeks in which he worked only two or three days per week. The Commission then used the balance of 33 weeks, in which the employee worked either four or five days per week, and calculated the average weekly wage on the

earnings for those 33 weeks. On appeal the Arkansas Supreme Court held that the average weekly wage should be based on a full week's pay.

The statutory law in effect during the period involved in the *Gill* case is still in effect now. While the factual situation there was different from the factual situation in the case at bar, the principle is the same. Obviously, the court in *Gill* did not think there were exceptional circumstances which required the Commission to devise some "just and fair" method to replace "the average weekly wage earned by the employee under the contract of hire" as the basis on which compensation benefits should be computed. In the present case we do not approve of the method used by the Commission. It used less than a "full time work week" contrary to the statute, and even if there had been a full work week to use, there probably still would have been exceptional circumstances to require the employee's 1979 earnings to be used in determining the average weekly wages. We do not, however, think there are exceptional circumstances in this case that would make it just and fair to both parties to take the wages earned in 1979, divide that amount by 52, and use that figure as the average weekly wage.

In discussing average wage computation, 11 Schneider, *Workmen's Compensation Law* § 2175 (perm. ed. 1957), states:

> The computation of such average wage, under particular fact situations, often becomes difficult in one's effort to arrive at a result just and fair to both employee and employer. It is generally considered contrary to that concept and against public policy to so compute an employee's wage that it will result in a compensation award that pays the employee more during his period of disability than he is accustomed to earn in his usual or normal year around activity.

In the instant case, $126.00 per week for 52 weeks will pay this widow $6,552.00 per year. This is certainly not more than her husband was earning at the time he was killed. So

while we do not approve of the method used by the Commission in the determination of the average weekly wage of the deceased employee, we see no other method, which we think would be just and fair to both parties, that would make any difference in the amount of benefits to be paid the appellee.

A third consideration in our decision to affirm is the fact that our Workers' Compensation Act contains no specific provision dealing with seasonal employment. To hold that the 1979 earnings have to be spread out over the whole year for the purpose of determining the employee's average weekly wage, it seems to us, would go further than the use of a more appropriate basis to compute the wage, and would, in this case, be tantamount to legislating policy in regard to seasonal employment.

Finally, we note the statement in *Gill, supra,* that "it is well established in workmen's compensation cases that when doubt exists we must remember the Workmen's Compensation Act is remedial and should be construed liberally to effectuate its purpose."

Based upon the above considerations, we affirm.

CLONINGER and CORBIN, JJ., agree.

Charles R. BEESON and Jeanne H. BEESON, His Wife
v. Mary Lelia BEESON and Ulrich R. BEESON

CA 83-141 667 S.W.2d 368

Court of Appeals of Arkansas
Division I
Opinion delivered March 28, 1984
[Rehearing denied May 2, 1984.]

Larry W. Chandler and *Robert R. Wright,* for appellant.

Keith, Clegg & Eckert, for appellee.

GEORGE K. CRACRAFT, Judge. Charles R. Beeson and Jeanne H. Beeson appeal from a decree of the chancery court imposing a constructive trust on the title to lands conveyed to Charles R. Beeson by his mother, Mary Lelia Beeson, and ordering him to account for rents and profits derived from the lands in issue during the period of trust. The appellants contend that the court erred in not ruling that the evidence of oral trust agreements was inadmissible under the statute of frauds, that the evidence did not support findings of those facts giving rise to a constructive trust, and in not finding that the claim of appellee was barred by the statute of limitations, laches and estoppel. We do not agree that the chancellor erred in his findings of fact and conclusions of law, but we do modify the relief granted.

There are four deeds in issue in this litigation. One of them was executed by the appellee on July 23, 1965 and another on July 26, 1965. Both of those deeds were duly recorded on July 26, 1965. The other two deeds were both dated August 2, 1967 but were not recorded until April 22, 1977.[1] The appellant contended that the deeds in issue were intended to be absolute gifts and were part of a comprehensive "estate plan." He denied that any agreements accompanied the execution of the deeds respecting the beneficial interest and asserted that these actions were brought solely as a result of difficulties which arose in 1981 with regard to the management of the lands and his subsequent efforts to have a conservator appointed to manage the affairs of appellee.

Appellee owned several tracts of land which she had

[1]A fifth deed dated in 1954 and also "recorded on April 22, 1977" was mentioned in the pleadings, evidence and decree. The record, however, discloses that although that deed was "acknowledged in 1954" and "recorded in 1977" it was not signed by the grantor and conveyed no title. The lands described in the 1954 unsigned deed were included in the description of one of the 1965 deeds.

acquired by inheritance and which had been in her family for several generations. Appellant testified that he was appellee's only child and that for many years his mother had insisted that they develop an "estate plan" for her. As part of that plan she executed the deeds in 1965, one to a tract referred to as the "Hartley Farm" which she owned in fee and the other to an undivided one-half interest in what was known as the "Fairview Farm" which she owned as a tenant in common with appellant. These interests in Fairview had been acquired from appellee's sister shortly before her death in 1954. The Fairview Farm had been in appellee's family for several generations. Appellant testified that these two deeds were intended to be recorded promptly and he denied that the execution of these deeds had connection with any transaction other than the estate plan.

Appellant testified that in 1967 appellee executed to him the two additional deeds, directing these deeds not to be recorded immediately because "she wanted something to hold on to." He stated, "Mother wanted to hold on to these things indefinitely, and before I accepted this we discussed this thoroughly. I told her that she could not transfer this land as a death bed transfer. I said that the deed must be recorded and transferred in my name." He stated that he made it quite clear that he must exercise both ownership and management for a period of five years before her death or it would be considered as a transfer in contemplation of death by the Internal Revenue Service. He used actuarial tables of life expectancies in determining that the deeds should be recorded in 1977. He testified that there was, however, an agreement that the income from the land would be used in the "best interest of the entire family" and that it would be left entirely in his discretion as to where the best interest of the family lay and who was to receive the income and in what proportion. He testified that he was the only son and was helping the family do the estate planning, "and they trusted me and had confidence in me."

The appellee testified that in 1965 the appellant was attempting to purchase what was known as the "Watkins Farm" which was adjacent to the Hartley Farm, but he was unable to obtain the required loan. She stated that she

deeded the Hartley Farm and her interest in the Fairview Farm to him for additional collateral for the loan. She stated that she wanted him to purchase the Watkins Farm and encouraged him to do so. She deeded the lands to him merely as collateral for the Watkins loan on his promise that she could continue to manage and control her property and to receive the rents and profits from it for as long as she lived. She stated that all of these properties had originally been acquired by her great-grandfather. She stated that it was the custom in her family to hand land down through the bloodline and that "it was a birthright." There was evidence that for this reason she did not wish her husband to acquire an interest in the properties at her death which he might convey to strangers. She stated that she executed the 1967 deeds for that purpose. She and the appellant had orally agreed that she retain the control of and the beneficial interest in the property for her lifetime and that the deeds were not to be recorded until after her death. She denied that there was any estate planning for tax purposes involved in these transfers and that she had rejected all planning proposals of the appellant. She testified that she did retain the management and control of the properties and the incomes from them until a few years before this action was commenced. At that time she had begun to have arguments with appellant about the management and control of her property and her right to the proceeds.

The testimony of appellee was corroborated to a large extent by her grandson Charles Rische Beeson who stated that he had always been close to his grandparents and had had "over a hundred conversations with her concerning the deeds." He stated that the deeds to the Hartley and Fairview Farms were to collateralize the loan to his father to buy the Watkins place. He stated that the 1967 deeds were executed because his grandmother feared that something might happen to her before her husband's death and that the ownership "as far as bloodline was concerned would be jeopardized." He stated that she wanted to make sure that the title would remain in her bloodline. He testified that there were attempts to work out an estate plan by forming a family corporation and issuing stock in accordance with the value of the lands contributed. This proposal was submitted by the

appellant but was refused by appellee and her husband. He testified further that you could not form a corporation without deeding real estate to it and they could never get appellee to do so because she wanted to "dictate all of the policies of the corporation."

The chancellor found that the 1965 deeds were executed soley in order to provide appellant additional security to obtain the financing to purchase other lands and upon agreement that appellee retain the beneficial interest. With regard to the 1967 deeds he found that they were executed pursuant to an agreement and understanding that they were not to be recorded during the lifetime of the grantor and that she would retain exclusive right to manage and control the lands and the right to receive all income from them during her lifetime. The chancellor also specifically found that at all material times the appellant stood in a confidential relationship with his parents and that the deeds, which were made without consideration, were made pursuant to those specific agreements, undertakings and promises.

Although we review chancery cases *de novo* on the record we will not reverse the findings and conclusions of the chancellor unless they are clearly erroneous, giving due weight to the superior position of the chancellor to judge the credibility of the witnesses. Rule 52(a); *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W.2d 404 (1981). We cannnot conclude that these findings of the chancellor with regard to the constructive trust are clearly erroneous.

It is well settled that a constructive trust will arise and be imposed in favor of persons entitled to the beneficial interest against one who secures legal title by an intentional false oral promise to hold title for specific purposes and having thus obtained title claims the property his own, or when that promise is given by a grantee who stands in a confidential relationship to the grantor, upon refusal to perform the promise. *Edmondson* v. *Edmondson,* 269 Ark. 664, 599 S.W.2d 765 (Ark. App. 1980); *Walker* v. *Biddle,* 225 Ark. 654, 284 S.W.2d 840 (1955); *Andres* v. *Andres,* supra; *Armstrong* v. *Armstrong,* 181 Ark. 597, 27 S.W.2d 88 (1930). The proof giving rise to a constructive trust must be clear, cogent and

convincing. *S & M Oil Co.* v. *Mosley*, 227 Ark. 250, 297 S.W.2d 926 (1957); *Edmondson* v. *Edmondson, supra.*

Although a confidential relationship is not established merely by showing that the parties are related, it has been held that the relationship between mother and father and brother and sister is, in the absence of evidence of estrangement or other circumstances, one of confidence and they are not regarded as dealing with each other at arm's length. *Walker* v. *Biddle, supra; Edmondson* v. *Edmondson, supra.*

In 3 Ark. L. Rev. 3 (1948), Justice George Rose Smith stated:

> In the last series of cases which we will discuss, the recent decisions have unsettled principles that seemed to be firmly established in our law. We refer to the rules given in § 44 of the Restatement, to the effect that when land is conveyed in reliance upon the grantee's oral promise to hold it in trust for the grantor, a constructive trust will be imposed if (a) the transfer was procured by fraud, duress, undue influence or mistake, or (b) a confidential relation existed between the parties. It is important to note that in the latter case fraud need not be shown; the mere existence of a confidential relation is enough to dispense with the requirement of a written momorandum.
>
> The rules given in the Restatement are entirely sound. As to clause (a), the statute of frauds should not be used to permit the grantee to take advantage of his own fraud. *And as to clause (b), a writing is not required simply because such a requirement is opposed to normal human conduct. Brother and sister, or others who stand in a confidential relation, do not ordinarily make a written record of their dealings with one another.* A rule of law requiring such a standard of conduct would work injustice in the majority of cases.

There is no evidence here that the relationship between appellant and his mother was not a close and confidential one during the period in which these deeds were executed.

Appellant himself testified that his parents placed full confidence in him. We can find no error in the chancellor's application of the law of constructive trust to the facts as found by him.

Appellant next contends that the appellee's suit was barred by the statute of limitations, laches and estoppel. These are affirmative defenses which must be pled. *Sheffield* v. *Strickland,* 268 Ark. 1148, 599 S.W.2d 422 (1980). Although the appellant did plead laches and estoppel, we find no pleading in which the statute of limitations was raised. Additionally we note that even when the statute of limitations has been pled, the one relying upon it has the burden of proving those facts giving rise to it. *McCrite* v. *Hendrix College,* 198 Ark. 1149, 133 S.W.2d 31 (1939). Appellant concedes in his argument that it is difficult to tell when the alleged breach occurred. He argued that as to the 1965 deeds the breach occurred when he recorded them in 1965. Appellee conceded in her testimony that she must have known that deeds that are to be used as collateral for a loan must be recorded, but she steadfastly maintained that there was an oral promise and agreement that she retain the management and control for as long as she lived or until the debt was paid. The chancellor expressly so found. The breach of this trust would not occur until that loan had been repaid. The chancellor further found that the 1967 deeds were executed on the understanding that they not be recorded during the lifetime of the appellee and that she was to retain management, control and beneficial interest. The appellant's breach of his promise not to record the deeds occurred in 1977. The denial of appellee's right to control and have beneficial interest occurred at the same time or thereafter. This action was commenced in January 1982, less than seven years after the breach occurred.

The doctrine of laches does not apply unless there is an unreasonable delay, coupled with some change of position of circumstance which makes it inequitable to enforce the claim. *Hendrix* v. *Hendrix,* 256 Ark. 289, 506 S.W.2d 848 (1974). Estoppel only arises by a detrimental change of position of one party resulting from the conduct of another. *Davidson* v. *Sanders,* 235 Ark. 161, 357 S.W.2d 510 (1962);

Collier v. *Brent*, 266 Ark. 1008, 589 S.W.2d 198 (Ark. App. 1979). We cannot find, and appellant has not pointed out to us, an inequitable circumstance which resulted from delay on the part of the appellee in bringing her action or any detrimental change in appellant's position by relying on the conduct of the appellee.

Although on *de novo* review in chancery cases we do not reverse unless we find the chancellor's findings of fact and conclusions of law to be erroneous, when we do find error and the record is fully developed where we can plainly see where the equities lie, we do not remand for further proceedings but enter here the decree which ought to have been entered by the chancellor. *Ferguson* v. *Green*, 266 Ark. 556, 587 S.W.2d 18 (1979). The chancellor ordered the 1965 deeds cancelled and set aside on a finding that the agreement of the parties was that the "land be reconveyed when the loan was repaid" and that this agreement between the parties provided for a reconveyance. The evidence of the appellee would establish only that the legal title was to be placed in appellant and that the equitable title would be retained by her *during her lifetime* with the right to manage and control and receive rents and profits. With regard to the 1967 deeds we likewise find no provision for reconveyance by appellant. The appellant did violate the terms of his trust in two material respects — he recorded the deeds during appellee's lifetime and he interfered with her management and control. While we deem it proper for the chancellor to have ordered an accounting of those funds obtained by appellant as a result of his breach, we do not agree that the equities require that the deeds be set aside because it was the parties' intention that appellant take absolute title after appellee's death. The order the chancellor ought to have made would enjoin and restrain the appellant from interfering in any manner with the exclusive use and enjoyment of those properties by the appellee during her lifetime.

The decree as modified is affirmed.

MAYFIELD and COOPER, JJ., agree.

TOM E. JONES CONSTRUCTION COMPANY, INC. *v.* Silas HOLMES

CA 83-179 666 S.W.2d 412

Court of Appeals of Arkansas
Division I
Opinion delivered March 28, 1984

Marion B. Burton, for appellant.

George D. Ellis, P. A., for appellee.

LAWSON CLONINGER, Judge. This is an appeal from an order of the trial judge denying appellant's motion to set aside a default judgment and dismissing appellant's counterclaim. Appellee, Silas Holmes, filed a complaint against appellant, Jones Construction Company, alleging that it owed him $6,000 which he earned while working for appellant. His complaint was filed on November 18, 1982. On November 30, 1982, appellee filed an amended complaint making Integon Indemnity Company a co-defendant. On December 14, 1982, a default judgment was entered against appellant for the amount asked for. The following

day appellant filed a motion to set aside the default judgment and answered, denying that appellee was due a bonus and counterclaimed for $1,700 for property wrongfully withheld. The court denied the motion and dismissed the counterclaim.

Appellant's first point for reversal is that the court erred in entering default judgment against it. Specifically it argues that by filing an amended complaint, appellee extended the time in which to file an answer because appellant was not served with the amended complaint. The amended complaint merely added an additional party and did not change any issues with regard to appellant. There is no question but that appellant was put on notice of the complaint filed against it, although the amended complaint was not properly served to it. Since appellant was served notice with the original complaint, it cannot now argue that the time was extended merely because an additional party was added in an amended complaint. See *Pulpwood Suppliers* v. *Owens*, 268 Ark. 324, 597 S.W.2d 65 (1980); *Claibourne* v. *Smith Rice Mill Co.*, 181 Ark. 279, 25 S.W.2d 1050 (1930). Under Rule 15 of the Arkansas Rules of Civil Procedure, a party must respond to an amended pleading within the time remaining for a response to the original pleading or within ten days after service of the amended pleading, whichever period may be longer. Although the amended pleading was never served on appellant, it had notice of the original pleading and the amended pleading did not change any issue. In our opinion, default judgment was properly entered against appellant on this issue.

Appellant further argues that it was error to enter default judgment when the time for the other defendant to answer had not expired. Appellant premises this argument on the common defense doctrine stated in the case of *Firestone Tire & Rubber Co.* v. *Little*, 269 Ark. 636, 599 S.W.2d 756 (Ark. App. 1980). However, nowhere was this argument presented to the trial court either by a motion or in its argument to the court at the hearing. Appellant is not permitted to advance a new theory on appeal. See *Callaway* v. *Callaway*, 8 Ark. App. 129, 648 S.W.2d 520 (1983).

Appellant finally argues that the counterclaim should stand as a claim of set-off against any judgment in favor of appellee. Since we hold the trial court was not in error in finding appellant in default, this point is moot.

Accordingly, the decision of the trial judge is affirmed.

MAYFIELD and CRACRAFT, JJ., agree.

ARKANSAS POWER AND LIGHT COMPANY
v. Cleo J. MELKOVITZ and Martha A.
MELKOVITZ, His Wife; Herbert C. RULE and
Elizabeth D. RULE, His Wife; and
Robert J. CONRAD, Trustee of THE PRUDENTIAL
INSURANCE COMPANY OF AMERICA

CA 83-145 668 S.W.2d 37

Court of Appeals of Arkansas
Division II
Opinion delivered April 4, 1984
[Rehearing denied May 2, 1984.]

House, Jewell, Dillon, Dover & Dixon, P.A., by: *Donald H. Henry*, for appellant.

David Hodges and *Henry Hodges*, for appellees.

GEORGE K. CRACRAFT, Judge. In January 1979 Cleo Melkovitz and Martha, his wife, and Herbert C. Rule and Elizabeth, his wife, purchased a 439 acre tract of land in Lonoke County. In August 1979 Arkansas Power and Light Company brought this action to condemn 12.77 acres of that land for an easement for a power transmission line and, making the required deposit, entered the land on August 29, 1979. On December 27, 1982 the jury found the sum of $75,000 to be just compensation for the taking and judgment was entered. The appellant brings this appeal contending that the trial court erred in refusing to strike the testimony of appellees' expert, that the jury verdict was grossly excessive, that the trial court erred in permitting the jury to hear evidence concerning the deposit made at the time of entry, in

excluding appellant's expert witnesses from the courtroom during the trial, and in refusing to instruct the jury as to appellees' duty to mitigate their damages. We find no error.

Walter C. Estes, appellees' expert, testified that he had been engaged in extensive farming all his life and had been a real estate broker in Arkansas since 1970 and in Louisiana since 1977. He now maintains real estate offices in both states. In 1978 he had a listing to sell appellees' farm then owned by Mr. Coleman for $1250 per acre, which in his opinion after an inspection represented the fair market value. He was unable to sell the farm for Coleman and his listing expired. He took no further interest in the property until this controversy arose. He testified that he arrived at the market value at the time of taking by adjusting the $1250 per acre value he had placed on it in 1978 to current value by utilizing a percentage factor published by the government for lands in Arkansas which he had found to be accurate. He determined the value of 80 acres immediately surrounding the transmission lines after the taking at $807.50 per acre, a reduction of 50% of fair market value. He also reduced the remainder of the property by 5%, arriving at a before value of $1615.00 per acre and an after value of $1534.25 per acre. Appellant contends that although the witness gave his opinion as to these values there was no reasonable basis for it. We do not agree.

It is settled that the testimony of an expert witness should be stricken if cross-examination demonstrates that he has no reasonable basis for his opinion. *Ark. State Hwy. Comm'n* v. *Russell,* 240 Ark. 21, 398 S.W.2d 201 (1966). Appellant argues that a basis was lacking here because the expert had arrived at his value before the taking by projecting the "1978 list price of $1250 per acre and adjusted it forward to August 21, 1979 using a percentage factor published in government reports for all lands in Arkansas." He argues that the basic figure of $1250 was the asking price of Mr. Coleman and not one determined by the witness. We cannot agree because although the witness did testify with regard to the listing and the price contained in it, he testified that he had inspected the property himself and had determined that Coleman's asking price of $1250 per acre

represented the fair market value. The witness testified at length as to the criteria he had used in determining fair market value such as location, soil type, adaptability of the soil, and improvements. Additionally the witness testified to several comparable sales he had utilized in arriving at his fair market value on the date of the property before the taking. No objection was made to his use of the percentage factors published by the government in adjusting that value forward to the date of taking.

Estes testified that the value of the 80 acres immediately surrounding the transmission lines was decreased by 50% and he devalued the remaining acreage by 5%. He had taken into consideration the location, size and construction of the power line and its interruption of farming activity in the 80 acre tract. He stated that any potential purchaser of the property would take those things into consideration in determining what he would be willing to pay for the property. On cross-examination he admitted that he was not familiar with any sale of real estate in that area in which the presence of a transmission line had actually depreciated market value but was giving his "educated opinion." The appellant, relying on *Ark. State Hwy Comm'n* v. *Jensen*, 253 Ark. 795, 489 S.W.2d 5 (1973), contends that this testimony was fatally defective and should be stricken. In *Jensen* the expert gave opinion evidence on the value of property and improvements but admitted on cross-examination that he had not inspected the improvements and was not familiar with the farm prior to the taking except by casually viewing it from the highway. The court held that the expert's familiarity with the property was not sufficiently established to support his specific testimony.

The court declared that on cross-examination an expert witness should be able to demonstrate that his valuation has a foundation in fact rather than mere surmise. It did not hold, as appellant suggests, that "experience and knowledge of real estate" cannot be utilized or relied on by an expert in making appraisals. It merely holds that one cannot base an opinion on those factors alone but must demonstrate some familiarity with the property.

Estes, unlike the expert in *Jensen*, testified that he had personally inspected the property both before and after the construction of the power line and was familiar with the property in both conditions. After the power line was erected he found the efficiency of the operation would be reduced and the cost of the operation increased by its existence. Based on his experience as a farmer and former owner of a farm crossed by a power line, he testified that obstruction on the land created hazards to the operation of machinery and aircraft and would decrease the effectiveness and increase the cost of aerial application of seed, fertilizer and herbicides, and reduce crop yield.

These opinions were shared by appellee Melkovitz, an experienced farmer and industrial pilot, and by other crop dusters called to testify. Estes also testified that the location of the towers and power lines precluded the use of a pivot sprinkler system, which is now being used in lieu of irrigation in the area because of the falling of the water table. His opinion was corroborated by other expert testimony. He testified that the reduction of 5% in value to the remaining acreage was also due to the presence of the power line and reduction in productivity to the 80 acre tract which affected the desirability of buying the whole farm. He testified that these and other problems occasioned by the erecting of the power line would definitely have an effect on the willing purchaser. In his opinion a willing purchaser when offered identical tracts, one with a power line and one without, would pay more for the one without. According to Estes these problems would recur from year to year and have an effect upon the value of the property.

Appellant also relies on *Ark.-Mo. Power Co.* v. *Sain,* 262 Ark. 326, 556 S.W.2d 441 (1977) in which seven acres through a farm were condemned for an easement for a transmission line. The expert witness testified as to the difference in the market value of the farm before and after the condemnation. On cross-examination he admitted that he could not think of a single instance where a transmission line had any effect on the market value of the property. The court held that his opinion on the damages did not have a sound and reasonable basis. Here, however, the witness did

testify to the effects the erection of the transmission line would have on the sale of the property and gave his reasons for his opinion. Testimony as to fair market value of real property is not limited to sales of comparable property, but may be determined from the opinions of witnesses having knowledge of the subject and whose business or experience entitles their opinion to weight. *Ark. State Hwy. Comm'n* v. *Ormond,* 247 Ark. 867, 448 S.W.2d 354 (1969). Based upon his knowledge and experience both as a realtor and a farmer this witness was entitled to give an opinion as to what effect the erection of the transmission line would have on the salability of this property. Any supposed weakness in his testimony goes to the weight of the evidence or credibility of the witness and not to the admissibility of the testimony. *Fulmer* v. *Southwestern Bell Tel. Co.,* 9 Ark. App. 92, 654 S.W.2d 603 (1983); *Ark. State Hwy. Comm'n* v. *First Pyramid Life Ins. Co.,* 265 Ark. 417, 579 S.W.2d 587 (1979). We cannot conclude that the opinions expressed by this witness were without reasonable basis or that the trial court erred in not striking his testimony.

The appellant next contends that the jury's award was grossly excessive and was obviously motivated by passion or prejudice. In determining whether evidence is sufficient to support the verdict, this court will view the testimony in the light most favorable to appellees and will indulge all reasonable inferences in favor of the judgment. *Ark. State Hwy. Comm'n* v. *Dupree,* 228 Ark. 1032, 311 S.W.2d 791 (1958). A jury verdict will not be set aside as excessive unless it is so excessive as to indicate passion, prejudice or an incorrect application of the law applicable to the case, even though the award may appear liberal. *Ark. State Hwy. Comm'n* v. *Sargent,* 241 Ark. 783, 410 S.W.2d 381 (1967). Appellant contends that since the opinions of Estes and the two appellees as to value of the property had no reasonable basis the verdict should not be permitted to stand. It is settled in this state that a landowner is competent to express an opinion as to the value of his land and it is not necessary to show that he was acquainted with market value of property or was an expert on values. He is deemed qualified by reason of his relationship as owner to give estimates as to the value of what he owns and the weight of his testimony is affected

by knowledge of the value. *Ark. State Hwy. Comm'n* v. *Fowler,* 240 Ark. 595, 401 S.W.2d 1 (1966). *Ark. State Hwy. Comm'n* v. *Mullens,* 255 Ark. 796, 502 S.W.2d 626 (1973).

Appellant argues that the testimony of the two appellees was defective because they paid only $1100 per acre in January 1979 but they testified that at the time of the taking eight months later the value had risen to $1500 per acre. Both, however, testified that at the time the purchase contract was negotiated the asking price was far below what they considered to be fair market value and that it "was a bargain." There was some evidence that their grantor had knowledge of the impending condemnation and that he had reduced the price for that reason to effect a quick sale. At the time of purchase it had not been farmed efficiently and was used mainly as pasture. They both testified that they had already made extensive improvements on the property before the taking. They had improved the irrigation system with a relift by laying 3,300 feet of pipe to the 80 acre tract where the transmission lines were located. This land had not theretofore been used for rice which is its most profitable use. They had eliminated a number of roads and put them in cultivation, combined smaller fields into larger ones, and leveled other areas and made them suitable for cultivation. They both testified that by the time the condemnation proceedings had commenced they had made it a "fully mature, desirable farm" where it had been a less desirable one.

The testimony of appellee Melkovitz, who qualified as an expert farmer and crop duster, was that the taking had reduced the value of the farm by $250 per acre. He testified that the existence of the towers and wires had increased the difficulty and cost of the whole farming operation. This property was particularly well suited for growing rice, which requires aerial application of seed, fertilizer and herbicides. He stated that it was a "nightmare for an AG pilot to fly in fields where there are power lines, and as a result they will accept jobs from other farmers in preference to them." He stated in his experience this often delayed the application of chemicals beyond the critical date, resulting in ineffective application. He testified, and this was

corroborated by another agricultural pilot, that the application of chemicals should be made 20 to 40 feet above the ground and in a straight line. The presence of the power lines made this impossible because it was too dangerous to fly under the lines and the pilot would be too high to make even application. He stated that uneven aerial applications reduced yields and increased weed problems. He demonstrated this by showing photographic slides of fields where the chemicals had not been uniformly applied. Where these chemicals are not uniformly applied they must be reapplied at double expense. He stated that the problems could not be solved by flying parallel to the power lines because the towers were not in a straight line. He futher testified that the risks of liability and danger to crops of neighbors and his own was increased because when the AG planes went too high the chemicals were more likely to drift great distances and could not be controlled. Due to the location of the towers it was impossible to make any aerial application to some parts of the farm. As a result the productivity of the farm and the cost factors were greatly increased and would continue to be incurred as long as the power line remained in place. He testified to a number of other effects of the erection of the power line and of the likelihood of damage to machinery as a result and stated that all of these factors would be considered by a prospective purchaser of the property.

Appellee also testified that the water table in that area was falling and that conventional irrigation was becoming less and less feasible. Although the acquisition of pivot sprinkler systems was expensive they use one-half as much as flood irrigation and therefore were more economical. He stated that as the water table fell the area would become more and more dependent upon the sprinkler system. As a result of the erection of the power line the use of pivot systems on the field comprised of 130 acres would be prohibited and this fact would be one a purchaser would consider. Witness Estes corroborated this when he testified that:

> My experience is that buyers of rural land are usually farmers, and when they buy they try to pick out all of those things that are a hindrance to their farming

> operation. I cannot think that anybody who is being a careful buyer would want to buy a farm with a transmission line on it when you could buy one exactly the same without it.

We cannot conclude from this testimony that opinion evidence of the landowners was without reasonable basis. The weight to be given to it was a matter for the jury to determine. As these opinions were founded on a reasonable and logical basis and would sustain the amount of the jury's verdict we cannot say that the verdict was grossly excessive.

The appellant next contends that the trial court erred in permitting the jury to hear evidence concerning the amount of the deposit made by appellant. The appellant at the initiation of the proceedings had deposited only $13,000. The appellant's expert testified that in his opinion the difference in fair market value of the property before and after the taking was $14,000. On cross-examination the witness was asked if he had not been working on an appraisal of the properties when the lawsuit was filed to determine just compensation. The witness answered that he had. The appellant objected and in an in chambers conference the court ruled that counsel could not inquire as to any privileged communications but that he might inquire for purposes of impeachment as to any variance in his prior appraisal or statement. The witness was then asked if he had done the appraisal work on the appellees' farm prior to the condemnation, and the witness admitted that he had and he assumed that the company had determined the amount of deposit from his report.

> Q. Alright, then can you explain to me why the tender in the court on the day the complaint was filed was $13,791.60?
>
> A. No response.
>
> Q. And today you're telling the jury that in your opinion the just compensation is $16,000?
>
> A. I don't make the decisions for the deposit so I can't answer for somebody else.

Ordinarily evidence of the amount deposited by a condemnor as estimated just compensation for land taken in eminent domain proceedings is not admissible in evidence. It is not admissible to contradict lower valuations by other witnesses and should be totally disregarded in fixing the award. *Ark. State Hwy. Comm'n* v. *Taylor,* 269 Ark. 458, 602 S.W.2d 657 (1980). This question was not asked for the purpose of contradicting valuations by other witnesses or establishing the valuation of the property but for purposes of impeachment. In *Ark. State Hwy. Comm'n* v. *Blakeley,* 231 Ark. 273, 329 S.W.2d 158 (1959) the court permitted such cross-examination to show a prior inconsistent statement. Here the appellee first answered that he assumed that the company determined the amount of deposit from his report. On that assumption *Blakely* would permit the continued questioning on this point for purposes of impeachment regarding an appraisal already admitted into evidence. However, here it was subsequently explained that this witness was not the only appraiser and that his appraisal might have differed from the other, which he understood was lower than his. No further questions were asked on that subject. As this evidence was allowed for the limited purpose of impeachment the trial court should have given a cautionary instruction but the burden was on appellant to ask for one. As it was not requested the failure to give it can not be complained of for the first time on appeal. *Matkin, Adm'r* v. *Jones,* 260 Ark. 731, 543 S.W.2d 764 (1976).

The appellant next contends that the trial court erred in excluding appellant's expert witnesses from the courtroom during the trial. Before the trial began there was a request made that all witnesses be excluded from the courtroom pursuant to Unif. R. Evid. 615. The court overruled appellant's motion that its expert appraiser and agricultural consultant be permitted to remain in the courtroom. The proceedings on this motion were not transcribed and the only reference to it appears at page 264 of the transcript as follows:

> THE COURT: We need to put something else on the record that we forgot to do this morning that we were

going to go back and put on the record at the first break. What was it?

MR. HENRY: Yes sir. We objected to the court granting Mr. Hodges' motion to remove C. V.Barnes and Bill Dortch because we felt that their testimony was going to be based on the testimony of the other witnesses in the trial and it was necessary and essential to our case.

THE COURT: The court ruled at that time that they were not essential to your case. And according to your files [sic] the exemption under 615 did not apply.

The appellant contends that the ruling of the trial court illustrates a conflict which exists between Unif. R. Evid. 615 and Unif. R. Evid. 703. Those rules are as follows:

RULE 615: *Exclusion of Witnesses.* — At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of . . . (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

RULE 703: *Basis of Opinion Testimony By Experts.* — The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing.

The appellant argues that if an opposing expert witness is excluded from hearing testimony he cannot base his opinion on "the facts or data presented by those witnesses." He argues that these witnesses would have been able to learn facts and data from hearing the testimony of appellees and their witnesses to use as a basis for their opinion. Certainly if a witness is to testify, not to the facts in the case but solely in his capacity as an expert, and must use the testimony presented at the trial as the basis for his opinion, this argument would have merit. However, both of these

witnesses testified from their own independent investigations of the property before and after the taking, and stated their opinions based on those investigations.

In *Chambers* v. *State,* 264 Ark. 279, 571 S.W.2d 79 (1978) this court declared that the word "shall" as used in Rule 615 is mandatory. In *Morvant* v. *Const. Aggregates Corp.,* 570 F.2d 626 (6th Cir. 1978) the court said that where an exception to the exclusionary rule is sought under Unif. R. Evid. 615(3), it could only be based on Rule 703 which at least implies that experts will be present in court to hear the evidence. The court held, however, that the mere fact that an expert witness may be assisted by being present to hear the testimony upon which he is expected to base his expert opinion does not necessarily furnish an automatic basis for exempting him from sequestration under Rule 615(3).

Where a party seeks to exempt an expert witness from the exclusionary rule on that basis the decision is within the discretion of the trial judge, which should not normally be disturbed on appeal. *Morvant* v. *Const. Aggregates Corp., supra; Miller* v. *Universal City Studios, Inc.,* 650 F.2d 1365 (5th Cir. 1981). In the absence of a record of the proceedings had on the motion we are unwilling to conclude that the trial judge abused his discretion in not exempting the experts under Rule 703. We are unable to find any indication that these witnesses intended to base their opinion on the testimony of other witnesses heard in the courtroom and would be unable or hindered in some way to give opinion tstimony if excluded. On the contrary the record indicates that the opinions of both witnesses were based on independent observations and differed from appellees' witnesses only as to conclusion.

Nor do we find error in the court's ruling that the presence of these witnesses was not "essential to the presentation of the case" as provided in Rule 615(3). In *Chambers* v. *State, supra,* our court adopted the generally accepted interpretation of that section which is that it applies "to such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation." *International*

Harvester Corp. v. *Hardin,* 264 Ark. 717, 574 S.W.2d 260 (1978). (See 28 USCA Federal Rules of Evidence, Rule 615, Notes of Advisory Committee (1975)). In *Oliver B. Cannon & Son* v. *Fidelity and Cas. Co.,* 519 F.Supp. 668 (D. Del. 1981) the court stated that what must be shown is that a witness has such specialized expertise or intimate knowledge of the facts of the case that a party's attorney could not effectively function without the presence and aid of the witness or that the witness would be unable to present essential testimony without hearing the testimony of all other witnesses. This record does not contain such a showing.

In his testimony appellee Melkovitz stated that after the easement was taken the appellant placed three towers along an existing ditch which had been used as a border for his fields and drainage for his farm and neighboring farms. He testified that as a result of the easement he was forced to move the ditch at considerable expense and gave testimony of that expense as an element of damage. The appellant countered that testimony with another expert who testified that it was not necessary to move the ditch as a result of the border but that Melkovitz was merely proceeding with his plans to improve the farm and that it was not necessary to alleviate damages caused by A.P. & L. Relying on *Ark. State Hwy. Comm'n* v. *Dean,* 244 Ark. 405, 425 S.W.2d 306 (1968) appellant contends that it was not necessary to move it and that it was the duty of the appellee to mitigate his own damage and that the court erred in refusing to give the jury a proffered instruction on the duty of the landowner to mitigate his damages. We do not find that case controlling here. There, after property had been condemned for highway purposes and the road constructed, the landowner at considerable expense ran a conduit under the constructed highway for a sewer line across the right-of-way from the appellee's property on both sides of the road. There was evidence that the landowner could have mitigated his damages by constructing the conduit before the road was constructed. In this case the question is not whether the ditch should have been moved in a different way or at a different time but whether the power line necessitated moving the ditch at all. There was no showing that it would have cost more or less to have moved the ditch before the

power lines were constructed. The question of whether the erection of these lines necessitated the moving of the ditch was a question for the jury to determine. We find no error.

Affirmed.

MAYFIELD and COOPER, JJ., agree.

Charlotte L. HANSEN *v.* Dennis Wayne HANSEN

CA 83-389 666 S.W.2d 726

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

Howard & Howard, by; *William B. Howard,* for appellant.

Macom, Moorhead, Green & Henry, by: *J. W. Green,. Jr.,* for appellee.

GEORGE K. CRACRAFT, Judge. Charlotte L. Hansen appeals from that part of the divorce decrees which provides that the custody of her three year old child should be joint with her husband Dennis Wayne Hansen. Under the provisions of the decree physical custody would be for alternating periods of approximately 3 months each, commencing July 15, 1983 and would provide for visitation by the absent parent for at least one three day period per month. The decree further provided that when the child started kindergarten in August 1985 physical custody would be placed with the appellant during the school years with specific reasonable visitations in the appellee, who would have custody during the summer months. Appellant

contends that the court erred in awarding split custody and should have given her primary custody with specific reasonable visitation awarded to the appellee. We agree.

The law pertaining to joint or divided custody is now well settled in this state. Although equally divided custody of minor children is not generally favored, it may be ordered where the circumstances clearly warrant it. The paramount issue in all custody cases is the welfare and best interest of the child. If it is shown that the interest of the child is better fostered by divided custody we have held that this is a proper order for a court to make. *Drewry* v. *Drewry*, 3 Ark. App. 97, 622 S.W.2d 206 (1981).

In *Drewry* we affirmed an award of joint custody where there were factors which, when viewed from the superior position of the chancellor, clearly warranted the order. In *Drewry* both parents lived in the same community and each could rear the child in his accustomed environment, and had the same time available to devote to it. The parents had been sharing equally the care of the child who had no emotional or other problems. The only effect of that order was that the child merely changed the place of principal residence within the same community on a biannual basis. There was no evidence in that case that there was any disagreement between the parents as to the manner in which the child should be raised. The child could mature in the presence of both parents with a sense of security without being subjected to the emotional trauma of experiencing an abrupt severance of a relationship with both parents by a sudden change in custody and environment.

The circumstances in this record are quite different from those in *Drewry*. In this case the parties were living in Stuttgart at the time the child was born. The appellee testified that from the time of birth he shared equally in the duties of taking care of the child and attending to all of her needs. This was disputed by the appellant, who contended that she had the primary duty of caring for the child. The child was born in July 1980 and was one year and seven months old when the parties separated. At the time of separation the appellant returned to her home in Kennett,

Missouri, taking the child with her. According to the testimony of the appellee, from the period between February 1982 and the date of trial his visitation with the child was "sporadic." Both parties testified that there had been constant disputes with regard to visitation, each blaming the other for the problems. It is also clear from the testimony that the parties are not working in concert to raise the child. They have differing ideas in many areas as to her upbringing, including diet, discipline and even as to the length of her fingernails.

Appellee testified that on many occasions appellant appeared to be more interested in her own hair and makeup than she did in the child, and she testified that he spent too much time drinking and pursuing other women. The appellee accused her of having a tendency to be hysterical and she stated that he was short tempered and had no patience with the child. Both parents work and both testified that the child would have to be in day care during working hours. Additionally we note that from February 19, 1982 until the date of the decree on June 9, 1983, the child was in the principal custody of her mother in Kennett, Missouri with sporadic visitation with the appellee and that the temporary order entered on December 8, 1983 continued primary custody in the mother. Thus it appears that this child has spent the last year and three months of her life with her mother with only short, occcasional visits with the father. Unlike *Drewry* the present order will not avoid subjecting the child to the emotional and psychological trauma of adjusting to one parent and experiencing the abrupt severance of that relationship by a sudden change in custody and environment to another parent. She would now be abruptly removed from the primary custody of her mother and accustomed surroundings for three months and every other three months thereafter. She would have two homes located in different states. She would have to adjust to two day care facilities and two sets of companions and associates. Her environment, diet and disciplinary rules would change every three months.

The appellate court does not disturb a chancellor's findings unless they are clearly against a preponderance of

the evidence giving due regard to the opportunity of the chancellor to judge the credibility of the witnesses. 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 and we know of no case in which the superior position, ability and opportunity of a chancellor to observe the parties carries as great a weight as one involving minor children. *Calhoun* v. *Calhoun,* 3 Ark. App. 270, 625 S.W.2d 545 (1981).

We do not depart from these well established tenets. However, after considering the age of the child, the attitudes of the parents toward each other, and their differing opinions as to how the child should be raised, we conclude that the chancellor's finding that the child's best interest would be fostered by ordering divided custody on a three month basis is clearly erroneous.

Chancery cases are tried *de novo* on appeal. On such a review all issues of law or fact raised in the chancery court are before the court for determination. Where error appears and the record is fully developed so that we can plainly see where the best interest of this minor lies we should correct the error by entering the decree which should have been entered by the chancellor. *Ferguson* v. *Green,* 266 Ark. 556, 587 S.W.2d 18 (1979). The appellate court does have a discretionary power to remand an equity case for further testimony or proceedings on a limited point if that is necessary to achieve equity. *Arnett* v. *Lillard,* 247 Ark. 931, 448 S.W.2d 626 (1970); *Ferguson* v. *Green, supra.*

From our *de novo* review of the record we conclude that the order which the chancellor should have entered would award custody to the appellant, making adequate provision for periodic visitation by the appellee and an extended visitation during the summer months, not to exceed three weeks.

In the order appealed from the chancellor provided

specific visitation for the absent parent while the child was in custody of the other. That visitation would not necessarily be fair and equitable under the order as we would modify it.The evidence on which that visitation schedule was determined does not appear in the record with sufficient clarity for us to make those determinations here. In the exercise of our discretion we remand the case for further proceedings on the issue of visitation of the minor child with the appellee.

The cause is remanded with directions that the chancellor enter an order not inconsistent with this opinion in which adequate rights of visitation are provided for appellee. In all other respects the decree is affirmed as modified.

Affirmed in part and reversed and remanded in part.

MAYFIELD and CLONINGER, JJ., agree.

Calvin GRAHAM d/b/a GRAHAM AND ASSOCIATES
v. Geraldine P. CRANDALL and
Matthew L. CRANDALL

CA 83-171 668 S.W.2d 548

Court of Appeals of Arkansas
Division II
Opinion delivered April 4, 1984
[Supplemental Opinion on Denial of Rehearing May 23, 1984.]

Stripling & Morgan, for appellant.

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

JAMES R. COOPER, Judge. The appellees owned approximately 511 acres in Van Buren County, which they listed for sale with the appellant, who is a real estate broker in Clinton, Arkansas. The appellant found a buyer, but the appellees refused to close the transaction due to the parties' inability to agree upon the buyer's right to prepay the note. When the appellees refused to close, the appellant brought suit to recover his commission. The trial court denied the appellant's motion for a directed verdict, and the jury found

for the appellees. From that decision, comes this appeal.

For reversal, the appellant first argues that it was error for the trial judge to refuse to direct a verdict in the appellant's favor when the appellees failed to rebut the appellant's prima facie case that the appellant was entitled to his commission.

George and Jean Pike were contacted by the appellant, and, after several offers and counter-offers, an offer and acceptance was executed on July 8, 1980 by all the parties. The contract provided for a sale price of $244,600.00 payable as follows: $24,600.00 down, and the $220,000.00 balance payable in twenty annual installments of $25,845.00. The interest rate was 10%. The parties later agreed to reduce the down payment by $5,525.00 when it was determined that the mineral rights had been severed from 221 acres.

The appellees refused to consummate the sale because the note and mortgage, (which were prepared by Mr. Pike) included a provision allowing prepayment of the balance without penalty. The appellees testified that they did not want the buyer to be able to prepay the note. Mr. Pike testified that he would have agreed to a note which was silent on the point. The offer and acceptance was silent on the question of prepayment, but the listing contract had, as one of its terms, a requirement of a penalty if the note was prepaid within the first two years. The appellant argues that as of July 8, 1980, he had produced a ready, willing and able buyer and therefore he had fulfilled his contract with the appellees and was entitled to his commission.

In *Whitefield* v. *Haggart,* 272 Ark. 433, 615 S.W.2d 350 (1981) the Arkansas Supreme Court stated that "the broker earns his commission by producing a purchaser ready, willing and able to take the property on the seller's terms . . ." (citations omitted). The appellees freely entered into the offer and acceptance contract which did not contain a provision prohibiting prepayment or providing for a penalty for prepayment. An offer and acceptance is an

enforceable contract between the buyer and seller, and the contract in the case at bar could have been enforced by either party. By the offer and acceptance contract the appellees reaffirmed their obligation to pay the appellant a 6% commission for his services in procuring the contract. *See Walker* v. *Huckabee,* 10 Ark. App. 165, 661 S.W.2d 460 (1983).

In *Pinkerton* v. *Hudson,* 87 Ark. 506, 113 S.W. 35 (1908) the Arkansas Supreme Court stated:

> "The law is well settled that 'where a real estate broker contracts to produce a purchaser who shall actually buy, he has performed his contract by the production of one financially able, and with whom the owner actually makes an enforceable contract of sale. The failure to carry out that contract, even if the default be that of purchaser, does not deprive the broker of his right to commissions.' "

This language is applicable to the case at bar. The sellers entered into an enforceable contract with the buyers who were supplied by the appellant. It does not matter for purposes of the broker's commission that the parties subsequently could not agree on the completion of the land sale, but the fact that they had entered into an enforceable contract, the offer and acceptance of July 8, 1980, entitled the broker to his commission, in the absence of a showing of fraud or misrepresentation.

It is undisputed that the Pikes were ready, willing, and able to perform their part of the contract, without the stated right to prepay. Were this judgment to stand, it would allow any seller to avoid paying a commission by insisting on provisions in the note and mortgage which were not part of the contract. The offer and acceptance contract was clear and unambiguous, freely entered into by all parties, and, as stated earlier, was enforceable by either the appellees or the Pikes. The prepayment issue was between the appellees and the Pikes, and its resolution, if the Pikes ever elected to attempt prepayment, was for another day. It is worth

noting that the appellees never insisted on any prepayment clause during the two months of negotiations, which involved three offers and two counter-offers.

The test as to whether a trial court may direct a verdict without abusing its discretion has been clearly stated by this Court. The evidence and all reasonable inferences deducible therefrom must be viewed in the light most favorable to the party against whom the directed verdict is sought, and if there is any conflict of evidence or the evidence is not in dispute but is in such a state that fair-minded persons might draw a different conclusion therefrom, a jury question is presented. *Arkavalley Farms* v. *McCollum,* 271 Ark. 840, 611 S.W.2d 201 (Ark. App. 1981). Applying this standard to the facts before us, we find that the trial court erred in refusing to grant a directed verdict at the close of the appellees' case.

The evidence was undisputed that the appellant produced a ready, willing and able buyer who entered into an enforceable contract with the appellees. The appellees asserted the affirmative defenses of misconduct on the part of the appellant in representing the interests of the buyer as well as the appellees, and also fraud and bad faith. The appellees' case consisted of testimony that was designed to substantiate these allegations. At the close of the appellees' case, the trial judge ruled that the appellees failed to present sufficient evidence to prove these defenses and would not allow the appellees' case to go to the jury on these defenses. When this ruling was made, the appellant was entitled to a directed verdict. At this time there was no disputed fact to be resolved by the jury and the appellant had proved his entitlement to the disputed commission.

The appellees argue that the appellant's motion for a directed verdict was not specific enough. We disagree. Rule 50 of the Arkansas Rules of Civil Procedure requires

that such a motion shall state specific grounds. The motion in the case at bar was specific. We therefore reverse and remand with instructions to enter judgment for the appellant for the amount prayed for, that being 6% of the purchase price according to the amount stated in the offer and acceptance contract of July 8, 1980, as reduced by the addendum. Because we reach this result, it is unnecessary to decide the other points raised by the appellant.

Reversed and remanded.

CORBIN and GLAZE, JJ., agree.

Supplemental Opinion on Denial of Rehearing
delivered May 23, 1984

672 S.W.2d 914

JAMES R. COOPER, Judge. The petition for rehearing filed by the appellees points out one inadvertent error in our original opinion. It is true that Mr. Pike stated that he "probably" would have signed a note which was silent on the issue of prepayment, but that error in our opinion changes nothing.

The point of the decision is that both parties had entered into an enforceable contract for the sale of the land in question; that Mr. Pike was in no position to demand any provision concerning prepayment; that the Crandalls were in no position to demand any provision concerning prepayment; and that the contract, at least on the record before us, appeared to be subject to specific performance by either party. As between the appellants and the appellees it does

not matter that the Pikes and the appellees might eventually have been involved in litigation concerning the right, or the lack of the right, to prepay. The appellants produced a ready, willing, and able buyer who executed a binding contract for the purchase of the subject lands on terms which, according to the offer and acceptance, were acceptable to the appellees. Having done so, the appellants earned their commission.

Petition for rehearing denied.

Mitchell G. LITTLE *v.* DELTA RICE MILL, INC. and CNA INSURANCE COMPANY

CA 83-206 667 S.W.2d 373

Court of Appeals of Arkansas
En Banc
Opinion delivered April 4, 1984
[Rehearing denied May 2, 1984.]

Lightle, Beebe, Raney & Bell, by: *A. Watson Bell,* for appellant.

Wright, Lindsey & Jennings, for appellee.

JAMES R. COOPER, Judge. In this workers' compensation case, the Commission, by a two to one[1] vote, held that the appellant, Mitchell Gene Little,[2] had failed to prove a causal connection between a fall suffered while in the employ of the appellee, Delta Rice Mill, Inc., and his subsequent disability and medical treatment. From that decision, comes this appeal.

The facts of this case are essentially undisputed. Mitchell Gene Little suffered a fall on May 12, 1981, and as a result of that fall was off work for approximately nine days. The appellees did not controvert the compensability of that accident. The appellant returned to work and was continuously employed by the appellee, Delta Rice MIll, Inc., until August 4, 1981. The testimony indicates that from the time of the initial fall until the time he quit work, the appellant suffered severe headaches, dizziness, and unsteadiness on his feet. He sought medical attention in August of 1981, and after consulting a neuro-surgeon, Dr. Thomas Miller, on September 4, 1981, a CT brainscan was performed on September 11, 1981, and a malignant brain tumor was discovered. The tumor was removed on September 17, 1981, and from that date until the appellant's death in August, 1983, he required medical treatments consisting of radiation therapy and other required treatments.

Both counsel agree that the medical testimony is critical to a disposition of this case. The administrative law judge, and the Commission's opinion view Dr. Miller's testimony as contradictory, while Commissioner Farrar's dissent finds no inconsistency in the testimony of Dr. Miller. Dr. Miller testified that, in his medical opinion, the tumor did not

[1]Commissioner Tatum concurred in the majority opinion written by Chairman Rotenberry. Commissioner Farrar, dissented.

[2]The appellant, Mitchell Gene Little, died on August 15, 1983. A motion to revive the cause of action in the name of his administrator was granted by this Court on September 28, 1983.

grow related to the fall suffered in May, 1981, nor did it become malignant with regard to the trauma, nor was the actual growth of the tumor actually accelerated as a result of the trauma. However, he testified that the fall and the blow to the appellant's head caused swelling in and around the tumor, which caused symptoms, *i.e.*, headaches, to arise sooner than they otherwise would have absent the trauma. Dr. Miller also testified that, in his medical opinion, these symptoms would not have arisen for a period of time, in his best judgment six months, without the trauma. He further testified that, based upon a reasonable degree of medical certainty, the May 12, 1981, fall aggravated or accelerated the tumor to the extent that it produced swelling and edema which caused symptoms and difficulties earlier than would have been present absent the fall.

It is uncontradicted that the appellant suffered no symptoms of dizziness, unsteadiness, or headaches prior to the fall on May 12, 1981; that the symptoms began immediately after the trauma, and did not cease, even though, for a period of approximately three months, the symptoms were not disabling; that with no additional trauma or intervening cause, the symptoms caused the appellant to become disabled in early August, 1981; that the medical testimony clearly indicates that the tumor itself suffered a traumatic injury, thereby causing it to become symptomatic earlier than it would have absent the trauma; and finally, that the trauma to the tumor was sustained by examination of the tumor following its removal, when Dr. Miller found dead tissue and stained fluid in and about the tumor.

It has long been the rule in Arkansas that a pre-existing disease or infirmity of an employee does not disqualify his claim under the requirement that the disability "arise out of the employment" where the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. *Black* v. *Riverside Co.*, 6 Ark. App. 370, 642 S.W.2d 338 (1982).

It is worth observing that Dr. Miller noted that there was no history of any prior disability which preceded the

May 12, 1981 fall, and no other witness testified as to any disability which had disabled the claimant prior to that injury. Although Dr. Miller testified that the tumor pre-existed the injury, and in fact may have been present at birth or shortly thereafter, no symptoms or other evidence of its existence was evident until the fall precipitated the onset of symptoms which soon became totally disabling.

We recognize the standard of review which the law dictates this Court follow. On appeal, we are required to review the evidence in the light most favorable to the Commission's decision and uphold it if it is supported by substantial evidence. Before we may reverse a decision of the Commission, we must be convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at 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 cannot say that fair-minded persons could arrive at the conclusion found by the Commission. The chain of events from the fall suffered by the appellant on May 12, 1981, shows without doubt that, after considering the testimony of all witnesses, including the appellant's mother, and his treating neuro-surgeon, Dr. Miller, his disability and medical expenses were causally connected to the earlier fall. Dr. Miller's testimony clearly indicates that the trauma to the appellant's head accelerated the onset of disabling symptoms by as much as six months. That fact is uncontroverted since the fall hastened the appellant's disability, regardless of whether it would have occurred eventually anyway.

The case of *Claphan* v. *Great Bend Manor*, 5 Kan. App. 2d 47, 611 P.2d 180 (1980), is strikingly similar to the case at bar. In *Claphan*, the worker suffered a disc injury. She worked for approximately twelve days until the pain caused her to cease work. In the course of receiving medical treatment, a tumor was discovered. The medical testimony indicated that, as in the case at bar, the tumor was not the result of the work-related injury, but that the injury caused the onset of symptoms related to the tumor. The neuro-

surgeon's testimony in *Claphan* is remarkably similar to that in the case at bar. In *Claphan*, the doctor stated:

> "I would think that the tumor was there at that time, preexisting to that, that she probably had adequate room in the spinal canal for the tumor, that it had, you know, at that point wasn't causing severe pressure, but that the effect of lifting at that particular time may very well have exacerbated or caused that preexisting tumor to become symptomatic. That isn't all that terribly uncommon. I've seen patients who had a minor car accident — or one particularly fell out of a tree and hit his head, started having headaches, never had them before. Well, he had a brain tumor but, you know, the cause — the fall simply caused the tumor to become symptomatic. His pressure relationships in the head were just adequately balanced until that. I think that's what happened to her back."

The physician further stated that if the claimant had not had the accident, the tumor would have become symptomatic within approximately three to six months. The Kansas Court of Appeals, in considering the issue, noted that the medical testimony stressed that the injury did not cause the tumor, but pointed out that that was not the test. In so doing, the court stated ". . . the test is not whether the injury causes the tumor, but rather whether the injury aggravates or accelerates the condition . . ." The Kansas Court of Appeals reversed the administrative decision denying benefits and awarded full benefits.

We hold that the evidence in the case at bar is such that fair-minded persons could not conclude that the appellant's work-related injury did not accelerate and/or aggravate the onset of symptoms which caused his disability earlier than if he had not been injured on the job. Accordingly we reverse and remand to the Commission with directions to award benefits, both disability and medical.

Reversed and remanded.

CLONINGER and GLAZE, JJ., concur.

John Wayne MOORING *v.* STATE of Arkansas

CA CR 83-107 666 S.W.2d 720

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

Green Law Office, by: James P. Clouette, for appellant.

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

LAWSON CLONINGER, Judge. Appellant, John Wayne Mooring, was tried and convicted of the offense of possession of a controlled substance with intent to deliver. He now brings this appeal.

His first point for reversal is that the court erred in refusing to direct a verdict in his favor. A directed verdict is only proper when there is no issue of fact for the jury to decide. In resolving the issue, an appellate court should review the evidence in the light most favorable to the appellee and affirm if there is any substantial evidence to

support the verdict. *Burks* v. *State,* 255 Ark. 23, 498 S.W.2d 336 (1973). Upon reviewing the evidence in the light most favorable to the state, we find that Robert Rich, an ABC enforcement officer, entered Hal's Liquor Store around 11:00 a.m. on July 7, 1982. He was there to make a routine inspection of the store. Upon entering, he noticed empty bottles in the trash can near the door. He observed an open bottle of whiskey sitting under the counter near the cash register. He also noticed a set of scales and a box of plastic bags. Appellant placed a cigarette machine in front of the items but Mr. Rich asked him to move it so he could look underneath the counter. He saw a brown paper sack next to the scales and bags. At that point, appellant picked up the sack and handed it to a friend, telling him to throw the sack in the trash. Mr. Rich requested to see the sack and, upon opening it, found it to contain seven plastic bags containing marijuana.

Appellant cites the case of *Osborne* v. *State,* 278 Ark. 45, 643 S.W.2d 251 (1982) for the rule 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. In *Osborne* the police had gone to the appellant's residence with a search warrant and his wife answered the door. Upon a search, the police found contraband in a dresser in one of the bedrooms and a suitcase in the hall. Marijuana was found in an ashtray in the living room. The Arkansas Supreme Court reversed a conviction for possession with intent to deliver a controlled substance, stating that the only evidence the state presented on the issue was the stipulation that appellant resided at the premises. The court noted that there were four other people at the residence when the police arrived and there was no testimony as to whose bedroom it was where the pills were found. However, it was also stated in *Osborne* that 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 joint control of the accused and another, but neither actual nor exclusive possession of the contraband is necessary to sustain a charge of possession.

In the instant case there was additional evidence to show that appellant had possession of the contraband. Appellant picked up the brown paper sack containing the marijuana and gave it to a friend and asked him to throw it away. Further, it was shown that appellant had moved a cigarette machine in front of the incriminating evidence, and it can be inferred from this action that appellant was attempting to hide the incriminating evidence. In our opinion, there was ample evidence to support the jury verdict.

Appellant's second point for reversal is that the court erred in refusing to suppress evidence seized as a result of a warrantless search. There is a rebuttable presumption that a search without a warrant is an unreasonable search. *Sanders* v. *State,* 262 Ark. 595, 559 S.W.2d 704 (1977). Appellant outlines the exceptions to a warrantless search as (1) a search incident to a lawful arrest; (2) the automobile exception; (3) when consent is given; (4) the plain view doctrine. He argues that none of these exceptions is supported by the evidence in this case. However, the state counters this argument by justifying the search on the basis of a warrantless inspection. See *United States* v. *Biswell,* 406 U.S. 311 (1972). The rule in *Biswell* was recognized in an Arkansas case, *Hosto* v. *Brickell,* 265 Ark. 147, 577 S.W.2d 401 (1978). In *Hosto, supra,* the rule was stated that in a business where there is a legitimate public interest in close regulation, such as the distribution of drugs, a procedure for the issuance of a warrant prior to an administrative inspection is not constitutionally required. The court went on to say:

> Where close scrutiny of traffic and commodities which are subject to close governmental supervision is of central importance for a proper governmental purpose and inspection is crucial to the regulatory scheme, if the laws are to be properly enforced and inspection made effective, unannounced inspections without a warrant must be deemed reasonable official conduct.

In *Hosto,* the court cited from *State* v *Albuquerque Publishing Co.,* 91 N.M. 125, 571 P.2d 117 (1977), *cert. denied,* 435 U.S. 956 (1978). It appears that the Arkansas

Supreme Court adopted the test outlined in that case for determining when a non-consensual warrantless administrative inspection of business premises can be made:

> 1. The enterprise sought to be inspected was engaged in a business purpose pervasively regulated by state or federal government.
>
> 2. The inspection would pose only a minimal threat to justifiable expectations of privacy.
>
> 3. The warrantless inspection was a crucial part of a regulatory scheme designed to further an urgent government interest.
>
> 4. The inspection was carefully limited to time, place and scope.

In this case, it is our opinion that these facts meet the test for a warrantless administrative inspection allowed under the rule of *Hosto* v. *Brickell.* First of all, the appellant was an employee of a business which is pervasively regulated by the state. Secondly, the inspection posed only a minimal threat to justifiable expectations of privacy. The search was only conducted on the business premises and there was no area of the business premises which was searched in which appellant had any justifiable expectation of privacy. Although it could be argued that appellant did have a justifiable expectation of privacy inside the brown paper sack, he abandoned any expectation he had when he gave this sack to a friend to be thrown away. Further, the ABC agent had reason to believe that illegal activity was taking place on the premises, since he had seen the weight scales and the clear plastic bags underneath the counter. He had also seen empty liquor bottles in the trash can. Third, the warrantless inspection was a crucial part of a regulatory scheme designed to further an urgent government interest. It is well known that ABC agents conduct routine unannounced inspections on business premises to determine if there are any illegal activities taking place on the premises. The final requirement was also met. The inspection was carefully limited as to time, place and scope.

The jury's verdict is affirmed.

CRACRAFT and MAYFIELD, JJ., agree.

J. H. FRANKLIN and Jerry D. FRANKLIN
v. ESTATE OF Asa J. GRIFFITH et al

CA 83-394 666 S.W.2d 723

Court of Appeals of Arkansas
Division II
Opinion delivered April 4, 1984

Lavender, Rochelle, Barnette, Franks & Arnold, for appellant.

Honey & Rodgers, by: *Danny P. Rodgers;* and *Shackleford, Shackleford & Phillips, P. A.,* for appellee Griffith.

Brown, Compton & Prewett and *Young, Patton & Folsom,* for appellee Williamson.

DONALD L. CORBIN, Judge. A Union County Circuit Court jury, upon the verdict of nine jurors, assessed a $1,047,850.20 verdict against appellant Jerry D. Franklin individually and a verdict of $4,950.00 against him and his co-defendant, J. H. Franklin, and co-appellant herein. We affirm.

Before opening statements and any testimony had been presented, counsel for appellants informed the trial court that a juror, identified as Perry Kinard, had been overheard by a witness for appellants in the restroom making the statement that "he hoped Franklin had a lot of insurance." Appellants subsequently moved that the trial court continue the case to investigate any bias on the part of Juror Kinard; for a mistrial; or to excuse Kinard from the jury. The court responded as follows to these motions:

> Gentlemen, I've found that you properly brought this to the attention of the Court. I've had one other experience in this and I did not act with regard to the juror. A juror was alleged to have talked to one of the witnesses and we had a request again for a mistrial and I did not grant that.
>
> I do think, in reponse to Mr. Compton's statement, that if there is the possibility that someone is tainted, certainly that it should be brought to the Court, and I'm willing to deal with that. I'm not too sure if dealing with it wouldn't prejudice the remainder of the jurors at this point and create even more of a Pandora's box once we open the door to that. I think the best thing to do at this point is to, again on the basis you've made your record, deny the motion for a continuance and mistrial.
>
> I don't feel inclined to excusing Mr. —
>
> NICK PATTON: — Kinard.
>
> THE COURT: — Kinard, it's Mr. Perry Kinard — at this point for a number of reasons. It might well be that we should bring him in and talk to him, but I think that might even be prejudicial, so at this time I'm going

to deny your motions, both for a continuance and a mistrial or that the juror be excused, and let's proceed.

For reversal appellants contend that the trial court erred in refusing to grant their motion to excuse Juror Perry Kinard; to grant a mistrial; or to grant a continuance to further investigate any bias of Kinard.

Appellants rely on *United States* v. *Dean,* 647 F.2d 779 (8th Cir. 1981), *modified on other grounds,* 667 F.2d 729 (8th Cir. 1982), *cert. denied,* 456 U.S. 1006 (1982), which suggests that appropriate action by a trial court under these circumstances includes "a short continuance for further investigating, excusing the juror and seating an alternate, or granting a mistrial." Here, appellants argue that it is important to note that the case was submitted to the jury on interrogatories and that appellees prevailed on a 9-3 split of the jury. Appellants note that Juror Perry Kinard voted with the majority on each interrogatory and that his name was at the head of each interrogatory response. Appellants argue that on these facts, the probability of Kinard's expressed bias being influential in the overall outcome of the case is made manifest.

Appellees contend that no basis to excuse Juror Perry Kinard was stated by appellants and rely on this Court's decision in *Farm Bureau Mutual Ins. Co.* v. *Smith,* 5 Ark. App. 37, 632 S.W.2d 244 (1982). There, appellees filed a motion for new trial based on an allegation of juror misconduct consisting of a statement said to have been made by one of the jurors during jury deliberations. The motion was accompanied by the affidavit of a juror who also testified at the hearing on the motion. The juror said, "it's lawsuits like this that will make all our insurance premiums go up." The trial court granted the motion for new trial and this Court reversed holding that the statement fell within the proscription of Uniform Rules of Evidence 606(b) and could not properly be considered as the basis for granting the motion for new trial. In addition, we noted that the statement was simply an expression of opinion on the merits of the appellees' case.

It is well settled that in passing on the qualifications of jurors, the trial court has much latitude and discretion, and unless abused, its action will not be disturbed on appeal. *Crouch* v. *Richards,* 212 Ark. 980, 208 S.W.2d 460 (1948). Insurance is a fact of life in our society and jurors are cognizant that most operators of vehicles carry liability insurance of some kind. Appellants were sued by appellees in the amount of $4,067,392.22 for the alleged wrongful death of two middle-aged men who were each survived by a widow and small children. The trial court could have viewed the alleged statement of Juror Kinard as merely an expression of concern. The trial court heard the statements of counsel and was in a position far superior to ours to determine whether the granting of appellants' motions was in order. Accordingly, we cannot say that the trial court's denial of appellants' motions constituted an abuse of discretion.

Appellants contend as their second point for reversal that the trial court erred in denying their motion for new trial pursuant to A.R.C.P. Rule 59. At the conclusion of the trial, appellants filed the motion alleging that the trial court abused its discretion in denying their original motions for a continuance to further investigate any bias of Juror Kinard; for a mistrial, or to excuse Kinard from the jury and this prevented them from having a fair trial. This motion was overruled by the lower court which recited in the order that "a hearing not having been requested by the parties, the matter is submitted to the court upon the motion for a new trial and the pertinent portion of the trial record . . ." The trial court found that appellants failed to comply with Rule 59(a)(2) and (c) in that their motion was not accompanied by an affidavit as required by the rule and that the allegation of bias as to Juror Kinard was unsupported and without merit.

Appellants and appellees rely on different sections of Rule 59 to support their conflicting positions. Appellants contend that Rule 59(a)(1) is the proper provision for our consideration which provides:

> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues

on the application of the party aggrieved, for any of the following grounds materially affecting the substantial rights of such party:

(1) any irregularity in the proceedings or any order of court or abuse of discretion by which the party was prevented from having a fair trial.

On the other hand, appellees contend that the trial court was correct and that Rule 59(a)(2) and (c) is applicable which provides:

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues on the application of the party aggrieved, for any of the following grounds materially affecting the substantial rights of such party:

. . .

(2) misconduct of the jury or prevailing party

. . .

(c) Form of Motion. The motion must be in writing setting forth in separate paragraphs the grounds or assignments of error relied upon for a new trial. The grounds mentioned in section (a) (2), (3) and (7) of this rule must be supported by affidavits showing their truth and may be controverted in the same manner.

It is well settled that the granting of a new trial addresses itself to the sound discretion of the trial court, and this Court will not reverse unless it appears that the trial court abused its discretion. *Smith* v. *Villarreal,* 253 Ark. 482, 486 S.W.2d 671 (1972). We agree with appellees and the trial court that Rule 59(a)(2) and (c) is the proper provision under which this motion should have been presented to the trial court. We cannot say that the alleged statement of Juror Kinard indicates bias or prejudice. In the absence of any supporting affidavits, both this Court as well as the trial court would

have to resort to speculation and conjecture to determine whether the statement "I hope Franklin has a lot of insurance" constituted bias in favor of either party. Appellants should have filed supporting affidavits together with a request for a hearing on their motion for a new trial. We cannot say that the trial court abused its discretion in denying appellants' request for a new trial.

Affirmed.

COOPER and GLAZE, JJ., agree.

Lloyd JONES *v.* STATE of Arkansas

CA CR 83-144 668 S.W.2d 30

Court of Appeals of Arkansas
En Banc
Opinion delivered April 4, 1984
[Rehearing denied May 2, 1984.]

Kincaid, Horne & Trumbo, by: *Bass Trumbo,* for appellant.

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

TOM GLAZE, Judge. Appellant, Lloyd Jones, was convicted by a jury of murder in the first degree. The jury found that appellant had, with premeditation and deliberation as required by Ark. Stat. Ann. § 41-1502 (Repl. 1977), placed his 30-30 caliber rifle against the abdomen of his girlfried, Annie Terry, and shot her. Appellant was sentenced to twenty-five years imprisonment.

In this appeal, Jones raises two points for reversal. Appellant challenges the sufficiency of the evidence to sustain a conviction of first degree murder against him. He also contends that the trial court erred in not suppressing evidence against him obtained by the State's search of his home.

The facts establishing the background of appellant's relationship with Annie Terry are not in dispute. Appellant and Ms. Terry had lived together for over a year and a half. For the last fourteen months of their relationship, they lived near Paris, Arkansas. Appellant and Ms. Terry apparently cared for each other and had discussed the possibility of marriage. Ramona Whitman, who had known appellant and Ms. Terry for two years, testified, "They got along like — I guess, any other couples do." Other witnesses testified to the same effect.

The facts leading up to the shooting are not disputed either. On May 20, 1982, appellant and Ms. Terry entered the Rock Tavern around 3:00 P.M. in Paris and drank some beer. Appellant left with a friend named Jim Gilbert and went to a V.F.W. club in a nearby town and drank more beer. Ms. Terry remained in the Rock Tavern. Appellant and Gilbert returned to the Rock Tavern about 6:00 P.M. Appellant stayed there with Ms. Terry until approximately 8:30 P.M. Gilbert testified that appellant may have had as many as nine beers from 3:00 P.M. until 8:00 P.M. Appellant stated he may had had ten or twelve beers during this period. Gilbert said that Ms. Terry had two or three beers after he and appellant returned to the Rock Tavern. He also testified

that appellant and Ms. Terry were "loving, kissing and hugging each other and things like that, that night" in the Rock Tavern.

Appellant was the only witness to the shooting. The following recitation of facts is his version of the incident. He testified that he and Ms. Terry left the Rock Tavern at 8:30 P.M. and arrived home at approximately 9:15 P.M. As they pulled into their driveway, a coyote ran across the road. Appellant stated Ms. Terry said that she wished she knew how to use a gun so she could shoot coyotes. The couple entered their house, and appellant went into the kitchen. Ms. Terry went into the living room and took the 30-30 rifle off the rack. She levered the rifle and handed it to appellant when he walked into the living room. Appellant put a shell into the magazine of the rifle and levered it to show Ms. Terry how to put a bullet into the chamber. At this time, appellant was standing near the end of a couch in the living room, and Ms. Terry was standing facing him to his left. Just as appellant was trying to let the hammer down to uncock the rifle, Ms. Terry grabbed the rifle barrel and pulled it toward her, saying, "Let me see it." The rifle discharged when she grabbed the barrel. After being shot, Ms. Terry slumped down against the end of the couch.

Appellant took two or three steps to replace the rifle in its rack on the wall and then went back to Ms. Terry to see what he could do for her. He telephoned a married couple who were friends of his and asked them what to do. The friends told appellant to rush Ms. Terry to the hospital in Paris. Appellant did so, covering the thirty-minute drive down a steep, twisting mountain road in fifteen minutes. Ms. Terry was admitted to the hospital and subsequently transferred to a hospital in Fort Smith, where she died as a result of her wound.

Friends of the appellant, who met him at the hospital, testified that he was crying and seemed scared and upset. They stated that he kept referring to the incident as an accident and kept asking himself what he was going to do.

Appellant was taken by police officers to the Fort Smith

Police Station for questioning, where he was given a blood alcohol test that registered 18%. He was arrested at Fort Smith at 1:00 A.M. From Fort Smith, appellant was taken to the Franklin County Jail in Ozark, where he was interrogated by police officers at 3:40 A.M. Police officers stated that appellant consented to a search of his house during this questioning. Appellant says he did not consent to a search of his home. At approximately 5:00 A.M., police officers did search appellant's home and removed a 30-30 caliber Marlin rifle, two pieces of wood paneling from the south wall of the house, a lead projectile recovered from the wall, a cartridge casing recovered from the couch, a cartridge casing recovered from the rifle, a fiberglass fishing rod which was on the couch, and two live cartridges recovered from the gun rack; officers made sketches of the crime scene that showed a two-foot blood stain on the floor of the house, thirty-six inches from the wall, and a bullet hole in the wall, seventeen inches from the floor. The piece of paneling removed from the house had traces of partially burned gunpowder, soot, gunshot residue, particles of barium, antimony, lead, intestinal matter and blood on it. The blood and intestinal matter were not visible to the naked eye.

Appellant also testified that Ms. Terry did not know anything about guns or how to handle them but that he was experienced in handling firearms. There was testimony from appellant and some of his friends that appellant's 30-30 rifle was dangerous to handle because it had a hair trigger and because it did not have a safety device on it. The State's firearms expert testified that after a bullet is levered into the chamber of appellant's rifle, the trigger has to be pulled and simultaneously the hammer has to be slowly lowered to be certain the rifle will not discharge.

The State's evidence consisted of the testimony of an associate medical examiner and the chief criminalist of the State Crime Laboratory, detailing the results of various tests they had performed. This testimony is too extensive to set forth in toto. We do, however, relate that part of the State's experts' testimonies that conflict in several crucial respects with that of Jones'. In essence, the State's expert witnesses testified that: (1) Ms. Terry was squatting, not standing,

when she was shot; (2) Ms. Terry was very near the south wall of the living room when she was shot — not near the couch, as appellant said; (3) Ms. Terry did not grab the rifle barrel — instead she pushed it away from her in a defensive motion; (4) Ms. Terry did not lever the rifle. The associate medical examiner's autopsy of Ms. Terry showed that the bullet that killed her dropped three inches from entrance to exit in the victim's body and showed lacerations to the left side of the liver. The associate medical examiner also testified that the exit wound was blocked by part of the intestines in such a way as to prevent bleeding from the exit wound. Based on these autopsy results, the associate medical examiner stated that Ms. Terry was not standing when she was shot, but "was leaning forward and most probably squatting."

The chief criminalist testified that trace metal tests he performed on the corpse's hands indicate that Ms. Terry did not grip the barrel of the gun and pull it toward her, but rather pushed it away from her in a defensive motion. He testified further that the trace metal test results were inconsistent with appellant's statement that Ms. Terry levered the rifle before she handed it to him. The criminalist stated that his examination of the sweater Ms. Terry was wearing when she was shot and pieces of paneling taken from the crime scene containing a hole made by the bullet that killed Ms. Terry led him to believe "that this subject was most probably in a squatting position, or bending very low . . . and with the body being possibly adjacent to the wall, maybe the left shoulder or something of this closeness, or a short distance from it." He also explained the absence of blood visible to the naked eye on the paneling by observing that the pressure generated by the gun blast and the vacuum created by the bullet as it left the body would force part of Ms. Terry's intestines into the hole in her lower back created by the bullet's exit, thus blocking any blood from spraying backward toward the paneled wall. He explained the presence of a large blood stain on the floor, thirty-six inches away from the wall, by noting that as Ms. Terry was squatting, she was probably off-balance and could have fallen forward away from the wall after being shot.

Based on the foregoing evidence, the jury concluded the appellant deliberately and premeditatedly shot Ms. Terry. We must affirm the jury's verdict if there is substantial evidence to support it. *Stanley* v. *State*, 248 Ark. 787, 454 S.W.2d 72 (1970). Substantial evidence is that evidence that is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other. It must force or induce the mind to pass beyond a suspicion or conjecture. *Jones* v. *State*, 269 Ark. 119, 598 S.W.2d 748 (1980). The jury may infer premeditation and deliberation from the circumstances of the case, such as the character of the weapon used, the manner in which it was used, the nature, extent and location of the wounds inflicted and the like. *See McLemore* v. *State*, 274 Ark. 527, 626 S.W.2d 364 (1982); *see also Shipman* v. *State*, 252 Ark. 285, 478 S.W.2d 421 (1972).

Glaring discrepancies existed between the State's evidence and the appellant's version of the shooting. Based on those crucial differences, we believe the jury permissibly could, as it did, infer the homicidal nature of Jones' mental state at the time of the shooting. Viewing the evidence in the light most favorable to the appellee, we conclude the State, through expert testimony and circumstantial proof, contradicted appellant's story of what happened on the night of Ms. Terry's death. The State presented evidence to show that the appellant simply could not have been standing beside Ms. Terry, showing her how to load the rifle and that she did not grab the rifle, thus causing it to accidentally discharge. Instead, the evidence is sufficient to allow the jury to reasonably infer that the appellant, a knowledgeable gun handler, loaded the 30-30 Marlin rifle inside the house; he advanced toward Ms. Terry, and shoved the rifle's muzzle into her abdomen, from which she retreated to, or close to, the south wall in the living room. While Ms. Terry cowered and attempted to push the rifle away, appellant pulled the trigger. He then walked to the opposite end of the couch and returned the rifle to the gun rack before administering aid to Ms. Terry or calling friends for help.

Appellant does not deny he shot Ms. Terry; instead, he argues that he simply did not intend to shoot her.

Accordingly, appellant contends the State did not bring forward any motive which would suggest to the jury that he premeditated and deliberated the murder. To the contrary, appellant points out that the evidence shows he and Ms. Terry had a loving relationship and that he tried to get her to the hospital as quickly as possible after she was shot. The short answer to appellant's contention is that the State is not bound to prove a motive for the killing, and the absence thereof is only a circumstance to be considered with other facts and circumstances in determining guilt or innocence. *Ezell* v. *State*, 217 Ark. 94, 229 S.W.2d 32 (1950); *Dowell* v. *State*, 191 Ark. 311, 86 S.W.2d 23 (1935). *See also Murry* v. *State*, 276 Ark. 372, 635 S.W.2d 237 (1982). Perhaps appellant did not premeditate the murder for long, but an instant of premeditation is long enough. *Shipman, supra; Green* v. *State*, 51 Ark. 189, 10 S.W. 266 (1888).

In addition to the lack of motive, the appellant contends the State's evidence, which is circumstantial evidence consisting of experts' testimonies, does not exclude an accidental shooting as a reasonable hypothesis to be drawn from the evidence taken as a whole. For circumstantial evidence to be sufficient, it must exclude every reasonable hypothesis consistent with innocence. *Drew* v. *State*,, 8 Ark. App. 120, 648 S.W.2d 836 (1983). However, it is basically a question for the jury to determine whether the evidence excludes every other reasonable hypothesis. *Upton* v. *State*, 257 Ark. 424, 516 S.W.2d 904 (1974).

Appellant does not attack the qualifications of the experts or in any way impeach the witnesses themselves on appeal. He simply presents to this Court the testimonies of the State's experts in his abstract and calls them "illogical" and "contradictory." Of course, this part of appellant's argument goes to the credibility and weight of the expert witnesses, and he presumably made such a plea to the jury at trial. Nonetheless, it is not our duty or function to assess credibility. Testimony of expert witnesses is to be considered by the jury in the same manner as other testimony and in the light of other testimony and circumstances in the case; the jury alone determines its value and weight, and may, under the same rules governing other evidence, reject or accept all

or any part thereof as it may believe to be true or false. *Gruzen* v. *State*, 267 Ark. 380, 591 S.W.2d 342 (1979), *cert. denied*, 449 U.S. 852 (1980), *appeal after remand*, 276 Ark. 149, 634 S.W.2d 92 (1982), *cert. denied*, 103 S.Ct. 386 (1982). *See also Parris* v. *State*, 270 Ark. 269, 604 S.W.2d 582 (Ark. App. 1980). The trial court instructed the jury on all degrees of homicide, and it was the jury's agonizing duty to resolve the conflicting theories and evidence presented by the State and the appellant. Based on our careful review of the record, we are compelled to conclude that the State offered substantial evidence from which the jury could find the appellant guilty of the premediated and deliberate murder of Annie Terry.

Appellant also contends the State conducted an illegal search of his home, and the trial court erred in not suppressing the evidence against him obtained in this search. The trial court found appellant had consented to this search and that the search was also valid because it was incidental to a lawful arrest.

We agree with appellant that the search was not incidental to a lawful arrest. Appellant was arrested at 1:00 A.M. in Fort Smith. His home, in Paris, was not searched until 5:00 A.M. The search incident doctrine has two purposes: (1) to enable police officers to protect themselves by searching suspects for weapons, and (2) prevent the destruction of evidence. *Chimel* v. *California*, 395 U.S. 752 (1969). *See also* J. Hall, *Search and Seizure* § 8:7 (1982). Because of the remoteness in time and place of the site of the search from the arrest site, there was no danger appellant could produce a weapon or destroy evidence. There were no exigencies at appellant's arrest that would justify a search incident to a lawful arrest. *Cf. Chimel, supra; Van Cleef* v. *New Jersey*, 395 U.S. 814 (1969); *Shipley* v. *California*, 395 U.S. 818 (1969); *Preston* v. *United States*, 376 U.S. 364 (1964); *Jenkins* v. *State*, 253 Ark. 249, 485 S.W.2d 541 (1972).

Even though the State's search of appellant's home was not a search incident to a lawful arrest, we agree with the trial court that appellant consented to the search. Of course, appellant argues he never consented to a police search of his

home. However, the two police officers who questioned him in Ozark say he invited them to examine the crime scene. The State has the burden of proving by clear and positive testimony that consent to a search was freely and voluntarily given. *Scroggins* v. *State,* 268 Ark. 261, 595 S.W.2d 219 (1980).

Appellant does not argue he was directly or indirectly coerced by the police officers into consenting. Nor does the appellant contend he acquiesced to a seemingly valid claim of lawful authority to search his home, which subsequently turned out to be invalid. Appellant simply argues that the State did not prove by clear and positive testimony that his consent to the search was freely and voluntarily given. To show the State's lack of clear and positive testimony regarding his consent to the search, appellant cites four facts: (1) his drunkenness; (2) the failure of the State in its answer to his motion for discovery to mention his verbal consent; (3) the belief of the police officers that they did not need a warrant to search a violent crime scene; and (4) the failure of the police to obtain from appellant a written consent to the search when such a written consent could easily have been obtained.

Appellant cites *White* v. *State,* 261 Ark. 23-D, 545 S.W.2d 641 (1977), and argues that the intoxication of the accused removes clarity and positiveness from the police officers' testimony that the accused consented to the search. *White* is distinguishable, however. The accused in *White* was so drunk that he remembered almost nothing of his encounter with police officers in his home and was intoxicated enough to be placed by the police in a drunk tank after the search of his home was completed. Appellant was not so intoxicated. By his own testimony, appellant had drunk his last beer at approximately 8:30 P.M. Seven hours later, at approximately 3:30 A.M., police officers say he consented to the search. By this time, given what had transpired in the interim, appellant was soberer that the accused in *White*. There was also testimony in *White* by the accused that the police officers had shoved a pistol in his face. This evidence of coercion was considered by the court in holding:

> When we consider all the circumstances in connection with the alleged consent here we are unable to say the State met its burden of proving consent freely and voluntarily given by clear and positive testimony.

Id. at 25, 545 S.W.2d at 643. There was no testimony of similar coercive tactics being used against appellant in this case.

The other three factors cited by appellant amount to a claim that the police never asked him if they could search his home and lied when they testified that he did consent. This argument notwithstanding, we agree with the trial court that given "all the circumstances in connection with the alleged consent," the two police officers' testimonies that appellant did consent is clear and positive testimony that appellant did so consent. It is for the trial court to determine the credibility of the witnesses, and it is not required to give the appellant's testimony greater weight than that of the police officers. *Johnson* v. *State*, 6 Ark. App. 342, 642 S.W.2d 324 (1982).

We affirm the appellant's conviction for murder in the first degree.

Affirmed.

CLONINGER and CORBIN, JJ., dissent.

LAWSON CLONINGER, Judge, dissenting. I respectfully dissent from the majority opinion in this case. Ark. Stat. Ann. § 41-1502 (Repl. 1977) reads in pertinent part:

> A person commits murder in the first degree if: . . . with the premeditated and deliberated purpose of causing the death of another person, he causes the death of any person.

No killing can be murder in the first degree in the absence of premeditation and deliberation. Where there is no testimony indicating any deliberate or premeditated intention to kill and no evidence showing that the defendant harbored any

malice or ill will toward the victim, a jury verdict of murder in the first degree is difficult to sustain. *Stanley* v. *State*, 183 Ark. 1093, 40 S.W.2d 415 (1931). See also *Blake* v. *State*, 186 Ark. 77, 52 S.W.2d 644 (1932).

In *Simmons* v. *State*, 227 Ark. 1109, 305 S.W.2d 119 (1957) the court held that the state must prove, beyond a reasonable doubt, that a killing was done willfully, deliberately, maliciously and with premeditation of mind in order to sustain a conviction of first degree murder. The court held that, generally speaking, when the fact of death alone is proved, the presumption is that the crime is murder in the second degree; and, before it can be determined that crime is murder in the first degree, it is incumbent on the prosecution to prove further, by evidence, that the killing was done with premeditation and deliberation. Premeditation cannot be inferred from the fact of death, but there must be evidence of a prior intention to do the act of killing in question. Accordingly, the court reduced the conviction of Simmons to murder in the second degree.

From a review of the record in this case, I can find no evidence which the state introduced on the issue of premeditation and deliberation. The evidence against appellant was circumstantial. In an attempt to discredit appellant's statement and to prove that the act was an intentional killing, the state relied on expert testimony regarding the nature and character of the wounds, the location of the victim when she was shot, and the significance of the metal tracings on the victim's hands and body. I agree with the majority that the jury has the duty to determine the value and weight to be given to expert testimony, and that there was substantial evidence to support a jury verdict that appellant did intentionally kill the victim. But I cannot find one shred of evidence to support a finding of first degree murder. The majority states, "Perhaps appellant did not premeditate the murder for long, but an instant of premeditation is long enough." I agree. However, there is not any evidence to support a finding that appellant harbored even an instant of premeditation.

Therefore, I would reduce the conviction of appellant to murder in the second degree.

CORBIN, J., joins in this dissent.

UNITED STATES FIRE INSURANCE COMPANY
v. Johnathan L. REYNOLDS

CA 83-54 667 S.W.2d 664

Court of Appeals of Arkansas
Division II
Opinion delivered April 11, 1984
[Rehearing denied May 9, 1984.]

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

Compton, Prewett, Thomas & Hickey, P. A., by: *Robert C. Compton,* for appellee.

MELVIN MAYFIELD, Judge. This case involves the liability coverage of a homeowner's insurance policy issued by the appellant to the appellee.

The appellee, Johnathan Reynolds, was employed by Natural Resources, Inc., a company primarily engaged in the growing and selling of timber. Appellee's father was the owner and president of the company and appellee was the timber manager for about 600 acres of the company's timberland. Appellee's duties included spotting the timber to be sold, negotiating prices, checking the timber to see that it was properly cut, maintaining the boundary lines, and protecting against theft, fire, and arson.

For about three weeks prior to the incident giving rise to this suit, appellee had been aware that timber was being cut and removed from the company's land without authorization. He reported this to his father who contacted the sheriff's office, and appellee was instructed to work with the sheriff and his deputies to stop the stealing. Appellee went to the sheriff's office, discussed the matter with some deputies, and was told to keep on the lookout for the thieves and try to find out who they were.

A few days later appellee discovered three men cutting timber without authorization. He had seen two of them on the land before and had been told that they might be the timber thieves and that they were armed and dangerous. Without making his presence known, the appellee watched these men load the timber into a truck and drive away. He reported this information to the sheriff's office. After some discussion, it was decided that the value of the timber appellee saw cut and carried away would not amount to a felony and that he should try to catch the men stealing some more timber so they could be charged with a felony.

On October 19, 1978, appellee was in the woods and heard a chainsaw. He drove closer, and taking his 30.06 rifle, he got out of his vehicle and walked to within 40 or 50 yards of where some timber was being cut. At that point he could see two trucks. One truck, loaded with timber, began to pull away and appellee shot out a rear tire. The driver got out and began walking toward the other truck. He was one of the men appellee had seen cutting the timber on the earlier occasion. Appellee told him to stop, and when he did not comply, appellee fired a shot into the motor and another

shot into a tire of that truck. Another man, Finis Lee, then appeared from the woods and walked toward appellee. Four times the appellee called upon Lee to stop but Lee, cursing appellee, continued to advance toward him. Appellee then fired a shot into the ground near Lee; the bullet shattered and fragments ricocheted into Lee's leg.

Appellee testified that when he fired that shot he did not intend to injure Lee and that he could have hit him ten out of ten times if that had been his purpose. He said it was a warning shot fired for self-protection; that arresting Lee or stopping him from stealing timber did not cause him to fire the shot; and that it was fired for his own defense. He did admit, however, that he shot the trucks to disable them and let the sheriff proceed from there.

Lee filed suit for personal injuries and damages against appellee. The appellant denied coverage under the "business pursuits" and the "expected or intentional injuries" exclusions of the policy. The personal injury suit is still pending and the case here is a declaratory judgment action in which the appellee has obtained a judgment that appellant must defend the suit brought by Lee and pay any sum that may be found due by appellee to Lee.

The "business pursuits" exclusion of the policy provides that the liability coverage does not apply "*to bodily injury or property damage arising out of business pursuits except activities therein which are ordinarily incident to non-business pursuits.*"

The trial court, sitting without a jury, found as follows:

> The Court finds that the shot which injured Mr. Lee did not arise out of the business pursuits of Mr. Reynolds, but arose out of his sense of self-protection in what he perceived to be a threat to his person from Mr. Lee and his associates. He was not at that point protecting the property of his employer, but protecting himself. The injury to Mr. Lee did not "arise out of" Mr. Reynolds' business pursuits. It did arise out of Mr. Lee's own actions. The Court finds that Mr. Reynolds'

> act of firing the shot which injured Mr. Lee was an activity "ordinarily incident to non-business pursuits."

The parties have cited a number of cases to support their positions in this matter. The factual situations are so varied and the ways in which the issue reaches the appellate court so different, it is really not possible to formulate a concise statement that will explain the results reached, and it would not be helpful to make an extensive review of the specific cases. We start, therefore, with some general observations.

In 7A Appleman, *Insurance Law and Practice* § 4501.10 (Berdal ed. 1979), it is said, "Whether an activity is a business pursuit is almost always a factual question presented for the determination by a court." In that regard, in *Comm. Union Ins. Co. of Amer.* v. *Henshall,* 262 Ark. 117, 553 S.W.2d 274 (1977), it was said that "the courts strictly interpret exclusions from insurance coverage and resolve all reasonable doubts in favor of the insured who had no part in the preparation of the contract," and that "the burden of proof is on the insurer to show that an injury was caused by an excepted event." It is also clear that the exclusion does not apply to all injuries or damages arising out of a business pursuit since the clause itself explicitly states "except activities therein which are ordinarily incident to non-business pursuits." This is pointed out in the 1982 pocket supplement to 7A Appleman, *Insurance Law and Practice, supra.* In the supplement to section 4501.10, footnote 11 contains the following comment on a case cited there:

> The court failed to even consider the effect of the exception. The mere fact the insured is engaged in a business pursuit is not enough. It must also not be an activity ordinarily incident to nonbusiness pursuits.

In our case, the trial court relied upon *Farmers Insurance Exchange* v. *Sipple,* 255 N.W.2d 373 (Minn. 1977), where the insured, Andrew Baud, employed as a senior highway technician and assigned to a project involving the construction of an interstate highway, met with John Sipple, a local farmer who thought the construction would

create drainage problems on his land. While Baud and Sipple were viewing the Sipple farm, they exchanged heated words and Baud struck Sipple with his fist and injured him. A suit for damages was brought by Sipple. Baud's insurance company denied coverage under the "business pursuits" exclusion. A declaratory judgment was then filed and the trial court found, as a matter of law, that the exclusion did not apply. In affirming, the Minnesota Supreme Court relied upon a prior decision in which it had noted that the exclusion should be construed with reference to the particular facts of each case, and the court quoted the following from Frazier, *The "Business Pursuits" Exclusion in Personal Liability Insurance Policies. What the Courts Have Done With It,* 1970 Ins. L. J. 519, 533:

> There seems almost unanimous accord in the decisions that the location at which an act is performed is not decisive on the question of whether the act constitutes part of an excluded business pursuit. Rather, it is the nature of the particular act involved and its relationship, or lack of relationship, to the business that controls. Personal acts, such as pranks, do not become part of a business pursuit, so as to be outside of the coverage, merely because performed during business hours and on business property. In order for an act to be considered part of a business pursuit it must be an act that contributes to, or furthers the interest of, the business and one that is peculiar to it. It must be an act that the insured would not normally perform but for the business, and must be solely referable to the conduct of the business.

The court said the assault arose out of a business setting, but was not an act peculiar to the business activities of the insured.

The previous case that Sipple relied upon is *Milwaukee Mutual Insurance Co.* v. *City of Minneapolis,* 239 N.W.2d 472 (Minn. 1976), where a police officer, while in the roll-call room just prior to the start of his shift of duty, accidentally shot a fellow officer while they were handling a

service revolver and discussing its trigger pull. The trial court held that the exclusion clause did not apply, and in affirming, the appellate court said the trial court was not clearly erroneous in holding that pistol handling and trigger-spring checking were activities ordinarily incident to nonbusiness pursuits.

One of the cases cited by the appellant is *Martinelli* v. *Security Insurance Co. of New Haven,* 490 S.W.2d 427 (Mo. Ct. App. 1972), where Martinelli, while on the job, was pushing a large box onto a forklift and had his right leg outstretched to brace himself, when a fellow employee fell over the leg causing it to be fractured. The fellow employee had a homeowner's policy in force with the same "business pursuit" exclusion as is involved in the instant case. The appellate court, holding the exclusion applicable, said that walking or bumping into another employee at work may or may not be an activity incident to a nonbusiness pursuit; but since in that case, the incident took place while the insured was walking down an aisle on the way to get something for use in his work, it occurred while the insured was in furtherance of his business pursuits, therefore, it was not an activity ordinarily incident to a nonbusiness pursuit.

On the other hand, the injury caused by the insured in *Martinelli* arose out of the insured's employment, and if not peculiar to his employment, it was solely referable to the conduct of that employment because his only reason for walking down the aisle was to accomplish his employer's work. There simply was no activity involved which could be ordinarily incident to a nonbusiness pursuit. All he was doing was walking and that was a part of his work.

Further consideration of specific cases would probably not be helpful since, as noted in *Robinson* v. *UTICA Mut. Ins. Co.,* 585 S.W.2d 593 (Tenn. 1979), the language of this exclusion clause has been the subject of many cases with divergent results for different reasons, and its application is "resolvable only in specific factual contexts." In summary, therefore, we think the burden of proof was on the appellant to show that the injury in this case was excluded from the policy's liability coverage; that the exclusion clause should

be strictly interpreted with all reasonable doubts resolved in favor of the insured; that the issue involved is a question of fact; that the trial court's finding was not clearly erroneous and, under Civil Procedure Rule 52(a), that it should be affirmed.

As to the "expected or intentional injuries" exclusion, little more needs to be said. The same rules of construction and burden of proof apply to this exclusion as apply to the other exclusion which we have discussed. In *Talley* v. *MFA Mutual Ins. Co.*, 273 Ark. 269, 620 S.W.2d 260 (1981), it was held that insurance coverage would be allowed for the unintended results of an intentional act, and the court rejected, in this regard, the tort concept of intending the natural and foreseeable consequences of one's acts.

Talley also holds that the question of intent is an issue of fact. The appellee testified that he did not intend to injure Lee, but only wanted to cause Lee to stop his advance toward appellee. Appellee also said he could have hit Lee ten times out of ten if that had been his purpose. The trial court found that appellee did not intend to injure Lee and that injury to Lee was not expected by appellee when the shot was fired. We hold that those findings are not clearly contrary to the preponderance of the evidence.

Affirmed.

CLONINGER and CORBIN, JJ., agree.

Chester SITTON and Edna SITTON, His Wife,
John SARTAIN and Sandra SARTAIN, His Wife
v. Nancy CONGLETON

CA 83-198 667 S.W.2d 377

Court of Appeals of Arkansas
Division II
Opinion delivered April 11, 1984

Kenneth G. Fuchs, for appellants.

H. G. Foster and *Frank E. Shaw,* for appellee.

JAMES R. COOPER, Judge. This is an action to foreclose on two promissory notes given in exchange for the purchase of shares of stock in a corporation, Con-Co, Inc. On October 21, 1981, the appellants entered into an agreement with the appellee and her husband, James Congleton, for the sale of stock in Con-Co, Inc. According to their contract, two promissory notes of $22,500.00 each were given to the appellee in exchange for 200 shares of stock in the corporation. The promissory notes called for 60 monthly payments. The appellants made approximately 8 payments and defaulted, and the appellee brought this action. The circuit court granted judgment against the appellants for the

balance due on the notes, and also found that the appellants were the majority shareholders in Con-Co., Inc., by virtue of this transfer. From that decision comes this appeal.

For reversal, the appellants argue that the notes given in exchange for the stock were not valid consideration in that Ark. Stat. Ann. § 64-205 (Repl. 1980) prohibits the giving of promissory notes in exchange for newly issued stock in a corporation. The appellants argue that since Nancy Congleton originally owned 150 shares of stock and her husband owned 150, and the appellee sold the appellants 200 shares of stock, and since there is no evidence of a sale or transfer of stock from James Congleton to his wife, the 50 shares he owned, which were transferred to the appellants were cancelled and reissued in the name of the appellee. The trial court addressed this issue and held that the statute referred to above did not apply to this transaction. We agree.

Although there is no evidence in the record that such a transfer of stock from the appellee's husband to her occurred, this does not necessarily mean that it did not occur or that the appellee could not transfer stock without cancelling this stock and having it reissued. The sale of the stock to the appellants was not a new issue by the corporation but rather a sale by the stockholders. The shares of stock in Con-Co, Inc. that were transferred to the appellants had already been issued and were fully paid. The transfer of these shares of stock was simply a sale of personal property. The trial court correctly determined that Ark. Stat. Ann. § 64-205 (Repl. 1980) did not apply to the facts of the case at bar.

The appellants argue that *Taylor* v. *Gordon,* 180 Ark. 753, 22 S.W.2d 561 (1929), is analogous to the case at bar. However, in *Taylor,* a bank loaned the purchasers of stock the money to purchase stock in the bank and received as payment a promissory note. There, the court held that the bank became the equitable owner of the stock and its attempt to make a sale of the stock to Gordon and Lucas, the purchasers, by taking their notes for the purchase price was in violation of the law. In *Taylor,* the stock was never delivered, but was issued by the bank and retained by it, thus

there was never an exchange of consideration as the bank was both the seller and buyer. Here, however, the transaction was not a sale by the Congletons to themselves, but rather a transfer of the shares of stock in exchange for something of value, the appellants' promissory notes.

Affirmed.

CORBIN and GLAZE, JJ., agree.

Marguerite C. DURKEE *v.* ARKANSAS ALCOHOLIC BEVERAGE CONTROL BOARD

CA 83-233 667 S.W.2d 376

Court of Appeals of Arkansas
Division I
Opinion Delivered April 11, 1984

Ernie Witt, for appellant.

Treeca J. Dyer, for appellee.

DONALD L. CORBIN, Judge. This is an appeal from a Pulaski County Circuit Court decision affirming an Arkan-

sas Alcoholic Beverage Control Board decision denying an application for an off-premises beer permit.

Appellant filed an application with the Arkansas Alcoholic Beverage Control Board which was denied by the Board's Director. On appeal, the Board was unable to reach a majority decision, voting two for reversal of the Director's decision and two against, with one abstention. The Board then issued an order reinstating the Director's decision, substituting different findings of fact for those of the Director. Appellant appealed the Board's order to the Pulaski County Circuit Court, Second Division, which affirmed the Board's action. We reverse and remand.

The circuit court's decision is clearly erroneous. Ark. Stat. Ann. § 48-1302.1a (Repl. 1977), specifically requires that "all action by the Arkansas Alcoholic Beverage Control Board shall be by a majority vote of the full membership." In this instance, a majority of the Board failed to either reverse or affirm the Director's decision. There is no evidence in the record that a majority of the Board's full membership took any action regarding appellant's application. In the absence of a decision by a majority of the Board's membership, there is nothing for the circuit court to review. Therefore, the Board's decision which was reviewed by the circuit court was not a valid, appealable order.

We reverse and remand to the trial court with directions to reverse its decision and remand the matter to the Arkansas Alcoholic Beverage Control Board for consideration of the Director's denial of appellant's application and his findings of fact, pursuant to the provisions of Ark. Stat. Ann. § 48-1314 et. seq.

Reversed and remanded.

COOPER and CRACRAFT, JJ., agree.

Stephen C. DAVENPORT *v.* BRUNO-PYATT PUBLIC SCHOOLS

CA 83-327 667 S.W.2d 668

Court of Appeals of Arkansas
En Banc
Opinion delivered April 18, 1984

Cearley, Mitchell & Roachell, by: *Richard W. Roachell, for appellant.*

G. Ross Smith, P.A., for appellee.

GEORGE K. CRACRAFT, Judge. On July 15, 1982 the Bruno-Pyatt School Board voted not to renew the contract of Stephen C. Davenport, a non-probationary teacher, for the year 1982-83. The basis for that determination was that he had violated a known policy promulgated and adopted by that board. On appeal to the circuit court the board's decision was affirmed on finding that the determination not to renew appellant's contract was for legitimate reasons and

was not arbitrary, capricious or discriminatory. The court also affirmed the finding of the board that he had been discharged for failure to comply with the school district's written policies and directives regarding deadlines for return of renewal contracts.

On appeal the appellant does not contend that the school policy was unreasonable but admits that it was adopted for compelling reasons. He contends only that the board was equitably estopped to rely on that policy and acted arbitrarily and capriciously in failing to renew his contract. We find no merit to these contentions.

Ark. Stat. Ann. § 80-1264.9(b) (Repl. 1980) provided that any certified teacher who had been employed continuously by a school district for three or more years may be terminated or the board may refuse to renew the contract for any cause "which is not arbitrary, capricious or discriminatory." The courts have previously held that an action is arbitrary or capricious only if it is not supported on any reasonable basis. *Lamar School Dist. No. 39* v. *Kinder,* 278 Ark. 1, 642 S.W.2d 885 (1982). On May 18, 1982 the superintendent tendered renewal contracts to all teachers in the Bruno-Pyatt Public Schools to which were attached a memorandum stating that pursuant to school board policy all contracts must be signed and returned by June 3, 1982 or the positions would be considered unfilled.

Shortly before June 3rd the superintendent learned that all of the teachers' contracts except that of appellant had been returned signed. On June 1st appellant was reminded that his contract would be due no later than June 3rd. Appellant obtained permission to appear before the board to request an increase in salary, stating that he would turn in his contract at that time. He testified that the superintendent stated that there would be no objection to holding the contract until that date. The superintendent denied having made this statement. On June 7th Mr. Davenport attended the board meeting but did not return his contract because it was in his wife's car and he stated he would not be able to turn it in until the 9th. The superintendent reminded him at the meeting that his contract was already past due.

On June 15th the superintendent notified the appellant that he was recommending that his contract not be renewed for the coming year because he had not returned his contract within the specified time. After receiving that notice the appellant did execute and return his contract on June 21st and requested a hearing before the board on the recommendation not to renew. On July 15th a hearing was held at which the board accepted the superintendent's recommendation that appellant's contract not be renewed for the reasons given in the notice. At that hearing the appellant testified that he had obtained permission from the superintendent to hold his contract until the board meeting.

Appellant testified that after presenting his request for an increase in salary to the board it indicated that it would not make a decision on his request at that time but would communicate with him later. He testified that he then stated that if the board did not mind he would hold his contract until after the decision was reached. He stated that none of the board members responded but that one nodded affirmatively when his request was made. He testified that he had interpreted this affirmation and the silence of the other members to mean that his request was favorably received. Both the superintendent and principal who were present at that meeting testified that no member of the board gave an indication of approval by nodding or otherwise. Both of them interpreted the silence of the board to mean that appellant's failure to return the contract was presenting a problem for the board. One board member testified that her silence was intended to indicate disapproval of his request and that no member of the board gave indications of approval in any manner.

Appellant argues that because the school board had indicated that it would contact him later with regard to his raise he had every right to expect that the rule of the superintendent was to be waived until such time as the board had considered and reviewed his salary for the coming year. The record discloses, however, that before the June 7th meeting began he was reminded at least once that his contract was already past due. Rational minds could conclude that he was withholding this contract for other

reasons. He also argues that the silence of the board in his request to hold his contract until after the decision of the board was made lulled him into a sense of security to his detriment. He argues that equitable estoppel would arise where there was an opportunity and duty on the part of the board to speak when they knew that he would rely upon their silence to his injury. Rational minds could conclude that the inference to be drawn from the board's silence was not its approval of appellant's conduct but rather its disapproval, as the superintendent, principal, and a board member testified. Based on these facts we can find no error in the trial court's finding that the action of the board was not arbitrary or capricious.

Appellant next argues that he substantially complied with the board's rule and his delay in returning his contract had not substantially prejudiced any right of the school board and that therefore their action was arbitrary and capricious. He contends as he had not indicated that he would not sign the contract or that he intended to resign if his raise was not granted, and the superintendent testified that at the time of the hearing he had not contacted or employed a teacher to take his place, no prejudice could have resulted from his delay. The appellant himself admits that staffing for the coming year in an orderly and efficient manner is an important if not compelling reason for such a rule. The superintendent testified at the renewal hearing that the reason for the rule was that the school administrator could not obtain a staff for the next year without knowing what existing staff members plan to return and that a reasonable time is needed to search for the best person to fill existing vacancies. The appellant, after having been notified that his contract was due by June 3rd at the latest, did not turn his in until June 21st. We can find no error in the trial court's finding that appellant failed to comply with the deadline and therefore the nonrenewal was not arbitrary or capricious but was based on legitimate reasons.

We find no error and affirm.

COOPER and CLONINGER, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. I disagree with the majority opinion which holds that the trial court determined correctly that the Board's actions were not arbitrary or capricious.

The first reason given to support the Board's action is that the appellant violated a board policy by failing to return his contract within the time limits established by the Board. The appellant's renewal contract shows on its face that it was issued April 5, 1982. The superintendent distributed the contracts on May 18, and he requested that they be returned by June 3, 1982. The written policy concerning return of renewal contracts states:

> . . . All offers to renew annual contracts shall expire if not accepted in writing to the school administration office within ten (10) days of the date issued.

The Board and the superintendent did not distribute the contracts until six weeks after their issuance, and the superintendent did not abide by the written policy when he gave the teachers more than ten days to return the contracts. It appears that other teachers who complied with the superintendent's directive also violated the Board policy, but apparently were not penalized. I believe that this lack of uniformity in applying the policy shows that the Board acted arbitrarily.

The appellant clearly intended to return to his position, but delayed in returning his contract because, as a twelve-month teacher, he wished to exercise his right to negotiate over his salary. Under the conditions imposed by the superintendent, he had no real opportunity to negotiate. There was no Board meeting during the time the contracts were out, and, therefore, to comply with the superintendent's directive he would have been required to sign a contract which was silent as to salary and then, after signing, attempt to negotiate with the Board. It is worth noting that, although the Board agreed to consider his request for a raise, no action was ever taken on his request, but he was non-renewed.

There was no real staffing uncertainty, because the appellant had assured both the superintendent and the Board that he intended to return regardless of the Board's action on his request for a raise.

I think that the Board's action was clearly arbitrary and capricious because the appellant was forced to either violate the superintendent's directive or to effectively give up his right to any meaninfgul negotiation over salary.

I would reverse and remand with directions that the appellant be reinstated.

CLONINGER, J., joins in this dissent.

MADEMOISELLE FASHIONS, INC. *v.*
BUCCANEER SPORTSWEAR, INC., A Subsidiary
of PALM BEACH, INC.

CA 83-238 668 S.W.2d 45

Court of Appeals of Arkansas
Division I
Opinion delivered April 18, 1984

Willis V. Lewis, for appellant.

Francis T. Donovan, for appellee.

JAMES R. COOPER, Judge. This appeal arises from a delinquent account owed the appellee by the appellant. The appellant ordered items of clothing from the appellee. The appellant received the merchandise it ordered, but was dissatisfied with the quality or condition of several of the items. Upon bringing this to the appellee's attention, the appellant received a credit from the appellee for several items. The appellee billed the appellant for the amount owed on the shipment, less the credits given for the nonconforming goods. The appellant sent a check to the appellee in the amount of $11,520.00 which contained the following language: "Invoices 6832-6833 & 6508 This represents any & all debt paid in full." The amount the appellant owed the appellee on invoice number 6832 was the amount of this check, $11,520.00. When no further payments on the appellant's account were received, the appellee instituted this action to collect the amounts it alleged were owing on the remaining invoices, $3,633.29. The appellant answered, setting up the defense of accord and satisfaction. The appellant argued that there was a dispute as to the amount owed by the appellant on its account with the appellee, and its act in tendering the check with the above quoted language, and the appellee's acceptance of it, amounted to an accord and satisfaction. The trial court rejected this argument and found there was no accord and satisfaction. Thus, judgment was rendered in favor of the appellee for the amount prayed for. From that decision, comes this appeal.

In *Widmer* v. *Price Oil Co.,* 243 Ark. 756, 421 S.W.2d 885 (1967), the court stated, "[I]n accord and satisfaction there must be a disputed amount involved and consent to accept less than the claimed amount in settlement of the whole." (citations omitted). Also, as stated by the court in *Camfield Tires, Inc.* v. *Mosely,* 253 Ark. 585, 487 S.W. 2d 268 (1972), quoting from 1 Am. Jur. 2d, *Accord and Satisfaction,* § 1:

> . . . there must be an offer in full satisfaction of the obligation, accompanied by such acts and declarations as amount to a condition that if it is accepted, it is to be in full satisfaction, and the condition must be such that the party to whom the offer is made is bound to understand that if he accepts it, he does so subject to the condition imposed.

In the case at bar, the appellant asserts that there was a dispute between the parties as to the amount owed. The appellee testified that after giving the appellant credit for the merchandise rejected, the amount owed on the appellant's account was then established. After these adjustments were made on the account, and were accepted by the appellant, we feel that there could be no good-faith basis for the appellant to then dispute the amount owed to the appellee and the appellant's act of writing on the check that it represented "any & all debit paid in full" did not have the effect of discharging the remaining debt on the appellant's account. Obviously, the trial court was of the same belief. Although the appellant's president, Don Wilkerson, testified that the amount the appellant owed the appellee was disputed, the appellee testified to the contrary. The trial judge, sitting as the finder of fact, decided this issue against the appellant and we cannot say that his decision was clearly erroneous or against a preponderance of the evidence. ARCP Rule 52 (a).

The fact that the amount of the check tendered to the appellee was the exact amount owed on invoice number 6832 tends to support the finding that the language on the check was not such as would place the appellee on notice, or, as stated in *Camfield Tires, supra,* was not such an act and declaration that if accepted by the appellee, would be accepted as full satisfaction of the debt. Rather, we feel that the employee of the appellee who received this check would naturally consider this check as payment for invoice number 6832, as there was no knowledge of a dispute as to the other amounts owing on the appellant's account and the employee's act of accepting the check and depositing it, cannot be held to constitute an acceptance as full satisfaction of the debt owed by the appellant to the appellee.

We find no error in the ruling of the trial court as to the issue of accord and satisfaction and therefore affirm.

Affirmed.

CORBIN and CRACRAFT, JJ., agree.

Lorene MORRISON *v.* TYSON FOODS, INC.

CA 83-282 668 S.W.2d 47

Court of Appeals of Arkansas
En Banc
Opinion delivered April 25, 1984

James M. Ammel, for appellant.

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

MELVIN MAYFIELD, Chief Judge. On May 11, 1983, the Workers' Compensation Commission filed an opinion agreeing with an administrative law judge's decision that the appellant in this case was not entitled to additional temporary total disability benefits and was not entitled to a change of physicians.

By a letter dated June 10, 1983, appellant's attorney filed a motion for reconsideration which asserted that appellant had raised the issue of entitlement to "current total disability" with the Commission but the issue was not addressed either "directly or indirectly" in the Commission's opinion. In an order dated July 15, 1983, the Commission held that because no notice of appeal had been filed, its May 11th decision had become final, and it had no authority to grant appellant's motion for reconsideration. Thus, the motion was denied.

On July 22, 1983, the appellant filed a notice of appeal to this court and argues here (1) that the Commission's May 11th decision is not supported by substantial evidence, and (2) that the Commission did have the authority to grant the motion for reconsideration. We agree that the decision of May 11th became final since no notice of appeal from that decision was filed within 30 days from receipt of the decision as required by Ark. Stat. Ann. § 81-1325(b) (Supp. 1983). We do not agree, however, that the Commission did not have authority to grant appellant's motion for reconsideration.

There is no explicit statutory authority for the Commission to grant petitions for reconsideration, but in *Walker*

v. *J & J Pest Control,* 270 Ark. 941, 606 S.W.2d 597 (Ark. App. 1980), the court said, "We are of the view that the Commission does have authority to consider a motion for rehearing which is timely filed." In that case the motion was filed 19 days after the Commission's decision, and the court said the fact that Ark. Stat. Ann. § 81-1325(b) provides that the decision becomes final within 30 days unless notice of appeal is filed, "supports the concept that the Commission has jurisdiction during such 30 day period to reopen the case for further evidence and modification of the decision."[1] In *Smith* v. *Servomation,* 8 Ark. App. 274, 651 S.W. 2d 118 (1983), we noted that *Walker* was clarified and limited by *Cooper Industrial Products* v. *Meadows,* 5 Ark. App. 205, 634 S.W.2d 400 (1982), which held that neither administrative law judges nor the Commission have the power to waive or extend the thirty days in which their decisions may be appealed; and in a footnote we specifically pointed out that *Walker* involved a motion for rehearing filed within the thirty-day period for appeal. Therefore, we hold that the Commission did have the authority to grant appellant's motion for reconsideration in this case. The chairman of the Commission recognized this fact and dissented. From his dissent it appears that the Commission has, in fact, been considering motions for rehearing. Moreover, the General Assembly has met twice since *Walker* and has not disturbed its holding. We think the rule is established.

We do want to be specific in what is involved in this case. Ark. Stat. Ann. § 81-1325(b) (Supp. 1983) provides that the notice of appeal shall be filed within 30 days from the date of the receipt of the order or award of the Commission. There has been no notice of appeal filed here within that period of time. We agree with the appellee that the filing of a motion for reconsideration, or rehearing, does not extend the time to file the notice of appeal. Thus, the decision which held that appellant is not entitled to additional temporary total disability benefits or to a change of physicians is final. Incidentally, we also agree with the appellee that a motion for reconsideration, or rehearing,

[1]The court also discussed other provisions of the Act, as well as due process and equal protection considerations. See also 34 Ark. L. Rev. 506 (1980).

may be acted upon within the ninety-day period[2] in which the record on appeal must be filed and docketed. This seems clear because, even though a notice of appeal is filed, the trial court, and by analogy the Commission, retains jurisdiction until the record on appeal is lodged in the appellate court. *Brady* v. *Alken, Inc.,* 273 Ark. 147, 617 S.W.2d 358 (1981); *Estes* v. *Masner,* 244 Ark. 797, 427 S.W.2d 161 (1968); *Andrews* v. *Lauener,* 229 Ark. 894, 318 S.W. 2d 805 (1958).

Although there was no timely appeal from the Commission's decision of May 11, 1983, the question of whether appellant is entitled to "current total disability" — which is the subject of the motion for reconsideration — is a matter for the Commission to decide. We express no opinion on how it should be decided. We also recognize that there may be a question of whether the motion was filed within 30 days from the receipt of the Commission's May 11 decision. On remand, any question in that regard may be settled by the Commission, except we note that the controlling date is the date of filing, not the date the motion is put on the Commission's motion docket. Whether new evidence may be introduced and whether the Commission should remand to an administrative law judge are also matters for the Commission to settle. We hold only that the Commission has the authority to grant the motion for reconsideration.

Remanded for proceedings consistent with this opinion.

GLAZE, J., not participating.

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[2]See *Davis* v. *C & M Tractor Co.,* 2 Ark. App. 150, 617 S.W.2d 382 (1981), for the derivation of this ninety-day period.

Freemont DEATON *v.* Patsy Fay DEATON

CA 83-137 668 S.W.2d 49

Court of Appeals of Arkansas
Division I
Opinion delivered April 25, 1984

Charles P. Allen, for appellant.

Douglas Anderson, for appellee.

JAMES R. COOPER, Judge. In this divorce case the appellant alleges that the trial court erred in declaring the appellant's retirement fund to be marital property, in awarding a $1,200.00 attorney's fee, and in the manner the personal property was divided. We find no merit to any of the appellant's arguments, and therefore, we affirm.

Generally, the facts are not in dispute. Mr. Deaton has a retirement account with his employer, which the trial court found to be vested. There is scant evidence in the record concerning the retirement account, apparently because the appellant refused to furnish any information concerning the

account. We cannot say that the trial court erred in finding the retirement account to be vested and that, therefore, it was marital property. The appellant argues that such benefits which are vested but not currently due and payable are not marital property, and cites as authority for that proposition *Knopf* v. *Knopf,* 264 Ark. 946, 576 S.W.2d 193 (1979), and *Sweeney* v. *Sweeney,* 267 Ark. 595, 593 S.W.2d 21 (1980). However, on January 30, 1984, the Arkansas Supreme Court decided *Day* v. *Day,* 281 Ark. 261, 663 S.W.2d 719 (1984). In *Day,* the Court apparently overruled *Knopf* and *Sweeney,* and a number of other cases which were in accord with them. *See Day, supra,* (dissenting opinion). Therefore, we affirm the chancellor's finding that the plan constituted marital property, and that Mrs. Deaton was entitled to one half of it. The decree, however, should be modified so as to provide that the value of her interest is fixed as of the date of the decree, and that any contributions made by Mr. Deaton after the date of the decree will increase his portion of the retirement account and will accrue only to his benefit. The appellant should also be required to maintain Mrs. Deaton as beneficiary on her half of the account. Because the case at bar was decided before the decision in *Day, supra,* and because of the pending litigation concerning the pension plan, this case must be remanded to the trial court so that the dollar amount of the appellees' interest can be fixed as of the date of the divorce decree.

The second point raised by the appellant is that the chancellor erred in awarding additional attorney's fees. He bases this argument on the fact that the appellee did not provide any documentation as to the time spent on the case by her attorney. Attorney's fees are a matter for the discretion of the trial court, and, absent an abuse of discretion, we will not reverse his decision in that regard. In the case at bar, the chancellor had the opportunity to observe the parties and, as the chancellor noted, the appellant was extremely uncooperative in adhering to any of the court's orders. We find no abuse of discretion on the part of the chancellor. Further, this issue was not raised before the trial court nor was any documentation requested.

Finally, the appellant claims that the trial court erred in

basing his division of the personal property on the stated value rather than on fair market value. Since this point was not presented to the trial court, we will not consider it on appeal.

For the reasons stated earlier, the case is affirmed as modified, and remanded to the trial court for a determination as to the dollar amount of Mrs. Deaton's interest in the pension plan, in light of the standards set forth in *Day, supra.* The trial court shall retain jurisdiction of this matter so that amount can be fixed, and, in the event there is tax liability on the proceeds of the plan, those liabilities can be appropriately apportioned.

Affirmed as modified, and remanded.

MAYFIELD, C.J., and CRACRAFT, J., agree.

Wayne NEWTON *v.* MERCHANTS & FARMERS BANK OF DUMAS, ARKANSAS

CA 83-228 668 S.W.2d 51

Court of Appeals of Arkansas
Division II
Opinion delivered April 25, 1984

Chambers & Chambers, for appellant.

Gill & Johnson, by: *Marion S. Gill,* for appellee.

TOM GLAZE, Judge. This is an appeal from a judgment

in favor of appellee, Merchants and Farmers Bank, on an assignment to it of the right to receive payment for work done on a plumbing subcontract. We affirm.

Appellant, Wayne Newton, is a general contractor. He had a contract to construct an addition to the Delta Lodge Motel, owned by Aubrey Mitcherson, in Dumas. Newton subcontracted plumbing work to be done in the addition to Kenneth Rogers, d/b/a Ken Rogers Plumbing. Rogers agreed to do the work for $22,100, to be paid in three installments, to begin after the job was "roughed in." After receiving the subcontract, Rogers borrowed $15,500 from the Merchants and Farmers Bank to have cash ready to meet expenses due before the first installment was paid. To obtain the loan, Rogers signed a consumer note and security agreement with the bank. To secure the loan further, the bank required Rogers to assign his subcontract on the Delta Lodge job to the bank.

On February 11, 1981, Merchants and Farmers Bank sent Newton a letter giving him notice of the assignment by Rogers. In the letter, the bank, in order to protect its interest under the loan to Rogers, requested Newton to make all checks payable to it *and* Ken Rogers Plumbing. Five days earlier, on February 6, Newton had sent the bank a letter informing it of his knowledge of the assignment. With regard to naming the bank as co-payee, the letter stated, "This letter is to inform you that we will issue payments jointly to Mr. Rogers and Merchants and Farmers Bank as per his request." Prior to this correspondence between the parties, Rogers and Newton discussed naming the bank as co-payee on the installment checks. Newton told Rogers that he would make out the checks for payment of the plumbing work to him and the bank.

On March 2, 1981, Newton wrote a check to Rogers for $7,085 — $6,700 for work done on Delta Lodge and the balance for related expenses. Newton did not name the bank as co-payee on the check. The trial testimony is unclear as to exactly why Newton left the bank off the check, but, apparently, Newton and Rogers agreed, "It would be alright" to make the check out to Rogers alone. Rogers paid

his general operating expenses for the Delta Lodge job, but did not pay his matrialman, Southern Pipe and Supply Company, which had supplied him with the plumbing fixtures. Rogers completed the job in May, 1981, but Newton never paid the balance due under the subcontract. Newton admitted Rogers had completed the job and had done good work.

Rogers went into default on the bank loan on June 11, 1981. In July, 1981, Southern Pipe obtained a materialman's lien on Mr. Mitcherson's property, Delta Lodge Motel. The bank filed suit against Newton and Rogers to collect on the note and won a judgment against them for the principal amount, $15,000, and interest.

On appeal, appellant raises several points. The only argument we need address is appellant's contention that Rogers delegated to the bank his duty to pay Southern Pipe for the plumbing fixtures as well as his right to receive payments under the subcontract. Appellant bases his contention on the language contained in the consumer note and security agreement and the February 11 letter signed by Rogers to secure his loan from the bank. First, the consumer note and security agreement provided:

> I [Ken Rogers] own the property described below. To protect the Bank I give what is known as a security interest (like a mortgage) in my: Assignment of Contract on Delta Lodge — From Wayne Newton Const. Co.

Next, Rogers also signed the letter of February 11, in which he said:

> I, Kenneth Rogers, D/B/A Ken Rogers Plumbing Co., hereby assigns [sic], set over and deliver to Merchants and Farmers Bank of Dumas, Arkansas, a certain subcontract between Wayne Newton Construction Company of Magnolia, Arkansas and Delta Lodge Motel, in the amount of $22,100, dated February 11, 1981.

In support of his contention, appellant cites *Pemberton v. Arkansas State Highway Commission,* 268 Ark. 929, 597

S.W.2d 605 (Ark. App. 1980), a case interpreting Ark. Stat. Ann. § 85-2-210(4) (Add. 1961). However, Ark. Stat. Ann. § 85-2-102 (Add. 1961) limits the application of § 85-2-210 to contracts involving the sale of goods. Here, the underlying contract between Newton and Rogers does not involve the sale of goods, thus § 85-2-210(4) is simply not applicable. Nevertheless, the general contract law of assignments on this issue is on point and is substantially the same as § 85-2-210(4). The Restatement of Contracts section 328, subsection 1, states:

> Unless the language or the circumstances indicate the contrary, as in an assignment for security, an assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of the assignor's rights and a delegation of his unperformed duties under the contract.

Restatement (Second) of Contracts § 328(1) (1979).

In applying the foregoing rule to the facts at bar, we observe that the language of the consumer note and security agreement Rogers signed to get the loan from the bank describes the assignment as a "security interest" to secure the $15,500 loan. In addition, the bank's letter of February 11 to Newton formally notified Newton that the assignment of Rogers' subcontract was to secure the loan. Furthermore, the record is replete with testimony indicating Newton was well aware that Rogers assigned his right to payments for the plumbing work to the bank to obtain the capital necessary to start the job. On the other hand, there is no evidence showing the bank intended to perform Rogers' duties under the contract. In fact, the most convincing evidence of Rogers' *nondelegation* of his duty to pay Southern Pipe is Newton's omission of the bank as payee on the initial check to Rogers for $7,085. In brief, if Newton had believed then, as he asserts now, that the bank was responsible for paying Southern Pipe, he surely would have included the bank as payee on the check.

From the forgoing, we conclude that Rogers assigned his right to payments on his subcontract with Newton, and such assignment did not delegate to the bank his duty to pay

Southern Pipe. We make no finding regarding which party owed Southern Pipe except that the bank does not. Clearly, Newton's initial partial payment to Rogers is in no way a defense to the bank's claim. *See Wimberly Grocery Co.* v. *Border City Broom Co.*, 166 Ark. 570, 266 S.W. 2d 679 (1924) (wherein the Supreme Court held payment to the assignor, or discharge or release by him after notice to the debtor of the assignment, is no defense to the claim of the assignee). Because Newton admitted the justness of his debt to Rogers and because the validity of the assignment of the debt to the bank is not questioned, we agree with the circuit judge that Newton and Rogers are indebted to the bank. *See generally* Ark. Stat. Ann. § 68-805 (Repl. 1979).

Affirmed.

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

Lynn K. HOGAN (DURGAN) *v.* Kanat DURGAN

CA 83-158 668 S.W.2d 57

Court of Appeals of Arkansas
Division I
Opinion delivered May 2, 1984

Riddell, Williams, Bullit & Walkinshaw; and *Davidson, Horne, Hollingsworth, Arnold & Grobmyer, A Professional Association,* for appellant.

Michael Redden, for appellee.

MELVIN MAYFIELD, Chief Judge. Pursuant to the Uniform Enforcement of Foreign Judgments Act, Ark. Stat. Ann. §§ 29-801—29-818 (Repl. 1979), the appellant filed an amended petition in Pulaski Chancery Court to register a foreign judgment against her ex-husband, appellee herein, who was residing in Little Rock and teaching at the University of Arkansas at Little Rock. The judgment was

rendered by an Alabama court on March 4, 1980, and provided for child support arrearages, expenses, and attorney's fees. The Arkansas court registered the judgment, but modified the child support payments and visitation rights provided therein. Appellant appeals only the modification of visitation rights.

The parties were divorced in Alabama in 1979. Appellant was awarded custody of their minor daughter with appellee receiving usual visitation rights. In late 1979, in violation of a court order that denied him permission, the appellee took the fifteen-month-old child to Turkey and the West Bank of the Jordan River. About two months later, the appellant secured the child's return and, thereafter, obtained a judgment in Alabama against appellee for arrearages in child support and for the money she had expended in locating her daughter and regaining her custody. The judgment also modified the original decree by denying appellee any visitation rights except those which appellant determined to be in the best interests of the child. This is the judgment of March 4, 1980, which is involved in this appeal.

After the divorce, appellant moved to the State of Washington, her original home, and is still living there. She has registered the Alabama judgment in Washington and the Washington court also granted her a cost-of-living increase in child support. Upon learning that appellee was teaching in Little Rock, appellant first petitioned to register the Washington judgment here and then amended her petition to include the Alabama judgment. Appellee contended that the Washington judgment was void for lack of proper service and also asked for affirmative relief in the form of a reduction in child support and for the allowance of visitation rights. The chancellor refused to grant full faith and credit to the Washington judgment, holding that it was not based upon proper service, but did register the Alabama judgment. He assumed jurisdiction, however, over all matters covered by the Alabama decree and granted appellee certain visitation rights on the condition that appellee surrender his passport to the court and not regain it without a specific court order.

It is the appellant's contention that under the Uniform Child Custody Jurisdiction Act (UCCJA), Ark. Stat. Ann. §§ 34-2701—34-2726 (Supp. 1983), the chancellor erred in assuming jurisdiction to grant appellee's motion to modify visitation. We agree.

Some of the general purposes of the UCCJA, as set out in section 34-2701, are to avoid jurisdictional competition and conflict with courts of other states in matters of child custody; to assure that litigation concerning custody will ordinarily take place in the state where the child and his family have the closest connection; and to avoid relitigation of custody decisions of other states. The Act sets up certain criteria which must be met before a court can assume jurisdiction to make a determination about the custody of a child. The definition of "custody determination" includes visitation rights, Ark. Stat. Ann. § 34-2702(2) (Supp. 1983), and under § 34-2703(a) (Supp. 1983), an Arkansas court would not have jurisdiction over visitation rights unless:

> (1) this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six (6) months before commencement of the proceeding . . . or
>
> (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
>
> (3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or
>
> (4) (i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another

> state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

Applying these requirements to the facts of the instant case, we find that the home state of the child was Washington. She was not physically present in Arkansas and never had been. Except for the period when her father had her in Turkey, the child has lived with her mother since November 1, 1979, in Seattle, Washington. Neither the child nor her mother has any significant connection with Arkansas. The sole reason for appellant's petition to register the foreign judgment in Arkansas was that the appellee was living and working here and it was necessary to register the judgment before appellant could attempt to collect it by execution or garnishment. There is nothing in the record to indicate or suggest that it was in the child's best interest for the trial court to assume jurisdiction to modify the visitation order made by the Alabama court — an order which both Arkansas and Washington agree is entitled to full faith and credit. Here, as in *LeGuin* v. *Caswell,* 277 Ark. 20, 638 S.W.2d 674 (1982), the only connection Arkansas has with the case is "that the father has moved here," and we find, as that court found, "Arkansas did not have jurisdiction in this matter." *See also Biggers* v. *Biggers,* 11 Ark. App. 62, 666 S.W.2d 714 (1984).

Appellee argues, however, that this issue was raised for the first time on appeal. In the first place, it is clear that jurisdictional issues may be raised at any time, even on appeal. *Head* v. *Caddo Hills School District,* 277 Ark. 482, 644 S.W.2d 246 (1982); *Hilburn* v. *First State Bank of Springdale,* 259 Ark. 569, 535 S.W.2d 810 (1976); and *Hervey* v. *The Farms, Inc.,* 252 Ark. 881, 481 S.W.2d 348 (1972). In the second place, we do not agree that the issue is raised here for the first time. The record contains memorandum briefs filed in the trial court by both parties, and appellant's brief specifically argued that custody and visitation rights were matters that should continue to be exercised in the Washington courts.

The appellee cites *Holley* v. *Holley,* 264 Ark. 35, 568 S.W.2d 487 (1978), as authority for the proposition that once jurisdiction has attached, the trial court may settle all the rights of the parties as long as jurisdiction of the subject matter is not wholly beyond the power of the court. Appellee overlooks the fact that *Holley* was decided before Arkansas adopted the UCCJA by enacting Act 91 of 1979. Section 27 of that Act provides that "All laws and parts of laws in conflict with this Act are hereby repealed." The appellant properly filed her petition under the Registration of Foreign Judgments Act, but the UCCJA prevented the court, under the circumstances in this case, from assuming jurisdiction to change the custody or visitation rights provided in the judgment registered. To hold otherwise, as appellant states it, "undermines the very purposes for which the UCCJA was enacted — to avoid jurisdictional conflicts, promote co-operation between courts of different states, and allow visitation decisions to be made by the state with the closest connection to the child." The order appealed from is reversed as to the modification of visitation rights and the visitation arrangement as specified in the March 4, 1980, order of the Mobile County Alabama Circuit Court is reinstated.

Reversed.

CRACRAFT and CLONINGER, JJ., agree.

McLARTY LEASING SYSTEM, INC. *v.*
Lehman D. BLACKSHEAR and E. Sidney GROVES

CA 83-403 668 S.W.2d 53

Court of Appeals of Arkansas
Division I
Opinion delivered May 2, 1984

[redacted]

Wright, Lindsey & Jennings, for appellant.

Richard L. Miller and *F. H. Martin,* for appellees.

GEORGE K. CRACRAFT, Judge. McLarty Leasing System, Inc. appeals from a judgment dismissing its complaint against Lehman D. Blackshear and E. Sidney Groves as guarantors with prejudice. Blackshear and Groves cross-appeal from that part of the order which dismissed their third-party complaint against Ronnie Sleeth as a co-guarantor.

On December 12, 1979 the appellant McLarty Leasing System, Inc. entered into two identical leasing agreements with Big Three Transportation, Inc. in which McLarty leased seventy over-the-road tractors and trailers to Big Three for thirty-seven months at a stipulated monthly rental for each unit. Simultaneously, Lehman Blackshear, E. Sidney Groves and Ronnie Sleeth executed an addendum to each lease in which they guaranteed payment of all rentals and any amounts owed by Big Three to McLarty following surrender and sale of the leased equipment. Before the end of the term of these leases Big Three encountered financial difficulties, voluntarily surrendered possession of the leased equipment to McLarty, and instituted bankruptcy proceedings. The interest of the bankrupt in the leases was released by the bankruptcy court and the equipment was disposed of by McLarty under the lease agreement.

McLarty then brought this action against Blackshear and Groves on their guaranty for the amount of its loss allegedly resulting from the early termination of the lease agreements. Blackshear and Groves answered raising several defenses and filed a third-party complaint against Sleeth for contribution as a co-guarantor. Sleeth answered alleging that he had been released by McLarty from all obligation under the guaranty agreement.

The court sitting without a jury found no merit to any

of the defenses raised by appellees against appellant but, on finding the plaintiff had failed in its burden of proving damages and that the enforcement of certain provisions of the contract would be unconscionable, dismissed appellant's complaint with prejudice. As the trial court found no liability of Blackshear and Groves under the guaranty agreement it also dismissed their cross-complaint against Sleeth and made no finding as to Sleeth's obligation under the guaranty agreement.

We agree that the trial court erred in dismissing both the complaint and the cross-complaint and remand the case for a new trial on the issues raised in both the appeal and cross-appeal.

The lease agreement contained three separate provisions governing the rights and liabilities of the parties on termination of the contract. Paragraphs 3 and 4 governed the rights and obligations of the parties in the event all of the monthly payments were timely made and the equipment was returned to the lessor at the end of the term. Paragraph 4 provided that at termination of the lease the vehicles would be returned to the lessor who shall sell each vehicle at the highest available *"net wholesale figure"* which was defined as the sale proceeds less direct cost of such sale, including but not limited to reconditioning, transportation charges and all other costs arising directly from the holding for sale and the sale of each vehicle. It further provided that in order to obtain the highest available *"net wholesale figure"* the lessor shall require three closed, bona fide bids from three prospective buyers and that the vehicle be sold to the highest bidder.

Paragraph 5 governed the parties' rights and liabilities in the event of early termination by mutual agreement. Paragraph 5 provided as follows:

> 5. *EARLY TERMINATION.* From time to time as mutually agreed upon by the Lessor and Lessee, any Vehicle may be terminated before the full intended lease term as indicated by Schedule "A". The remaining liability of Lessee under such early termination

shall be calculated by the following formula:

> The *Original Lease Value,* as specified on Schedule "A", shall be reduced by all Monthly Rental Payments made on such Vehicle. The resulting amount will be further reduced by a refund for interest not incurred by Lessor due to early termination, and further adjusted by the balance, if any, remaining in the Escrow Account for such Vehicle, and the resulting figure shall be the *Depreciated Residual Value* for said Vehicle. In the event the Net Wholesale Figure as defined in Paragraph 4, is greater than the Depreciated Residual Value, it will be paid to the Lessee. *In the event the Net Wholesale Figure is less than the Depreciated Residual Value, the difference between the two amounts shall be paid by Lessee to Lessor.* [Emphasis supplied]

Paragraph 15, found to be unconscionable, governed in the event of default by breach of any of the terms, conditions or provisions of the agreement, or institution of proceedings in bankruptcy. The rights, duties and obligations of the parties were substantially different in each of the three situations. It was admitted in argument by both parties that the return of the vehicles in this instance was an "early termination" and Paragraph 5 governed.

The reasonableness of Paragraphs 4 and 5 was not questioned by the parties. Nor were they found to be unconscionable by the trial court. John Vaughn testified that all but seventeen of the leased vehicles were each sold for the highest of three sealed bids. The "original lease value" of each vehicle sold was specified in the lease agreement and was easily ascertainable. Vaughn testified that in arriving at the "depreciated residual value" he had followed the provisions of Paragraph 5 by first reducing the "original lease value" by all monthly rental payments paid on each vehicle, further reducing it by a refund for interest not accrued by reason of early termination, and then adjusting for the balance, if any, remaining in the escrow account for each vehicle. He testified that in arriving at "net wholesale figure" he had reduced the actual sale price by the direct cost

incurred in locating, transporting and reconditioning each vehicle. He testified to the specific amount for which each vehicle was sold and listed separately the actual cost incurred in the sale of each. The accuracy of the difference between "net wholesale value" and "depreciated residual value" as computed by him was not questioned at any time. There was no other direct testimony on any of those issues and none was adduced to infer that his calculations were inaccurate or his testimony not trustworthy. When the appellant concluded its case in chief the appellees rested their case and put on no proof.

Vaughn further testified that the sealed bids received on seventeen of the vehicles were rejected as being grossly inadequate. Rather than sell those vehicles they had negotiated new leases at monthly rentals which substantially mitigated the loss which would have resulted from a sale. He testified to the specific amount of loss to McLarty resulting from early termination applicable to each vehicle leased to other persons. This testimony was not disputed. The court made no finding on the question of whether the re-leasing of some of the vehicles rather than sale of them was a reasonable exercise of McLarty's duty to mitigate the damage.

If the sales were conducted and the loss on each vehicle was computed in the manner Vaughn stated, the appellant at least proved damage in some amount. The court could only have found the burden of proving damage had not been met by totally disregarding the uncontradicted testimony of Vaughn. Since Vaughn was not a party to the action it cannot be said that his testimony was disputed as a matter of law, but he was an employee of a party and his testimony would be subject to much closer scrutiny than that of a wholly disinterested witness. Under our established rules of law the trier of fact is not bound to accept the testimony of any witness even if uncontradicted and is the judge of the weight of the testimony and credibility of the witnesses. It does not, however, have the right to arbitrarily disregard the testimony of any witness and where the uncontradicted testimony of even an interested witness is unaffected by any conflicting inferences to be drawn from it, and is not

improbable, extraordinary or surprising in its nature or there is no other ground for hesitating to accept it as truth, there is no reason for denying the finding of verity dictated by such evidence. *Knighton* v. *International Paper Co.*, 246 Ark. 523, 438 S.W.2d 721 (1969); *St. Louis-San Francisco Rwy. Co.* v. *Harmon,* 179 Ark. 248, 15 S.W.2d 310 (1929).

We conclude that it was arbitrary for the trial judge to totally disregard Vaughn's testimony. It was consistent in its entirety and no fact or circumstance was offered into evidence which contradicts or conflicts with it. We further conclude that the appellant proved damage in some amount resulting from the early termination of the lease which the trial court must determine at a new trial.

We do not find merit in the contention that the contract was one of adhesion and should not be enforced. Neither party has pointed out to us any evidence tending to show that the bargaining power of the parties was wholly unequal or other circumstances which would give rise to a conclusion that the contract was unenforcible for that reason. That argument is based upon the following conclusion of law by the trial court:

> 1. That the provision of the lease agreements purporting to make notice of the time, place and manner of sale of the equipment by the plaintiff unnecessary is an unconscionable provision in a contract of adhesion; is in conflict with the letter and spirit of the Uniform Commercial Code; and is void.

The only provision in the lease agreement which provided for sale of the leased equipment without notice to the lessee was contained in Paragraph 15 which provided for the rights and obligations of the parties in the event of default or failure to comply with other conditions of the lease. The parties concede that the provisions of Paragraph 5 govern these rights and obligations in the case under review and Paragraph 15 has no application.

By cross-appeal the appellees contended that the court erred in not ruling that Sleeth had not been released from his

obligation under the guaranty agreement. Under the court's ruling it was not necessary to reach that issue. On retrial the question of whether Sleeth was released will be an issue of fact for the trial court to determine.

Reversed and remanded.

COOPER and CORBIN, JJ., agree.

Danny HICE *v.* STATE of Arkansas

CA CR 83-185 668 S.W.2d 552

Court of Appeals of Arkansas
Division I
Opinion delivered May 2, 1984

Steve Kirk, for appellant.

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

JAMES R. COOPER, Judge. In this criminal case, the appellant appeals his conviction for the charge of driving while intoxicated (DWI). The appellant was charged and convicted in Conway County Municipal Court of DWI, and was charged but acquitted of refusal to take a breathalizer test. The appellant appealed his conviction for DWI to the Conway County Circuit Court. At the subsequent circuit court trial, the State moved *in limine* to prohibit any testimony concerning the breathalizer test. This motion was granted on the grounds that this testimony would not be relevant to the issues before the court in the circuit court trial. The appellant was found guilty by a jury and fined $500.00. From that decision, comes this appeal.

For reversal, the appellant argues that it was error for the trial court to refuse to allow the appellant and the appellant's witness to testify concerning the arresting officer's refusal to give the appellant a breathalizer test. Also, the appellant alleges that the court erred in refusing to allow him to cross-examine the arresting officer concerning his refusal to administer the breathalizer test.

As to the first point, a brief account of the facts surrounding the appellant's arrest and subsequent charge of DWI is necessary. The appellant was stopped at approximately 1:00 a.m. on January 23, 1983, after his vehicle was allegedly observed swerving across the center line of the highway. The arresting officer testified that the appellant failed a field sobriety test. The appellant was taken to the police station where he refused to submit to a breathalizer test until his attorney could be summoned. Some 30 to 40 minutes later, the appellant's attorney arrived and questioned the arresting officer. The appellant claims that, at this time, he and his attorney requested that the officer

administer a breathalizer test. The officer allegedly refused because too much time had passed since the arrest.

The appellant argues that the State's Motion *in limine* should have been denied and the testimony about the officer's alleged refusal to administer the breath test and his subsequent charge against the appellant of refusal to take the test should have been admitted. The appellant's defense was that he was not intoxicated, but that the arresting officer had treated him harshly and filed the charges against the appellant as a result of his attitude toward the appellant rather than a belief that the appellant was actually violating the law by operating his automobile while intoxicated. The trial judge ruled that the evidence was not relevant in that the State's case would stand or fall on the subjective observations of the policeman and the test, which was not administered was not relevant. We disagree and therefore we reverse.

The appellant asserts that this excluded evidence was relevant. The Uniform Rules of Evidence, Rule 401, Ark. Stat. Ann. § 28-1001 (Repl. 1979), defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." One fact which was of consequence in this case was the credibility of the arresting officer. The appellant argues that if the arresting officer had actually believed that the appellant was intoxicated then he would have given the breathalizer test when the appellant's attorney arrived at the station. Also, the officer's alleged refusal to administer the test, and his subsequently charging the appellant with refusal to submit to the test, is some evidence that would tend to prove the arresting officer's less than courteous attitude toward the appellant. The appellant's refusal to submit to the test until his attorney arrived was a right we feel he plainly had. He had been arrested and charged with a crime and he was made aware that he had the right to the presence of an attorney. His assertion of this right should not be used against him at this time, and there is no evidence that the passage of 30-40 minutes would have affected the test results. The appellant alleged that the officer

making the arrest treated the appellant abusively in that he used harsh language with the appellant, and physically abused the appellant while leading him into the police station. The officer's alleged refusal to administer the test, and the charge of refusal to submit to the test, regardless of the fact that the appellant was later acquitted of this charge, is evidence which the jury should have been allowed to consider as bearing on the officer's credibility.

As to the second point, counsel for the appellant should have been allowed to go into the facts related to the breathalizer on cross-examination as it would tend to impeach the officer's direct testimony that the appellant was obviously intoxicated at the time of his arrest.

We therefore reverse and remand for a new trial consistent with this opinion.

Reversed and remanded.

CRACRAFT and CORBIN, JJ., agree.

Cecil RAGSDELL and Betty Jo RAGSDELL *v.* GAZAWAY LUMBER COMPANY, INC., and SECURITY BANK OF PARAGOULD

CA 83-241 668 S.W.2d 60

Court of Appeals of Arkansas
Division II
Opinion delivered May 2, 1984

R. James Lyons, for appellant.

Branch & Thompson, by: *Robert F. Thompson,* for appellee.

LAWSON CLONINGER, Judge. In this case, appellee, Gazaway Lumber Company, Inc., was granted a materialman's lien against the home of appellants, Cecil and Betty Jo Ragsdell, for an indebtedness of $7,087.44. In the same decree, appellee, Security Bank of Paragould, was granted

an *in rem* judgment in the amount of $107,930.58 and a decree of foreclosure of its mortgage against appellants' home and other property. The indebtedness owed to Security Bank of Paragould was declared a first lien against the property, and Gazaway Lumber Company's lien was subject only to that of Security Bank of Paragould.

For reversal, appellants contend that there was no compliance with the requirements for a materialman's lien, and that Security Bank of Paragould's mortgage was defective. We affirm the decision of the chancellor in part and reverse in part.

We agree with the contention of appellants that the requirements for perfecting a materialman's lien were not complied with. Ark. Stat. Ann. § 51-601 (Repl. 1971) is in derogation of the common law and must be strictly construed since it provides an extraordinary remedy that is not available to every merchant. *Valley Metal Works* v. *A. O. Smith-Inland,* 264 Ark. 341, 572 S.W.2d 138 (1978).

The manager of Gazaway Lumber Company testified that he had no idea whether the materials Gazaway furnished were delivered to appellants' home. Appellant Cecil Ragsdell testified that he did not know whether any of the materials purchased from Gazaway by the absconding contractor were put into his house. The burden is on the materialman to show that the materials for which he claims a lien were used in the improvements on which the lien is sought. *Eudora Lumber Co.* v. *Neal & Jones,* 263 Ark. 40, 562 S.W.2d 294 (1978). Appellee Gazaway Lumber Company failed to offer any proof that the materials it furnished were incorporated into appellants' property, and it was clearly erroneous for the trial court to find that Gazaway had complied with the requirements for a materialman's lien. We reverse that part of the decree which holds that Gazaway Lumber Company was entitled to a materialman's lien against appellants' property. Our ruling on this issue does not foreclose any right of action which Gazaway may have against appellants for debt.

Appellants urge that Gazaway was not in compliance

for a number of other reasons, but it is unnecessary to consider those contentions.

The chancellor was correct in finding that the mortgage executed by appellants to appellee, Security Bank of Paragould, was valid and that appellants had effectively waived their homestead interest in the property.

Appellants failed to abstract the mortgage instrument, but we have examined the instrument furnished by Security Bank of Paragould. The mortgage was duly executed by both Cecil Ragsdell and Betty Jo Ragsdell as grantors and both signed in all the required spaces. There is a total lack of evidence to indicate that either appellant was unaware of the consequences of the execution of the mortgage. The issue of whether appellants effectively waived their homestead rights is settled by the decision of the Arkansas Supreme Court in the case of *Mayfield* v. *Sehon,* 205 Ark. 1142, 172 S.W.2d 914 (1943). In *Mayfield,* the wife's name did not appear as a grantor in the granting clause of the deed of trust. Her name was mentioned at the end of the deed and she did sign the document. However, the word homestead was not used in any place in the deed of trust. The court held that it was not essential that a wife's name appear in the granting clause nor was it essential that the word homestead be used in the deed of trust in order for one to waive his homestead exemption.

In the instant case, both the husband and wife signed as grantors, and each conveyed his title. The consideration for the conveyance was the money borrowed from the bank by appellants, and the purpose of the mortgage was to convey the whole title to the land as security for the repayment of the loan. *Mayfield* v. *Sehon, supra.*

That part of the chancellor's decree which found that Gazaway Lumber Company was entitled to a materialman's lien is reversed, and that part of the decree finding that the mortgage held by Security Bank of Paragould was valid is affirmed.

MAYFIELD, C.J., and GLAZE, J., agree.

GUNTER BROTHERS LUMBER COMPANY
v. Jimmy R. LAUNIUS, and Wife, Elizabeth LAUNIUS

CA 83-252 669 S.W.2d 205

Court of Appeals of Arkansas
Division II
Opinion delivered May 2, 1984

Eric W. Bishop, for appellant.

Dowd, Harrelson & Moore, for appellee.

TOM GLAZE, Judge. This case arose from appellees' purchase of a home that Bennie Montgomery and his wife were building in the North Hills Subdivision in Ashdown, Arkansas. Appellant supplied Montgomery with building materials which were delivered to and used in the con-

struction of appellees' home. Appellees paid the contractor, Montgomery, but Montgomery failed to pay the appellant, the supplier of the materials. As a consequence, appellant filed its lien against the appellees' property. It is undisputed that neither Montgomery nor appellant gave appellees the notice required under Ark. Stat. Ann. § 51-608.1 *et seq.* (Supp. 1983), that their property could be subject to a lien if persons supplying materials to improve the property were not paid in full. No such notice was required prior to §§ 51-608.1 *et seq.*, which became effective on October 1, 1979. The issue in this appeal springs from the fact that appellant supplied and delivered materials to appellees' homesite twice before October 1, 1979. Its other deliveries, a total of nineteen, came after October 1. Appellant argues that because it commenced deliveries to the worksite before the effective date of the new statutes, notice to appellees was not required. The trial court rejected this argument, finding that appellant had no valid, enforceable lien for the materials furnished after October 1, 1979; however, it found appellant entitled to a lien for $887.84, covering the two deliveries prior to that date. We believe the trial court's findings were correct.

Relying on *Kizer Lumber Co.* v. *Mosley,* 56 Ark. 516, 20 S.W. 409 (1892), appellant contends the materials sent to appellees' homesite were supplied under a single or executory contract that existed at the time the first materials were delivered — September 27, 1979. Thus, appellant concludes, if the new statutory notice provisions were construed to apply to an agreement preceding their effective date, such a construction or application would be an impairment of a contract prohibited by the Constitutions of both the United States and Arkansas. U.S. Const. art. I, § 10, cl. 1; Ark. Const. art. 2, § 17.

First, we note that appellant fails to cite any case in support of its constitutional argument. However, assuming such argument has validity — which we seriously doubt — we need not reach it because the evidence supports the trial court's finding that appellant's agreement with Montgomery to supply materials was severable and terminable after each purchase rather than a single contract to supply

all the necessary materials to build appellees' house. Of course, if each purchase by Montgomery was a separate contract, the notice provisions in §§ 51-608.1 *et seq.* clearly applied to each purchase made and delivered beginning on October 1, 1979.

Appellant's single-contract theory is based on its reading of *Kizer, supra,* but that case simply does not support appellant's position. The Court in *Kizer* was confronted with a statute of limitation issue — when the materialman, Kizer Lumber, was required to file its lien. Citing the applicable law, the *Kizer* court stated:

> If the materials were furnished under one contract, he [the materialman] should file the account . . . after the last was delivered; but if the materials were furnished under separate and distinct contracts, it [the account] should be filed under each contract. . . . If, however, he [the materialman] began to furnish "without any specific agreement as to the amount to be furnished," or the time within which they were to be furnished, and there was a "reasonable expectation that further material" would "be required of him," and he was "afterwards called upon from time to time to furnish the same," he should file it . . . after the last item was delivered.

Id. at 519, 20 S.W. at 410.

In reviewing the evidence, the Court found that when the contractor Mosely purchased his first lumber from the Kizer Lumber Company, he made no contract to buy any other, *but said to them that he might need more.* Under these facts, the Court held the materials were presumed to have been furnished under one contract and the amounts due under the contract should be treated as one demand.

Here, appellant's president testified that materials for appellees' home were supplied on an open account in Montgomery's name. Appellant presented no evidence showing it was to supply all materials for appellees' home. Nor was it shown that Montgomery, either expressly or

impliedly, gave appellant any "reasonable expectation" that he would — or even might — purchase other materials with which to build appellees' house. While Montgomery did purchase other materials from appellant for that project, he could have terminated those purchases at any time. This being true, we conclude the trial court correctly found that §§ 51-608 *et seq.* and the notice provisions contained therein applied to the deliveries of materials by appellant to the appellees' property after October 1, 1979. Because there is no dispute that appellees did not receive the notice required under those statutory provisions, appellant simply is not entitled to a lien for the value of the materials delivered after October 1, 1979.

We affirm.

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

Bera BARNETT, Executrix of the Estate of
Vern BARNETT, Deceased *v.* Gary JENKINS,
d/b/a GARY JENKINS AND COMPANY

CA 83-254 668 S.W.2d 550

Court of Appeals of Arkansas
Division II
Opinion delivered May 2, 1984
[Rehearing denied May 30, 1984.]

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

Paul E. Hopper, for appellee.

TOM GLAZE, Judge. This appeal involves the trial court's award of a real estate broker's commission. The appellant, Bera Barnett, represents the estate of Vern Barnett, deceased, who had listed certain property with his son, Gene Barnett, an agent for the appellee Gary Jenkins, a real estate broker. Appellee instituted this action based on that listing contract and a subsequent offer and acceptance contract signed by Barnett, as seller, and L. G. Morris, as buyer, on August 5, 1981. The relevant events leading to and the circumstances surrounding the execution of these two documents must first be discussed before addressing the issues raised in this appeal.

Vern Barnett had owned two adjoining tracts of farm land which he conveyed separately to his son, Fred Barnett, and to Dr. Hermie Plunk — Fred received 160 acres and Dr. Plunk received 178 acres. Later, Barnett listed only the 160-acre tract for sale with his son Gene, who was an agent for appellee. However, when Barnett and appellee discussed selling the 160-acre tract, appellee said that Barnett indicated he wanted to sell both tracts. Barnett explained that he had transferred the 160 acres to Fred only to protect himself against possible judgments. He also indicated that Dr. Plunk was behind on her payments, and "he was talking to her to get her to concede to give the property back to him to sell." After appellee's discussion with Barnett, appellee started negotiating with L. G. Morris, a farm buyer and neighbor of Barnett's. Apparently, Barnett and Morris agreed to the terms of the proposed sale of the two tracts on August 5, 1981. On that date, an agent for appellee prepared an offer and acceptance, which was signed by both Barnett and Morris. On August 6, 1981, Barnett contacted Dr. Plunk, and asked her to deed the 178-acre tract back to him. She refused. Barnett also failed to obtain Fred's consent to reconvey the 160-acre tract to Barnett so that he could consummate the sale with Morris. Appellee subsequently asked Barnett to pay the $17,000 commission due under the offer and acceptance agreement, and Barnett refused. Appellee then filed suit for the commission, contending he had produced a buyer ready, willing and able to purchase

both tracts of land. *See Graham* v. *Crandall,* 11 Ark. App. 109, 668 S.W.2d 548 (1984). Barnett raised several defenses before and at trial, but the trial court held appellee was entitled to his commission. Barnett died the day after the trial and before judgment was entered against him on December 24, 1982.

Appellant Bera Barnett raises four issues on appeal, but we only need to consider one of them. She contends that the appellee did not produce a buyer ready, willing and able to purchase the tracts involved according to the terms of their agreements. In sum, appellant argues that everyone knew the offer was conditioned upon Barnett's reacquiring title to the two tracts. Barnett failed in his efforts to obtain such title, and appellant argues Morris simply was unable to purchase the tracts from Barnett.

While we agree with appellant's argument in part, we believe her conclusion is best premised on the law announced in *Southern Trust Co.* v. *Bunch,* 159 Ark. 47, 251 S.W. 674 (1923). The Supreme Court in *Bunch,* quoting from *Foltz* v. *Conrad Realty Co.,* 131 Va. 496, 511, 109 S.E. 463, 468 (1921), stated the rule as follows:

> If at the time a broker makes sale of property he has knowledge of, or information of defects in the title, and by reason of these defects the sale cannot be made effective, he is not entitled to his commission.

Applying the foregoing rule to the facts at bar, appellee conceded throughout his testimony that he knew that before a sale could be made to Morris or anyone else, Barnett would have to reacquire the title to the two tracts. Appellee was aware of this title defect when he negotiated the sale to Morris, and he knew the sale could not be effected unless title to the tracts could be restored in Barnett. Because appellee had this knowledge, the trial court erred in awarding him a commission.

Reversed and dismissed.

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

IN THE MATTER OF THE ADOPTION OF ROBERT CRAIG TITSWORTH

CA 84-12 669 S.W.2d 8

Court of Appeals of Arkansas
Division II
Opinion delivered May 2, 1984

Peel & Eddy, for appellant.

Kenneth W. Cowan, Western Arkanss Legal Services, for appellee.

TOM GLAZE, Judge. This is an appeal from a denial of appellants' petition to adopt Robert Craig Harrison. Appellants contend the probate judge clearly erred (1) in not finding that the mother failed to communicate with or to support the child for a period of one year, or (2) in not finding that the mother unreasonably withheld her consent to the adoption contrary to the best interest of the child. We have reviewed the record and find that the probate judge's findings are clearly against the preponderance of the evidence.

On December 30, 1978, a son, Robert Craig Harrison, was born out of wedlock to appellee Lori Harrison. The appellant father, Robert Titsworth, did not visit or support the child or acknowledge paternity until sometime in June,

1980. Beginning then, Lori took the child to Robert's place of business for visits. In September, 1980, Lori placed the child in the custody of Robert because, according to her testimony, she was having personal and financial difficulties. Since September, 1980, Robert Titsworth has had continuous custody of the child.

Apparently, between December, 1980, and March, 1981, Robert and his wife, appellant Sheila, would not allow Lori to see her son, so she sought and gained visitation privileges in a Pope County Court action. In that same proceeding, Robert was adjudged the natural father and granted custody of the child. Although Lori visited her son at times after the March, 1981, proceeding, she undisputedly had no direct contact with the child between September 16, 1981, and October, 1982. Lori's lack of contact with her son largely resulted from her attempted suicide in October, 1981, and her commitment to the State penitentiary in March, 1982. She testified that she did not see her son after her suicide attempt because she was "just real upset" and "it took me awhile to get myself back together."

In addition, between December, 1981, and August, 1983, the appellee was in jail or the penitentiary for a number of criminal offenses unrelated to this action. However, according to her testimony, she did attempt unsuccessfully to communicate with the appellants and the child, by mail and through the prison chaplain. Appellee testified her letter was returned stamped "not deliverable as addressed to this person," and the chaplain's attempts were rebuffed by appellants.

In their petition to adopt Robert Harrison, the appellants alleged that Lori Harrison had failed significantly, without justifiable cause, to communicate with and to provide for the care and support of Robert Craig Harrison as required under Ark. Stat. Ann. § 56-207(a)(2) (Supp. 1983). In their amended petition, appellants alleged that it was in the best interest of Robert Craig Harrison that appellants be allowed to adopt him and that Lori Harrison was unreasonably withholding her consent contrary to Robert Harrison's best interest. *See* Ark. Stat. Ann. § 56-220(c)(3) (Supp. 1983). In denying the adoption, the probate judge stated that he did

not believe that the evidence was clear and convincing that the mother had failed to communicate with or to support her child without cause as required by law. He made no finding regarding appellants' assertions under § 56-220(c)(3).

We review probate proceedings *de novo* on the record, but it is well settled that the decision of a probate judge will not be disturbed unless clearly erroneous; and we give due regard to the opportunity and superior position of the trial judge to judge the credibility of witnesses. Ark. R. Civ. P. 52(a); *Taylor* v. *Hill,* 10 Ark. App. 45, 661 S.W.2d 412 (1983). Personal observations of the judge are entitled to even more weight in cases involving the welfare of a small child. *Id.* (citing *Wilson* v. *Wilson,* 228 Ark. 789, 310 S.W.2d 500 (1958).

This Court recently has decided four cases involving Ark. Stat. Ann. § 56-207 (Supp. 1983), which provides, in part:

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

See Dodson v. *Donaldson,* 10 Ark. App. 64, 661 S.W.2d 425 (1983); *McKee* v. *Bates,* 10 Ark. App. 51, 661 S.W.2d 415 (1983); *Taylor* v. *Hill,* 10 Ark. App. 45, 661 S.W.2d 412 (1983); and *Chrisos* v. *Egleston,* 7 Ark. App. 82, 644 S.W.2d 326 (1983). *See also Loveless* v. *May,* 278 Ark. 127, 644 S.W.2d 261 (1983); *Henson* v. *Money,* 273 Ark. 203, 617 S.W.2d 367 (1981); *Pender* v. *McKee,* 266 Ark. 18, 582 S.W.2d 929 (1979); *Harper* v. *Caskin,* 265 Ark. 558, 580 S.W.2d 176 (1979); *Watkins* v. *Dudgeon,* 270 Ark. 516, 606 S.W.2d 78 (Ark. App. 1980); *Brown* v. *Fleming,* 266 Ark. 814, 586 S.W.2d 8 (Ark. App. 1979).

A party seeking to adopt a child without the consent of a natural parent bears the heavy burden of proving by clear and convincing evidence that the parents have failed sig-

nificantly without justifiable cause to communicate with the child or to provide for its care and support for the prescribed period. *Taylor* v. *Hill,* 10 Ark. App. at 47, 661 S.W.2d at 414 (1983) citing *Harper* v. *Caskin,* 265 Ark. 558, 580 S.W.2d 176 (1979).

Appellants contend that the evidence at the hearing showed undisputedly that Lori failed significantly and without justifiable cause to communicate with or to support her child from September of 1981 to October of 1982. They argue further, citing *Zgleszewski* v. *Zgleszewski,* 260 Ark. 629, 542 S.W.2d 765 (1976), that the fact the appellee was in jail or the penitentiary for most of that one-year period does not constitute justifiable cause.

Zgleszewski involved the abandonment provision of our prior adoption law, Ark. Stat. Ann. § 56-106 (Repl. 1971), under which consent to adopt was not required of a parent who had abandoned a child for more than six months preceding the filing of the petition. In *Zgleszewski,* the mother and stepfather petitioned to adopt her children without the consent of the natural father, who was in prison in Pennsylvania at the time of the petition. The probate court denied the adoption, and the Supreme Court reversed. The Court noted that between 1969 and 1975, the father had seen his children for only about five minutes at his father's funeral. Although he had saved $1,400 while in prison, he spent none of that to help his children; furthermore, at trial he indicated no intention to help them in the future. After reviewing the record, the *Zgleszewski* court, quoting from *In re Adoption of McCray,* 460 Pa. 210, 331 A.2d 652 (1975), stated:

> [A] parent's absence and/or failure to support due to incarceration is not conclusive on the issue of abandonment. Nevertheless, we are not willing to completely toll a parent's responsibilities during his or her incarceration. Rather, we must inquire whether the parent has utilized those resources at his or her command while in prison in continuing a close relationship with the child.

The Court found that the father's interest in his children's welfare was minimal and that his "criminal acts and the course of conduct followed thereafter indicate a conscious disregard of the children and an indifference to their welfare tantamount to voluntary abandonment." *Id.* at 632-33, 542 S.W.2d at 768.

In the instant case, appellants were not required to show Lori abandoned her son but only that for at least one year she significantly and without justifiable cause failed to communicate with or support him — a less stringent standard than that required under the earlier adoption code considered by the Court in *Zgleszewski.* However, like the Court in *Zgleszewski,* we believe the facts here clearly demonstrate that Lori's criminal acts and course of conduct indicate a conscious disregard of her child. By her own testimony, Lori committed her first felony when she was bearing Robert Craig, who later was born on December 30, 1978. By February, 1980 — when her son was fourteen months old — Lori had been convicted and entered the penitentiary for her first time. She was discharged in May, 1980, and in either June or July, 1980, she gave physical custody of Robert Craig to his father. In 1981, she admits she again was charged with felony crimes — at least fourteen. She subsequently attempted suicide by cutting her left wrist seven times and her elbow once. She was treated for these injuries in a private hospital; then, she spent a brief time in the State Hospital. Thereafter, she was incarcerated in a county jail for one month and then commenced her second penitentiary term in March, 1982. Lori concedes that she had not communicated with Robert Craig from the time she attempted suicide in October, 1981, until after she was transported from the penitentiary to Pope County on other felonies in October, 1982. Accepting Lori's own testimony as true, her only efforts to contact her son were (1) by a letter that was returned as undeliverable, (2) through the prison's chaplain, who called Robert Craig's grandmother on behalf of Lori "to find out about him . . . but they wouldn't talk to him [the chaplain]," and (3) through her sister, who took some clothes and toys to Robert Craig for Christmas in December, 1981. Based upon Lori's testimony alone as set forth above, we believe she failed significantly and without

justifiable cause to communicate with or support Robert Craig, and as a consequence, we conclude her consent was unnecessary in this adoption proceeding.

Even if we were to conclude that Lori's efforts to communicate with Robert Craig were legally sufficient to require her consent, we believe the evidence clearly establishes that Lori unreasonably withheld her consent contrary to her son's best interest. *See Wineman* v. *Brewer,* 280 Ark. 527, 660 S.W.2d 655 (1983), and *Lindsey* v. *Ketchum,* 10 Ark. App. 128, 661 S.W.2d 453 (1983). Lori argues that the facts presented in *Wineman* and *Lindsey* were worse than those here, and therefore those cases are distinguishable and inapposite. We find no meaningful distinction with respect to the requirements of the statutory provisions in question. Without being too repetitious, we will attempt to summarize the evidence that leads us to this conclusion. Lori first married at the age of fifteen years. That marriage ended in divorce eight months later on July 12, 1976. Sometime thereafter, she and Robert dated; she became pregnant and gave birth to Robert Craig on December 30, 1978. At this time, Lori was eighteen years old. Afterwards, she commenced residing at various places, living in at least eleven different dwellings until her second commitment to the penitentiary in March, 1982. During this period, she relied on friends and acquaintances to help care for Robert Craig. In 1979, she met a man named Louis Horton and married him; she later learned the marriage was invalid. Lori said that she lived with Horton three or four days, at which time he went to the penitentiary; she has not seen him since.

Lori's lifestyle proved detrimental to her son. Mary McKinney, a psychological intern at Human Services in Russellville, testified that she had treated Robert Craig in a children's communication and interaction group between June of 1981 and August of 1982. She described him as "socially maladjusted" with "very aggressive behavior" when she first saw him. McKinney testified that Robert Craig would point and grunt instead of asking for something. She said that he had "delayed speech." He was very disruptive in the group. However, he made good progress,

according to Ms. McKinney. She said that she had the full cooperation of Sheila and Robert Titsworth, who met with her privately to discuss problems and who also attended parenting classes.

Another witness, Ed Williams, who sponsored Lori after she left the penitentiary, testified that Robert Craig's "best interests from a parenting standpoint never seemed to be a part of her thinking as far as her daily routine or her night activities or anything else." Williams related a number of occasions on which she simply failed to properly feed Robert Craig or look after his hygiene requirements. From our *de novo* review of the entire record, we believe the evidence clearly manifests that Lori has largely ignored Robert Craig's interests and at the same time has failed to demonstrate any stability in her own life. Unfortunately, she has shown during her young life that she has a propensity to violate the law, which, in turn, has caused her to serve a great deal of time in jail and the penitentiary — a fact not conducive to raising a child.

For the reasons given above, we reverse and remand.

Reversed and remanded.

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

Earl GODWIN *v.* Burt T. HAMPTON d/b/a SOUTHERN SCRAP CO., and Troyce HAMPTON

CA 83-304 669 S.W.2d 12

Court of Appeals of Arkansas
Division II
Opinion delivered May 9, 1984
[Rehearing denied June 6, 1984.]

Woodward, Kinard & Epley, Ltd., by: *Mike Kinard*, for appellant.

Larry Chandler, for appellee Burt Hampton.

Keith, Clegg & Eckert, for appellee Troyce Hampton.

MELVIN MAYFIELD, Chief Judge. The appellee Burt Hampton filed suit in the Columbia County Chancery Court against appellant Earl Godwin alleging that because of false and material representations, knowingly made by appellant, appellee entered into a contract to purchase a Magnolia, Arkansas, scrap metal business from appellant, and as a result thereof appellee sustained damages. In addition to a money judgment, the appellee sought an injunction to prevent appellant from continuing to engage in business in competition with appellee, contrary to the provisions of the contract.

Godwin answered with a denial of the allegations of the complaint. He also filed a counterclaim against Burt Hampton and a third party complaint against Burt's father, appellee Troyce Hampton. The claims against the Hamptons alleged that they purchased the business as a partnership and Godwin sought judgment against them for $19,000.00 alleged to be due on the purchase price. An additional judgment for $100,000.00 was sought against the father on allegations that he caused Godwin mental anguish and monetary loss by attempting to abrogate the purchase agreement and by conspiring to prevent payment of the amount due on the purchase price. No motion was made to transfer any part of the case to law.

The chancellor found that one of the assets of the business was a crane which Godwin represented was operable and had been purchased for $25,000.00; that in fact it was not operable to do the job for which it was intended and Godwin had paid only $3,000.00 for it; that Burt Hampton agreed to a $25,000.00 increase in the purchase

price of the business in reliance upon Godwin's false representations about the crane; and that Hampton was entitled to damages for $22,000.00 which was the difference between the cost of the crane and what Godwin represented the cost to be. The court also found there was no partnership between the Hamptons, and that Godwin was not entitled to judgment against Troyce Hampton in any amount. The $22,000.00 due to Burt Hampton was offset against the $19,000.00 he owed on the purchase price, and Burt was given judgment against Godwin for $3,000.00. The chancellor found there was no proof that Godwin was competing against Burt contrary to the purchase agreement and, therefore, no ruling was made on the right to injunctive relief.

Godwin appeals and contends that the trial judge's decision as to liability is not supported by a preponderance of the evidence and that the judge erred in failing to rule on the validity of the covenant not to compete.

The parties are in agreement that the elements of an action for fraud or deceit are (1) a false representation, normally of fact, by the defendant; (2) knowledge or belief by the defendant that the representation is false — or, what is regarded as the equivalent, that he has not a sufficient basis of information to make the representation; (3) an intention to induce the plaintiff to act or to refrain from action in reliance upon the misrepresentation; (4) justifiable reliance upon the representation on the part of the plaintiff, in taking action or refraining from it; (5) damage to plaintiff, resulting from such reliance. *MFA Mutual Ins. Co.* v. *Keller,* 274 Ark. 281, 623 S.W.2d 841 (1981).

There is evidence in the record to support the following factual summary. Burt Hampton was about 25 years old when he entered into the agreement to buy the scrap metal business from Godwin. Burt had no prior experience in this business and his father helped negotiate the purchase and obtain the financing for Burt. Burt lived next door to the business and the purchase had been under discussion for some time. In April of 1981 a price of $30,000.00 was agreed upon but just before Burt started operating the business,

Godwin informed the Hamptons that he had purchased a crane from a scrap dealer in Dallas, Texas. Godwin told the Hamptons that he had paid $25,000.00 for the crane and that the sale price of the business would have to be increased to $55,000.00 to cover the amount paid for the crane. Both of the Hamptons testified that Godwin said the crane was operational and had been working on a yard in Dallas, and that in reliance upon his statements as to the crane's cost and condition they agreed to increase the purchase price to $55,000.00.

Burt started operating the business on April 21, 1981, and the crane arrived a few days later. On April 30, 1981, apparently the same day the crane arrived, Burt gave Godwin three checks which left him owing $19,000.00 on the $55,000.00 purchase price. On July 10, 1981, a formal written agreement to buy and sell the business was signed by Burt Hampton and Earl Godwin.

The crane was an old scrap railroad crane. Its function was to crush cars and load and unload scrap metal. When it was delivered to the Magnolia yard the magnet generator had a burned out coil. The truck engine would not run and the crane had to be pulled from place to place by another vehicle. The motor that ran the boom up and down would run but a chain had slipped to the side of the chain drive sprocket and some sprockets needed to be rebuilt. There was evidence of other defects in the crane and, although there was testimony that it should have been repaired for less, Troyce Hampton, who testified to extensive experience in automotive repair, filed a lien against the crane for $79,554.39, which he said was for repairs he made to the crane that were absolutely necessary.

A stipulation in the record agrees that the manager and assistant manager of the Dallas scrap company that sold the crane to Godwin would testify that it had been taken out of operation by that company approximately seven months before Godwin purchased it; that it was taken out of service because it became inoperable; that it was sold to Godwin for $3,000.00 and would not have been sold for that price if it had been useable and in working condition; and that they

discussed these facts with Godwin when he bought the crane.

Appellant's contention that the trial judge's decision as to liability is not supported by the evidence is presented in several ways. One argument is that Godwin increased the purchase price by $25,000.00 only because he decided the business was worth that much; but there was testimony, and the chancellor found, that Godwin said he was increasing the price because he gave $25,000.00 for the crane and "all he wanted was his money back." It is also argued that Burt relied upon his father in making the purchase agreement and not upon representations made by Godwin. It was Burt's testimony, however, that he would not have paid the extra $25,000.00 if Godwin had not told him this is what the crane cost and that all Burt would have to do would be to put gas and oil in it and it would be ready to go to work. These arguments simply present issues of fact which the trial judge decided in Burt's favor.

Godwin also points out that 78 days from the day the crane arrived Burt went to his own lawyer's office and signed a formal written agreement to buy the business. Thus, it is argued that both Burt and his father had ample opportunity to inspect the crane and determine its condition before the contract was signed and that this shows that Burt did not rely upon Godwin's representations about the crane; or that his reliance thereon was not justified; or that any misrepresentation was waived. Cases relied upon include *Herrick* v. *Robinson,* 267 Ark. 576, 595 S.W.2d 637 (1980); *Vaught* v. *Satterfield,* 260 Ark. 544, 542 S.W.2d 502 (1976); and *Mid-America Truck & Equipment* v. *Mack Trucks, Inc.,* 519 F. Supp. 461 (W.D.Ark. 1981). The last two cases turn upon the sufficiency of the evidence. In *Mid-America Truck and Equipment,* the court held (1) there was no misrepresentation because the plaintiff had knowledge of the matter involved and did not rely on the defendant's statement, and (2) plaintiff was not entitled to recover damages which it could have avoided after it learned of the matter involved. In *Vaught,* the court found that the plaintiffs not only failed to show that they did not know the facts claimed to have been undisclosed but also failed to show that those facts were not

within the reach of their own diligent attention or observation. In other words, they did not prove justifiable reliance upon the representations made.

Appellant's reliance upon *Herrick* v. *Robinson,* however, reveals the fundamental difference between Godwin's position and that taken by the Hamptons. That case involved an attempt to rescind a contract and the court said:

> One who desires to rescind upon the ground of fraud or deceit must, as soon as he discovers the truth, announce his purpose at once, adhere to it, and act with reasonable diligence, so that all parties may be restored to their original position as nearly as possible; if he continues to treat the property involved in the transaction as his own or conducts himself with reference to the transaction as though it were still subsisting and binding, he will be held to have waived the objection and will be as conclusively bound by the contract as if the fraud had not occurred.

Herrick v. *Robinson,* 267 Ark. at 585.

It is the Hamptons' position that the complaint filed in this case by Burt did not seek rescission but was a suit based upon the common law tort of fraud or deceit. *See MFA Mutual Ins. Co.* v. *Keller, supra.* They also point out that one who has been the victim of fraud may either affirm the transaction and sue for damages, or disaffirm and sue for rescission. *Stanford* v. *Smith,* 163 Ark. 583, 260 S.W.435 (1924). The complaint filed by Burt very clearly elected to sue for damages. Equity had jurisdiction because the suit also asked for an injunction to prohibit Godwin from violating the covenant not to compete. *Bailey* v. *King,* 240 Ark. 245, 398 S.W.2d 906 (1966). Unless equity is wholly incompetent to grant the relief sought, objection to its jurisdiction is waived if no motion to transfer to law is made. *Stolz* v. *Franklin,* 258 Ark. 999, 531 S.W.2d 1 (1975). However, no motion to transfer was made and in addition to jurisdiction to grant injunctions, equity is not wholly without authority to decide issues involving the elements of the tort of fraud or deceit. *Lane* v. *Rachel,* 239 Ark. 400, 389 S.W.2d 621 (1965).

So, the liability issue in this case is concerned with whether Godwin made the representations alleged; whether he knew they were false; whether Godwin intended for Burt to rely upon the representations; whether there was justifiable reliance by Burt to his damage; and whether any misrepresentation was waived. These are all questions of fact. It is our duty to affirm the factual findings of the trial judge unless they are *clearly* against the preponderance of the evidence, giving due rgard to his opportunity to judge the credibility of the witnesses. ARCP Rule 52(a); *Smith* v. *City of Little Rock,* 279 Ark. 4, 648 S.W.2d 454 (1983). We cannot say the trial judge was clearly wrong in deciding for Burt Hampton on the question of liability when we consider the evidence about Godwin's representations as to the cost and condition of the crane; the evidence of the increase in the purchase price of the business; and the evidence that all but $19,000.00 of the $55,000.00 purchase price was paid on the day the crane arrived in Magnolia and before either of the Hamptons knew of its true condition or what Godwin had actually paid for it.

This holding would seem to moot the partnership issue, although we cannot find the trial judge clearly wrong on that issue either.

This leaves the question about the trial court's failure to rule on the petition for injunctive relief on the covenant not to compete. Appellant suggests that the agreement may be against public policy, but the trial court found there was no proof that Godwin had gone into competition against Burt Hampton, and, therefore, "makes no decision as to whether said agreement is binding on the parties." We agree and also make no decision on that issue.

Affirmed.

CRACRAFT and COOPER, JJ., agree.

Mary NICHOLS *v.* Dewey STILES, DIRECTOR OF LABOR

E 84-7 668 S.W.2d 554

Court of Appeals of Arkansas
Division I
Opinion delivered May 9, 1984

Appellant, *pro se.*

Alinda Andrews, for appellee.

DONALD L. CORBIN, Judge. Appellant, Mary Nichols, appeals a decision of the Board of Review affirming the action of the Appeal Tribunal which affirmed an Agency determination denying benefits and reducing her base period wages pursuant to Ark. Stat. Ann. § 81-1106(a) and § 81-1104(h) (Supp. 1983). This action was predicated on the basis that appellant's appeal to the Appeal Tribunal was untimely filed pursuant to the authority of Ark. Stat. Ann. § 81-1107(d)(2) (Supp. 1983). We affirm.

The record reflects that appellant quit her employment with J.J.'s Truck Stop on July 15, 1983, in order to get married and move with her spouse to New Mexico. The notice of the Agency determination was mailed on Sep-

tember 12, 1983, and appellant filed her appeal on October 17, 1983. A telephone hearing was held on November 9, 1983, before the Appeal Tribunal. Pursuant to *Paulino* v. *Daniels*, 269 Ark. 676, 599 S.W.2d 760 (Ark. App. 1980), appellant was afforded this opportunity to establish why the late filing was the result of circumstances beyond her control. Appellant testified that after receiving the Agency determination, she stepped up her search for work. She stated that her appeal was untimely because of this concentrated effort to secure employment. This clearly is not an acceptable defense.

We note that Ark. Stat. Ann. § 81-1106(a) was amended by Act 482 of 1983 to disallow benefits to a claimant who voluntarily leaves his or her last work to accompany a spouse to a new place of residence unless he or she has done so prior to July 1, 1983. Thus, it would appear that appellant would have been disqualified under this amended Act because she left her employment on July 15, 1983.

Affirmed.

COOPER and CRACRAFT, JJ., agree.

Georgette FONTANA and
SUNDOWNERS CLUB, INC. *v.*
Jim GUNTER, Pros. Atty. et al
ALCOHOLIC BEVERAGE
CONTROL BOARD, Intervenor

CA 83-139 669 S.W.2d 487

Court of Appeals of Arkansas
Division II
Opinion delivered May 16, 1984

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

No response by appellee.

Treeca J. Dyer, for intervenor.

MELVIN MAYFIELD, Chief Judge. This is an appeal from a decision by the circuit court reversing the Alcoholic Beverage Control Board's grant of a private club permit to the Sundowners Club. Application for the permit was made by the appellant, Georgette Fontana, as managing agent for the club. She was operating a restaurant in Hope, Arkansas, and the permit would authorize the serving of alcoholic beverages to the club members in a portion of the restaurant which the club would lease.

A hearing was held before the director of the ABC Board and the permit was granted. That decision was appealed to the full Board by the prosecuting attorney. Evidence was heard from the applicant and from public officials and private citizens. With one member abstaining, the Board voted unanimously to grant the permit. The prosecuting attorney and the chief of police of Hope then appealed to circuit court, naming the ABC Board as respondents. The court reversed the Board's decision and Mrs. Fontana and Sundowners appealed. The ABC Board was allowed to intervene in this court.

On appeal we review the entire record of the administrative agency and affirm its decision if it is supported by substantial evidence and is not arbitrary, capricious or characterized by an abuse of discretion. *Carder, ABC Director* v. *Hemstock,* 5 Ark. App. 115, 633 S.W.2d 384 (1982); *Citizens Bank* v. *Ark. State Banking Board,* 271 Ark. 703, 610 S.W.2d 257 (1981). Determining whether the Board's decision was arbitrary or capricious involves a limited inquiry into whether it acted with willful and unreasoning disregard of the facts and circumstances of the

case. *Carder, ABC Director* v. *Hemstock, supra, First National Bank of Paris* v. *Peoples Security Bank,* 1 Ark. App. 224, 614 S.W.2d 521 (1981); *Arkadelphia Federal S & L Ass'n* v. *Mid-South S & L Ass'n,* 265 Ark. 860, 581 S.W.2d 345 (1979). Courts rely heavily upon the principle that administrative agencies are better equipped than courts, by specialization, insight through experience, and more flexible procedures, to determine and analyze underlying issues. *Independence S & L Ass'n* v. *Citizens Fed. S & L Ass'n,* 265 Ark. 203, 577 S.W.2d 390 (1979). A 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. *First Nat'l Bank of Paris* v. *Peoples Security Bank, supra.*

Mrs. Fontana presented evidence to the Board that she operated the Sundowners Club in Prescott for about seven years and it had recently moved to Hope. The club wanted to serve wine, beer, and mixed drinks with meals. It would not have a bar, and no drinks would be served without a meal. She testified she was currently operating a restaurant called "The Branding Iron" in Hope and had many customers from Hope, Emmett, and Prescott who had expressed a desire to be able to have an alcoholic beverage with their meals.

Hempstead County has a population of about 25,000. All parties agreed that there were four private clubs located in the county. The opponents to the application insisted that this was enough. However, when examined carefully, it becomes clear that the availability of these is limited. According to the evidence, two of the clubs serve blacks predominantly. The other two are the Hope Country Club, which has a $350 initiation fee and a $40 monthly charge, and the VFW Club, which is for veterans only. Therefore, of the four private clubs in the county, only two are available to whites and both of them have obstacles to membership that could prevent many ordinary citizens from joining. In addition, of the four clubs, only the Hope Country Club has a restaurant in conjunction with it, although the other clubs do serve food in the form of sandwiches. The Sundowners Club would be primarily a nice supper club with an

affordable membership fee of $5.00 per year, where the ordinary citizen could get a good meal accompanied by a glass of wine or other alcoholic beverage.

The opponents of the permit did not question Mrs. Fontana's moral or legal qualifications to hold the permit as manager for the club. There were some questions about the club's membership list, and while the list was seven years old, it was evident that the club had more than the 100 members required by Ark. Stat. Ann. § 48-1402(j) (Repl. 1977). The trial judge pointed out that there were only a few Hope residents on the list; however, the restaurant had been located in Hope only a few months at the time the application was filed for the permit.

The primary opposition to the issuance of the permit was based on grounds that four clubs were sufficient to serve the area; that law enforcement problems would increase; that motels in the area would apply for permits if this one was granted; and that the population of the county had voted it "dry" so it would be in direct opposition to the wishes of the people of the county to issue the private club permit.

The Arkansas Supreme Court dealt with the issue of private clubs in dry counties in the recent case of *Morris* v. *Torch Club, Inc.*, 278 Ark. 285, 645 S.W.2d 938 (1983), where it reversed and remanded the finding of a lower court that held that the permit for serving alcoholic beverages in private clubs in dry counties was not authorized under Act 132 of 1969. While the decision of the Supreme Court recognized that a private club might be operated in violation of the Act, the argument made by the appellees that it "just wasn't right" to have a private club permit in a dry country was rejected in the *Morris* case.

The argument that several motels in the area, which had bars built into them when they were originally constructed but had never been granted private club permits, would also expect to be granted permits if this one was granted, was rejected by the Board. The evidence showed that appellant's restaurant was not part of any motel,

although it was in close proximity to one; but the motel and the restaurant were distinct and separate business entities and had different owners.

The fear of law enforcement officials that alcohol related crime would increase appears from the record to be based upon speculation. The officials offered no facts or figures to support this argument and the chief of police of Hope admitted he had no problems with the Hope Country Club.

The decision of the Board in this case was based on the evidence received. The question on review is not whether the evidence would have supported a contrary finding but whether it supports the finding that was made. *Westerman* v. *Singleton,* 9 Ark. App. 120, 653 S.W.2d 152 (1983). The reviewing court cannot 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*; and the question of whether the Board's action was arbitrary or capricious is only applicable when the decision is not supported on any rational basis and is made in disregard of the facts and circumstances. *First Nat'l Bank of Paris* v. *Peoples Security Bank, supra.*

We think there was substantial evidence in the record to support the Board's finding that granting this private club permit was in the public interest. Therefore, we reverse the decision of the trial court in regard to the issuance of the permit and remand this matter for that court to affirm the Board's decision.

Reversed and remanded.

CRACRAFT and COOPER, JJ., agree.

Moise Joseph GUIDRY, Jr. *v.*
J & R EADS CONSTRUCTION CO.
and USF&G INSURANCE CO.

CA 83-221 669 S.W.2d 483

Court of Appeals of Arkansas
En Banc
Opinion delivered May 16, 1984

James S. Hudson, Jr., for appellant.

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

MELVIN MAYFIELD, Chief Judge. This is an appeal from the Workers' Compensation Commission. The appellant was injured in May of 1980 while working for J & R Eads Construction Company. This resulted in surgery for the removal of a ruptured disc in June of 1980, and appellant was subsequently given a permanent partial disability rating of 10% to the body as a whole and released to return to work on January 5, 1981.

The appellant was paid the benefits required by the 10% disability, but he now contends that this rating is insufficient, that his healing period did not end in January of 1981, that he should be allowed a retroactive change in physicians so that a doctor who has treated him will be paid by appellant's employer, and that he is entitled to future medical treatment. A hearing was held on these contentions and they were denied. The full Commission affirmed.

At the hearing before the administrative law judge the appellant testified that he returned to work for the appellee employer in January of 1981, but after working a few days fell off a ladder because his legs "just gave out." The doctor who performed his original surgery had recommended that he go back to work and appellant was not satisfied with this recommendation so he went to see another doctor. The new doctor hospitalized appellant and on May 6, 1981, performed surgery. He reported to appellant's attorney that a "huge extruded fragment of disc" was removed, apparently from the same disc space operated on by the first doctor. The second doctor estimated a disability of 20% to the body as a whole and another doctor, seen by appellant after this last surgery, estimated his disability at 30%.

At the hearing before the administrative law judge, the appellant admitted that he was involved in an automobile accident in November of 1980. He also admitted that suit was filed against the employer of the driver of the other vehicle for injuries alleged to have been received in that collision by appellant and his wife and daughter who were in the

automobile with him. The complaint specifically alleged that appellant "suffered pain and injuries, including acute lumbar strain and acute aggravation of previous lumbosacral disc disease."

In answers to interrogatories served on him in the tort case, the appellant stated under oath that the injury sustained in the automobile collision aggravated the previous back injury and further surgery was required; that the surgery was performed in the Baptist Memorial Hospital in Little Rock; that as a result of the accident he had been treated by three different doctors; and that he had lost wages at the rate of $5.00 per hour for forty (40) hours each week since the accident. He also admitted that the tort suit was settled but said his wife and daughter received all the proceeds of the settlement and he got nothing.

In denying additional benefits, the Commission said:

> [I]t is apparent that claimant's second injury was not as a result of the May 29, 1980 injury but was as a result of either the automobile accident of November 7, 1980, or the fall from the ladder in January of 1981. In short, obviously, there was a new event that occurred that aggravated claimant's prior injury, and it is axiomatic that aggravations of preexisting injuries are considered, in effect, new injuries and not recurrences of the original injury.

The above statement is then followed by this unfortunate statement:

> In summary, the Workers' Compensation Commission will not award benefits to a claimant who has previously given sworn statements in a pending lawsuit that his physical difficulties relate to a non-job-related automobile accident when he later changes his mind and decides to file a workers' compensation claim for additional benefits.

It is, of course, the duty of the Commission to pass upon the credibility of the parties and witnesses who give evidence

before it. It is not, however, the Commission's prerogative to refuse compensation to a claimant simply because he is untruthful. But even when we regard the statement in the most favorable light, we think this matter should be remanded because the statement also contains the language "it is axiomatic that aggravations of preexisting injuries are considered, in effect, new injuries and not recurrences of the original injury." While the language may be correct in an appropriate situation, we are troubled by it in view of the appellant's argument in this case.

The appellant cites *Moss* v. *El Dorado Drilling Co.*, 237 Ark. 80, 371 S.W.2d 528 (1963), and builds his argument around the following quotation that case makes from 1 Larson, *Workmen's Compensation Law*, § 13.00.

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own negligence or misconduct.

Appellant's brief contains the flat assertion, "There can be no independent intervening cause unless the claimant was negligent or reckless in causing a subsequent injury." We think appellant has misread Larson and *Moss* v. *El Dorado Drilling*. In this case, appellant's fall from the ladder was in the course of his employment by the appellee construction company, so the only independent intervening cause possible is the automobile accident. It did not, however, have to be caused by appellant' negligence or recklessness in order to be an independent intervening cause.

This is made clear in 1 Larson, *Workmen's Compensation Law* § 13.11 at 3-353 (1982), where it is said:

> The issue in all of these cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications. By the same token, denials of compensation in this category have invariably been the result of a

conclusion that the requisite medical causal connection did not exist.

Cases cited in the 1983 Supplement to section 13.11 of Larson's treatise also make it clear that the question is whether there is a causal connection between the primary injury and the subsequent disability and if there is such a connection, there is no independent intervening cause unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. *Medart Div. of Jackes-Evans Mfg.* v. *Adams,* 344 So.2d 141 (Miss. 1977). *See also Richardson* v. *Robbins Lumber, Inc.,* 379 A.2d 380 (Me. 1977); *Schaefer* v. *Williamston Community Schools,* 323 N.W.2d 577 (Mich. App. 1982), and 1 Larson, *Workmen's Compensation Law* § 13.12 at 3-375 through 3-379 (1982). We think the point is plainly stated in this summary in the *Schaefer* case:

> In light of our discussion of Larson and our interpretation of *Adkins,* in our view, where the primary compensable injury arises out of and in the course of employment compensability may be extended to a subsequent injury or aggravation of the primary injury where it has been established that the subsequent injury or aggravation is the direct and natural result of the primary injury and the claimant's own conduct has not acted as an independent intervening cause of the subsequent injury or aggravation.

The Arkansas cases also make this matter plain. The *Moss* v. *El Dorado Drilling* case, relied upon by appellant, quotes from the Arkansas case of *Aluminum Co. of America* v. *Williams,* 232 Ark. 216, 335 S.W.2d 315 (1960). In that case the Commission had found that a second surgical procedure was necessary because of an independent intervening cause. The court reversed that finding for lack of substantial evidence but made no reference to any requirement of negligence or fault on the claimant's part. In *Gibson's Discount Center* v. *Bornmann,* 252 Ark. 24, 477 S.W.2d 171 (1972), the appellant relied upon *Moss* v. *El Dorado Drilling* to support its contention that the claimant's condition was the result of her original injury. The court, however,

affirmed the Commission's finding that her condition was the result of a second injury. Again, no discussion and no mention of the second injury being caused by the claimant's fault or negligence. We therefore conclude - contrary to the appellant's contention - not only can there be an independent intervening cause without negligence or recklessness on the claimant's part, but unreasonable conduct on a claimant's part may create an independent intervening cause which would otherwise not exist.

As we have pointed out, compensation cannot be denied to a claimant simply because he is untruthful. Moreover, as we have indicated, in view of the appellant's contention that there is no independent intervening cause in this case, we are not sure that the Commission's findings really met the issue presented. For these reasons this matter is reversed and remanded for reconsideration in keeping with this opinion.

Remanded.

CLONINGER and GLAZE, JJ., dissent.

LAWSON CLONINGER, Judge, dissenting. I respectfully dissent from the majority decision in this case. *Moss* v. *El Dorado Drilling Co.*, 237 Ark. 80, 371 S.W.2d 528 (1963), citing from 1 Larson, *Workmen's Compensation Law*, § 13.00, specifically states:

> When the primary injury is shown to have arisen out of and in the course of an employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause *attributable to claimant's own negligence or misconduct.* (Emphasis added)

From a reading of this rule, it is my opinion that an independent intervening cause can only defeat a claim which is otherwise compensable if it is caused by the claimant's own negligence or misconduct. This rule still requires that in order to be compensable, it must be a "natural consequence that flows from the injury."

In *Aluminum Co. of America* v. *Williams,* 232 Ark. 216, 335 S.W.2d 315 (1960), the Arkansas Supreme Court again cited the rule stated above from Larson's treatise. The majority opinion emphasizes the fact that although the court reversed a finding by the Circuit Court that a second surgical procedure was made necessary because of an independent intervening cause, the opinion made no reference to any requirement of negligence or fault on the claimant's part. However, the court did cite the rule from Larson's treatise which, in its fact, seems clear. Further, it is intereting to note that in that opinion, the Supreme Court cited testimony of the claimant that the incident occurred when he arose from a chair at his home. The court also made note of the fact that the claimant had been doing some painting during the week in question but that he had not done anything that would have hurt his back.

For the above stated reasons, I would reverse the finding of the Commission that claimant's injury was not compensable. The claimant in this case was not engaged in any activity which could be considered negligence or misconduct, and the evidence clearly indicates that the subsequent episode "flowed from the original injury."

TOM GLAZE, Judge, dissenting. The Commission found appellant's second surgery was not a result of the May 29, 1980, injury, but was a result of either the automobile accident of November 7, 1980, or the fall from a ladder in January of 1981. Such a finding was clearly supported by substantial evidence, particularly that medical evidence showing appellant's condition that required the second surgery was caused by the vehicular accident. The majority does not actually deny that such substantial evidence exists, but it remands the case because it infers from one of the Commission's statements that the Commission actually refused compensation to the appellant because he was untruthful. I do not agree with the majority's interpretation of what the Commission found and held. Appellant's credibility was an issue, and in view of all the evidence, the Commission simply did not believe or accept the appellant's arguments concerning the effect of his automobile accident. Credibility is always a matter lying exclusively within the

province of the Commission. Here, the Commission resolved that credibility issue against appellant; merely because the Commission found that the appellant lacked credibility is no reason to remand this matter for further proceedings. Because substantial evidence supports the Commission's denial of benefits, our remanding this matter will unnecessarily prolong this cause, and will in no way change the result. I would affirm.

Delmer G. OSBORN and Frances A. OSBORN *v.* Johnnie P. WILSON and Eunice L. WILSON

CA 83-264 669 S.W.2d 481

Court of Appeals of Arkansas
Division I
Opinion delivered May 16, 1984

Bill F. Doshier, and *Dan R. Bowers,* for appellant.

Smith & Kelly, by: *Kenneth R. Smith,* for appellee.

GEORGE K. CRACRAFT, Judge. Appellants bring this appeal from an April 23, 1983 order of the chancery court extending the time for filing the record on appeal contending that the trial court erred in ordering the extension at a hearing conducted on less than ten days' notice to them. We do not agree that the trial court must require ten days' notice or that the appellants were entitled to receive more than "reasonable" notice of the hearing.

The decree appealed from was entered on December 31, 1982. On January 25, 1983 the appellees filed a timely notice of appeal and ordered a transcript of the evidence. On April 14th the appellees filed a petition for an extension of time in which to file the transcript on appeal and gave appellants notice that the application for the order would be presented to the court on April 20, 1983. A copy of the notice was received by appellants' counsel on April 15th. On April 19th the appellants filed a motion in opposition to the petition for an extension asserting that the court should conduct no hearing on that motion until "after sufficient time has elapsed from the filing of the petition to give the defendants sufficient time to prepare their defense to the petition."

On April 20th the hearing on the petition for an extension was reset for April 23rd at which time the appellants again objected to a hearing before the expiration of the time for filing a response, which he contended was ten days as provided in ARCP Rule 6(c). Counsel candidly admitted that he could have easily responded to the motion within the eight days between the date he received notice and the date of hearing but that his duty to his client required that he rely on any technicality which might cause the time for perfecting the appeal to expire before the hearing was held.

The court reporter testified that the term of the chancellor hearing the case had expired on December 31, 1982 and at that time he had had a number of cases under

submission. She stated that a number of those cases were finally decided and decrees and orders entered during the last few days of his term. Five of those orders were appealed from and those transcripts would all be due at the same time. She stated that the trial of this case lasted five days, that the transcript would consist of over 1700 pages and that it was impossible for her to complete the transcript without an extension of time.

In granting the extension the chancellor made the following findings:

> 1. That the appellants' application for an extension of time was timely filed; that notice was given to opposing counsel and that all requirements of the rules have been met.
>
> 2. That due to the heavy workload of the court reporter and the number of transcripts she is presently working on and the size of this transcript, it is impossible for her to complete the transcript of the testimony in time for the record to be prepared and filed, and that she needs the maximum time of seven months in which to prepare the transcript of the testimony in this matter.

Ark. R. App. P. Rule 5(b) governs the granting of extensions of time in which to file a transcript on appeal. It provides that in those cases where a trial is stenographically reported, on a finding that the transcript has been ordered by the appellant and the further finding that an extension is necessary for the inclusion in the record of evidence stenographically reported, the court may extend the time for filing the record on appeal for a period not to exceed seven months from the date of entry of the judgment. It further provides that counsel seeking an extension shall give the opposing counsel notice of the application for an extension of time.

The appellants contend further that the courts have not declared the meaning of the word "notice" in Ark. R. App. P. 5(b) and that it should therefore require ten days' notice as

set forth in ARCP Rule 6(c). Although Ark. R. App. P. Rule 5(b) states no specific time requirement as to notice, the history of the notice requirements on petitions for extension as set forth in *Gallman* v. *Carnes*, 254 Ark. 155, 492 S.W.2d 255 (1973) and the court's pronouncements in that case make it clear that the only requirement is for "reasonable notice" within the discretion of the trial court.

As recited in *Gallman*, Ark. Stat. Ann. § 27-2127.1 (Repl. 1962) as originally enacted provided that the court in its discretion might grant an extension of time "with or without notice to opposing counsel and without specifying a reasons for the request if granted within a period previously allowed." In order to reduce the delay in the appellate process the legislature by Act 206 of 1971 added an additional condition to the granting of extensions by providing that they could be granted only on a showing that the appellant had ordered the transcript of the stenographically reported evidence. In *Gallman* the court construed those conditions to require that a hearing be held and in announcing its attitude toward the hardships which rigid enforcement might impose stated:

> Nevertheless, to avoid unnecessary hardship to litigants who are not themselves at fault, we think it best to allow a short period of grace before the provisions of Act 206 will be routinely applied. Moreover, we think it desirable that applications for extensions of time be considered by trial courts only after *reasonable notice* to other attorneys in the case. We are therefore adopting today by per curiam order a rule implementing § 27-2127.1 as amended.

Appended to *Gallman* was a per curiam order adopting former Ark. Sup. Ct. R. 26(A) which provided that a trial court might extend the time allowed for the docketing of an appeal if it found that the extension was related to the inclusions of stenographically reported evidence and entered the order of extension before the expiration of the period originally prescribed. It concluded that counsel seeking such an extension of time shall give opposing counsel notice of the application for an extension of time.

Although Ark. Sup. Ct. R. 26(A) stated no fixed period of notice it is clear from the *Gallman* decision that only reasonable notice was required. Effective July 1, 1979, Ark. Sup. Ct. R. 26(A) was superseded by present Ark. R. App. P. 5(b). See Reporter's Notes to Ark. R. App. P. 5.

Appellants argue that ARCP Rule 6(c) superseded Ark. R. App. P. 5(b). However, ARCP Rule 81 provides that the rules of civil procedure apply to "civil proceedings in chancery, circuit and probate courts." Ark. R. App. P. 1 provides that those rules govern the procedure on appeals to the Arkansas Supreme Court and Court of Appeals. Former Ark. Sup. Ct. R. 26(A) was deemed superseded by Ark. R. App. P. 5(b) in the same per curiam order in which the rules of civil procedure were deemed to have superseded prior law applicable to civil proceedings in the trial courts.

While we do not agree with counsel that Rule 6(c) has any applicability to appellate procedure, we point out that even that rule does not require that ten days' notice be given in every case. It provides only that ten days' notice be given for the hearing, unless a different period is fixed by these rules or by an *order of the court.*

We find no error and affirm.

CORBIN and COOPER, JJ., agree.

ARKANSAS LOUISIANA GAS COMPANY, A Division of ARKLA, INC. *v.* Norris G. DOWNS and Earline P. DOWNS

CA 83-262 669 S.W.2d 478

Court of Appeals of Arkansas
Division II
Opinion delivered May 16, 1984

Daily, West, Core, Coffman & Canfield, by: *Wyman R. Wade, Jr.,* for appellant.

Hixson, Cleveland & Rush, by: *Herschel W. Cleveland,* for appellee.

TOM GLAZE, Judge. This appeal results from an eminent domain proceeding in which a jury awarded appellees $15,000 damages. On appeal, appellant Arkansas Louisiana Gas Company (Arkla) contends (1) there was insufficient, competent evidence to support the verdict, and (2) that the trial court erred (a) in not striking the testimony of appellee Downs concerning after value, (b) in permitting appellees' counsel in his opening statement to note past dealings between the parties, and (c) in denying appellant's motion for a mistrial.

In August of 1981, Arkla entered into an agreement with George L. Terry to construct a roadway, dehydrator, separator and a tank lot on property Arkla believed Terry owned. In March of 1982, Arkla learned that the property was actually owned by the appellees, Norris and Earline Downs. After the Downs got a restraining order to keep Arkla off their property, Arkla sought and was granted an order of entry to permit them to complete the project and to maintain and service the equipment. Subsequently, a jury trial was held to determine what, if any, damages were sustained by the Downs because of the contruction.

In challenging the jury's verdict in this appeal, appellant contends the testimonies of appellee, Mr. Downs, and of appellees' expert, "Butch" Wade, were insufficient to support the jury's verdict of $15,000. It also argues the trial court should have stricken Mr. Downs' testimony because he failed to state a reasonable basis for his opinion.

We first consider the testimony of Mr. Downs. Downs testified that he acquired his 58-acre farm in 1971, and that he believed his property was worth $750 per acre prior to the taking and construction by appellant. He testified further that, in his opinion, the land had decreased in value to $400 per acre because of the taking so that the difference in the

before and after values of the 57 acres was $20,700.[1] Appellant points to various parts of Downs' testimony and concludes there is no basis for the damages he claims. For example, appellant relates that Downs was not qualified as an expert; he did not specify or calculate his loss; he did not claim that the highest and best use for his remaining more-than-57 acres had been altered; he valued the .52 acre that was taken at $4,000, but admitted he had never actually planned to develop that property as a home site; and he was not familiar with any nearby land prices or sales.

Of course, the principle is well established that a landowner may testify to the value of his lands, despite his lack of knowledge of property value, if a satisfactory explanation is given for his conclusion. *Arkansas State Highway Commission* v. *Cottrell,* 9 Ark. App. 359, 660 S.W. 2d 179 (1983); *see also Arkansas State Highway Commission* v. *Maus,* 245 Ark. 357, 432 S.W.2d 478 (1968). Although Downs might have strengthened his testimony by supplying detailed losses or comparable sale figures, it cannot be said seriouly that he had no reasonable basis for his opinion about the value of the land.

Downs and his wife have lived on the 58-acre farm for twelve years. He has used the property to raise chickens, run cattle and grow hay. He testified that the .52 acre taken by appellant was located on the highest point and in the center of his property. Downs said that the large dehydrator and the tank — which extends twenty feet above the ground — are visible from anywhere on the property. Besides being aestheticly displeasing to Downs, he testified that he lost that portion of the property for grazing purpose and for raising hay. Too, he added that he and his wife had discussed building a house at the same spot on which the unit was built. Finally, Downs further related that noise, a "rotten" odor and "clouds like soapsuds" emanated from the unit. Reviewing all of Downs' testimony, we believe that he clearly demontrated the necessary familiarity with his

[1]In his calculations, Mr. Downs excluded the acre taken when he figured the after value. Thus, the before value, $750 X 58 acres, minus the after value, $400 X 57, equals the difference, $20,700.

property upon which he based an opinion concerning its value.

Next, we consider appellant's challenge of the testimony given by appellees' expert, Mr. Wade. Wade opined that total damages to the Downs were $16,600, *viz.*, $12,000 damages for the difference between the before an after value of the land, $4,000 for the .52 acre actually taken and $600 for the loss of land on which the roadway was built and for the pasture. Appellant primarily attacks Wade's opinion testimony because, it argues, Wade admitted that he did not have a single example of the market value of grazing land having decreased in value because of the existence of a dehydrator. Appellant contends that expert testimony similar to Wade's was determined incompetent and stricken in *Arkanas-Missouri Power Co.* v. *Sain,* 262 Ark. 326, 556 S.W.2d 441 (1977). In *Sain,* the Arkanas-Missouri Power Company had condemned seven acres through a farm for the purpose of obtaining an easement for a transmission line. The Supreme Court, noting that "the expert on cross-examination admitted that he could not think of a single instance where a transmission line had any effect on the market value of the property," held the expert's testimony that the damages amounted to $27,197 did not have a sound and reasonable basis. *Id.* at 327-28, 556 S.W.2d at 442. The Supreme Court's holding in *Sain* is not controlling here, however, because Wade did have personal knowledge of a piece of property with a facility like that constructed on the Downs' property. In fact, Wade testified that he listed such property but "never got the opportunity to show it [because] they did not want to be near a facility like that." *Cf. Fulmer* v. *Southwestern Bell Telephone Co.,* 9 Ark. App. 92, 654 S.W.2d 603 (1983). In addition, Wade used comparable sales to support his value opinion. One comparable included a forty-acre farm located in Logan County that sold for $721 an acre about four months before the trial in this cause. Wade testified this forty-acre tract had "no road to it when it was purchased at that price" and it was "similar-type property but not as cleared and clean as this [Downs'] property." Another comparable given by Wade was property adjacent to the Downs' farm that sold at $780 per acre. Wade emphasized that the knoll on which appellant built its unit is the high

point — which is also the best view — of the Downs' property. He explained that because that knoll was the best acre on the farm and was in the center of the tract, the dehydrator's presence on that spot affected the property's market value to a buyer who wanted the land for a home and for grazing. Wade also considered the noise, smell, looks, fire and view as factors when arriving at his before and after value figures. In sum, he bound his diminution in the value of the acreage surrounding the acre in the middle of the farm land upon his "fifteen years of experience with buyers and what they prefer." From our review of the record, we believe the testimonies of both Downs and Wade are competent and substantially support the jury's verdict. *Butler* v. *Arkansas State Highway Commission,* 6 Ark. App. 267, 640 S.W.2d 467 (1982).

For its third point, appellant contends that the trial court erred in permitting the jury to hear and consider certain historical recitations about past dealings between appellant and appellees. Appellant's objection stems from remarks made by appellees' counsel in opening statement to the effect that appellant had gone to the appellees prior to this taking to request permission to survey the property, which request, according to appellees' counsel, was granted. Appellant's counsel objected at trial, and the court sustained the objection and warned appellees' counsel to deal only with the value of the property. On appeal, appellant contends the reference was so damaging that the court should have admonished the jury to disrgard the statement. However, the record does not indicate that appellant requested an admonition; therefore, the trial court did not err in not admonishing the jury. *Rickett* v. *Hayes,* 256 Ark. 893, 511 S.W.2d 187 (1974).

Appellant's last argument is that the trial court erred in not granting a mistrial when appellees' expert witness stated that one of his considerations in appraising the property was "the liability exposure." Appellant cites no authority for the proposition that a statement concerning potential liability is prohibited in an eminent domain proceeding. The trial court did prohibit the witness from making further references to possible liability of the appellees, and on its

own motion, the court admonished the jury to ignore the witness's comment. A trial court is vested with considerable latitude and discretion in granting or denying a mistrial. *Dickeron Construction Co.* v. *Dozier,* 266 Ark. 345, 584 S.W.2d 36 (1979). It is an extreme measure to be taken only when it is apparent that justice cannot be served by continuing the trial. *Morton* v. *Wiley,* 271 Ark. 319, 609 S.W.2d 332 (1980). We find no abuse of discretion in the trial court's action in denying appellant' motion for mistrial. If error resulted from the remark, we believe it was cured by the trial judge's admonition to the jury.

Because we find substantial evidence to support the jury's verdict in favor of a $15,000 award to appellee, we affirm.

Affirmed.

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

Ellen LUNSFORD *v.* Henry JONES

CA 84-107 669 S.W.2d 16

Court of Appeals of Arkansas
Opinion delivered May 16, 1984

Fletcher Long, for appellant.

M. Randy Rice, for appellee.

PER CURIAM. The appellee has filed a motion to dismiss this appeal because of appellant's failure to file her brief when due. Appellant's response states that she did not receive a briefing schedule from the clerk's office and she requests that a new briefing schedule be established and she be allowed to file her brief in accordance with that schedule.

We deny the appellee's motion to dismiss the appeal and grant appellant twenty (20) days in which to file her brief. We note, however, a recent tendency on the part of appellants to overlook Supreme Court and Court of Appeals Rule 7 which provides that in all civil cases the appellant's abstract and brief shall be filed within forty (40) days of lodging the record on appeal.

We also note an increasing tendency to overlook the provision of Rule 7 that requires the appellee's brief to be filed within thirty (30) days after the appellant's brief has been *filed* even if the appellant's brief is filed early.

These time periods are fixed by the rule and do not depend upon notification by the clerk of the court. Therefore, it is important that the bar keep these provisions in mind.

Jackie PARKS *v.* STATE of Arkansas

CA CR 83-188 669 S.W.2d 496

Court of Appeals of Arkansas
Division II
Opinion delivered May 23, 1984

John A. Buckley, Jr., for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Dep. Atty. Gen., for appellee.

GEORGE K. CRACRAFT, Judge. Jackie Parks was found guilty of two counts of violation of the Controlled Substances Act. He was sentenced to a term of six years in the Department of Correction on one count and was fined $1,000 on the second one. He appeals only from the first conviction.

The appellant first contends that the trial court erred in denying his motion to sever the offenses and subjecting him to one trial on both counts. We do not agree.

Appellant was charged in separate informations with having violated the Controlled Substances Act by selling marijuana on October 20, 1982 and on October 29, 1982. The record does not contain the Information or any earlier pleadings concerning the charge growing out of the October 20th transaction which might have been filed prior to the date of arraignment on April 15, 1983. Although the record does contain the order of consolidation of the two cases it is clear that at least by the date of arraignment the cases had been consolidated and set for trial on May 9, 1983.

On the morning of trial, after the jury had been qualified and sworn, the appellant orally moved to sever the offenses. The court ruled that in its discretion it had consolidated the cases for trial and denied the motion to sever as untimely made. The appellant contends that this was error because there was no evidence that the two offenses

were part of a single scheme and that they had been joined for trial solely on the ground that they were of the same or similar character. This argument was not made to the trial court, where no basis for the severance was asserted.

A.R.Cr.P. Rule 22.1(a) requires such a motion to be made before trial, or at the close of all the evidence if based upon a ground not previously known, and further provides that severance is waived if the motion is not made at the appropriate time. The record reflects that the fact that these two cases had been consolidated for trial was known to the appellant at least thirty-four days before the date of trial. He had full access to the prosecuting attorney's files on both counts. No pretrial motion for severance was made. Appellant did not make his motion until the morning of the trial and after the jury had been qualified and sworn. It is well settled that the trial court's action with regard to matters of severance lies within the sound discretion of the trial judge and will not be reversed absent a showing of abuse. *Brown* v. *State,* 5 Ark. App. 181, 636 S.W.2d 286 (1982); *Hallman & Martin* v. *State,* 264 Ark. 900, 575 S.W.2d 688 (1979).

Furthermore, A.R.Cr.P. Rule 22.1(b) provides that if a pretrial motion for severance is overruled the appellant may renew the motion on the same grounds before or at the close of all of the evidence and the argument is waived by failure to renew the motion. At the time the oral motion was made there had been nothing presented to the court on which a determination of whether the two offenses were or were not part of a single plan or scheme could have been made. After evidence was presented on which the court might have made the finding there was no renewal of the motion. We find no error or abuse of the trial court's discretion.

On April 15th the cases had been set for trial on Monday, May 9, 1983. On Friday, May 5 the appellant filed a motion to have the State disclose the identity of the confidential informant who had been working with the police officers in several transactions including those with the appellant. No action was taken on that motion until after the jury had been qualified and sworn. At that time the

appellant presented his motion contending that the State should be required to disclose the identity of the confidential informant. The court noted that such matters should be taken up long before the day of trial and empanelling of the jury and denied the motion as untimely. Appellant did not move for a continuance on this basis.

The question of whether and under what circumstances disclosure of the identity of a confidential informant is required has been before the courts on many occasions. *State* v. *Lechner,* 262 Ark. 401, 557 S.W.2d 195 (1977); *Brothers* v. *State,* 261 Ark. 64, 546 S.W.2d 715 (1977); *Hooper & Westlin* v. *State,* 257 Ark. 103, 514 S.W.2d 394 (1974); *West* v. *State,* 255 Ark. 668, 501 S.W.2d 771 (1973); *Roviaro* v. *United States,* 353 U.S. 53 (1957). Often this determination is based on whether the informant was present or participated in the illegal act or merely furnished information of criminal activity to law enforcement officers. The testimony of an informant who has been a witness or participant in the illegal activity may in most cases be the only means by which the accused can amplify, modify or contradict the testimony of a prosecuting witness and therefore may be essential to the preparation of a defense. Where the informant merely furnished information to the officers and has no knowledge of the facts and circumstances surrounding the arrest or illegal activity, his testimony in most cases may be neither relevant nor helpful to the defense.

The cases make it clear that there is no fixed or inflexible rule for determining whether disclosure should be required. That determination requires a balancing of the public interest in continued communication resepcting illegal activities by preserving anonymity, against the rights of the accused to prepare an adequate defense. It must depend on the particular circumstances of each case and generally disclosure is required when those circumstances reveal that the informant's testimony may be relevant and helpful to the defense.

In the particular circumstances of this case we would find no error in the court's determination that this informant possessed no knowledge which was vital to the

appellant's defense and that he was not a participant in or witness to the illegal activity. The record reflects that the police officer who testified was engaged in an undercover narcotics operation in the Texarkana area utilizing information from a confidential informant paid by the Miller County Sheriff's Office. He made contact with persons suspected of engaging in illegal activities through Johnny Sams who did not know that the other two were involved in law enforcement.

On October 29, 1982 Sams "set up a buy" for the officer from the appellant which was to take place in appellant's apartment. The confidential informant was not present when Sams made these arrangements with the appellant but was informed of them by Sams. The informant then relayed this information to the officer by telephone. The officer and Sams went to appellant's apartment and negotiated the purchase of a quarter pound of marijuana for $140. Appellant then made a telephone call and informed the officer that the marijuana would be delivered to his apartment "right away." Sams and the officer waited for the delivery and when it did not arrive within a reasonable time they left and returned to the confidential informant's apartment to wait for a call from the appellant. After waiting there for a period of time the officer and informant left the apartment and drove downtown for purposes which were not shown to have been connected with the appellant. While en route they passed a vehicle occupied by three persons, one of whom was the appellant, who signaled to the officer to stop in a parking lot. On the parking lot the informant walked over to the other vehicle and engaged the two occupants in conversation. The appellant walked over to the officer's car, got in the back seat with the officer and delivered the marijuana in exchange for the agreed price.

The confidential informant was not present in appellant's apartment when the sale was negotiated. He neither witnessed nor participated in those discussions in that part of the transaction but merely furnished information about it to the officer by telephone. At the time the transaction was consummated the informant was not present but was engaged in conversation elsewhere. There was no evidence

that he witnessed the transaction or participated in it in any way. In the particular circumstances of the case we find no error in the court's ruling.

At the same time the motion to disclose was presented, appellant orally moved for a continuance on the ground of inability to communicate with the appellant for preparation for trial. The appellant contends that it was error for the court to overrule that motion. We do not agree. Counsel stated that he had attempted to contact the appellant several times but had only been able to contact him on one occasion. He stated that he believed the appellant was reluctant to contact him because his fees had not been paid and that the first opportunity he had to discuss the case with appellant was on the morning of trial.

Whether to grant a continuance is a matter lying within the sound discretion of the trial court and will not be overturned on appeal absent a showing of clear abuse of discretion. The burden lies with the appellant to demonstrate both the abuse and resulting prejudice. *Walls* v. *State,* 8 Ark. App. 315, 652 S.W.2d 37 (1983), aff'd 280 Ark. 291, 658 S.W.2d 362 (1983); *Russell & Davis* v. *State,* 262 Ark. 447, 559 S.W.2d 7 (1977). It is noted here that the failure of communication was brought about by the appellant himself. Nor did the appellant support his request for a continuance with any information regarding additional witnesses or evidence which might have been developed with more time. It has also been held that the fact that the motion is not made until the day of trial is an important consideration. *Tyler* v. *State,* 265 Ark. 822, 581 S.W.2d 328 (1979). We find no error in the trial court's ruling.

During cross-examination of one of the police officers the witness testified that Sams and the confidential informant involved in this case had arranged drug transactions with two or three other persons. The court sustained an objection to a question seeking the identity of those other persons. Appellant then asked the officer if he made buys from the other person. The trial court sustained the objection to that question. The appellant argues that he was attempting to show the jury that appellant's role in the drug

transactions was minor compared to that of the informant. We agree with the trial court that this was not relevant to any issue in the case or to the credibility of any witness or to the weight to be accorded to his testimony. The fact that other persons were more deeply involved in violation of the controlled substances law is wholly irrelevant to the issue of the guilt or innocence of the appellant.

The court also sustained an objection during cross-examination of the police officer as to the criminal record of Sams. He argued that this was material to his credibility and prevented the jury from hearing evidence related to the defense of entrapment. Sams did not testify and his credibility was not in issue. The only evidence of guilt presented was from the police officers involved in the actual transaction. Nor would the fact that the informant had been previously convicted of unrelated felonies be relevant to his conduct with regard to the defendant or probative on any issue surrounding the defense of entrapment.

During the direct examination of the police officer defense counsel objected several times to the witness's testifying in narrative form. These objections were overruled. The record discloses that the answers referred to were in response to questions as to what discussions took place between the officer and the appellant at the time the purchase of the marijuana was negotiated. During the argument on objections the prosecuting attorney stated that he was "getting a little tired of Mr. Buckley's running the court in trying to order the prosecution on how to answer questions, what to do and what is not proper." Appellant contends that the trial court should have granted his motion for mistrial. The trial court is afforded wide discretion in controlling examination of witnesses during the course of the trial and may permit narrative testimony that will expedite the trial and create no prejudice. *Kitchen* v. *State,* 271 Ark. 1, 607 S.W.2d 345 (1980); 98 C.J.S. *Witnesses* § 325 (1957). The granting of a mistrial is a drastic remedy and should be granted only when justice cannot be accomplished by continuing the trial. It is a discretionary matter and we cannot say that the judge abused that discretion. *King* v. *State,* 9 Ark. App. 295, 658 S.W.2d 434 (1983). The

remarks here were no more than that usually unnecessary banter which counsel often feel compelled to engage in. *Swaite* v. *State,* 274 Ark. 154, 623 S.W.2d 176 (1981). If appellant felt that the trial court should have admonished the jury to disregard the statement he should have asked the court to do so but he did not.

Appellant next contends that the trial court erred in refusing to give his proffered instruction on entrapment. We conclude that the trial court ruled properly because the appellant failed to proffer a complete instruction and because the evidence did not support the giving of an instruction on that defense. Appellant offered an instruction containing the language of AMCI 4009 which did give an accurate definition of the defense of entrapment and told the jury that the defense must be proved by a preponderance of the evidence, but it did not contain a definition of preponderance of the evidence and failed to advise the jury how to weigh the evidence of an affirmative defense in light of the State's burden of proof. A party may not complain of the refusal of a trial court to give an instruction which is only partially correct as it is his duty to submit a wholly correct one. *Johnson* v. *State,* 6 Ark. App. 342, 642 S.W.2d 324 (1982); *Ellis* v. *State,* 267 Ark. 690, 590 S.W.2d 309 (Ark. App. 1979); *Moser* v. *State,* 262 Ark. 329, 557 S.W.2d 385 (1977).

Appellant did not testify and there was no other evidence of any acts constituting entrapment. To warrant the giving of the instruction there must be some evidence on which the jury could find that the officers or the confidential informant had induced the commission of the crime by persuasion or other means. Based on the State's evidence the narcotics officer acted on information supplied to him by an informant that the apellant would sell him marijuana. There is nothing in the record indicating that either the officer or the informant induced or persuaded the appellant to sell. To the contrary the evidence clearly indicates that the appellant was ready, willing and able to make the sale and was merely afforded the opportunity. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment. *Harper* v. *State,* 7 Ark. App. 28, 643 S.W.2d 585 (1982).

During closing arguments the prosecuting attorney argued the fact that a drug dealer may be "part of a ring" in the sense that he goes and gets the substance from somebody else does not make him any less guilty. The appellant contends that this was reversible error because the argument was not supported by evidence of a "ring" and that the court in overruling the objection gave the argument the endorsement of the court. We do not agree.

Throughout the trial appellant attempted to show that there were people involved in these transactions other than himself and even argued that he was not the owner of the marijuana but was only the delivery person. In his argument to the jury appellant's counsel emphasized the fact that on the two occasions in which the police officers came to appellant's house he had no marijuana and "was sitting in his house minding his own business." He argued that he had to go to someone else's house to get it and bring it back to consummate the sale. He further argued that the informants who set up the sale had not been arrested and that the appellant was "what you call a conduit or an agent" just like Sams or the confidential informant who were not charged. He further argued that where the appellant had no marijuana when first contacted "if Jackie had had the marijuana, they would have gotten it two hours ago. This marijuana came from someone else." Under the circumstances the State's rebuttal argument would appear to be proper and invited by defense counsel's remarks. *Orsini* v. *State,* 281 Ark. 348, 665 S.W.2d 245 (1984).

Furthermore there was no request for a mistrial or an admonition to the jury at the time the objection was made. It was noted from the record that the jury was instructed by the court that remarks of counsel were not evidence. The appellant has demonstrated no prejudice resulting from the argument.

After the jury had retired to consider its verdict it returned a finding of guilty in both cases. The jury was polled and excused. The trial court sentenced the appellant in accordance with the jury's verdicts. After pronouncing that sentence the trial court stated that the appellant

was fortunate that the jury had not been aware of prior convictions for aggravated robbery, negligent homicide and theft by receiving. It was then established by appellant's counsel that he had only been convicted of the robbery charge and that the theft by receiving charge had been dismissed. There was no conviction for negligent homicide. Appellant argues that this remark was critical of the verdict and an indication that the court felt the jury should have imposed a heavier sentence. We attach no such meaning to his statement. Furthermore defense counsel did not object to the court's remarks. He also argues that the court did not ask appellant if he had any legal cause to show why judgment should not be pronounced against him as provided in Ark. Stat. Ann. § 43-2303 (Repl. 1977). These issues were not raised in the trial court and may not be raised here in accordance with our established rule. *Brown* v. *State,* supra.

Affirmed.

COOPER and CLONINGER, JJ., agree.

Edward WHALEY *v.* STATE of Arkansas

CA CR 84-6 669 S.W.2d 502

Court of Appeals of Arkansas
Division II
Opinion delivered May 23, 1984
[Rehearing denied June 20, 1984.]

Boyett, Morgan & Millar, P.A., for appellant.

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

GEORGE K. CRACRAFT, Judge. Appellant appeals from his conviction of manslaughter, for which he was sentenced to four years in the Department of Correction, after a jury found him guilty of unlawfully and recklessly causing the death of Byron Joe Whaley. In support of its position the State introduced evidence that on the evening of May 1, 1982, a vehicle driven by the appellant and being operated in a reckless manner passed several vehicles on the highway at speeds in excess of 90 to 100 miles per hour. The State presented both eye-witness and expert testimony that while the appellant's vehicle was traveling at an extremely high rate of speed he attempted to pass a tractor-trailer, lost control of the vehicle, swerved onto the shoulder of the road, spun around and crashed into the tractor-trailer. Byron J. Whaley, a passenger in the appellant's vehicle, was killed in the crash.

The appellant does not contend that the finding of guilt is not supported by substantial evidence. He argues only that by admitting some of the evidence considered by the jury in arriving at its verdict the court committed prejudicial error. We do not agree.

In support of its charge that the appellant had acted recklessly the State introduced evidence to show that he had been drinking heavily on the afternoon before the accident.

Several witnesses testified to the large amount of alcohol the appellant had consumed. One witness testified that appellant had consumed "a half a case of beer." Officer Gentry who investigated the accident testified that he spoke with the appellant immediately after the accident and advised him of his *Miranda* rights. He stated that he smelled alcohol on his breath and asked him if he had been drinking. He stated that the appellant admitted to having had only two or three beers. Over appellant's objection the officer was permitted to testify that he had asked the appellant to submit to a blood alcohol test but appellant had refused.

Appellant argued in the trial court, as he does here, that as the evidence disclosed that the officer did not advise the appellant that if he objected to the taking of his blood a breath or urine test might be taken at his own expense, all testimony with regard to the test was inadmissible under the provisions of Ark. Stat. Ann. § 75-1045 (Repl. 1979). Ark. Stat. Ann. § 75-1045(a) (Repl. 1979) provides that any person operating a vehicle on the highways of this state shall be deemed to have given consent to the taking of a chemical test of his blood, breath or urine for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while driving a motor vehicle under the influence of intoxicating liquor. It further provides that the law enforcement agency by which the arresting officer is employed shall designate which of those tests shall be administered but grants to the arrested person the alternative of having additional tests made as provided in paragraph c(3) of that statute which follows:

> The person tested may have a physician, or a qualified technician, registered nurse or other qualified person of his own choice administer a complete [chemical] test or tests in addition to any administered at the direction of a police officer. The law enforcement officer shall advise such person of this right. The refusal or failure of a law enforcement officer to advise such person of this right and to permit and assist the person to obtain such test or tests shall preclude the admission of evidence relating to the test or tests [taken] at the

direction of a law enforcement officer.

This argument was rejected by the court in *Fletcher* v. *City of Newport,* 260 Ark. 476, 541 S.W.2d 681 (1976). There the court said:

> In the instant case appellant never took the test, and, therefore, there were no results to exclude. He refused to submit to the test because, according to his own testimony, he thought he would be declared guilty no matter what the outcome revealed. It naturally follows that appellant, in not having any test results introduced into evidence against him, was not deprived of the right the statute cited is intended to insure. Thus this contention is wholly without foundation.

Other arguments appellant makes in his brief were not raised in the trial court. (Counsel for the appellant on this appeal did not represent him in the trial court.) Under our well established rule we will not consider issues raised for the first time on appeal.

The appellant next argues that the trial court erred in permitting a lay witness to express his opinion that the high rate of speed at which appellant's vehicle was traveling could have attributed to the accident. Appellant contends this opinion was not admissible under Unif. R. Evid. 701 and 704.

The witness testified he saw the accident and that the appellant passed him at a high rate of speed approximately 300 yards from where the accident occurred. He estimated that appellant's vehicle was traveling between 90 and 100 miles per hour when he passed him.

This witness was then asked:

> Q. In your opinion do you think that the high rate of of speed could have attributed to the accident?
>
> A. Yes, very definitely.
>
> DEFENSE COUNSEL: Your Honor, I move that that

> be stricken from the record. His opinion is . . . there is not proper foundation laid to qualify him as an expert witness to give that opinion.
>
> THE COURT: The objection is overruled and exceptions are noted.

Unif. R. Evid. 701 provides that a witness not testifying as an expert may give opinion evidence only if it is rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue. Clearly it is not required in all circumstances that a witness be qualified as an expert in order to state an opinion. Unif. R. Evid. 704 states that opinion testimony which is otherwise admissible is not objectionable because it embraces an ultimate fact issue. The objection made at trial was not that the lay witness's opinion did not meet the criteria of Unif. R. Evid. 701, but only that the witness had not been qualified as an expert. The appellant in his brief argues to us, however, that it was error to permit the witness to testify or to express an opinion on an ultimate issue of fact to be determined by the jury, and relies upon the standards set forth in *Ethridge* v. *State,* 9 Ark. App. 111, 654 S.W.2d 595 (1983). We do not need to determine whether *Ethridge* applies because that was not the basis of the objection made to the trial court. It is well established that a timely objection must be made to preserve an alleged error for review and the only specific objection available on appeal is the specific objection made in the trial court. All other specific objections are waived. *Wilson* v. *State,* 9 Ark. App. 213, 657 S.W.2d 558 (1983).

The appellant finally argues that the court erred in admitting the testimony of a state trooper as to the speed at which the appellant's vehicle was traveling at the time of the accident because he had not been properly qualified as an expert. It is well established that the determination of an expert's qualifications as a witness is within the sound discretion of the trial court and, absent an abuse of this discretion, his decision will not be reversed on appeal. *Harper* v. *State,* 7 Ark. App. 28, 643 S.W.2d 585 (1982); *Smith* v. *State,* 258 Ark. 601, 528 S.W.2d 389 (1975); *Ray* v. *Fletcher,*

244 Ark. 74, 423 S.W.2d 865 (1968). Here the officer testified that he had been a state trooper for fifteen years and had worked many accidents during that period. He stated that he had worked several accidents quite similar to the one involved in this action. He stated that he had received training in investigation of accidents and that the training coupled with his years of experience enabled him to determine how accidents occur and speeds of automobiles from skid marks and other physical evidence. In his testimony he carefully outlined the physical evidence observed at the scene and described the various measurements taken by him in ivestigating the accident. He based his opinion upon the measurement of skid marks, squall marks and other physical evidence and determined the speed of appellant's vehicle to be between 80 and 100 miles per hour. We find no abuse of discretion on the part of the trial court in determining the officer to be sufficiently qualified as an expert witness to give the above opinion evidence.

Affirmed.

COOPER and CLONINGER, JJ., agree.

Ruby BROWN, Individually and as
Executrix of the Estate of Jesse BROWN, Deceased
v. CUDIS INSURANCE SOCIETY, INC. and
CUNA MUTUAL INSURANCE SOCIETY

CA 83-436 669 S.W.2d 207

Court of Appeals of Arkansas
Division I
Opinion delivered May 23, 1984

Keith Vaughn, P.A., for appellant

Wright, Lindsey & Jennings, for appellee.

DONALD L. CORBIN, Judge. This is an appeal by appellant Ruby Brown, individually and as executrix of the estate of Jesse Brown, deceased, from a summary judgment in favor of CUDIS Insurance Society, Inc., and CUNA Mutual Insurance Society. We affirm.

On or about April 28, 1982, Jesse Brown, appellant's deceased husband, borrowed money from Bakem Credit Union to purchase a 1982 Oldsmobile. He executed two promissory notes totaling $10,781.85. When these loans were made, there was in force a group creditors disability insurance policy issued by CUDIS Insurance Society to Bakem Credit Union. Jesse Brown applied for group credit disability insurance for both loans. The insurance policy provided that if the disability for which benefits were claimed began within six months after the date the insurance became effective and for which the member had received medical treatment within six months before the date of insurance, there would be no coverage. Jesse Brown became disabled on May 10 or 11, 1982. His disability resulted directly or indirectly from or was contributed to by chronic myelocytic leukemia. The record reflects that he had received medical advice, consultation, and treatment for that illness during the six months before the effective date of the insurance.

When the loans were made, there also was in force a group credit life insurance policy issued by CUNA Mutual Insurance Society to Bakem Credit Union. That policy provided that no benefit would be provided for death if a material contributing cause of death was a sickness which became manifest prior to the time insurance coverage became effective and if the death occurred within six months after the effective date of insurance. Jesse Brown died on October 25, 1982, which was within six months of the time the insurance became effective on April 28, 1982. Death occurred from chronic myelocytic leukemia, which was manifested in Jesse Brown before April 28, 1982, the effective date of the insurance.

Appellant Ruby Brown made timely application for both the disability insurance and the credit life insurance through Arkansas Central Credit Union who had succeeded Bakem Credit Union. Both claims were denied by appellees citing Mr. Brown's preexisting condition.

After Arkansas Central Credit Union repossessed the automobile, appellant brought suit to recover the disability

and credit life proceeds to apply them against the indebtedness due Arkansas Central Credit Union. The suit claimed the appellees were estopped, as the insurer accepted the first premium payment made by Jesse Brown subsequent to his total disability.

The issue on appeal is whether the trial court erred in granting summary judgment on the basis that the doctrines of waiver and estoppel do not apply in this case because the credit union was not an agent for the two insurers.

Appellees moved for summary judgment which appellant did not respond to in writing. A hearing was held and the trial court granted appellees' motion for summary judgment. At the hearing, appellant argued that the exclusions from coverage in the two policies were waived by the insurance companies or that the insurance companies were estopped from relying on those exclusions. Appellant alleged that the claims of waiver and estoppel were based on the actions of the credit union. Appellant claimed that the credit union knew of Jesse Brown's leukemia when it made the loans that were the subject of this lawsuit and filled out the applications for credit life and credit disability insurance. Appellant contended that the credit union acted as agent for appellee insurance companies and that the credit union's knowledge of the leukemia should be imputed to appellee insurance companies.

Mr. Brown became totally disabled before the first payment on either loan was due. An attorney employed by Mr. Brown submitted payments to the credit union with a letter in which he stated that Mr. Brown could not have been aware of his impending disability when he obtained disability insurance and in which he stated that the first payments on the loan were being submitted to negate any possible defense by the insurance company.

Appellant admitted that the credit union, not the credit union member, Mr. Brown, was the insured under the policies. The policies provided insurance to the credit union if its member was unable to repay loans made by the credit union because of total disability under the terms of one

policy or death under the terms of the other policy.

Appellant admitted in response to requests for admissions that Jesse Brown's disability resulted from or was contributed to by the leukemia; that he became totally disabled before June 30, 1982; and that he had received medical treatment for the leukemia during the six months before April 28, 1982, the effective date of the insurance policies.

The trial court rejected the application of the doctrines of waiver and estoppel by adopting as more persuasive the rule that as a matter of law the credit union was not an agent for appellee insurance companies. It relied upon *Sadtler* v. *John Hancock Mutual Life Ins. Co.,* 291 A.2d 500 (1972), in its decision. The trial court believed that it would be unfair to appellees to adopt the opposite rule since the credit union had a direct economic interest in having the policies in force. Also, the credit union would be able to bind appellee insurance companies to payment of the policies by waiving requirements under the policy or committing acts that would estop appellee insurance companies from denying coverage. We reject the rule adopted by the trial court because we have applicable Arkansas law on the subject.

The sole argument presented by appellant in her brief is that there was a dispute about the facts and that the facts could have supported a finding that the credit union was the agent of appellee insurance companies.

We agree with appellees that the doctrines of waiver or estoppel cannot be invoked to extend coverage and thereby bring into existence a contract not made by the parties. This principle of law is best illustrated in the case of *Life & Casualty Ins. Co. of Tenn.* v. *Nicholson,* 246 Ark. 570, 439 S.W.2d 648 (1969). In *Nicholson, supra,* a mother purchased a policy to cover her son for death or loss of sight or limb. The policy provided coverage only for losses resulting from diseases contracted after the effective date of the policy. The boy lost the sight in one eye due to a condition in existence before the policy was purchased. She successfully argued at the trial level that since the soliciting agent knew about her

son's condition when the policy was purchased, there was a waiver of the condition because premiums were accepted. The Arkansas Supreme Court reversed and denied the claim, stating, "We find no waiver under the facts in this case . . . It is well settled in this state that the doctrines of waiver and estoppel, based upon the conduct or action of the insurer, cannot be used to extend the coverage of an insurance policy to a risk not covered by its terms or expressly excluded therefrom."

The most recent case in which this doctrine was applied is *Peoples Protective Life Ins.* v. *Smith,* 257 Ark. 76, 514 S.W.2d 400 (1974). Clarence Smith was an employee of Moore Ford. He became totally disabled on June 18, 1970, and died on March 4, 1972. For many years Mid-West National Life Insurance Company provided group life and health insurance to the employees of Moore Ford. That policy extended through the end of 1970, by which time Clarence Smith had been totally disabled for a number of months. He never worked as a full-time employee at Moore Ford after June 18, 1970. Peoples Protective Life, the successor of Mid-West, issued a new group life and health insurance program to the Moore Ford employees on January 1, 1971. It provided that only full-time employees were eligible for coverage. Smith never worked for Moore Ford while the Peoples policy was in force. He paid premiums on the policy to Moore Ford, which remitted the premiums to Peoples Protective as if Smith was an employee. Moore Ford also listed him on the reports to Peoples Protective as a full-time employee. The circuit judge held that there was coverage under the group life policy for Smith's death.

In reversing, the Arkansas Supreme Court held first that there was no coverage for the loss because Smith never qualified for coverage since he was never a full-time worker. The Court also pointed out that Smith's widow, who was the beneficiary of the policy, had the burden of proving coverage. The Court also held that there was no waiver or estoppel based on the fact that Smith had paid premiums from the time the policy went into effect until his death and the fact that Smith had made several claims for medical payments under the policy, which claims allegedly alerted

the company to his terminal cancer. The Court held that the doctrines of waiver and estoppel could not be invoked to extend coverage and thereby bring into existence a contract not made by the parties. It quoted extensively from Couch on Insurance in part as follows:

> The doctrine of waiver or estoppel cannot be given the effect of enlarging or extending the coverage as defined in the contract, nor can it create a contract of insurance, since a cause of action cannot be based on a waiver.
>
> The doctrine of waiver or estoppel, based upon the conduct or action of the insurer, is not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom, and the application of the doctrine in this respect is to be distinguished from the waiver of, or estoppel to deny, grounds of forfeiture. . .
>
> A cause of action cannot arise on the theory of estoppel. . .

There is another line of cases, which, at first glance would lead us to a different result. *Home Mutual Fire Ins. Co.* v. *Riley,* 252 Ark. 750, 480 S.W.2d 957 (1972), is representative of this divergent line of cases.

Dr. Riley owned a rent house next door to his clinic. Home Mutual insured the house against loss by fire. The policy contained a standard provision that there would be no liability for loss if the described property remained unoccupied for a period beyond thirty days. The house burned thirty-four days after being vacated on May 29, 1970.

Home Mutual Fire Insurance Company denied liability for the loss of the building owed by Dr. Riley under the policy by virtue of the nonoccupancy clause. Dr. Riley argued that this provision was waived. Dr. Riley was awarded judgment on the grounds of waiver and estoppel. The Supreme Court affirmed, and quoted from a previous decision as follows:

> The doctrine is firmly established by the highest courts in this country, and approved by us in numerous cases, that 'forfeitures are not favored in law,' and that 'courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so, on which the party has relied and acted. Any agreement, declaration or course of action on the part of an insurance company which leads a party insured honestly to believe that, by conformity thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop, and ought to estop, the company from insisting on a forfeiture, though it might be claimed under the express terms of the contract.'

One key evidentiary fact was that the agent, Dessie Pitts, was a general agent who had authority to bind the company. She told Dr. Riley, "that he had insurance on the building, period, but that they denied it on the equipment." This case did not turn on any single act standing alone but on the totality of the activities which included the knowledge of the company of the unoccupancy of the building, the agent's ability to bind the company; the nonremittance of any prepaid premiums and the course of action on the part of the insurer, which led Dr. Riley to honestly believe that, by his conformity thereto, a forfeiture of his policy would not occur.

A careful reading of *Nicholson* and *Riley, supra,* leads us to the conclusion that the cases are distinguishable and that *Nicholson* is controlling in the case at bar. Here, a forfeiture was not attempted by appellee insurance companies as was the case in *Riley, supra.* The question here was the extent of the coverage of the policies. It is clear that appellee insurance companies refused to extend their coverage. The record also reveals that appellees did not have any direct contact with the insured as was the case in *Riley, supra.*

It is well settled that summary judgment is an extreme remedy and should be granted only in the absence of a genuine issue as to a material fact remaining to be decided.

Chick v. *Rebsamen Insurance,* 8 Ark. App. 157, 649 S.W.2d 196 (1983). Outside of the pleadings, there is nothing in the record here to indicate a remaining genuine material issue of fact. Appellees filed a written motion for summary judgment to which appellant did not respond in writing. The hearing on the motion for summary judgment was not recorded and no additional evidence was presented. In her response to Requests for Admissions, appellant admitted that Jesse Brown's disability resulted from or was contributed to by leukemia, that Jesse Brown became totally disabled before June 30, 1982, (3 days before the 6 month exclusion ended), and that Jesse Brown had received medical treatment for leukemia during the six months before April 28, 1982, the effective date of the insurance policies. Appellant also admitted in her response to Request for Admissions that the six month exclusionary clause was in the policy. See, also, *Wilkinson* v. *Amos Enderlin Contr. Co.,* 7 Ark. App. 56, 644 S.W.2d 313 (1982). Appellees also introduced the policy that contained provisions that the credit union was not their agent.

In view of the pleadings, the exhibits which included the contracts of insurance and appellant's responses to Requests for Admission, we cannot say that the trial court erred in granting summary judgment in favor of appellees on the basis that waiver and estoppel did not apply.

Affirmed.

MAYFIELD, C.J., and GLAZE, J., agree.

Mary Gentry WELCH and Thomas J. WELCH
v. Gerald Dale COOPER
and Bessie COOPER

CA 83-275 670 S.W.2d 454

Court of Appeals of Arkansas
Division II
Opinion delivered May 23, 1984

Harkness, Friedman, Kusin & Britt, by: *Harry B. Friedman,* for appellant.

Hawkins & Metzger, by: *Jay P. Metzger,* for appellee.

TOM GLAZE, Judge. This is an appeal of a chancery court's enforcement of a contract for the sale of land and a cross-appeal of the court's award of actual damages for trespass and punitive damages for assault. We affirm in part and reverse in part.

In 1972, Mary and Thomas Welch, appellants, and Gerald and Bessie Cooper, appellees, entered into a contract for the sale of some land owned by Mrs. Welch. The contract contained a provision giving the Coopers an option to purchase an adjoining parcel. In addition, the contract contained a "forfeiture" clause, providing that in the event of the Coopers' default, all the previous payments "shall be retained" by Mrs. Welch as rent and liquidated damages. The last clause of the contract contained provisions regarding the payment of property taxes on the land and the payment of rent for the use of the west parcel. That clause provided:

> Gerald Dale Cooper has permission to dig and make pond larger and deeper as he deems necessary, and to keep all taxes paid when due. It is also agreed that Gerald Dale Cooper shall have the use of the W 1/2 of SW 1/4 of SE 1/4 of Sec. 17, Twp. 12S, Rge. 29, West, during the life of this contract with rent.

The Coopers made the down payment and made their annual payments on the outstanding balance for the east parcel. Mrs. Welch accepted all the Coopers' payments through 1978. During this same period and particularly on March 29, 1974, and April 11, 1974, Mrs. Welch's attorney sent notices to the Coopers informing them that they were in arrears on interest payments owed on the balance for the east parcel. The Coopers made up the arrearages, and Mrs. Welch accepted them.

In October of 1978, Mrs. Welch refused to sell the west parcel to the Coopers when they tried to exercise their option to purchase it. The Coopers filed suit for specific performance in March, 1979. The Coopers' final payment on the east parcel and a check for the 1973 to 1978 property taxes on the east parcel were returned to them along with a letter from Mrs. Welch's attorney, dated April 10, 1979, stating they had forfeited their rights under the contract by not paying property taxes due on the land and by not paying rent on the west parcel. The Welches counterclaimed for the rent on the west parcel. They also claimed actual and punitive damages, alleging that Mr. Cooper had committed an intentional trespass and "acts of assault, harassment and invasion of privacy."

At trial, the appellees testified that from the signing of the contract in 1972 until their receipt of the letter from Mrs. Welch's attorney in 1979, Mrs. Welch had never objected to the nonpayment of taxes or rent and that whenever the appellees had checked on the property taxes, the appellees found the Welches had alrady paid them. Appellee Bessie Cooper testified that Mrs. Welch mentioned property taxes only after she and her husband sued the Welches for specific performance. Gerald Cooper testified that he and Mrs. Welch had never discused the payment of rent by the

Coopers for use of the west parcel. Mrs. Welch, on the other hand, testified that there was a separate, oral agreement made in April, 1972, in which Mr. Cooper agreed to pay $350 rent for use of the west parcel. She stated that she repeatedly had asked Mr. Cooper to pay the taxes and the rent and that she had paid the property taxes before they were due to keep the land from being forfeited to the State. However, Mrs. Welch also stated that she paid property taxes on all real estate she owned, including the land in question, but never had sent the Coopers any notice informing them of the amount they owed her for the taxes she paid on the east parcel. She admitted that the notices to the Coopers about their interest payment arrearages did not mention their failure to pay property taxes or rent. She stated that she continued to accept payments from the Coopers on the east parcel despite their nonpayment of property taxes and rent on the west parcel, because she felt they would eventually pay her the property taxes and rent they owed.

On October 19, 1978, the Coopers sent Mrs. Welch a letter informing her that they intended to exercise their option to purchase the west parcel. The letter, containing an initial $500 payment, was returned to them marked "Unclaimed." Mrs. Cooper testified that, prior to mailing the letter, she had told Mrs. Welch that they (the Coopers) intended to exercise their option to purchase the west parcel, but Mrs. Welch responded that she did not want to sell the west parcel. Mrs. Welch countered that she had not received the letter of October 19, 1978, nor had she ever discussed the option provision of the contract with Mrs. Cooper. In addition, Mrs. Welch related that Mr. Cooper repeatedly came to her house intoxicated and verbally abused her. She also stated that Mr. Cooper had driven a bulldozer onto property owned by her son and grandson and had uprooted a mulberry tree in the summer of 1980. Mr. Cooper denied harassing Mrs. Welch and denied knocking down the mulberry tree.

In his decree, the chancellor ordered specific performance of the contract for the sale of the east and west parcels. The Coopers were ordered to pay the $467.88 in principal, interest and taxes remaining on the east parcel and the full

purchase price for the west parcel. He did not award the Welches any payments for rent on their west parcel, but he did award them $500 in punitive damages for harassment and $250 actual damages to the mulberry tree.

On appeal, appellants argue that the contract is unenforceable because the appellees did not pay taxes on the land and did not pay an annual rent of $350 on the west parcel. Appellees contend they did not breach the contract because appellants paid the property taxes themselves and because there was no duty on appellees to pay rent on the west parcel. Appellees also contend the appellants, by their conduct, waived any claim they might have had for either the taxes or rent. The chancellor found that the appellants, by accepting payments each year for the east parcel, waived their right to declare a forfeiture of the contract by appellees. He also found that the appellees had properly exercised their option to purchase the west parcel of land.

Of course, 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). Ark. R. Civ. P. 52(a); *Ballard* v. *Carroll,* 2 Ark. App. 283, 621 S.W.2d 484 (1981). The applicable or governing Arkansas case law concerning the waiver of the right of forfeiture is also clear. There is no doubt that a vendor may, by his acts and conduct, waive his right of forfeiture. Such a waiver will be found to exist when the vendor habitually accepts delinquent payments. *Ashworth* v. *Hankins,* 248 Ark. 567, 452 S.W.2d 838 (1970). *See also Truemper* v. *Thane Lumber Co.,* 154 Ark. 524, 242 S.W. 823 (1922); *Friar* v. *Baldridge,* 91 Ark. 133, 120 S.W. 989 (1909). According to Arkansas law, in most cases, the question of waiver is one of fact. *Freeman* v. *King,* 10 Ark. App. 220, 662 S.W.2d 479 (1984). Also, we must review the testimony in the light most favorable to the appellee, and indulge all reasonable inferences in the favor of the decree. *Arkansas State Highway Commission* v. *Oakdale Development Corporation,* 1 Ark. App. 286, 614 S.W.2d 693 (1981). From our review of the facts in this cause as set out above, we believe the chancellor's findings that the appellants had waived their right to declare a forfeiture and that the

appellees had exercised their option to purchase the west parcel are not against the preponderance of the evidence.

We must also reject appellants' other contention that the chancellor erred in refusing to grant them damages for past due rental on the west parcel. In this regard, the chancellor found that the appellants had not met their burden of proof on this issue. Whether there was an agreement between the parties for appellees to pay $350 rent for the use of the west parcel was clearly disputed. That dispute emanates from the parties' contract itself which lacks specificity regarding rental payments and which fails to recite any dollar amount for rent. The pertinent contractual provision in dispute reads:

> It is also agreed that Gerald Dale Cooper shall have the use of the . . . [west parcel] . . . during the life of this contract with rent.

In Arkansas, the general rule is that before a contract may be enforceable, it must be definite and certain in all of its terms. *Phipps* v. *Storey,* 269 Ark. 886, 601 S.W.2d 249 (1980). However, the parties, by their conduct, can enable a court to give substance to an indefinite term of a contract. In essence, the court looks to the conduct of the parties to determine what they intended. *See Beasley* v. *Boren,* 210 Ark. 608, 197 S.W.2d 287 (1946). Here, the chancellor found no conduct which would establish with any specificity the parties' intention regarding the payment of rent for the use of the west parcel, and from our examination of the record, we believe his finding was not against the preponderance of the evidence. Ark. R. Civ. P. 52(a).

Appellants also argue that their $500 recovery in punitive damages against appellee Gerald Cooper for his harassment of appellant Mary Welch was insufficient. We cannot agree. In fact, because the trial court found no actual damages for harassment, it erred in awarding punitive damages in any amount. The general rule in Arkansas is that punitive damages cannot be awarded in the absence of actual damages. *Winkle* v. *Grand National Bank,* 267 Ark. 123, 601 S.W.2d 559, *cert. denied,* 449 U.S. 880 (1980). Therefore, the

trial court's award of $500 for punitive damages to the appellants must be set aside.

Appellants also contend that their $250 recovery for actual damages to their mulberry tree when appellee Gerald Cooper trespassed was insufficient. Appellees respond that the chancellor did not have the authority to grant the $250 recovery to appellant Mary Welch because Mary Welch was not the real party in interest to prosecute the trespass counterclaim as required by Arkansas Rules of Civil Procedure 17(a). We agree with the appellees that the chancellor had no such authority.

Appellant Mary Welch admitted that at the time the tree was damaged she did not own the property on which the tree was located; she had previously transferred the property to her son and grandson. In his decree, the chancellor awarded the $250 actual damages to appellant Mary Welch as trustee for her son and grandson. Arkansas Rule of Civil Procedure 17(a) states that the "trustee of an express trust . . . may sue in his own name without joining with him the party for whose benefit the action is being brought." Here, no express trust existed. In Arkansas, such a trust can never be implied or arise by operation of law and can be proved only by some instrument in writing signed by the party enabled by law to declare the trust. *Hunt* v. *Hunt,* 202 Ark. 130, 149 S.W.2d 930 (1941). *See also Morris* v. *Boyd,* 110 Ark. 468, 162 S.W. 69 (1913). Clearly, the chancellor had no authority to grant $250 actual damages to appellant Mary Welch as trustee for her son and grandson, for no such relationship had been created by the parties. Thus, we also set aside this award.

On their cross-appeal, appellees contend the chancellor erred in ordering them to make a lump sum payment for the west parcel. They argue that this acceleration of payment was, in effect, a reformation of the contract. Because neither party requested a reformation of the contract, appellees feel the chancellor erred in ordering a lump sum payment. However, in their amended complaint, the appellees, as plaintiffs, pleaded:

That plaintiffs are entitled to a decree for specific

performance from this court ordering the defendant, Mary Gentry Welch, upon payment of the agreed purchase price to convey the following described property.

The agreed purchase price for the west parcel was $500 down and $190 an acre according to the original contract. The appellees had tendered the $500 down payment to appellant Mary Welch in 1978 and periodically had made the payments on the balance of the west parcel, but those payments were refused by Mary Welch. Appellees testified during trial that they had the money to pay the balance and would do so if the court ruled in their favor. The chancellor took the appellees at their word and ordered the balance payable. We find no reversible error in his having done so.

Affirmed in part and reversed in part.

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

INTEGON LIFE INSURANCE CORP.
v. George M. VANDEGRIFT

CA 83-281 669 S.W.2d 492

Court of Appeals of Arkansas
Division II
Opinion delivered May 23, 1984

Wright, Lindsey & Jennings, for appellant.

Theodore Lamb, for appellee.

TOM GLAZE, Judge. This appeal results from a declaratory judgment action brought in chancery court by appellee George M. Vandegrift pursuant to Ark. Stat. Ann. §§ 34-2501 to -2512 (Repl. 1962). The appellant, Integon Life Insurance Corporation (Integon), alleges on appeal that the chancellor erred in ruling that the employment agreement between appellant and appellee was neither terminable at will nor terminable upon ten days' notice.

The facts are virtually undisputed. In September of 1981, Vandegrift became employed as regional director for Integon in Arkansas and Oklahoma. David Pollock, agency director for Integon at that time, wrote Vandegrift a letter dated September 8, 1981, to "detail the agreements" the parties had reached verbally the week before. The letter included details of Vandegrift's salary, his territory and other matters related to his employment. The letter referred to a "regional director's contract" and an "enclos[ed] . . . complete set of contract papers." In late September Vandegrift attended an orientation program at Integon's

home office in Winston-Salem, North Carolina. While in Winston-Salem, Vandegrift signed a "Regional Director Contract" dated September 30, 1981. These two documents — the September 8 letter and the September 30 contract — created the dispute that led to the declaratory judgment action. Vandegrift claims that he was guaranteed a minimum of three years' employment and points to language in the letter to support his assertion. Integon, on the other hand, claims that a termination provision contained in the Regional Director Contract applies to all of its employment contracts, including the one with Vandegrift. That provision reflects that either party may terminate the employment agreement with ten days' notice to the other party.

In October, 1982, Vandegrift attended a meeting in Winston-Salem at which Integon's new president announced an increase in income requirements for all regions. He also said that Integon intended to consolidate some of its smaller regions into larger ones. In January of 1983, Vandegrift attended another regional meeting, and his new agency director indicated that changes in the Arkansas-Oklahoma region might be forthcoming. About a week later, the agency director informed Vandegrift that the Arkansas-Oklahoma region was being combined with a portion of Tennessee. He asked Vandegrift to sign a new marketing general agent's agreement (not a regional director's contract) by the next morning or relinquish all rights to profit from sales made by agents he had recruited.

Vandegrift did not sign the new agreement. Instead, he filed a declaratory judgment action in February, 1983, asking the court to determine the parties' rights and obligations with regard to Vandegrift's employment agreement or agreements. He specifically requested the court to resolve the dispute over (1) the contractual validity of the terms and conditions of the letter dated September 8, 1981, and (2) the contractual validity of the ten-day termination clause in the contract dated September 30, 1981.

At trial, the court heard testimony from both Vandegrift and Dave Pollock, a regional director and formerly the agency director who had recruited Vandegrift for Integon.

Both men testified about the circumstances surrounding Vandegrift's association with Integon and about the two disputed documents. The trial court found, in part:

> 1. The provisions contained in the letter of September 8, 1981 . . . and the subsequent performance of both parties, causes this letter to become an enforceable contract between the parties for a term of three years from on or about September 8, 1981, at the rates and other terms identified in the letter, for the regional area of Arkansas and Oklahoma.
>
> 2. The bilaterally executed agreement of September 30, 1981, is integrated into the contract of September 8, 1981, except in two areas that appear inconsistent with the terms and conditions of the September 8, 1981, letter, to-wit:
>
> (A) Section II. Territory and Part 6 Territory.
>
> (B) Section IX. Termination
>
> These sections appear to deprive Plaintiff [Vandegrift] of substantive contractual rights contained in the contract letter of September 8, 1981, without extending to Plaintiff any new consideration; were not explained to the Plaintiff in such a fashion as to make him aware of the proposed diminution of contractual rights and the two sections aforementioned are irreconcilable with other sections of the contracts calling for payment over a three-year period and setting premium goals in anticipation of volume in the Arkansas-Oklahoma geographic area.
>
> 3. The Court is without jurisdiction to enjoin either party from terminating a personal service contract, but if such termination occurs, the Court retains jurisdiction in the event either party chooses to present a proper petition for damages that may result from such termination.

The appellant's only point for reversal is that the

chancellor erred in finding the employment agreement between Vandegrift and Integon neither terminable at will nor terminable upon ten days' notice. Appellant argues that because neither the letter nor the contract set out a specific term of employment, the agreement was terminable at the will of either party, in accordance with the common law rule. *See Griffin* v. *Erickson,* 277 Ark. 433, 642 S.W.2d 308 (1982); *M.B.M. Co.* v. *Counce,* 268 Ark. 269, 596 S.W.2d 681 (1980). In the case at bar, however, the chancellor found that a specific term of employment was agreed upon. If that finding was correct, then the common law rule upon which the appellant relies would not apply. On appeal, we review the record *de novo* and affirm unless the chancellor's findings of fact are clearly erroneous or clearly against the preponderance of the evidence. Ark. R. Civ. P. 52(a). Here, we must determine whether the chancellor clearly erred in finding that a three-year term was provided by the parties' agreement.

The chancellor found that the letter of September 8 and the contract of September 30 must be construed together in order to ascertain the parties' intended agreement. The chancellor found that two sections in the September 30 contract, one pertaining to "territory" and one to "termination" were irreconcilable with provisions in the letter of September 8 covering the same subject matter. We believe that the law in Arkansas, as applied to the facts of this case, supports the chancellor's decision.

The September 8 letter was from Pollock to Vandegrift and was a follow-up to a meeting between them. The letter specifically outlined Vandegrift's territory, the production requirements for that territory for each of three years and Vandegrift's salary. The letter provided, in part, as follows:

> Your territory will comprise the states of Arkansas and Oklahoma and will be detailed as part of your regional director's contract. . . . [T]he minimum requirements for production should be $350,000 of premium the first full year under contract, $600,000 the second full year under contract and $950,000 the third complete year under contract. . . .

> As we discussed, we will be sending you a check for $6,000 each month. $2,500 of the monthly check will be our investment in you with the additional $3,500.00 being a draw against your regional director earnings and overrides.
>
> The $2,500 of subsidy each month will continue for 36 months for a total investment of $30,000 a year or $90,000 over a three-year period. We will continue the $3,500 monthly advancement until you have developed a credit in your account. Hopefully, you will have developed a credit in your account before the 36-month investment period has expired and at such time that it looks that your monthly production will provide a steady cash flow, then you would have the option of coming off the advance program and going on monthly credit balance and receiving a check for any credit balance built up in your account.

None of the salary information specified above was included in the September 30 contract. Both Vandegrift and Pollock testified that the letter set out the oral agreement they had reached the week before. Pollock testified that the $2,500 "investment" in Mr. Vandegrift was a "separate agreement," not a part of the regional director's contract. He stated that the *only* details of the "financing agreement for new regional director" was his letter of September 8. Pollock explained the situation as follows:

> Each regional director has a contract which is the regional director's contract, and that governs the terms of his employment with Integon. Okay, with a new regional director, we also offered additional financing over and above the contract to help him get started. My letter was to clarify the financing that we had offered to Mr. Vandegrift. . . . The letter itself is the agreement.

In other words, the letter is crucial to an understanding of one important aspect of Vandegrift's employment with Integon — his salary. In addition to specifics of salary, the letter specified Vandegrift's territory as the states of Arkansas and Oklahoma. The "Territory Supplement" of the Sep-

tember 30 contract set out "All Counties" of Arkansas and Oklahoma as his territory with the added condition that assignments are subject to change in the discretion of Integon.

Vandegrift also testified about the circumstances surrounding his signing of the September 30 agreement. After receiving the September 8 letter, Vandegrift complied with the company's instructions and got a physical examination. On September 15, he resigned his position as vice president and assistant agency director of First Pyramid Life Insurance Company. He leased office space on September 17, bought office furniture and prepared to commence business. Although the exact date is in conflict, at the end of September or the beginning of October, he went to North Carolina to attend a regional meeting and an orientation program. Vandegrift testified that at the end of a full week there, the following occurred:

> I was sitting in Dave Pollock's office, and a person came in with this document, and said in order to — in words such as make this whole thing complete, we need your signature here and here and here and whatever the number of signatures are. . . . [I]f I hadn't signed that agreement, I wouldn't have had a job.

We believe the preponderance of the evidence supports the chancellor's finding that the letter of September 8 was an enforceable contract between Vandegrift and Integon and that this letter and the contract of September 30 became integrated to express the full agreement of the parties. Vandegrift testified that he interpreted the September 8 letter to mean he had a three-year contract with Integon, and the letter merely substantiated "what he had been told." The evidence also supports the chancellor's disregard of those contract provisions governing territory and termination that were irreconcilable with specific agreements set out in the letter. These parties' agreement is governed by general rules for the construction of contracts. A contract is to be considered as a whole, and if the agreement of the parties is embraced in two or more instruments, both or all of the instruments must be considered together. *Wallace* v. *United*

States, 294 F.Supp. 1225, 1231 (E.D. Ark. 1968). In *W. T. Rawleigh Co.* v. *Wilkes,* 197 Ark. 6, 121 S.W.2d 886 (1938), the Arkansas Supreme Court said:

> The principal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. . . . This court has many times held that in ascertaining the intention of the contracting parties, courts may acquaint themselves with the persons and circumstances mentioned in the contract, and may place themselves in parties' situation. . . .

Id. at 9-10, 121 S.W.2d at 888 (citations omitted).

In ascertaining the parties' intent, the chancellor heard the testimony of both Vandegrift and Pollock. The court considered the actions of the respective parties from the time of the letter. Vandegrift resigned his position, set up his Integon office and began conducting Integon business. At the end of October, 1981, Integon began paying Vandegrift $6,000 a month pursuant to the letter and was still paying that amount monthly at the time this cause was heard in March, 1983. As noted previously, Vandegrift interpreted the parties' September 8 letter to mean that he had a three-year contract with Integon, and the letter merely substantiated what he had been told. Because the parties' initial financial agreement was exclusively contained in that letter and revolved around a three-year period, we believe the chancellor's finding that Integon contracted to pay Vandegrift over a three-year period is supported by the evidence. Therefore, we affirm.

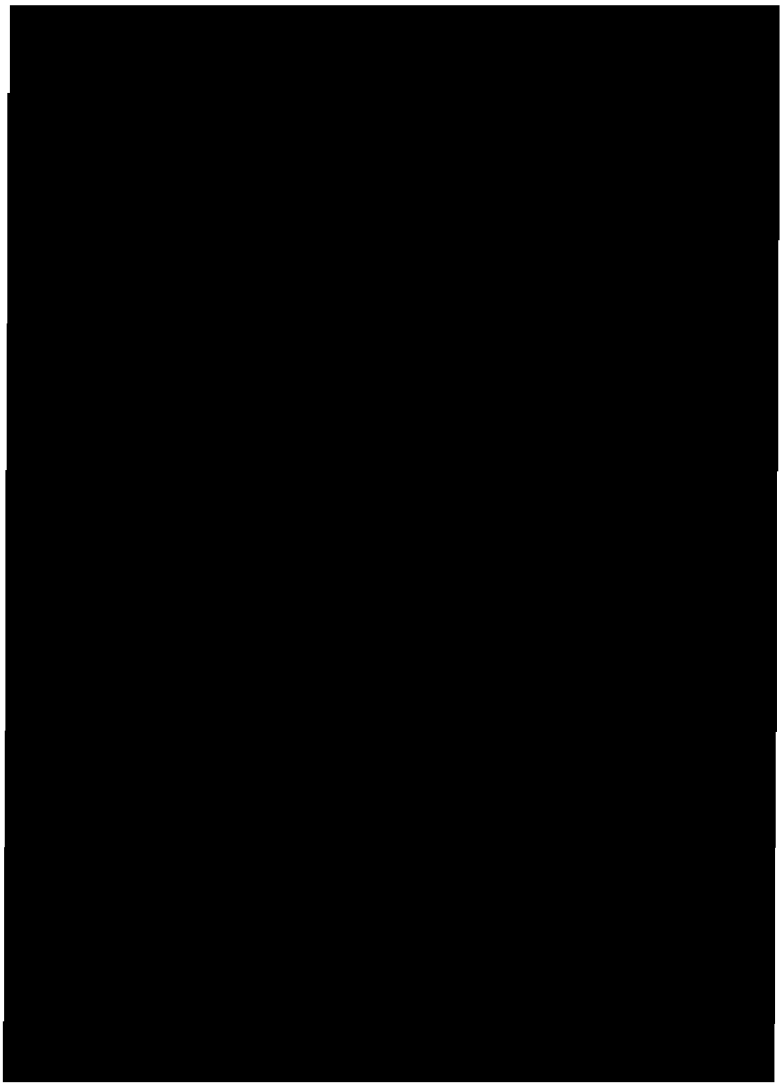
Affirmed.

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

Lawrence GONCE *v.* STATE of Arkansas

CA CR 83-186 669 S.W.2d 490

Court of Appeals of Arkansas
Division I
Opinion delivered May 23, 1984



Davis & Bracey, P.A., by: *Charles E. Davis,* for appellant.

Steve Clark, Atty. Gen., by: *Velda West Vanderbilt,* Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. Appellant appeals from his second degree forgery conviction for which he was sentenced to eight years in prison with four years suspended. He raises two points for reversal: (1) that the trial court erred in ruling that voluntary intoxication is a mitigating factor in setting punishment instead of a complete defense, and (2) that substantial evidence was not presented to show he had the requisite purposeful state of mind to commit forgery.

Appellant's case was tried to the trial court, and he bases his first contention on remarks made by the judge at the trial's conclusion. The judge said, in part, that appellant had "about a three-week drunk coming down," but he added that was "not a legal excuse and not justification. I do think it had some effect on mitigating or explaining the circumstances that went along with it." Appellant argues the trial judge's findings are contrary to the appellate court decisions in *Varnedare* v. *State,* 264 Ark. 596, 573 S.W.2d 57 (1978), and *Johns* v. *State,* 6 Ark. App. 74, 637 S.W.2d 623 (1982), wherein the Supreme Court and Court of Appeals held that voluntary intoxication is a defense to specific intent crimes when the intoxication negates the required intent. Of course, our Court, quoting from *Olles and Anderson* v. *State,* 260 Ark. 571, 542 S.W.2d 755 (1976), recognized that except in cases involving specific intent crimes, voluntary intoxication is not a defense, even though it may produce a form of "temporary insanity" or render the person charged unconscious of what he is doing. *Johns* v. *State* at 76, 637 S.W.2d at 624.

In the instant case, appellant was charged with and convicted of forgery — a crime which requires a "purposeful" mental state. *See* Ark. Stat. Ann. § 41-2302 (Repl. 1977). The Arkansas Criminal Code defines "purposely" as follows:

> A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

Ark. Stat. Ann. § 41-203(1) (Repl. 1977).

Thus, in establishing his defense of intoxication, appellant was required to prove by a preponderance of the evidence that he could not have entertained or formed the necessary intent or purposeful mental state to commit forgery. *See Johns* v. *State, supra.* He simply failed to sustain that burden, and the trial judge so found. In this respect, the judge said:

> Gentlemen, in reviewing the testimony and evidence presented here and the items that have been received into evidence, I think it is relatively clear to the Court that the Defendant passed the check that was forged. The issue is whether or not he knew it was forged at the time, knew it was bad. I think reviewing the evidence as a whole, it is likewise *relatively clear Mr. Gonce knew he was fooling here with something that wasn't any good, and in all likelihood, it was forged.* (Emphasis supplied.)

The evidence, including appellant's own testimony, clearly supports the finding that the appellant knew the check he uttered was forged. Appellant testified that he knew the woman who gave him the check was named April, yet she wrote a check payable to appellant for $168.50 and signed it "Veta Long." He recalled that after receiving the check, he waited a day or two before he attempted to negotiate it. At that time, he and April drove to Springdale, Arkansas, to get some liquor and unsuccessfully attempted to cash the check at three different businesses. Appellant

indicated that he then waited two days before he successfully negotiated the check at a liquor store. Appellant also testified on cross-examination that he suspected the check was forged *before* he cashed it, although on direct examination he denied any such suspicion. Throughout his testimony, appellant made no effort or attempt to mask his detailed knowledge of the events leading to his negotiating the forged check. In sum, appellant's testimony and recollection of the circumstances surrounding the crime substantiates the judge's conclusion that the appellant was aware the check he cashed was forged.

We are cognizant of that part of appellant's argument that challenges the judge's reference to intoxication as a "mitigating" circumstance. While we may agree such reference was erroneous, we cannot agree it was sufficient to reverse this cause in view of the clear, factual findings made by the judge. In other words, even if a trial judge gives the wrong reason for a ruling, we will not reverse if the ruling was right. *Chisum* v. *State,* 273 Ark. 1, 616 S.W.2d 728 (1981); *Keith* v. *Freeman,* 43 Ark. 296 (1884).

Our disposition of appellant's first contention essentially resolves his second argument as well. In this regard, he contends the evidence was insufficient to show that he had the requisite purposeful state of mind to commit forgery. 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); *Mayes* v. *State,* 264 Ark. 283, 571 S.W.2d 420 (1978); and *Robinson* v. *State,* 10 Ark. App. 441, 664 S.W.2d 905 (1984). 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 that act. Ark. Stat. Ann. § 41-2302(1) (Repl. 1977).

We already have discussed the evidence presented to the trial court that supports appellant's conviction. We have reviewed that evidence in the light most favorable to the appellee, and suffice it to say, we believe it is sufficient to

sustain a conviction of forgery.

Affirmed.

CORBIN, J., agrees.

MAYFIELD, C.J., concurs.

Eddie Lee COLLINS *v.* STATE of Arkansas

CA CR 83-145 669 S.W.2d 505

Court of Appeals of Arkansas
Division II
Opinion delivered May 30, 1984

Hawkins & Metzger, by: *Claude S. Hawkins, Jr.,* for appellant.

Steve Clark, Atty. Gen., by: *Velda West Vanderbilt,* Asst. Atty. Gen., for appellee.

MELVIN MAYFIELD, Chief Judge. The appellant was convicted of carnal abuse in the first degree and sentenced to ten years and a fine of $10,000. He was charged with the crime after the eleven-year-old daughter of his live-in girlfriend reported to her grandmother that appellant had been coming to her bed and forcing her to engage in sexual contact and intercourse with him for the past three years. Only one incident, alleged to have occurred on July 16, 1982, was charged.

Appellant's first argument for reversal is that the trial court erred by allowing testimony concerning prior "bad

acts" alleged to have been committed by him. He bases this argument on two instances in which the jury was allowed to hear testimony that he had committed prior sexual offenses against the young girl.

The first instance occurred when the girl's mother testified that she had seen the defendant display his penis to the girl and order her to perform fellatio. This took place in their home approximately one month before the incident with which appellant was charged. Immediately after this testimony, the judge admonished the jury that it was not admissible to prove the character of a person in order to show that he acted in conformity therewith, but only for the purpose of showing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The second instance complained of occurred when the prosecutrix was allowed to testify that appellant had been coming to her bed on weekends since she was eight years old, forcing her to have sexual intercourse with him and trying to force her to perform fellatio on him. Again the trial court admonished the jury.

It is appellant's argument that the admission of this evidence was error under Rule 404(b) of the Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001, which provides:

> 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.

Appellant cites *Wood* v. *State,* 248 Ark. 109, 450 S.W.2d 537 (1970), and admits it holds that in cases similar to the one here involved the prior acts of misconduct are admissible. However, the appellant says that since the adoption of the Uniform Rules of Evidence in 1976, the law expressed in *Wood* has been superseded.

We do not agree. To the contrary, in *Price* v. *State,* 267 Ark. 1172, 599 S.W.2d 394 (Ark. App. 1980), this court noted that Rule 404(b) only codified the law in existence before the rule was adopted; and in *Price* v. *State,* 268 Ark. 535, 597 S.W.2d 598 (1980), the Arkansas Supreme Court reviewed and affirmed our *Price* decision and relying upon *Alford* v. *State,* 223 Ark. 330, 266 S.W.2d 804 (1954), said the rule "clearly permits" evidence of other criminal activity committed by a defendant "if it has relevancy independent of a mere showing that the defendant is a bad character." The *Alford* case, decided long before the Uniform Rules of Evidence were adopted, contains this language:

> Superficially similar to the case at bar are those decisions holding that in trials for incest or carnal abuse the State may show other acts of intercourse *between the same parties. Adams* v. *State,* 78 Ark. 16, 92 S.W. 1123; *Williams* v. *State,* 156 Ark. 205, 246 S.W. 503. But obviously such testimony is directly relevant to the question at issue. As stated in the *Williams* case, such prior acts of intercourse show "the relation and intimacy of the parties, their disposition and antecedent conduct toward each other," and for that reason the evidence aids the jury in determining whether the offense was committed on the particular occasion charged in the indictment.
>
> Again, where the charge involves unnatural sexual acts proof of prior similar offenses has been received. *Hummel* v. *State,* 210 Ark. 471, 196 S.W.2d 594; *Roach* v. *State,* 222 Ark. 738, 262 S.W.2d 647. Such evidence shows not that the accused is a criminal but that he has "a depraved sexual instinct," to quote Judge Parker's phrase in *Lovely* v. *United States,* 4th Cir., 169 F.2d 386.

223 Ark. at 335.

In the case at bar, we think the evidence that appellant had made a sexual overture to the little girl in her mother's presence and that he had been sexually molesting her for three years was admissible under Rule 404(b) and the cited case law. This evidence tends to show that appellant did not

crawl into the girl's bed on the night of July 16, 1982, by mistake, accident, or because he was drunk. The prior acts were committed under circumstances similar to the July 16 act, and all of them were after appellant and the girl's mother had been drinking and the mother had fallen asleep. All of this, plus appellant's unnatural sexual advances, were relevant to show purpose, plan, and opportunity. To hold it admissible under Rule 404(b) is in keeping with decisions in other states. *See Elliott* v. *State,* 600 P.2d 1044 (Wyo. 1979); *State* v. *Jerousek,* 590 P.2d 1366 (Ariz. 1979). No argument is made that the prejudicial effect of the evidence outweighed its probative value, and we find no error in its admission.

Appellant's other argument is that the court erred in admitting evidence of the victim's truthful character. The appellant testified that she was lying. He said everything she said was a lie and that her grandmother put her up to it because the grandmother did not want the girl's mother and the appellant to live together. Afterwards, on rebuttal, the State, over appellant's objection, was allowed to put into evidence the testimony of the girl's schoolteacher that the child's general reputation for truthfulness was good. Uniform Evidence Rule 608(a) provides:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

It might seem from a simple reading of the rule that the appellant's testimony that the prosecuting witness was lying because her grandmother put her up to it would suffice to meet the requirement that the witness's character for truthfulness must be attacked before evidence of good character can be introduced. This exact situation, however, may not have been decided.

The State concedes, and it seems clear, that the mere fact

that a witness has been contradicted by other evidence does not constitute an attack upon the witness's character for truthfulness. *See Kauz* v. *United States,* 188 F.2d 9 (5th Cir. 1951). What will constitute such an attack is discussed in E. Cleary, *McCormick on Evidence* § 49 (2d ed. 1972), where different situations are considered. McCormick thinks even a "slashing cross-examination" may be enough, but suggests that it is unrealistic to handle the matter in any mechanical fashion. His conclusion is:

> A more sensible view is the notion that the judge should consider in each case whether the particular impeachment for inconsistency and the conflict in testimony, or either of them, amounts in net effect to an attack on character for truth and should exercise his discretion accordingly to admit or exclude the character-support.

3 J. Weinstein & M. Berger, *Weinstein's Evidence* par. 608[08], at 608-48 (1982), states that the mandate of Uniform Evidence Rule 401 to admit all relevant evidence "should be construed to authorize — but not to require — the admission of supportive character evidence" if the trial judge finds that the contradiction of a witness amounted to an attack on veracity. That suggestion was expressly adopted in *United States* v. *Medical Therapy Sciences, Inc.,* 583 F.2d 36 (2nd Cir. 1978), where the court said, "We think that trial judges should be permitted, under Rule 608, to exercise sound discretion to permit or deny a party the use of character evidence to support veracity."

Here, the trial judge allowed the State to introduce the supportive character evidence. The views expressed above indicate to us that we should leave the matter to the trial judge's discretion. Furthermore, there are two cases that indicate we should not disturb that discretion under the circumstances of this case.

In *Elliott* v. *State,* 600 P.2d 1044 (Wyo. 1979), which we cited earlier, the trial court allowed the victim's mother to testify that the victim was truthful. This was affirmed on appeal because the defendant testified that the reason the

victim would accuse him was "his being the closest one there and her mother and I not getting along," and because the defendant "indicated that the victim was selective with respect to truthfulness." In *State* v. *Craven,* 527 P.2d 1003 (Kan. 1974), the allowance of character for truthfulness evidence was affirmed. The court said:

> As the record points out, defendant repeatedly contradicted earlier statements given by the state's witnesses, and even stated that one witness "was not telling the truth." In the light of such evidence we cannot say the trial court abused its discretion.

It is, therefore, our view that the trial court in the instant case did not err in admitting the evidence of the victim's truthful character. In the cases of *Norrid* v. *State,* 188 Ark. 32, 63 S.W.2d 526 (1933) and *Lockett* v. *State,* 136 Ark. 473, 207 S.W. 55 (1918), cited by appellant, there was simply no evidence sufficient to constitute an attack on the witness's reputation for truthfulness. As we have said, in this case, we think the matter was for the exercise of the trial court's discretion and we find no abuse in that regard.

Affirmed.

CRACRAFT and COOPER, JJ., agree.

Margie HAYNES and Clayton HAYNES
v. FARM BUREAU MUTUAL
INSURANCE CO. OF ARKANSAS, INC.

CA 83-291 669 S.W.2d 511

Court of Appeals of Arkansas
Division II
Opinion delivered May 30, 1984

Switzer & Switzer, by: *Bruce D. Switzer;* and *Arnold, Hamilton & Streetman,* by: *Herman L. Hamilton, Jr.,* for appellant.

Griffin, Rainwater & Draper, for appellee.

GEORGE K. CRACRAFT, Judge. Margie Haynes and Clayton Haynes were divorced in 1979. In their court-approved property settlement agreement Clayton obligated himself to convey his interest in their former residence to Margie free of a $90,000 mortgaged indebtedness. He did not perform these obligations and contempt proceedings were instigated to seek his compliance. On July 21, 1981 the dwelling and its contents were totally destroyed in a fire which all parties concede was of incendiary origin. At the time of the fire Clayton had not conveyed his interest in the residence to Margie, had not discharged the mortgaged indebtedness against it, and still had contempt proceedings pending against him. At that time there was in force a policy of fire insurance on the dwelling issued by Farm Bureau Mutual Insurance Company of Arkansas in the name of Clayton Haynes only in the amount of $103,000.

After the fire Clayton conveyed all of his interest in the real estate to Margie who subsequently brought this action against Farm Breau Mutual to cover the fire loss. Farm Bureau Mutual had paid the mortgagee Bank of Parkdale according to its interest and had received an assignment of the bank's interest under the mortgage. Over his objection the trial court granted Farm Bureau's motion to make Clayton a party plaintiff in the action. Margie Haynes consented to making Clayton a party plaintiff. Although Clayton had objected, after the order was entered he filed a

formal pleading in which he joined in Margie's complaint against Farm Bureau Mutual. After Clayton was joined as a plaintiff Farm Bureau Mutual answered denying liability and asserting that the fire was the result of Clayton's unlawful acts either in setting the fire or causing it to be set. The Haynes appeal from a judgment entered in favor of Farm Bureau Mutual on a jury's special finding that the fire loss resulted from the unlawful acts of Clayton.

Appellants first contend that the trial court erred in requiring Clayton to join as an involuntary plaintiff. No authority is cited and no argument is made in support of this point other than that it somehow prejudiced the jury to see two divorced persons sitting at the same counsel table in a suit in which arson by one of them was an issue. Assignments of error presented by counsel in briefs unsupported by convincing argument and authority will not be considered on appeal unless it is apparent without further research that they are well taken. *Gray, Director* v. *Ragland, Director,* 277 Ark. 232, 640 S.W.2d 788 (1982); *Dixon* v. *State,* 260 Ark. 857, 545 S.W.2d 606 (1977).

The appellants next contend that the trial court erred in denying plaintiffs' motion that no testimony concerning arson be admitted unless it be directly connected with the appellant Clayton Haynes and in admitting such evidence. They also contend that the trial court erred in denying their motion for judgmet notwithstanding the verdict because the jury's verdict was not based on substantial evidence.

Although these contentions are stated under two points, we are concerned only with the question whether there was substantial evidence to support the verdict. *Steed* v. *Busby,* 268 Ark. 1, 593 S.W.2d 34 (1980). As to the substantiality of the evidence we will not disturb the jury's conclusion unless we can say there is no reasonable probability in favor of appellee's version and then only after giving legitimate effect to the presumptions in favor of a jury's finding. In testing that sufficiency as being substantial we need only consider the evidence which is most favorable to the appellee. *St. Paul Fire & Marine Ins.* v. *Prothro,* 266 Ark. 1020, 590 S.W.2d 35 (1979); *Ark. Power & Light Co.* v.

Johnson, 260 Ark. 237, 538 S.W.2d 541 (1976).

There are ordinarily no eye witnesses to an act of arson because the deliberate burning of an insured building by its owner is usually accomplished alone and in secret. Any material fact in issue, however, may be established by circumstantial evidence even though the testimony of other witnesses may be undisputed. The fact that evidence is circumstantial does not render it insubstantial as our law makes no distinction between direct evidence of a fact and circumstances from which it might be inferred. The circumstances may be such that different minds can reasonably draw different conclusions from them without resort to speculation. Where there are facts and circumstances in evidence from which reasonable minds might reach different conclusions without resort to speculation the matter is an issue of fact which must be submitted to the jury for its determination. *Farmers Ins. Exchange* v. *Staples,* 8 Ark. App. 224, 650 S.W.2d 244 (1983).

We agree that a mere showing of arson does not automatically relieve the insurer from liability under a fire policy excluding loss caused by the insured. It is also necessary to prove by direct or circumstantial evidence that the insured set the fire or caused the house to be burned. Our court on many occasions has declared that circumstantial evidence which is sufficient to warrant a jury in drawing a reasonable inference that the insured was the author of a fire is sufficient to sustain a verdict in favor of the insurer. *Rankin* v. *Nat'l Lib. Ins. Co. of America,* 188 Ark. 195, 65 S.W.2d 17 (1933).

A review of the evidence in this case convinces us that the jury's verdict is supported by substantial evidence. It was not disputed that the fire was of incendiary origin. In 1979 Clayton Haynes had obligated himself in a property settlement approved and enforced by the chancery court to convey this dwelling to Margie free of the $90,000 mortgage by January 1, 1980. He failed to discharge the indebtedness by that date or to convey the property to her. It was shown that he did not have sufficient cash to liquidate the mortgage as he was then having "cash flow problems." Contempt

proceedings were instituted against him but an agreed extension of time until August 1, 1981 was set for his compliance.

Under the terms of the divorce settlement Clayton was obligated to maintain insurance on the premises. Six or seven months before the fire he directed the insurance agent to issue the policy in his name only. This coverage was cancelled on or about the 1st of July, 1981, and from that date until the night before the fire on July 21st there was no insurance coverage on the house. Although Clayton denied that he had knowledge of this cancellation, there was testimony from an employee of the insurance agency that Clayton was previously aware of the cancellation and came to her house on July 20th, the night before the fire, to give her a check in order to reinstate the policy. At the time of the fire Clayton had had only nine days remaining in which to liquidate a $90,000 mortgage on the house and he did not have the money to accomplish it because he had "cash flow problems." There was outstanding a court order for him to appear and show cause why he had not done so. A jury could easily infer that he had a motive for the burning of the house and there is nothing in the record to disclose that anyone else did. *Westchester Fire Ins. Co.* v. *Tidwell,* 199 Ark. 621, 135 S.W.2d 842 (1940).

It was also established that the fire was first observed around 11:00 p.m. on June 21st. Haynes admitted that he had been at the house during the day to leave Margie's car there but had left before noon and had not returned. He stated that he had gone from there to attend a wedding in Texas. There was evidence that although Clayton went to Texas he had told people that he was going to Florida because he didn't want Margie to know where he was. At the time of the fire, although Margie was in possession of the house, Clayton had a key and had complete access to the house and went there frequently. Margie was attending school in Bastrop, Louisiana, and staying with her friends there during the week and their daughter was away at school in another state, leaving the house empty. Although Clayton offered evidence tending to prove that he was not in the State of Arkansas at the time the fire was first discovered, the jury

was not required to accept that evidence if it did not find it credible. There were a number of things in the testimony about Clayton's trip to Texas which might have easily caused the jury to question the complete veracity or purpose of this testimony. Our court has recognized that a trier of fact may know that an arsonist need not necessarily be personally present at the time the flash of the fire is observed because there are methods by which one can time the origin of an incendiary fire. *Garmon* v. *The Home Ins. Co. of New York,* 197 Ark. 1102, 126 S.W.2d 621 (1939).

From our review of the evidence in the light most favorable to the appellee we cannot say the verdict is not supported by substantial evidence.

Affirmed.

COOPER and CLONINGER, JJ., agree.

Clinton CAVIN *v.* STATE of Arkansas

CA CR 84-1 669 S.W.2d 508

Court of Appeals of Arkansas
Division II
Opinion delivered May 30, 1984
[Rehearing denied June 27, 1984.]

McHenry & Skipper, by: *Michael A. Skipper,* for appellant.

Steve Clark, Atty. Gen., by: *Michael E. Wheeler,* Asst. Atty. Gen., for appellee.

GEORGE K. CRACRAFT, Judge. On March 22, 1982, Clinton Cavin entered a plea of guilty to two counts of theft by deception. The court suspended the imposition of sentence for a period of eight years on the condition that appellant make restitution to his victims in the amount of

$66,240 of which $20,000 was to be paid on March 22, 1983, and the balance in annual installments of $5,000. The suspension was further conditioned upon payment of court costs, a fine of $10,000 and good behavior. On July 28, 1983, the suspension was revoked on a finding of the court that appellant had inexcusably failed to make any payments of restitution or court costs and committed him to the Arkansas Department of Correction for a term of eight years.

Appellant first contends that the trial court erred in revoking his suspension because his failure to make the required payments was excusable due to his inability to pay and that the trial court erred in not so finding. We do not agree.

The provisions for revocation of suspended sentences are set out in Ark. Stat. Ann. § 41-1208 (Repl. 1977). Subsection (4) of that statute provides that in order to revoke a sentence the court must find by a preponderance of the evidence that the defendant has inexcusably failed to comply with the conditions of his suspension. It is well settled that on a hearing to revoke the burden is upon the State to prove the violation of a condition by a preponderance of the evidence and on appellate review this court will not overturn the findings of the trial court unless it is clearly against a preponderance of the evidence. *Brown* v. *State,* 10 Ark. App. 387, 664 S.W.2d 507 (1984); *Brewer* v. *State,* 274 Ark. 38, 621 S.W.2d 698 (1981). As a determination of a preponderance of the evidence turns heavily on questions of credibility and weight to be given the testimony we defer to the trial judge's superior position in that regard. Here the trial court expressly found from the evidence that the appellant inexcusably failed to make the payments. We cannot conclude that this finding is clearly erroneous.

In *Drain* v. *State,* 10 Ark. App. 338, 664 S.W.2d 484 (1984) we held that a probationer ought not be imprisoned merely because he has not paid a fine or made restitution where it can be shown that the failure was not willful but was due solely to inability. In *Brown* v. *State, supra,* we held that where the record reveals the State has proved by a preponderance of the evidence that the failure to pay was

inexcusable, commitment is justified. Here the appellant testified that he had not made the payments because he had not been able to. He testified that he had had no earnings during either the two and a half year period since the offenses or the year subsequent to his suspended sentence. He said that he had worked but he had not been paid for it. In one instance he had worked for Eagle Enterprises in Oklahoma obtaining leases and doing other work in connection with the development of a natural gas field. Rather than his receiving remuneration for it, a 20% interest in the leases on 900 acres with eleven producing wells had been given to his adult children. He estimated the value of it to be in excess of $20,000. He tacitly admitted that the transfer was made to place that asset outside the reach of his judgment creditors.

He also indicated that he had an expectation of a substantial sum of money in the form of a commission for sale of a drill ship and offered to assign the leases and the commission to his victims. One of the victims testified that appellant's attorney had mentioned the assignment of the gas leases but that he considered them worthless and that he would prefer that the appellant dispose of them and pay him the proceeds. There was little to substantiate the expected commission on the drill ship and there was no evidence that an assignment of it had been offered to anyone. Appellant stated that he had not seriously sought employment for several years because regular employment would have interfered with his "other projects."

The trial court found that the offer to make restitution in the amount specified was suggested by the appellant himself and was not imposed by the court, that the court fully explained the consequences of failure to comply and that the appellant understood and agreed to those terms. It was stipulated that since that time appellant had paid nothing. The court further found "that appellant is not working and hasn't worked in several years, and for all practical purposes the prospects of doing so don't appear very good. Nobody is making a great deal of effort to go to work."

Appellant next argues that the trial court erred in revoking the suspended sentence because the defendant was never given a written statement specifically setting forth the conditions of his probation as provided in Ark. Stat. Ann. § 41-1203(4) (Repl. 1977). He argues that in *Ross* v. *State,* 268 Ark. 189, 594 S.W.2d 852 (1980) and *Neely* v. *State,* 7 Ark. App. 238, 647 S.W.2d 473 (1983) it was declared that the failure to furnish such a list of conditions mandates reversal. The record reflects that the appellant at no time raised this issue by pointing out to the trial court that he had not been furnished a written statement of his suspension or objected to the revocation hearing on that ground. This court will not consider issues raised for the first time on appeal. *Brown* v. *State,* 5 Ark. App. 181, 636 S.W.2d 286 (1982).

The appellant argues that the defect was jurisdictional and therefore could be raised at any time. Certainly this is the rule our court has adopted where the trial court is wholly without jurisdiction to try the issues presented. *Head* v. *Caddo Hills School District,* 277 Ark. 482, 644 S.W.2d 246 (1982); *State* v. *Glenn & Hamilton,* 267 Ark. 501, 592 S.W.2d 116 (1980). We cannot conclude that the doctrine is applicable here.

Unquestionably the circuit court has jurisdiction to try cases involving the crime of theft by deception and to appropriately sentence those found guilty of that offense. Nor can it be questioned that the circuit court in such cases has jurisdictional power to suspend imposition of sentence and to subsequently revoke the suspension. The circuit court clearly had jurisdiction of the subject matter of the revocation hearing and no one questioned that it had jurisdiction of the person of this appellant. The statutory requirement that the court furnish the appellant with a list of the conditions of his suspension is only a procedural matter, which if not complied with constitutes reversible error, but in no wise ousts the jurisdiction of the court. Like all other procedural errors for which reversal on appeal might be based it may be waived by failure to assert it. *Hawkins* v. *State,* 270 Ark. 1016, 607 S.W.2d 400 (Ark. App. 1980). Our court has consistently held that failure to object at the proper time waives rights otherwise afforded to a

criminal defendant. *Hawkins* v. *State,* supra.

Affirmed.

COOPER and CLONINGER, JJ., agree.

Stillie NICHOLSON
v. Lillian NICHOLSON

CA 83-292 669 S.W.2d 514

Court of Appeals of Arkansas
Division II
Opinion delivered May 30, 1984

Wilson, Bell & Neal Law Offices, by: *Olly Neal, Jr.,* for appellant.

Kinney, Easley & Kinney, by: *Knox Kinney,* for appellee.

JAMES R. COOPER, Judge. This divorce case involves the chancellor's award of alimony and the division of marital property. The chancellor ordered the appellant to pay $50.00 per week alimony to the appellee, and the sum of $6,000.00 was awarded to her as her half of the marital business. From that decision, comes this appeal.

The evidence indicates that the appellee suffered from poor health and that she could not work to support herself. She testified that she suffered from high blood pressure, back and side problems, and nervousness. The appellant, depending on whether one believed his version or the appellee's, earned either $600.00 per month or approximately $5,600.00 per month gross from his cafe and tavern. He also received approximately $8,000.00 from the rental of non-marital farm lands.

The award of alimony is within the sound discretion of the chancellor and this Court will not reverse his decision on an award of alimony absent an abuse of that discretion. *Stout* v. *Stout,* 4 Ark. App. 266, 630 S.W.2d 53 (1982). While we review chancery cases *de novo,* the chancellor's findings will not be reversed unless they are against a preponderance

of the evidence or are clearly erroneous. *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W.2d 404; A.R.C.P., Rule 52(a). Based on our standard of review and the evidence presented to the chancellor, we cannot say that his findings are either clearly erroneous or against a preponderance of the evidence.

The appellant also argued that the chancellor erred in finding that the cafe and tavern business was marital property. The appellant had opened the business in 1969 at a different location. In 1974, when the parties were married, they began jointly running the business. After the cafe burned in 1976, the appellant and the appellee borrowed $10,000.00 to rebuild the business. It is not contended that either the building, fixtures, or land upon which the business sits is marital property. The beer license for the business was in the appellee's name alone, since, apparently, the appellant could not have obtained the permit. On these facts, we cannot say that the chancellor's finding that the business constituted marital property was clearly erroneous or against a preponderance of the evidence.

Further, the appellant argues that the chancellor erred in determining that the business had a total value of $12,000.00 since the only thing which that could be based on was the goodwill of the business. We disagree. Goodwill of a business is a valuable assset subject to purchase and sale. *Cherry* v. *Kirkland,* 138 Ark. 33, 210 S.W. 344 (1919).

The appellant also argues that there was insufficient proof to show that the cafe had any goodwill. We disagree. There was ample proof that the business generated substantial income, was a going concern, and that the services it provided had substantial following in the community.

Finally, the appellant argues that the chancellor erred in the manner of computing the net worth of the business. Again, we disagree. The chancellor considered the testimony of the parties concerning the income of the business, and he observed the appellant's income tax return. It is clear that the chancellor had some evidence before him upon which to base his conclusion as to the worth of the business. We cannot say that his finding was either clearly erroneous

or against a preponderance of the evidence. The appellant has failed to bring us a record which demonstrates error, since he did not request that the chancellor make specific findings of fact concerning the manner in which he calculated the worth of the business. Therefore, we have no choice but to affirm. *SD Leasing* v. *RNF Corporation,* 278 Ark. 530, 647 S.W.2d 447 (1983).

Affirmed.

CLONINGER and CRACRAFT, JJ., agree.

Hunter WASSON and ROCKWOOD INSURANCE COMPANY *v.* Clinton LOSEY

CA 84-11 669 S.W.2d 516

Court of Appeals of Arkansas
Division I
Opinion delivered May 30, 1984

Walter A. Murray, for appellant.

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

DONALD L. CORBIN, Judge. Appellants, Hunter Wasson and Rockwood Insurance Company, appeal a decision of the Workers' Compensation Commission which allowed payment of nursing services to appellee's wife. We affirm as modified.

Appellants contend in their first point for reversal that the Commission erred by failing to allow a contract for nursing services entered into between appellee's wife and appellants to stand as a valid and enforceable agreement.

The Commission adopted the decision of the Administrative Law Judge who awarded the payment of nursing services to Mrs. Losey for the benefit of her husband, appellee Clinton Losey. The Administrative Law Judge calculated all nursing service benefits using minimum wage rates in effect at the time the services were rendered as follows: nursing service benefits provided by appellee's wife during appellee's hospitalization at Arkansas Rehabilitation Institute for 8 hours per day, 7 days per week; nursing service benefits for 24 hours per day, 7 days per week from May 29, 1980, until September 1, 1980; nursing service benefits for 12 hours per day, 7 days per week from September 1, 1980, until January 1, 1981; nursing service benefits for 8 hours per day, 7 days per week from January 1, 1981, until October 1, 1981; and nursing service benefits for 4 hours per day, 7 days per week for a period of time yet to be determined after October 1, 1981.

The Administrative Law Judge determined that the contract entered into by appellants and appellee's wife was an attempt on the part of appellants to circumvent or abrogate appellee's rights under Ark. Stat. Ann. § 81-1311 (Supp. 1983). The Administrative Law Judge disallowed the contract in toto on a finding that Ark. Stat. Ann. § 81-1320(a) (Supp. 1983), was controlling, which provides as follows:

> No agreement by an employee to waive his right to compensation shall be valid, and no contract, regulation, or device whatsoever, shall operate to relieve the employer or carrier, in whole or in part, from any liability created by this Act (§§ 81-1301—81-1349), except as specifically provided elsewhere in this Act. . . .

Ark. Stat. Ann. § 81-1311 (Supp. 1983), the statute providing for nursing services, states in part:

> The employer shall promptly provide for an injured employee such . . . nursing service . . . as may be reasonably necessary for the treatment of an injury received by the employee . . .
>
> All persons who render services or provide things mentioned herein shall submit the reasonableness of the charges to the Commission for its approval, and when so approved, shall be enforceable by the Commission in the same manner as is provided for the enforcement of compensation payments, *but the foregoing provisions relating to charges shall not apply where a written contract exists between the employer and the person who renders such service or furnishes such things* . . . (emphasis ours)

We believe the above is authority for the proposition that a provider of services to a claimant, in this instance appellee's wife, is free to contract with an employer or carrier for services rendered or goods supplied. The record clearly demonstrates that appellee's wife instituted the negotiations with appellants for the payment of nursing care provided by her to appellee. She bargained and compromised an agreement by letter dated May 29, 1980, which provided, among other things, for appellants to pay her $100.00 per week for nursing care to appellee Clinton Losey. Based upon Dr. Flanigan's report dated April 30, 1981, appellants terminated the $100.00 weekly payment to appellee's wife on May 15, 1981.

There was no evidence to establish that appellee did not

receive adequate nursing care services by his wife. It is clear appellee received all of the nursing services which he required. Accordingly, we hold that the Commission erred in refusing to allow the contract to stand as a valid and enforceable agreement between the parties. We, therefore, modify its decision to the effect that appellants are only responsible for nursing care benefits at the contracted rate of $100.00 per week for the term of the contract, May 29, 1980, to May 15, 1981.

Appellants' second contention for reversal is that the Commission erred in granting compensation to Mrs. Losey for her nursing services to appellee after May 15, 1981, and in granting an award for nursing services for the period appellee was hospitalized at the Arkansas Rehabilitation Institute. We find no error on this point.

As noted in appellants' first point, the contract was terminated effective May 15, 1981. Appellants had a responsibility to provide such nursing services for appellee as were reasonably necessary pursuant to statute. It is the prerogative of the Commission to determine from a preponderance of the evidence whether or not the charges were reasonably necessary. Furthermore, it is well settled that the Commission has the authority to accept or reject medical opinion and the authority to determine its ". . . medical soundness and probative force . . ." *Barksdale Lumber Co.* v. *McAnally,* 262 Ark. 379, 557 S.W.2d 868 (1977). Dr. Flanigan, appellee's physician, testified that Mrs. Losey's presence was necessary for appellee's therapy at the Arkansas Rehab Institute and that her continued nursing services were needed on a more limited basis thereafter. The Commission also had the benefit of the testimony of appellee, his wife, and the physical therapist in regard to the extent of nursing care needed by appellee on a daily basis. We find substantial evidence to support the Commission's award of nursing services provided by Mrs. Losey to appellee at prevailing minimum wage rates from May 15, 1981, up to and following a period of time yet to be determined after October 1, 1981. We also find substantial evidence to support the Commission's award of nursing care benefits provided by appellee's wife while appellee was a patient at Arkansas

Rehab Institute insofar as this rehabilitation pre-dated the contract between appellants and appellee's wife. We, therefore, affirm on this issue.

Finally, appellants contend that appellee should not have been allowed to amend his claim to include nursing services provided by his wife while he was hospitalized. The amendment was made near the end of the hearing before the Administrative Law Judge. Appellants argue that the amendment both surprised and prejudiced them. We agree with the Commission's finding that appellants had not demonstrated ". . . any prejudicial effect of this belated contention." The Commission further noted that no request for an immediate ruling was made at that time. In any event, the question of nursing services was not an incidental part of the claim. It was the very essence of the proceedings. We affirm on this point.

Affirmed as modified.

MAYFIELD, C.J., and GLAZE, J., agree.

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