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Robert M. RANKIN *v.* RANKIN CONSTRUCTION CO., FEDERAL INSURANCE CO. OF NEW YORK, RDR ENTERPRISES, INC., and STANDARD FIRE INSURANCE COMPANY

CA 84-6 669 S.W.2d 911

Court of Appeals of Arkansas
Division II
Opinion delivered June 6, 1984
[Rehearing denied June 27, 1984.]

Roy Finch, for appellant.

Anderson & Kilpatrick, by: *Overton S. Anderson,* for appellee.

MELVIN MAYFIELD, Chief Judge. This case is an appeal from a decision of the Workers' Compensation Commission denying and dismissing appellant's claim based on injuries he sustained in a one-vehicle accident that occurred when he was returning from Greers Ferry Lake to his home in North Little Rock.

Appellant, president and majority stockholder of appellee Rankin Construction Co. (a partner with appellee RDR Enterprises, Inc., in a joint venture), had planned a trip with his family to spend the weekend in a summer lake house. Before leaving North Little Rock, he had contacted Meyers, a subcontractor on the joint venture, and arranged to meet with him to discuss that and another project. On the way back from the lake, appellant, without detouring, stopped at Meyers' house near Higden. The accident happened after appellant left Meyers' house and was on the return route to North Little Rock.

Appellant claims on appeal that the Commission's decision is contrary to the law and the facts. He first contends that the Commission erred in basing its decision on the case of *Martin* v. *Lavender Radio & Supply, Inc.,* 228 Ark. 85, 305 S.W.2d 845 (1957). That case embraced the "dual purpose" trip doctrine as set forth by Judge Cardozo in *Marks' Dependents* v. *Gray,* 251 N.Y. 90, 167 N.E. 181 (1929). The doctrine is described succinctly in 1 Larson, *Workmen's Compensation Law* § 18.00 (1982), as follows:

> Injury during a trip which serves both a business and a personal purpose is within the course of employment if the trip involves the performance of a service for the employer which would have caused the

> trip to be taken by someone even if it had not coincided with the personal journey.

Larson's lengthy development of the subject uses Cardozo's opinion as its point of reference. That opinion states:

> What concerns us here is whether the risks of travel are also risks of the employment. In that view, the decisive test must be whether it is the employment or something else that has sent the traveler forth upon the journey or brought exposure to its perils.
>
> . . . We do not say that service to the employer must be the sole cause of the journey, but at least it must be a concurrent cause. To establish liability, the inference must be permissible that the trip would have been made though the private errand had been canceled. . . . The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. . . . If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk.

167 N.E. at 182-183.

The Arkansas Supreme Court adopted the *Marks'* v. *Gray* test in *Martin* v. *Lavender Radio & Supply, supra,* and later approved it in *Brooks* v. *Wage,* 242 Ark. 486, 414 S.W.2d 100 (1967); *Willis* v. *City of Dumas,* 250 Ark. 496, 466 S.W.2d 268 (1971); and *Wright* v. *Ben M. Hogan Co.,* 250 Ark. 960, 468 S.W.2d 233 (1971).

In the instant case, an examination of the record reveals that appellant had been thinking about the trip to the lake house for some time, and, after making those plans, he arranged his meeting with Meyers only a couple of days before leaving for Greers Ferry. Moreover, the Commission

found that the trip to the lake would not have been made except for the personal family outing. In his testimony, appellant admitted that if Meyers hadn't been available for a meeting on the weekend in question, he could and would have met with him at another time and place for the same purpose; and the Commission adopted the law judge's finding that there was no evidence that appellant would have been required to go to Meyers' home for that meeting as there were a number of other places they could have met, including appellant's office. Thus, we think there was substantial evidence from which the Commission, applying Cardozo's test, could find that the meeting with Meyers was not a "concurrent cause" of appellant's ill-fated journey.

Appellant strongly contends that there are factors here that make this case different from the *Marks'* and *Martin* cases. Specifically, he points to the fact that he was traveling in a vehicle owned and furnished by his employer; says he was "virtually on duty at all times and subject to call"; and contends he had completed the pleasure part of his dual purpose trip and was back on business when the accident occurred. The case of *Ark. Power & Light Co.* v. *Cox,* 229 Ark. 20, 313 S.W.2d 91 (1958), is cited as supportive of his contention that he is entitled to compensation under these circumstances.

In that case, Cox was furnished a car equipped with a two-way radio and was expected to keep himself and the car available on a 24-hour basis in case of emergencies. On the day involved, he was killed in a wreck while driving the company car from his office to his home. Pointing out that injuries sustained by employees while going to and from their regular place of employment are not, as a general rule, deemed to arise out of the employment, the court said there is an exception to the rule when the employee is traveling in a vehicle owned or supplied by the employer. That exception, however, is of no help to the appellant in this case since he was not on his way to or from his regular place of employment. *Cf. Wright* v. *Ben M. Hogan Co.,* 250 Ark. 960, 468 S.W.2d 233 (1971).

Appellant argues that *Martin* v. *Lavender Radio &*

Supply, supra, says that Martin's injury would have been covered had he stopped by the post office, while on the way to work, to get his employer's mail. The point is made that here the appellant *did* stop to discuss business with Meyers. We agree that both *Martin* and Cardozo's opinion relied upon in *Martin,* clearly indicate that an injury to appellant while he was stopped at Meyers' house would have been covered; but the injury to appellant occurred after appellant left Meyers and was on his way home from the weekend vacation. Furthermore, if Martin had stopped at the post office, he would have come under the dual purpose rule set forth in Cardozo's opinion, because in *Martin* it was necessary that someone go to the post office sometime to get the employer's mail. *See* Larson, *supra,* § 18.13. Here, however, the Commission found it would *not* have been necessary for appellant to go to Meyers' house at some other time.

Appellant also contends this case is like *Ark. Power & Light* v. *Cox* because he, like Cox, was "virtually on duty and subject to call at all times." The ultimate question to be answered in this case is whether appellant's injuries arose out of and in the course of his employment. Ark. Stat. Ann. § 81-1302(d) (Repl. 1976). The key to that question is the connection, or nexus, between the travel and the employment. *See Chicot Memorial Hospital* v. *Veazey,* 9 Ark. App. 18, 21, 652 S.W.2d 631 (1983). That was also the key to the question in the *Ark. Power & Light* v. *Cox* case. The employee was allowed recovery in that case because there was "substantial evidence to the effect that it was his duty to take the specially equipped automobile of his employer with him to the lake home for the mutual benefit of himself and his employer." 229 Ark. at 24. The employee was not allowed recovery in this case because the Commission found that his trip was not "sufficiently connected to his employment so as to be said to be reason enough for the trip to have been undertaken . . . absent the purely personal and private purpose."

On appeal we must accept the view of the facts most favorable to the findings of the Commission and affirm if there is substantial evidence to support its decision. *O.K.*

Processing, Inc. v. *Servold,* 265 Ark. 352, 578 S.W.2d 224 (1979). We find there is substantial evidence to support the Commission's finding that appellant has failed to establish that his injuries arose out of and in the course of his employment.

Affirmed.

CLONINGER, J., agrees.

GLAZE, J., concurs.

J. D. ROHRSCHEIB *v.*
HELENA HOSPITAL ASSOCIATION

CA 83-305 670 S.W.2d 812

Court of Appeals of Arkansas
Division II
Opinion delivered June 6, 1984

Garland Q. Ridenour, Ltd., for appellant.

Edward Grauman, for appellee.

GEORGE K. CRACRAFT, Judge. On January 20, 1982 Emma Trainer was admitted to the Helena Hospital for treatment. At that time an In-Patient Admission Form was typed for her which identified the patient by name, social security number, date of birth, occupation, address and next of kin. It contained the name of the admitting physician and "Symptoms and chief complaint." It also contained some information with regard to health insurance but contained no reference to charges for services or room rates and did not purport to impose any obligation upon the patient to do anything. It merely referred to her as "responsible party." It had a blank for a signature of the "responsible party" but did not define what the responsibilities were to be. This document was not signed by Mrs. Trainer. The appellant was not present when Mrs. Trainer was admitted to the hospital.

On January 25th at a time when charges in excess of $4,000 had been incurred for Mrs. Trainer's treatment she was visited by her brother-in-law J. D. Rohrscheib, who became apprehensive about her condition and obtained the concurrence of her doctor to transfer her to a hospital in

Memphis. At the time Mrs. Trainer was discharged Rohrscheib was informed that the ambulance service would require a deposit of $200, which he paid. At that time he was also asked to sign the bottom of the admission sheet as "responsible party," which he did. That portion of the document on which his signature appeared contained only the following words:

FINANCIAL STATEMENT

1/25/82	/s/ J. Childs	/s/ J. D. Rohrscheib
DATE	WITNESS	Signature of Responsible Party

Some months later the hospital brought this action to collect the sum of $4,239.16 which was the amount owed to the hospital by Mrs. Trainer for services rendered prior to her discharge. It contended that by signing the document as responsible party Rohrscheib had become a guarantor of Mrs. Trainer's obligation. Rohrscheib denied that he had become obligated for Mrs. Trainer's debt and contended that in any event the claim was subject to the Statute of Frauds.

Rohrscheib testified that at the time he signed the document it did not show any amount due to the hospital and contained no provisions for payment by him, and that he thought he was merely assuming the responsibility for any injury to Mrs. Trainer that might result from her release from the hospital and transportation to Memphis. There was testimony from a hospital employee that at some point Rohrscheib was informed that he was assuming responsibility for the hospital charges incurred by the patient even though the total amount had not then been computed. The trial court found that although the document might have been more definite and certain, Rohrscheib knew or should have known that he was assuming financial responsibility for Mrs. Trainer's hospitalization and entered judgment against him for the entire amount.

We agree with the appellant that this was erroneous. The admission sheet contained no promise on the part of Rohrscheib or anyone else to pay the debt. Although the admission sheet does use the words "responsible party," it

fails to provide what that party is responsible for. While the words "Financial Agreement" appear above the signature line for the responsible party, the document does not state what the responsible party has agreed to do financially. The trial court's finding that by signing the document as responsible party Rohrscheib obligated himself to pay all hospital charges for Mrs. Trainer's confinement rests entirely on parol evidence. This is expressly prohibited by Ark. Stat. Ann. § 38-101 (Repl. 1966) which provides that no action may be brought to charge any person upon a special promise to answer for the debt of another unless the promise is in writing and signed by the person sought to be charged. It is the settled construction of this section that every collateral undertaking or promise to answer for the default of another is within the statute and void if not in writing and signed by the person to be charged.

It is also settled that where the original debt has already been incurred, an oral promise by a third party to discharge a preexisting debt without new consideration is a collateral promise and within the statute. However, both an original undertaking under which benefits are initially obtained, and a promise to discharge a preexisting debt which is founded on new consideration are enforceable and deemed to be outside the statute. *Barnett* v. *Hughey Auto Parts, Inc.*, 5 Ark. App. 1, 631 S.W.2d 623 (1982); *Long* v. *McDaniel*, 76 Ark. 292, 88 S.W. 964 (1905); *Kurtz* v. *Adams*, 12 Ark. 174, 7 Eng. 174 (1851).

Even if this particular writing had purported in some manner or by use of some words to impose liability upon Rohrscheib as a guarantor (which it did not) it would be void for lack of consideration. *First Nat'l Bk. of Fort Smith* v. *Nakdimen*, 111 Ark. 223, 163 S.W. 785 (1914) and *Wilson Bros. Lumber Co.* v. *Furqueron*, 204 Ark. 1064, 166 S.W.2d 1026 (1942) declare the law clearly applicable to such a case as follows:

> It is essential to a valid contract of guaranty that there be a sufficient legal consideration. If there is not to be found in the contract either a benefit to the principal debtor, or to the guarantor on the one hand, or some

> detriment to the guarantee on the other, the contract will fail for want of a consideration. *The mere naked promise in writing to pay the existing debt of another without any consideration therefor is void. . . .* The guaranty of a preexisting debt relates to a past consideration and therefore to be valid must be based upon a new and additional consideration. [Emphasis supplied.]

There was no evidence that Mrs. Trainer or Rohrscheib benefited in any way from his signing the document or that the hospital suffered any detriment or forebore the assertion of any right as a result of it. It was not disputed that at the time Rohrscheib signed the document all of the charges for which this action was brought had already been incurred by Mrs. Trainer. There was no contention that any services were rendered to her thereafter in reliance on any oral promise of Rohrscheib. It was also established that had Rohrscheib not signed the document the hospital staff still would not have prevented Mrs. Trainer from leaving.

Reversed and dismissed.

COOPER and CLONINGER, JJ., agree.

ARKANSAS BLUE CROSS AND BLUE SHIELD, INC. *v.* James L. FUDGE

CA 83-279 669 S.W.2d 914

Court of Appeals of Arkansas
En Banc
Opinion delivered June 6, 1984

Jim Patton, for appellant.

John A. Crain, for appellee.

DONALD L. CORBIN, Judge. This action was brought by

appellee, James L. Fudge, against appellant, Arkansas Blue Cross and Blue Shield, Inc., for the cost of a tonsillectomy performed on appellee. Appellant refused payment on the premise that the hospitalization and surgery were caused by a condition which preexisted the effective date of coverage to appellee under a group health insurance policy issued by appellant. The trial court sitting as a fact finder awarded judgment to appellee against appellant for the sum of $766.04. We reverse and dismiss.

On July 1, 1981, James Fudge obtained coverage under a Farm Bureau group insurance contract underwritten by appellant Arkansas Blue Cross and Blue Shield, Inc. The policy contained the following exclusionary langugae:

> Article VI. Benefits and Services Not Included:
>
> A. Treatment of conditions or diseases existing prior to the effective date of the subscriber's contract until such contract has been continuously in effect for a period of at least twelve (12) consecutive months. This exclusion includes, but is not limited to, all conditions or diseases which may become aggravated or acute after the effective date of this contract or endorsement.
>
> B. A "condition or disease" which existed prior to the effective date of the subscriber's contract is one which caused symptoms or other manifestations prior to such effective date in such a manner as would cause an ordinarily prudent person to seek diagnosis, care or treatment.

On February 24, 1982, appellee was admitted to Baxter General Hospital where he underwent a tonsillectomy. Appellee's treating physician was Dr. Maxwell Cheney and his history and physical report stated in part:

> This is a 29-year-old white male with known chronic hypertrophic tonsillitis for many years, known upper respiratory allergy with severe nasal suction and difficulty for several years. He has had increasing complaints of recurrent sore throat and inability to feel

> well or gain weight and generally feel energetic. He has finally decided to have his chronically enlarged tonsils removed, largely because of choking and recurrent sore throat.

Dr. Cheney's discharge summary stated as follows:

> This patient is a known severe allergy patient and has had chronic tonsillitis three or four times per year, most of his life. The patient has been told in the past that tonsillectomy was contradicted [contraindicated] in an allergic patient, however, this was many years ago. The patient has taken Ampicillin at least two weeks out of every month for the past year.

Appellant contends for reversal that the trial court's ruling that appellant had not sufficiently established the existence of a preexisting condition is against the preponderance of the evidence and clearly erroneous. It is well settled that findings of fact by a trial judge will not be set aside by this Court unless clearly erroneous (clearly against the preponderance of the evidence). A.R.C.P. Rule 52(a); *Henson* v. *Money,* 1 Ark. App. 97, 613 S.W.2d 123 (1981).

We believe the decision of the Arkansas Supreme Court in *Lincoln Income Life* v. *Milton,* 242 Ark. 124, 412 S.W.2d 291 (1967), is dispositive of this case. There, the plaintiff-insured was hospitalized in November, 1965, after issuance of a policy in July, 1965. Her complaint was that she felt bad. Her physician testified that her last menstrual period was September, 1964, and tests performed during her hospitalization revealed that her thyroid gland was underactive, producing insufficient hormones to regulate bodily functions, including menstruation. The trial judge entered judgment for the plaintiff-insured, finding that she did not know the cause of her physical disorder when she applied for the policy. The Supreme Court reversed, stating:

> We can find no reasonable basis for declaring that the appellee's hospital expense was attributable to a sickness or disease which, in the language of the policy, first commenced or became evident after the effective

> date of the policy. . . . There is no evidence that the condition had worsened or had for the first time become subject to diagnosis. It is true, as the trial judge observed, that the insured did not know when she applied for the policy that her trouble was attributable to an underactive thyroid gland. It is clear, however, that such an underactivity did exist and that it led to the hospital expenses now in issue. That Mrs. Milton did not know the medical explanation for her condition when she applied for the policy is not a reason for holding that the condition first commenced or became evident after the effective date of the contract.

Milton, supra, is in accord with *State National Life Ins. Co.* v. *Stamper,* 228 Ark. 1128, 312 S.W.2d 441 (1985), wherein the Supreme Court stated that:

> . . . [T]he weight of authority is that the sickness should be deemed to have had its inception at the time it first manifested itself or became active, or when sufficient symptoms existed to allow a reasonably accurate diagnosis of the case . . .

The date of diagnosis of the condition is not dispositive. As Justice Fogleman observed in his concurring opinion in *Old Equity Life Ins. Co.* v. *Crumby,* 241 Ark. 982, 411 S.W.2d 292 (1967):

> Our decisions have turned on the active manifestation of the condition and not on the ability to diagnose.

Based upon the admitting and discharge reports of Dr. Cheney and the testimony at trial of Dr. Cheney and appellee, it is clear that appellee sought and received treatment for a condition which had long preexisted his insurance coverage. Taking the evidence as a whole, appellee clearly had not only a condition which manifested symptoms prior to the effective date of his insurance contract, but he also sought and received treatment for an extended period of time for this condition prior to the effective contract date of the contract. The fact that the condition was not allegedly diagnosed as requiring surgery

until appellee was admitted to the hospital by his doctor for surgery on February 24, 1982, is immaterial. Dr. Cheney testified that appellee had experienced chronic tonsillitis for many years prior to his hospitalization. He also stated that his examination established that the condition had "absolutely" existed for some time. The term "chronic" is defined as "of long duration; denoting a disease of slow progress and long continuance." Stedman's Medical Dictionary 278 (23d ed. 1976). The record reflects that appellee received treatment in the form of antibiotics prescribed over the telephone by Dr. Cheney for at least one year before his surgery. Appellee was not seen by Dr. Cheney in his office until the week preceding his surgery. In view of appellee's history of recurring sore throats, we believe a reasonable and prudent person, as defined in Article VI (B) of the contract of insurance, would have sought a direct medical examination of his condition. This was not done in the instant case. Accordingly, we hold that appellee's condition preexisted the effective date of coverage and the trial court was clearly erroneous in awarding judgment to appellee.

Reversed and dismissed.

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

MELVIN MAYFIELD, Chief Judge, dissenting. Although the majority opinion acknowledges the existence of A.R.C.P. Rule 52(a), which provides that the trial court's findings of fact shall not be set aside unless clearly against the preponderance of the evidence and that due regard shall be given to his opportunity to judge the credibility of the witnesses, the majority sets those findings aside without mentioning one word of the testimony given by the appellee or giving any reason why his testimony is not credible.

Because I believe the proper application of Rule 52(a) would require that this case be affirmed, I dissent.

I am authorized to state that Judge Cooper agrees.

Kaye MORROW *v.* Raymond WHITE
and Pam WHITE

CA 83-287 670 S.W.2d 459

Court of Appeals of Arkansas
Division II
Opinion delivered June 13, 1984
[Opinion Amended on Denial of Rehearing August 29, 1984.]

Thomas A. Martin, Jr., for appellant.

Gresham & Kirkpatrick, by: *James E. Gresham,* for appellee.

GEORGE K. CRACRAFT, Judge. This is the second appeal in this case involving a boundary line dispute. On March 4, 1981 in an unpublished opinion we reversed that portion of a decree which vested title to a two acre tract in the appellees upon a finding on *de novo* review that appellant had failed to sustain her burden of proving adverse possession. In that same decree the chancellor found that both parties had failed to establish the common boundary line of their respective properties because of the vast variance between two surveys

which were introduced and the admissions of both surveyors that neither had tied his survey to an established or known government corner. Both had been unable to reconcile existing monuments set by others, and neither was sure that his survey was a correct one. We remanded the cause and directed that further evidence regarding the location of the true boundary line between the properties be taken.

The parties are adjoining landowners and each has acquired his title by descriptions which make reference to subdivisions which were established in the General Land Office Survey of 1848. Appellant is the owner of the West three-fourths of the Southwest Quarter of the Southwest Quarter of Section 18 and appellees own the East one-quarter of that same Quarter-Quarter. As there has been no adverse possession established by either party, their common boundary lies along the line established in the original land office survey. Only by accurately locating that line could either establish his true boundary.

On remand, testimony of one of the two surveyors who had testified in the first trial was presented. After hearing this evidence the chancellor again found that the appellant had failed in her burden of proving the location of the true boundary line. We agree.

The surveyor testified that his subsequent field and office work convinced him that both surveys used in the prior hearing were in error but it was his opinion that his final survey was an accurate reconstruction of the General Land Office Survey of 1848. He stated that he found no GLO corners in the immediate area of the Southwest Quarter of Section 18 but that he did locate one monument mentioned in the original field notes and survey. Both the plat and survey made reference to a bluff 25 feet high on the west line of the Southwest Quarter of Section 7 (which is immediately north of Section 18). The field notes indicated that the surveyors had placed the west line of Section 7 at a certain point on that bluff which was 220 links west of the break in the bluff which they were required to utilize in an offset survey. From this certain point in the bluff he surveyed north until he found a mound of stones which was within 7

feet of the southwest corner of Section 7 set forth in the original field notes. He yielded the distance prescribed in the field notes to that monument and accepted it as the quarter corner of Section 7. In so doing he located the corner at a place other than that established in the field notes of the original survey.

Next, in locating the southwest corner of Section 18 he was required to run south from that starting point a distance of approximately a mile and a half. In the first segment of this subsequent survey he attempted to establish the northwest corner of Section 18. In doing so he did not survey *south* 1320 feet as directed in the field notes but *south 00° 17′ 20″* west a distance of only 1314.46 feet, yielding the prescribed course and distance to a pile of stones near that point. In doing so he also located this corner at a location other than that established by the original surveyor as shown by his field notes. Although the GLO field notes established the quarter corner of Section 18 at a point *south* 2629.44 feet from the northwest corner, the surveyor, again "yielding" to another pile of stones, varied that course to *south 00° 35′ 10″ east* and the distance to 2657.92 feet. Although the original field notes also ran *south* 1320 feet to the southwest corner of Section 18 he, again yielding to a pile of stones in the vicinity, followed the course *00° 42′ 20″* west a distance of 1232.26 feet, again locating the corner at a point different from that at which the field notes of the original survey said it should be.

Not one of the three segments of this survey followed the course or distances set out in the field notes. By varying the distances the southwest corner of Section 18 as located by the surveyor would be approximately 20 feet north of the point at which the original surveyor described it. It is a simple matter of geometric calculation to determine that a variance of 00° 30′ west for a distance of 1 mile would place the terminus approximately 41 feet west of a point which would have been reached by the same distance on a course of true south. The one and a half mile segment of this survey varied from the original course by more than half a degree and would place the corner considerably to the west of that prescribed in the field notes. We agree with the learned

chancellor that this survey did not accurately establish the section line and that the appellant therefore did not meet the burden of proving her boundary.

In varying the courses and distances when yielding to monuments other than those established by the government surveys, the surveyor misunderstood the mission of a surveyor in establishing original government corners. At the time of the Louisiana Purchase this area was a vast wilderness, sparsely populated and with no integrated system of land descriptions. Early in the nineteenth century Congress authorized the General Land Office to survey and plat the entire area in order to give each parcel of land in the public domain a specific and identifiable location which would be subject to relocation by survey at any time. The field notes and plats of those surveys are carefully preserved and with few exceptions all lands in this area were disposed of by the Federal Government with reference to these surveys. Due to errors which were bound to occur, these surveys did not always result in perfect square mile sections of 640 acres with parallel boundaries. Survey parties did not always meet at the point previously calculated and some of the established section corners did not coincide with adjoining ones.

These approved GLO surveys formed the basis for the description of lands when disposed of by the government and any errors, including variances from prescribed courses, distances of acreages, were merged into the government grants. A patent or other original conveyance made with reference to a subdivision conveyed those lands which the General Land Office Plat showed it to contain. *Little* v. *Williams,* 88 Ark. 37, 113 S.W. 340 (1908) aff'd 231 U.S. 335 (1913). The purpose of subsequent surveys in locating corners and boundaries is not to *correct* any error or variance of the original surveyor but is to retrace his steps by use of his field notes and plats and to locate the corners where he located them.

The surveyor testified that he found no corner markers set by the original surveyors because they had long since disappeared. The field notes disclosed that the original

surveyor marked all corners with wooden stakes and there is no reference to any corner in this vicinity having been marked by rocks. All of the witness monuments except for the possible exception of the 25 foot bluff have been obliterated. Unless the various piles of stones to which this surveyor yielded were shown to have been located where the plat and field notes said they should be, they were of no significance and it was error to yield to them. *The Manual of Surveying Instructions* published in 1973 by the United States Department of the Interior, Bureau of Land Management, sets out the prescribed method of relocating lost corners. The surveyor testified that he was familiar with that manual and that the methods prescribed by it were accepted as good practice in the surveying profession.

He further testified that, even if his corners had been properly established, good surveying methods would require him to have tied the location of the southeast corner of Section 18 to some *known corner* to the east of it. He did not do this because he said things in that area were so "messed up" that it would have required an expenditure in excess of $10,000 to accurately locate this property line. The court found from the surveyor's testimony that depending on the location of a known corner to the east, the location he established could still vary as much as 15 feet in any direction. The chancellor's finding that a survey containing the possibility of error of this magnitude does not meet that degree of certainty required in the establishment of boundaries between adjoining property owners is not clearly erroneous. *Wilson* v. *Brandenburg*, 252 Ark. 921, 481 S.W.2d 715 (1972).

We affirm.

COOPER and CLONINGER, JJ., agree.

Odie TOLLETT and Nitta TOLLETT, His Wife
v. Lenora TITSWORTH

CA 83-463 670 S.W.2d 467

Court of Appeals of Arkansas
Division II
Opinion delivered June 13, 1984

Jacoway & Sherman, by: *Merl O. Barns,* for appellant.

Jim O'Hara, for appellee.

GEORGE K. CRACRAFT, Judge. The sole issue on this appeal from a declaratory judgment is what the rights are of the junior lienholder who has not been made a party to an action foreclosing a first mortgage lien after the sale. The trial court declared that none of the rights of the junior lienholder were affected by the foreclosure to which he was not a party and after the sale became prior and paramount to those of the purchaser. While we agree that a junior lienholder was a necessary party to that action and his rights were not immediately affected by the decree, we do not agree that his lien became paramount to the rights of the purchaser.

The matter was submitted to the trial court on stipulated facts. On June 24, 1980 Larry W. Treadwell and Elaine Treadwell executed in favor of the appellants a first mortgage on a tract of land to secure the unpaid portion of the purchase price. The Treadwells defaulted on the note and appellants commenced this action in foreclosure on March 11, 1981. No *lis pendens* was filed. On March 25, 1981 the appellee Lenora Titsworth obtained a judgment for personal injuries against the Treadwells. The appellants were not aware of the judgment and did not make the appellee a party to the foreclosure action. The foreclosure decree was entered in October 1981 and the land was sold at judicial sale to the appellants on November 5, 1981 for the full amount of debt, cost and attorney's fees. The appellee had no knowledge of the foreclosure action until after the sale.

On learning of the judgment in favor of appellee the appellants sought to bring her into the action but that motion was denied because more than ninety days had expired since the entry of the decree. Appellee subsequently caused a writ of execution to be issued on the property. The

appellants then brought this action for a declaratory judgment to determine the rights and liabilities of the respective parties and seeking a stay of further proceedings in execution pending that determination. When the trial court declared that the right of the junior judgment creditor was superior to that of the appellants, this appeal followed.

It is well settled that, where the owner of real estate has executed a first mortgage on his property, after maturity and before his equity of redemption is foreclosed in equity he retains only the equitable right to perform the conditions of the mortgage. The equity of redemption is considered to be the real and beneficial estate, tantamount to the fee. It is descendible by inheritance and alienable by deed or mortgage the same as if it were an estate of inheritance, and may be taken on execution by judgment creditors. Any person who acquires a claim on the equity of redemption has the same right as the original mortgagor to redeem the legal title in order to protect his interest. *State, Use of Ashley & Watkins* v. *Lawson et al,* 6 Ark. 269, 2 Eng. 269 (1846); *German National Bank* v. *Barham,* 57 Ark. 533, 22 S.W. 95 (1893). Unquestionably junior lienholders ought to be made parties to the foreclosure of the first mortgage in order both to protect their rights and to foreclose their interest in the equity of redemption. Where, as in this case, a junior lienholder is not made a party to foreclosure of the first mortgage, he is not bound by the decree and neither his right to redeem nor his claim on the equity of redemption is extinguished. His status is the same as if there had been no foreclosure action. *Smith* v. *Simpson,* 129 Ark. 275, 195 S.W. 1067 (1917).

It is well settled that in such circumstances a subsequent lienor or grantee of the equity of redemption can only claim the right to redeem from the foreclosure sale. This right must be exercised by tendering into the court the entire amount of the debt for which the mortgage was foreclosed within a reasonable time of the sale. *Skelly Oil Co.* v. *Johnson,* 209 Ark. 1107, 194 S.W.2d 425 (1946); *Harrison* v. *Bank of Fordyce,* 178 Ark. 760, 12 S.W.2d 400 (1929); *Prouty* v. *Guaranty Loan & Trust Co.,* 174 Ark. 12, 294 S.W. 362 (1927); *Smith* v. *Simpson,* 129 Ark. 275, 195 S.W. 1067

(1917); *Longino* v. *Ball-Warren Commission Company,* 84 Ark. 521, 106 S.W. 682 (1907); *Livingston* v. *New England Mtge. Security Co.,* 77 Ark. 379, 91 S.W. 752 (1906); *Dickinson* v. *Duckworth,* 74 Ark. 138, 85 S.W. 82 (1905); *Allen* v. *Swoope,* 64 Ark. 576, 44 S.W. 78 (1898).

The difficulty in each case arises in determining how long this right to redeem by a junior lienholder continues to exist. In *Skelly Oil Co.* v. *Johnson, supra,* it was stated that in the absence of a statute equity will allow redemption "within a reasonable time," and what is reasonable depends on the pleas interposed, the facts and equities in each case.

It is clear from these cases that a junior lienholder such as this appellee who comes into court for the purpose of asserting his lien upon the equity of redemption must first exercise his right to redeem by tendering the proceeds of the entire debt for which the first mortgage was foreclosed within a reasonable time to be set by the court. This cause is therefore reversed and remanded for a determination by the court of a reasonable time during which this right may be exercised and entry of a decree which provides that if that right is not exercised within a reasonable time, the title acquired by the appellants at the foreclosure sale will be vested in them free and clear of the judgment lien of the appellee.

Reversed and remanded.

COOPER and CLONINGER, JJ., agree.

Kenneth HARDMAN and Judy HARDMAN, His Wife
v. DAIRY FARM LEASING COMPANY

CA 83-294 670 S.W.2d 466

Court of Appeals of Arkansas
Division II
Opinion delivered June 13, 1984

Adams, Covington & Younes, P.A., by: *Donald J. Adams,* for appellant.

Pinson & Reeves, by: *Jerry D. Pinson,* for appellee.

LAWSON CLONINGER, Judge. This is an appeal from a decree of the chancellor, finding that a written agreement by appellants to lease twenty-four dairy cattle from appellee was valid and was not in fact a credit sale which was void for usury as set out in *Bell* v. *Itek Leasing Corp.,* 262 Ark. 22, 555 S.W.2d 1 (1977).

This agreement was signed on December 15, 1979. Appellants then took possession of twenty-four dairy cows which they had picked out and made payments pursuant to the lease agreement for a period of approximately two and one-half years. The last payment on the lease by the appellants was in May of 1982. Thereafter, the appellants filed suit alleging that the lease was not a lease but was in fact the sale of the cattle and was usurious and unenforceable. Appellee cross complained, alleging that the agreement was a valid lease and arguing that it was entitled to accelerate the remaining payments left on the five-year lease. The chancellor refused to enforce a provision for

acceleration, holding that that provision was unconscionable and unenforceable in a court of equity. He did, however, enter judgment for appellee in the amount of $17,712.14 which represented the rental owed to the date of the decree. He further held that appellee was entitled to take possession of the cattle and retain jurisdiction to establish the actual damages sustained by appellee. Appellants now bring this appeal, and we must affirm.

Appellants' sole point for reversal is that the chancellor erred in finding that the transaction was a lease and not a sale. One case is cited for this point, *Bell* v. *Itek Leasing Corp., supra.* In *Bell,* the Arkansas Supreme Court reversed a finding by the chancellor that a valid lease existed between the parties which purported to lease certain printing equipment to appellant for a term of five years. The court held that an overwhelming preponderance of the evidence showed that the purported lease was in actuality an installment sale contract and was void for usury. The court looked to five important facts which supported the finding that the purported lease was in actuality a sale:

1. The defendant was in fact a finance company.

2. The printed form of the lease put all of the risk upon the lessee. The lessee was further required to pay all the taxes and insurance upon the leased property and all the risk of loss or damage to the leased property.

3. The contract provided the same remedies upon the lessee's default that would be available to a conditional seller or to a mortgagee on a similar delinquency.

4. The contract expressly provided that the lessee would join the lessor in executing financial statements and "in the execution of such other instruments or assurances as lessor deems necessary or advisable for protection of the interest of the lessor in the equipment."

5. The minimal amount the lessee would pay to acquire title after all the payments had been made

under the lease. The court held that if the amount was nominal, as it was in this case, then the transaction is patently a sale in lease's clothing.

In the instant case, many of the factors that were present in *Bell* are present here. First of all, there is some evidence in the record to support a finding that the appellee was, in fact, a financing company. Appellee did not own the cattle at the time the agreement was executed but rather purchased the cattle the following day. Appellants picked out all of the cattle which were purchased.

Secondly, the lease put all the risk of loss or damage to the leased property upon the lessee and further required the lessee to pay all licenses, fees, and taxes.

Thirdly, the contract provided many of the same remedies upon the lessee's default in the payment of rent that would be available to a conditional seller. The lease contained an acceleration clause and further required the execution of a mortgage upon appellants' property which also contained acceleration language. These remedies are very similar to those given a secured party. Fourth, the agreement did require appellants to execute financing Statements.

The last factor looked to in *Bell* was if the option to purchase at the end of the lease was a relatively small amount, then the transaction would be considered a sale rather than a lease. There is language in *Bell* to indicate that the most important factor in making the determination of the lease/sale distinction is the amount the lessee must pay at the end of the term in order to acquire title. In the instant case, appellants were given an option to purchase at the end of the lease for the fair market value of the cows. Appellants argue that there was testimony which indicated that the fair market value of the cows would have been diminished at the end of the five-year period. This testimony, however, did not give any definite value and we cannot speculate that it would have been a minimal amount to the extent that this transaction was a sale in lease's clothing.

We hold that the chancellor's finding that this agreement was a lease rather than as sale is not clearly against a preponderance of the evidence.

Affirmed.

CRACRAFT and COOPER, JJ., agree.

ARKANSAS STATE HIGHWAY COMMISSION
v. Yance WILKINSON et al

CA 83-299 670 S.W.2d 462

Court of Appeals of Arkansas
Division II
Opinion delivered June 13, 1984

Thomas B. Keys and *Philip N. Gowen,* for appellant.

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

LAWSON CLONINGER, Judge. This is an appeal from an eminent domain proceeding in White County Circuit Court. On April 10, 1978, appellant acquired in fee 8.73 acres of land from a 65-acre tract of land purportedly owned by Mr. and Mrs. Yance Wilkinson. On Aguust 20, 1982, J. R. and Patricia Smith filed a motion to intervene in the action alleging that they were contract purchasers of three acres from the 65 acres. They further alleged that access to their three-acre tract had been impaired by the taking of the 8.73 acres by appellant. In an order rendered on September 10, 1982, the court granted the intervention. This case was tried to a jury on April 11, 1983, and the jury rendered a verdict in favor of the appellees, Yance and Lena Wilkinson, in the amount of $30,216.00. By separate verdict form, the jury rendered a verdict in favor of appellees, J. R. and Patricia K. Smith, and fixed compensation at $3,000. The trial judge deducted $3,000 from the total amount awarded the Wilkinsons and awarded it to the Smiths.

Appellant now brings this appeal, alleging as its sole point for reversal that the court erred in permitting the intervention. Appellant initially argues that the granting of the intervention constituted a suit against the State of Arkansas, in violation of Article 5, Section 20, of the Arkansas Constitution. See also *Arkansas State Highway Commission* v. *Kincannon, Judge,* 193 Ark. 450, 100 S.W.2d 969 (1937). We agree with the trial judge that the granting of the intervention did not amount to a suit against the State.

Arkansas Rules of Civil Procedure, Rule 24, provides in pertinent part:

> Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a

> practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

There is no contention by appellant that the Smiths' interests would have been adequately represented by the Wilkinsons, and that issue therefore is not before us. In this case, we are unable to say that the judge's decision was in error. As equitable owners of a three-acre tract out of the 65 acres owned by the Wilkinsons, the court properly allowed the Smiths to intervene in the case. He instructed the jury that all damages were to be awarded to the Wilkinsons. He then asked the jury to submit on a separate verdict form the amount in which the Smiths had suffered damages by the taking. The Arkansas State Highway Commission was responsible for no damages suffered by the Smiths. There is no allegation that the award given to the Wilkinsons was excessive, and the award clearly was within the bounds of the expert testimony. The Wilkinsons have not appealed from the judgment of the trial court. We hold that appellant's argument that appellees' intervention violated the Arkansas Constitution is without merit.

Appellant further argues that no judgment should have been entered in favor of appellees, the Smiths, because they did not show any damages peculiar to them; namely, that they did not suffer any damage which was not suffered by the public in general. See *Arkansas State Highway Commission* v. *McNeill,* 238 Ark. 244, 381 S.W.2d 425 (1964). However, we hold that appellant has no standing to make this argument, since no judgment was entered against it in favor of the Smiths.

We accordingly affirm the jury verdict and the decision of the trial court.

COOPER and CRACRAFT, JJ., agree.

NU-WAY LAUNDRY & CLEANERS, Employer and ROCKWOOD INSURANCE COMPANY, Insurance Carrier *v.* Josie PALMER, Employee

CA 84-43 670 S.W.2d 464

Court of Appeals of Arkansas
Division II
Opinion delivered June 13, 1984

Walter A. Murray, for appellant.

Lesly W. Mattingly, for appellee.

LAWSON CLONINGER, Judge. This appeal arises from a decision of the Arkansas Workers' Compensation Commission awarding benefits to appellee for injuries she received in a fall while at work in appellant's cleaning plant. Appellee testified that she slipped in a puddle of water on the floor; appellant presented five witnesses who said that appellee had made statements immediately after the mishap to the effect that her knee had given way. The Commission endorsed the holding of an Administrative Law Judge that appellee's injury arose out of and in the course of her employment with appellant and was compensable. Appellant contends that the award is contrary to the law and the facts of the case. We agree, and we reverse and remand the case to the Commission for reconsideration in the light of the holdings in this opinion.

Appellee injured her knee as a teenager and has a

history of knee slippage and collapse. In her testimony she revealed that her knee had failed her between fifteen to twenty times since 1977. She alone testified to having slipped in the water at the cleaners. The Commission found by a preponderance of the evidence that appellee's fall was idiopathic in origin. Despite this finding, they determined that "whether or not claimant's preexisting left knee condition played a role in her fall, her injuries were compensable because she was performing her assigned duties when the accident occurred."

It appears that in arriving at its decision the Commission fused the distinct categories of "unexplained" and "idiopathic" falls. Further, the Commission dismissed as irrelevant any consideration of the difference between the two.

In *Country Pride* v. *Holly,* 3 Ark. App. 216, 219, 624 S.W.2d 443 (1981) we stated the general rule on the compensability of idiopathic falls, quoting Larson, *Workmen's Compensation Law,* §§ 12.11, 12.14 (1978):

> [T]he effects of such a fall are compensable if the employment places the employee in a position increasing the dangerous effects of such a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle. . . .
>
> Inevitably there arrive the cases in which the employee suffers an idiopathic fall while standing on a level surface, and in the course of his fall, hits no machinery, bookcases, or tables. At this point there is an obvious temptation to say that there is no way of distinguishing between a fall onto a table and a fall onto a floor, since in either case the hazard encountered in the fall was not conspicuously different from what it might have been at home. A distinct majority of jurisdictions, however, have resisted this temptation and have denied compensation in level-fall cases. *The reason is that the basic cause of the harm is personal, and that the employment does not significantly add to the risk.* (Emphasis added.)

We decided *Country Pride* on different grounds, but we here adopt both the rationale and the rule pertaining to idiopathic falls as set forth in that case.

We briefly addressed the issue of an "unexplained" fall apparently unconnected to a claimant's work in *Fairview Kennels* v. *Bailey,* 271 Ark. 712, 610 S.W.2d 270 (Ark. App. 1981). There we observed that Larson, at *Workmen's Compensation Law,* § 10.31 (1978), had noted that most courts awarded compensation in cases involving unexplained falls. We held that the claimant's explanation that she "fell and couldn't get up" was sufficient for a finding by the Commission that she fell while performing work required by her job and thus received an injury arising out of her employment.

In *Roc-Arc Water Co.* v. *Moore,* 10 Ark. App. 349, 664 S.W.2d 500 (1984), we considered a situation that the employer contended was "somewhere between an 'unexplained fall' and an 'idiopathic fall'." Although we found that there was evidence from which the Commission might have found that the employee's fall was idiopathic in nature, we held that there was sufficient evidence for the Commission to rule, as it did, that the fall was unexplained and arose in the course of the claimant's employment. The fact that we implicitly acknowledged a distinction in kind and consequence between idiopathic and unexplained falls in *Roc-Arc* should not pass unnoticed.

The present case goes further than any of the earlier ones in the unexplained/idiopathic line. The Workers' Compensation Commission relied upon *Fairview Kennels, supra,* and its own decision in *Moore* v. *Roc-Arc Water Co.,* WCC Claim No. D113610 (June 6, 1983), in holding that when a fall is attributable to either an unexplained or an idiopathic condition it is nonetheless compensable if the injury occurs while the claimant is doing required work. This ruling of the Commission extends the "unexplained" fall theory to the general rule stated by this Court in *Country Pride* v. *Holly, supra.* If we were to endorse the Commission's position in the instant case, any distinction between

unexplained and idiopathic falls would become blurred and irrelevant.

We reverse the decision of the Commission and remand the case to the Commission for reconsideration in light of this opinion.

CRACRAFT and COOPER, JJ., agree.

Judy CLARK *v.* FIRST COLONY LIFE INSURANCE COMPANY

CA 83-317 670 S.W.2d 470

Court of Appeals of Arkansas
Division I
Opinion delivered June 13, 1984

Holland & Todd, by: *Michael E. Todd;* and *Davis, Cox & Wright,* by: *Sidney P. Davis Jr.,* for appellant.

Sam Boyce and *Griffin Smith,* for appellee.

DONALD L. CORBIN, Judge. Appellant, Judy Clark, contends on appeal that the trial court erred in granting summary judgment to appellee, First Colony Life Insurance Company, Inc., which had the effect of denying appellant the benefits of a $50,000.00 term life insurance policy on the life of her deceased husband. We affirm.

Philip Clark, husband of appellant, had previously been insured under a policy issued by appellee. He applied for another policy but refused it upon delivery. The first policy had lapsed for non-payment of premium.

Bill Binnion was the soliciting agent for appellee First Colony Life, and Binnion met with Clark on or about November 14, 1978, to urge him to reinstate the first policy, one for ordinary life. Clark refused, saying he couldn't afford the premium; however, Clark indicated he would accept a term policy for $50,000.00 at a lower premium. According to Binnion, Clark "may have" given him one month's premium in the amount of $24.93 in cash.

On returning to the office, Binnion was informed by the general agent for appellee that a new application would be necessary. Binnion filled out the application using information contained in the previous application for life insurance by Clark and apparently signed Clark's name to the application. The application and a partial premium payment were sent to appellee by Binnion. The term policy was issued on the life of Philip Clark by appellee on January 2, 1979, and mailed to Binnion's office on January 5, 1979. Binnion made three attempts to deliver the policy. The telephone was answered on all three occasions by appellant who informed Binnion on the first call that Clark was out of town. Binnion was informed on the second call that Clark had the flu. Appellant told Binnion on his third attempt that Clark was not available. After the third call, Binnion mailed his check for the balance of the quarterly premium in the

sum of $42.67 to appellee. Philip Clark was murdered on February 4, 1979.

Appellant argues two propositions on appeal. On the one hand, it is urged that delivery of the policy to the general agent, who in turn delivered to Binnion, the soliciting agent, amounted to constructive delivery. On the other hand, it is also urged that compliance with the condition precedent pertaining to delivery was waived because the policy was mailed to the insurer's general agent, Impaired Risk Underwriters, Inc., and the accompanying document, labeled "Policy Delivery Invoice," had a check mark ("X") under "Delivery Instructions." The sentence checked provided, "Premium of $42.67 balance of first quarterly premium." Next to this, in longhand, was inscribed, "Paid by Broker."

Appellant asserts that the effect of this transmittal, with the accompanying invoice, amounted to a waiver of the condition precedent contained in the application requiring delivery during the lifetime of the proposed insured. Actually, no argument of waiver, as such, is made in appellant's brief. The assertion is made that since the policy delivery invoice did not reiterate the requirement set forth in the application that delivery during lifetime was essential, "a substantial question of fact exists as to whether appellee ought to be bound by the policy."

Both appellant and appellee rely on *New York Life Ins. Co.* v. *Mason,* 151 Ark. 135, 235 S.W. 422 (1921). In that case, Mason had applied for a policy of insurance from New York Life Insurance Company through its agent, W. J. Humphries. The application signed by Mason contained a stipulation that the insurance should not take effect "unless the first premium is paid and the policy is delivered to me and received by me during my life time and in good health." The evidence reflected that on a Sunday, Humphries tendered the policy to Mason and Mason accepted the policy but left it, for his own convenience, in the possession of Humphries. The issue was whether or not the delivery of the policy on Sunday put the insurance into force. It was contended in the *Mason* case that the mailing of the policy from its office to its

agent, Humphries, constituted a constructive delivery. The Court in *Mason, supra,* stated: "This would be true if the policy was mailed to Humphries unconditionally for the sole purpose of delivery to the assured, but such is not the effect of the transaction if the policy was mailed to the agent of the insurer for the performance of specified duties in making the delivery of the policy." The Court further stated "[T]he burden was on the plaintiff to show that delivery was made by mailing the policy unconditionally to Humphries for that purpose." The Supreme Court reversed the decision of the trial court holding that the mailing of the policy to the agent did not constitute a constructive delivery nor put the policy into force without an actual delivery to the insured in person.

In the case at bar the application for insurance contained a similar provision that delivery of the policy was conditioned upon the insured's continued good health at the time of delivery. The appellee's general agent's contract required the general agent not to deliver the policy unless the proposed insured, at the time of delivery was, to the best of the general agent's knowledge and belief, in as good a condition of health and insurability as stated in the application for the policy. Appellant contends that appellee's only condition precedent to the delivery of the policy was the collection of the balance of the premium which was referenced to in the policy invoice to appellee's general agent. We believe the policy invoice was merely an inter-office transaction confined to the insurer and its agent and, therefore, no jury question was raised as to any waiver of good health condition on delivery.

A long line of cases decided by the Arkansas Supreme Court recognize the validity of requiring compliance with a condition precedent under which a policy must be delivered while the prospective insured is still living and in good health at the time of delivery of the policy. *John Hancock Mutual Life Ins. Co.* v. *Henson,* 199 Ark. 987, 136 S.W.2d 684 (1940); *Life & Casualty Ins. Co. of Tennessee* v. *McCrae,* 193 Ark. 890, 103 S.W.2d 929 (1937); *Pyramid Life Ins. Co.* v. *Belmont,* 177 Ark. 564, 7 S.W.2d 32 (1928).

We believe this case to be an appropriate one for the application of the summary judgment provisions authorized by A.R.C.P. Rule 56. Once a *prima facie* case of entitlement is shown, the party resisting the motion must come from behind the shield of formal allegation and meet proof with proof. *Givens* v. *Hixson,* 275 Ark. 370, 631 S.W.2d 263 (1982).

Affirmed.

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

Darian HORTON *v.* Margaret Ann KONER, Mary Angelon PARKER, Pamela Jean MORRIS, Esther GREENWALD, Patti CARDOZA, Christine Marie SEEBA, and Diana RIVERS

CA 83-303 671 S.W.2d 235

Court of Appeals of Arkansas
Division I
Opinion delivered June 13, 1984

Thomas A. Martin, Jr., for appellant.

Ginger Parker Crisp, for appellees.

TOM GLAZE, Judge. This appeal results from the chancellor's denial of partition in an action the appellant brought against the seven appellees. The facts are undisputed. In 1972, the appellee Diana Rivers purchased a 520-acre tract in Newton County on which she established a community called Sassafras. The residents of Sassafras had a "back to the land" philosophy. In an attempt to return to a simpler life, the group eschewed chemical fertilizers and pesticides in their gardening, conducted their business by a "consensus democracy," and held an antipathy toward private ownership of property. In 1978, by a consensus of women residents, Sassafras became a community of women only. When the men were requested to leave, appellee Rivers deeded forty acres to a married couple who had been residents and active participants in the community since its inception.

At about the same time the men left, on June 6, 1978, Rivers, who had sole title to the property, made a deed to the remaining 480 acres, naming herself and the six other appellees as joint tenants with rights of survivorship. Appellant was away from Sassafras at the time the deed was made. When she returned, she complained to the appellees that she had not been named on the deed, despite the fact that she had been a resident for two years, had participated actively in the community, and had halfway completed a dwelling on the property. As a consequence, in September, 1978, Rivers made a new deed naming appellant and the seven appellees as joint tenants with rights of survivorship.

In 1979, the residents of Sassafras became embroiled in a dispute over permitting a group of women they called gypsies to come into the community to live. The appellant left the community and the state as a result of the controversy. In March of 1980, apparently when appellant was gone, the appellees — described as Anglo-Saxon — deeded a 120-acre tract to two minority women, leaving the 360 acres that are the subject matter of this dispute.[1] In 1981, she commenced the partition action that is the subject of this

[1]Appellant testified that she was on the land when the decision to deed the land to the minority women was made and when the deed was drawn, but not when the deed was filed. However, the deed does not reflect appellant's name as one of the grantors.

appeal. She contended below that she was entitled to a one-eighth interest in the 360-acre tract by virtue of the warranty deed naming her as an owner. She also contended the land is not divisible in kind and asked the chancery court to order the lands sold and the proceeds divided. The chancellor heard testimony from the appellant, appellee Rivers, two other appellees, and five women who were residents of Sassafras at the time of the action below.

The intentions of the parties, the living arrangements, and the agreements they had with each other with respect to the land were undisputed. Although appellee Rivers provided all of the $40,000 purchase money for the land, she testified that she did not consider it her private property, but rather community property, purchased because, "I had money and there [were] a lot of people interested in living on land in the country, growing gardens and doing all that stuff." The arrangement, according to all the testimony, was that Rivers and the others intended to create a "land trust," but when they were unable to do that legally, they created the joint tenancy as an interim means of sharing power and responsibility. Their goals were to create a community for women of like ideals and to treat the land with respect. They disclaimed any notion of private ownership but contended the women named on the deed were "caretakers" of the land and representatives of the community of women who lived and worked on the land. Even the appellant, in her effort to have the land partitioned, testified that she had never considered herelf an owner of the land. Her contention was that in permitting the gypsies to come onto the land, to "trash" the land, and to ignore the principles on which Sassafras was founded, the others had abdicated their responsibility to protect the land. She now feels she is entitled to something for the time and the efforts she expended for the five years she lived in the community.

The testimony indicated that actual residence at Sassafras was not a prerequisite to one's being named on the deed. In fact, neither the appellant nor any of the appellees lived on the land at the time of the hearing. Diana Rivers testified that she maintained a cabin there but that her primary residence was in Fayetteville.

The chancellor made lengthy findings of fact. He determined that in making the joint tenancy deed, the parties intended to protect the land and to prevent its sale. He impressed a constructive trust upon the property and found that appellant held the property in trust for the grantor, the other grantees, and the community of women who lived on the land. He ordered the appellant to convey her record interest to the appellees as joint tenants. He ordered that appellant be permitted to remove personal property from the land and to remove or to sell the dwelling she had constructed. The appellant contends on appeal that the chancellor erred in two respects: (1) in imposing a constructive trust and enforcing a parol agreement not to partition, and (2) in failing to grant appellant reimbursement for her improvements to the property.

The chancellor imposed a constructive trust after he found that the appellant was in a confidential relationship with the appellee Rivers, the other appellees, and the other members of the community. The chancellor found:

> It is clear that [appellant] had gained the confidence of all these individuals and in accepting placement on such deeds purported that she would act in their best interest to preserve the community and its goals. . . . Despite the occasional problems within the community, all member[s] were committed to the goal of preserving the land and deeply trusted each other in that regard. Besides the family nature of their living arrangement fostered by the small size of the group, the members of the community were kindred spirits with a special trust between themselves regarding the basic goals of the community, especially preservation and nonconveyance of the land. . . . To allow [appellant] 1/8 of the sale proceeds of the property would constitute unjust enrichment.

On appeal, we affirm the chancellor's findings of fact unless they are clearly erroneous or clearly against the preponderance of the evidence. Ark. R. Civ. P. 52(a). Also, we affirm if the chancellor reached the right result, even if he gave the wrong reason for his decision. *Moose* v. *Gregory,*

267 Ark. 86, 590 S.W.2d 662 (1979); *Williams* v. *Cotten,* 9 Ark. App. 304, 658 S.W.2d 421 (1983).

In the case at bar, the chancellor heard extensive testimony regarding what the parties intended when appellee Rivers made a deed naming herself, the appellant and the other appellees as owners. None of the evidence reflects the parties intended by their deed to create an express trust regarding the land in question. Rather, the chancellor utilized an equitable tool — the constructive trust — in order to prevent unjust enrichment to appellant who admittedly never considered herself an owner of the property, not even at the time of the hearing wherein she was seeking partition. All of the parties who testified with knowledge of the creation of the deed, including the appellant, testified that none of them owned the land, but that all were volunteers who assumed the responsibility of having their names on the deed and of being "caretakers" of the land.

Constructive trusts are said to arise and be imposed in favor of persons entitled to a beneficial interest against one who secures legal title either by an intentional false oral promise to hold title for a specified purpose, and having thus obtained title, claims the property as his or her own, or one who violates a confidential or fiduciary duty or is guilty of any other unconscionable conduct which amounts to constructive fraud. *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W.2d 404 (1981); *see also Henry* v. *Goodwin,* 266 Ark. 95, 583 S.W.2d 29 (1979). A constructive trust is an implied trust that arises whenever it appears from the accompanying facts and circumstances that the beneficial interest should not go with the legal title. *Andres* v. *Andres, supra.* Proof of fraud is not essential to the establishment of a constructive trust. *Davidson* v. *Sanders,* 235 Ark. 161, 357 S.W.2d 510 (1962). The chancellor below did not find that the appellant had committed fraud, but that the parties were in a confidential relationship.

A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. *Henry* v. *Goodman, supra.* There is no set formula by which

the existence of a confidential relationship may be determined, for each case is factually different and involves different individuals. *Donaldson* v. *Johnson,* 235 Ark. 348, 359 S.W.2d 810 (1962). The cases for the application of the doctrine cannot be scheduled. They pervade all social and domestic life. *Id.* Whether or not a confidential relationship exists depends upon the actual relationship between the parties. *Bramlett* v. *Selman,* 268 Ark. 457, 597 S.W.2d 80 (1980). A kinship is not necessary for a confidential relationship. *Id.*

The facts at bar present a classic case for imposition of a constructive trust. The parties agreed orally to hold the property for the grantor, appellee Rivers, to share her responsibility for the care of the land, and for the community of women who would inhabit Sassafras, including, but not limited to, the appellant and the appellees. When one takes property under a deed, absolute on its face, but has orally agreed to hold the property for the benefit of the grantor or a third person, a constructive trust may be imposed to prevent unjust enrichment to the constructive trustee. *See, e.g., Henry* v. *Goodwin, supra; Kingrey* v. *Wilson,* 227 Ark. 690, 301 S.W.2d 23 (1957); *Grissom* v. *Bunch,* 227 Ark. 696, 301 S.W.2d 462 (1957); *Andres* v. *Andres, supra.* The chancellor's extensive findings of fact and conclusions of law indicate that he thoughtfully studied the evidence presented to him and the applicable law. We believe the chancellor's finding that the parties enjoyed a confidential relationship with one another is not clearly erroneous. And we agree with the chancellor's decision to impose a constructive trust in favor of the appellees in an attempt to prevent unjust enrichment to appellant. However, we are unable to uphold that part of the chancellor's decree that imposes a constructive trust in favor of "the community."

Diana Rivers testified that Sassafras was being held for the women who lived there and for those who would live there in the future. All of the other women who testified spoke in terms of a "community" that could not be defined by naming names. By imposing a constructive trust to benefit "the community," the chancellor stretched the

concept of constructive trust beyond its limits. Instead of employing a constructive trust to prevent unjust enrichment to the appellant, the chancellor effectuated the parties' intent to hold the land in trust for "the community." In short, the chancellor made for the parties the express trust they failed to make themselves. The court erred in doing so in this action because an express trust cannot be established by oral evidence. *Jones* v. *Gachot,* 217 Ark. 462, 230 S.W.2d 937 (1950); *Patton* v. *Randolph,* 197 Ark. 653, 124 S.W.2d 823 (1939). Thus, the court correctly imposed the constructive trust for the benefit of the appellees, the grantor and grantees named in the deed, but erred in extending it in favor of "the community."

Appellant's second point for reversal is that the chancellor erred in failing to grant her reimbursement for her improvements to the property that she claims enhanced the value of the property by $5,000. On this point, the chancellor ordered she was entitled to remove a dwelling she built on the land or to sell it to someone acceptable to the appellees.[2] Appellant relies upon *Dodds* v. *Dodds,* 246 Ark. 313, 438 S.W.2d 54 (1969), for the proposition that upon partition, a cotenant is to be reimbursed for improvements based upon enhancement in value to the property. The simple answer, of course, is that partition was denied, the appellant was found not to be a cotenant, so the *Dodds* case, which involved tenants in common, does not apply. Appellant also relies upon *Walker* v. *Eller,* 178 Ark. 183, 10 S.W.2d 14 (1928). *Walker,* however, deals with appellants who made valuable improvements to a farm "under the honest belief that they had acquired title thereto. . . ." By appellant's own testimony, she was not operating under color of title. At no time prior to or during construction of her dwelling did she believe that she had acquired title to the property, but only the right to its use. Therefore, the *Walker* case is inapposite.

We affirm that part of the decree impressing a constructive trust for the benefit of the grantor, appellee Rivers, and the grantees, the other six named appellees. We modify the decree to delete any reference that the property is

[2]Appellees do not challenge this on appeal.

constructively held for the community.

Affirmed as modified.

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

Billy Joe LINCOLN
v. STATE of Arkansas

CA CR 83-117 670 S.W.2d 819

Court of Appeals of Arkansas
En Banc
Opinion delivered June 20, 1984

John W. Settle, Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Theodore Holder,* Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Chief Judge. In this case the appellant was charged with attempted murder in the first

degree. He was tried by a jury, found guilty, and sentenced to twenty-five years in the Department of Correction. We reverse and remand for a new trial.

The appellant presents two points on appeal. First, he argues the trial court incorrectly allowed testimony concerning another act of misconduct committed by him. Second, he argues it was error for the trial court to hold that the state could question him concerning a prior conviction for manslaughter when other convictions were available for impeachment purposes.

The events which gave rise to the attempted murder charge occurred on June 1, 1982. A witness for the state testified that earlier the same night the appellant and another person had an argument and appellant waved a pistol around during this argument.

This matter was discussed in *Alford* v. *State*, 223 Ark. 330, 334, 266 S.W.2d 804 (1954), where the Arkansas Supreme Court said:

> If other conduct on the part of the accused is independently relevant to the main issue — relevant in the sense of tending to prove some material point rather than merely to prove that the defendant is a criminal —then evidence of that conduct may be admissible, with a proper cautionary instruction by the court.

That case was decided before Arkansas adopted the Uniform Rules of Evidence which became effective July 1, 1976. *See* Ark. Stat. Ann. § 28-1001 (Repl. 1979). Uniform Rule 404(b) provides:

> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The case of *Price* v. *State*, 267 Ark. 1172, 599 S.W.2d 394

(Ark. App. 1980), pointed out that Rule 404(b) codified the rule in existence before the Uniform Rules were adopted. The opinion also said that the rule is most difficult to apply, although the court in *Alford* said the results reached "have been harmonious to a high degree." We do not think it would be helpful to make an extensive review of the cases, but we do note *Rowdean* v. *State,* 280 Ark. 146, 655 S.W.2d 413 (1983), because it seems factually similar to the one before us. In that case the appellant was convicted of first degree murder for shooting a man outside a nightclub. Evidence was admitted to show that earlier the same night the appellant pulled a gun on a patron of a drive-in. The first incident was totally unrelated to the second and the Arkansas Supreme Court held it should not have been admitted into evidence and the case was reversed and remanded for a new trial.

The Court of Appeals' decision in *Price* v. *State, supra,* was reviewed and affirmed by the Arkansas Supreme Court which held that the evidence of other crimes offered under Rule 404(b) should be scrutinized under the provisions of Rule 403. The court said:

> Although Rule 404(b) does not expressly provide for a balancing test with respect to the prejudicial effect of other crimes evidence where independent relevancy is established, the primary reason for excluding such evidence in the first instance is its prejudicial nature. Since an objection to the admission of other crimes evidence inherently raises an issue of prejudice, it is mandatory for the trial judge to also review the objections under the evidentiary standards prescribed by Rule 403. Therefore, other crimes evidence will be admitted only if it has independent relevancy and its relevancy is not "substantially outweighed" by the danger of unfair prejudice.

Price v. *State,* 268 Ark. 535, 539, 597 S.W.2d 598 (1980).

While the court did not say how the trial judge is to perform the Rule 403 "balancing test" the case of *United States* v. *Sangrey* 586 F.2d 1312 (9th Cir. 1978) is cited as

authority that the test should be made and *Sangrey* said "we refuse to require a mechanical recitation of Rule 403's formula on the record as a prerequisite to admitting evidence under Rule 404(b)." *Price* also cited *United States* v. *Conley,* 523 F.2d 650 (8th Cir. 1975), *cert. denied,* 424 U.S. 920 (1976), which says a judge admitting such evidence should immediately caution the jury about its use *unless* the cautionary instruction is waived.

In the first *Price* case, 267 Ark. 1172, 599 S.W.2d 394, the Court of Appeals referred to authority which suggested that one consideration in determining whether evidence of other acts is admissible under Rule 404(b) might be the strength of the proffered evidence itself — could the jury believe the acts occurred — and in the recent case of *Golden* v. *State,* 10 Ark. App. 362, 664 S.W.2d 496 (1984), we referred to authority which indicated that the probative value of Rule 404(b) evidence might correlate inversely to the strength of the prosecution's case.

In *Thomas* v. *State,* 273 Ark. 50, 55, 615 S.W.2d 361 (1981), the court said that it would be wise not to hold evidence of other crimes, wrongs, or acts inadmissible as a matter of law and leave it instead to the trial court's discretion, subject to a case-by-case consideration. Although we are reluctant to interfere with that discretion, we have concluded in this case that the evidence, that appellant had an argument with another man earlier the same night and that he waved a pistol around during that argument, should not have been admitted. It was unrelated to the shooting for which the appellant was charged and tried and we fail to see its relevancy to the later incident. Moreover, the evidence of the earlier incident is indefinite and lacking in detail, and the evidence of the shooting with which appellant was charged is fairly strong.

Since the case must be reversed and remanded for a new trial, it is necessary to discuss the second point raised in this appeal. Knowing that his credibility could be attacked under Uniform Evidence Rule 609(a), the appellant moved in limine that the state not be allowed to question him concerning certain previous convictions. His attorney told

the court that the appellant had been convicted for manslaughter and for a drug violation. It was his request that the state be confined to asking whether the appellant had been convicted of a felony. He contended that the number of convictions and the crimes for which appellant was convicted were irrelevant. The motion was overruled by the court and the appellant argues in this appeal that he could have been properly impeached by the previous felony drug conviction and that it was prejudicial error to allow the state to show the previous manslaughter conviction in this case where appellant was charged with attempted murder. The appellant says the reason he did not take the stand was because he did not want to risk impeachment by the highly prejudicial manslaughter conviction.

We note first that *Simmons* v. *State,* 278 Ark. 305, 645 S.W.2d 680 (1983), holds that the situation where a defendant asks for an advance ruling holding that he not be exposed to cross-examination about certain convictions is subject to abuse in that he may not intend to testify at all and yet ask for a ruling with the hope of leading the trial judge into reversible error with a possibility of a new trial and a second chance of acquittal. Therefore, the court adopted the following rule:

> In future cases, to preserve the issue for review, a defendant must at least, by a statement of his attorney: (1) establish on the record that he will in fact take the stand and testify if his challenged prior convictions are excluded; and (2) sufficiently outline the nature of his testimony so that the trial court, and the reviewing court, can do the necessary balancing contemplated in Rule 609.

We also note that neither this court nor the Supreme Court has established any mechanical formula to be followed in performing the balancing test required by Rule 609(a). In *Washington* v. *State,* 6 Ark. App. 85, 638 S.W.2d 690 (1982), we held that the trial court has a great deal of discretion in determining whether the probative value of the evidence of a prior felony conviction outweighs its prejudicial effect, and that the decision of the trial court should

not be reversed absent an abuse of that discretion. In *Williams* v. *State,* 6 Ark. App. 410, 644 S.W.2d 608 (1982), we said this weighing process must be decided on a case-by-case basis and our statement in *Williams* was noted by the Arkansas Supreme Court in *Floyd* v. *State,* 278 Ark. 342, 346, 645 S.W.2d 690 (1983), as being a correct statement of the law.

In *Floyd* the court also rejected the argument that when the defendant takes the stand and admits he has been convicted of a felony he has been impeached and the state should not be allowed to further impeach him. To the contrary, the court said he may be asked "how many times he has been convicted." The same issue was involved in *Bell* v. *State,* 6 Ark. App. 388, 644 S.W.2d 601 (1982), where, as a concurring opinion points out, the defendant wanted to limit the evidence of prior convictions to the *fact* of conviction, 6 Ark. App. at 398. The majority opinion held that "there was no abuse of discretion in the trial court's decision to allow the state to impeach appellant's credibility by naming the previous felony convictions."

For the reasons we have indicated, the judgment in this case is reversed and it is remanded for a new trial.

COOPER and GLAZE, JJ., concur.

JAMES R. COOPER, Judge, concurring. I concur in the majority's disposition of the Rule 404(b) argument, and, therefore, I agree that this case should be reversed and remanded for a new trial. However, I cannot agree with the majority's disposition of the Rule 609 argument. Therefore, for the reasons expressed in my dissenting opinions in *Williams* v. *State,* 6 Ark. App. 410, 644 S.W.2d 608 (1982) and *Bell* v. *State,* 6 Ark. App. 388, 644 S.W.2d 601 (1982), I dissent from the portion of the majority opinion which affirms as to Rule 609.

TOM GLAZE, Judge, concurring. I concur. In *Williams* v. *State,* 6 Ark. App. 410, 644 S.W.2d 608 (1982), I dissented because I believed definite guidelines should be established when the admissibility of impeachment evidence under

Rule 609 of the Arkansas Rules of Evidence is involved. The majority court in *Williams* rejected my views on the subject and refuses again in this cause to compel the trial court to make its findings required under the Rule 609 balancing process to be on the record. While I now join the majority in the result it reached in this case, I still have the same opinion as I expressed in my dissent in *Williams*.

Pinta Lou BRAY *v.* STATE of Arkansas

CA CR 84-20 670 S.W.2d 822

Court of Appeals of Arkansas
Division II
Opinion delivered June 20, 1984

Ronald G. Naramore, for appellant.

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

GEORGE K. CRACRAFT, Judge. Pinta Lou Bray was charged with the crime of arson after she voluntarily confessed to having set fire to a couch and a mattress in a halfway house. In her confession she stated that she had set the fire to get even with one of the supervisors of the halfway house. A jury found her guilty of the lesser included offense of criminal mischief in the first degree and she was sentenced to a term of four years in the Department of Correction. On appeal she contends that the trial court erred in not directing a verdict at the close of the State's case because the evidence

apart from her own confession was insufficient to establish that a crime had been committed. We agree.

Ark. Stat. Ann. § 43-2115 (Repl. 1977) provides that a confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that such an offense was committed. This statute requires that an extrajudicial confession be accompanied by other proof that the crime confessed to was actually committed by someone. The test of the correctness of the verdict is not whether the evidence is sufficient to sustain the verdict, but whether there was sufficient evidence that such an offense was actually committed or, in other words, proof of the *corpus delicti*. *Bivens* v. *State,* 242 Ark. 362, 413 S.W.2d 653 (1967).

Ark. Stat. Ann. § 41-1906 (Repl. 1977) provides that a person commits the offense of criminal mischief in the first degree if he *purposely* destroys or causes damage to any property of another. It is not enough to show merely that the property was damaged or destroyed, for one essential element of this crime is that the damage was willfully caused and not accidental.

Although the appellant voluntarily confessed that she willfully set fire to a couch and mattress, her admission will not sustain a conviction unless the record contains other independent proof that the property of another was *purposely* destroyed or damaged. The only evidence introduced by the State was that of a captain of the Hot Springs Fire Department who stated that when he arrived at the residence he found a couch and mattress on fire. A good portion of the fire had already been put out. There was some smoke damage, but the only property damage was to the mattress and couch. While they were putting out the fire the appellant, who was sitting in a rocking chair behind them, admitted that she had set the fire at least twice. Her voluntary confession was later reduced to writing and was signed by her. No investigation was made to determine how the fires were started or what caused them.

There is no presumption that an unexplained fire is of

an incendiary origin. On the contrary the presumption is that such fire is caused by accident, or at least that it is not of criminal design. It is incumbent on the State to prove the *corpus delicti,* and in the case of intentionally set fires it is necessary that the State prove that the burning of the property in question was caused by a purposeful act of some person criminally responsible and not by natural or accidental causes. *Johnson* v. *State,* 198 Ark. 871, 131 S.W.2d 934 (1939). Apart from the confession of appellant there is no evidence in the record, direct or circumstantial, tending to show either that the fire was intentionally set or that it resulted from other than accidental causes.

The State argues that as there were two fires, the jury could have inferred that they were purposely set, relying upon *Burke* v. *State,* 242 Ark. 368, 413 S.W.2d 646 (1967). We think *Burke* is clearly distinguishable. There a man discovered two fires in separate buildings on his farm which were located several hundred yards apart, burning at the same time. There was testimony from a witness, who was found not to be an accomplice, that he had accompanied the defendant to the property on the night of the fire. When the defendant stated his intention to burn the building, the witness left and returned to the vehicle. He further testified that he subsequently saw the defendant coming from the property after observing "a glow out to the left which was going pretty good." The witness stated that the defendant admitted to him that he had set the fires. There was no evidence to rebut this. In those circumstances the court stated that in the total absence of evidence that the fires could have been other than of incendiary origin the question was properly submitted to the jury. We interpret the words of the court not to mean that the two separate fires were circumstances giving rise to an inference of arson, but that the direct testimony of the witness was sufficient to overcome the presumption of accidental origin if the jury chose to believe him. In this case the mere fact of the fires and the presence of the appellant in the vicinity are insufficient to rebut the presumption that the fires were accidental.

The State further contends that the presumption mentioned in *Johnson* and followed in *Boden* v. *State,* 270 Ark.

614, 605 S.W.2d 429 (1980) and *Carpenter* v. *State,* 204 Ark. 752, 164 S.W.2d 993 (1942) does not apply to criminal mischief in the first degree but is restricted to arson. As criminal mischief in the first degree may be committed by purposely destroying or damaging another's property by fire, we see no reason why the same presumption of accidental origin should not apply in such cases.

Reversed and dismissed.

COOPER and CLONINGER, JJ., agree.

Thomas Jeffery TACKETT *v.* STATE of Arkansas

CA CR 84-26 670 S.W.2d 824

Court of Appeals of Arkansas
Division II
Opinion delivered June 20, 1984

Robert F. Morehead, for appellant.

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

GEORGE K. CRACRAFT, Judge. Thomas Jeffery Tackett was found guilty by a jury of the crimes of manslaughter and leaving the scene of a personal injury accident. He was sentenced to a term of eight years in the Department of Correction on the charge of manslaughter and was fined $10,000 on the charge of leaving the scene of a personal injury accident. He appeals only from the conviction of manslaughter contending that the evidence was not sufficient to support the conviction and the court erred in admitting hearsay evidence. We find no error.

On March 24, 1983 the passenger in a vehicle driven by Lesa Diffee was killed in an accident. The State's theory was that a blue and white van driven by Thomas Jeffery Tackett had intentionally bumped the rear of Diffee's vehicle and that this reckless act caused her to lose control of her car. The appellant contended that the Diffee vehicle was out of control when he first observed it and that he had swerved to avoid hitting it and was unaware of any contact between the two vehicles.

The State's witness, Lesa Diffee, testified that a blue and white van driven by the appellant struck her car from the rear three times immediately before the accident. She stated that this caused her to lose control of the car and that the van had been travelling close to the rear of her car for some time before the bumps occurred. Two witnesses who had arrived at the scene of the accident immediately following it testified that Lesa Diffee was screaming for help and was asking if she was going to die. While they were calming her down she stated to them that the blue and white van had forced her off the highway.

In addition Cindy Ryals testified that a short time before the accident she observed a blue and white van trailing the Diffee vehicle as they passed her house. When the two vehicles went into the curve in front of her home they were only two or three feet apart. There was other testimony that a very short time before the accident occurred the blue and white van driven by the appellant had passed at a high rate of speed astraddle of the center line of the highway.

There was also circumstantial evidence of the appellant's guilt. There was expert testimony that the path taken by the car as it left the highway was consistent with the situation where someone had deliberately run into the back of a car. These opinions were based on skid marks and other physical evidence found at the scene. The State also introduced evidence establishing that paint and scratch marks on the bumpers of both vehicles indicated that the rear of the Diffee vehicle and the front of the van driven by the appellant had come into contact.

There were some inconsistencies in the testimony and some conflict as to what the physical evidence showed. The appellant's principal argument is that these inconsistencies were sufficient to raise doubt as to the credibility of the prosecution's testimony which should be held to be insufficient as a matter of law. It is a settled rule in this state that the resolution of inconsistencies in the evidence adduced at trial is wholly within the province of the jury. *Thomas* v. *State,* 266 Ark. 162, 583 S.W.2d 32 (1979). The credibility of witnesses and the weight to be given their

testimony is within the exclusive province of the jury. *Jones* v. *State,* 269 Ark. 119, 598 S.W.2d 748 (1980). It is the settled rule in this state that a jury's verdict will not be disturbed if it is supported by substantial evidence. *Tucker* v. *State,* 3 Ark. App. 89, 622 S.W.2d 202 (1981). We cannot conclude that the verdict of the jury was not supported by substantial evidence.

Appellant principally argues that the trial court erred in permitting Cindy Ryals to testify that approximately fifteen minutes after the accident occurred Lesa Diffee had told her she had been hit from behind twice by a blue and white van. When this evidence was offered the objection was made that it was hearsay. After hearing the evidence as to the circumstances under which the statement was made the trial court ruled that it was admissible. We find no error in that ruling.

Unif. R. Evid. 803(2) states as follows:

> Hearsay Exceptions — The following are not excluded by the hearsay rule, even though the declarant is available as a witness; . . .
> (2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The basis underlying this exception is that a person who experiences a startling event and is still under the stress of the excitment of it when statements are made will not make fabricated statements and their utterances are therefore trustworthy. In these situations the court must find that there was a startling event and that at the time the utterance is made the declarant is still under the stress of excitement resulting from that event when the utterances are made. *Weaver* v. *State,* 271 Ark. 853, 612 S.W.2d 324 (Ark. App. 1981); *Burris* v. *State,* 265 Ark. 604, 580 S.W.2d 204 (1979). Although John Blankenship did not see the accident he arrived there immediately after it happened and stated that the Diffee car was lying on its side on the west side of the road in a ditch. He saw two people lying in the ditch, one

of whom was Lesa Diffee who was "hollering for help" and he tried to calm her down. He said that he could tell her leg was broken and that there was blood on her face. He stated that "she was wanting to know if she was going to die and I tried to assure her she wasn't." He asked her what had happened and she told him that a blue and white van had run her off the road.

Cindy Ryals came a short time after and obtained the telephone number of Lesa's mother and left to call her. Cindy returned in approximately ten to fifteen minutes and again talked with Lesa. Cindy stated at that time that Lesa was in shock and she kept talking to her trying to get her to calm down, holding her hand and wiping her face. Lesa was in considerable pain at the time she told Cindy she had been hit twice from behind. There was testimony from Blankenship that after that statement was made by Lesa and at the time the ambulance arrived to remove her to the hospital she was still in an excited condition requiring his efforts to calm her down.

Under Rule 803(2) although the excited utterance must be made close in time to the startling event the length of elapsed time is only one factor to be considered in determining whether the stress of the excitement has continued. We cannot conclude from the evidence presented that the trial court was in error in his ruling that Lesa had experienced a startling event and was still under the stress of excitement when the statement was made.

Affirmed.

CORBIN and GLAZE, JJ., agree.

James D. CHILDRESS and Leo Irene CHILDRESS
v. Robert RICHARDSON and
Fredricka B. RICHARDSON

CA 83-269 670 S.W.2d 475

Court of Appeals of Arkansas
Division II
Opinion delivered June 20, 1984

Evans, Farrar, Owen & Reis, by: *Bryan J. Reis,* for appellant.

Curtis L. Ridgeway, Jr., for appellee.

LAWSON CLONINGER, Judge. The issue on this appeal is whether the trial court's decision that appellees, Robert and Fredricka B. Richardson, had a prescriptive easement for a gas line across the property of appellants, James D. and Leo Irene Childress, was clearly against the preponderance of the evidence. We hold that there was no easement and we must reverse.

Appellants filed suit on November 14, 1982, to quiet title to their residential lot located in Garland County. Appellants had purchased their lot in 1978, and appellees had owned the lot immediately west of appellants' lot since 1962. The gas line servicing appellees' residence runs east across appellants' lot and connects with a meter located east of appellants' lot. The line is underground and no part of it is visible. Two houses are on the lot adjacent to appellants' lot to the east, described as the Flack property. Three gas meters are located on the boundary between appellants' lot and the Flack property; one of the meters services appellants, one services the appellees, and one services the two houses on the Flack property.

Appellant James Childress testified that he was not aware that apellees' gas line crossed his property until the line was inadvertently discovered by the telephone company a short time before this action was filed. Appellants had rebuilt their garage over the line without knowing of its existence. Appellee R.H. Richardson testified that he knew the line ran across appellants' property, but that he did not know where it crossed.

In *Craig* v. *O'Bryan*, 227 Ark. 681, 301 S.W.2d 18 (1957), quoting from Volume 14, Page 98, of *Words and Phrases*, the Arkansas Supreme Court stated:

> Easement by prescription may be created only by adverse use of privilege with knowledge of person against whom easement is claimed, or by use so open, notorious, and uninterrupted, that knowledge will be presumed, and exercised under claim of right adverse to owner and acquiesced in by him.

The trial court in this case found that it would be inequitable to require appellees to build some 550 feet of private gas line when their property has been served by the existing line across appellants' property for more than twenty years. The court found that appellees have a right to use the line, and that the parties should share equally the cost of relocating the line. We have reluctantly arrived at the conviction that the trial court was in error.

There was evidence from which the trial court could have found that appellants' predecessor in title was aware of the line and acquiesced in the use of it for a period of eleven years before appellants purchased their lot. Appellees contend, then, that once the easement was created, the right to the prescriptive easement is not subject to being cut off by a new purchaser. Appellees cite no Arkansas law to support their position, and since we base our decision upon another principle it is not necessary to resolve appellees' contention.

A purchaser of real estate is charged with notice of an unrecorded easement when the existence of the servitude is apparent upon an ordinary inspection of the premises. *Hannah* v. *Daniel,* 221 Ark. 105, 252 S.W.2d 548 (1952). In *Hannah,* the court found that at the time Hannah purchased his property there was no physical improvement located on that property which would reasonably make it apparent that a servitude existed. The court stated:

> We announced the rule in this language in *Waller* v. *Dansby,* 145 Ark. 306, 224 S.W. 615: 'The general rule is, that whatever puts a party upon inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty as in the case of vendor and purchaser, and would lead to the knowledge of the requisite fact, by the exercise of ordinary diligence and understanding. Or, as the rule has been expressed more briefly, where a man has sufficient information to lead him to a fact, he shall be deemed cognizant of it.'

In *French* v. *Richardson,* 246 Ark. 497, 438 S.W.2d 714 (1969), the rule laid down in *Hannah* was approved, but the court found that the existence of a tower and transmission lines was sufficient to put French on notice of the existence of a servitude. The court then ruled:

> Had he exercised his duty to make inquiry he would have easily discovered the existence and conditions of the lease easement. He is therefore charged, under our settled law, with notice of the easement.

This rule has been applied to prescriptive easements.

Armstrong v. *McCrary*, 249 Ark. 816, 462 S.W.2d 445 (1971).

In the present case, there was no actual notice to appellants and there was no evidence of the gas line sufficient to put appellants on notice of its presence. The line was entirely underground, and there was nothing to put appellants on notice that one of the three meters east of appellants' property serviced appellees' residence. Appellant James Childress testified that he was aware of the three meters, but had thought that one of the meters was his and that the other two serviced the two houses on the Flack property. Under the circumstances of this case his belief was a reasonable one.

The decision of the trial court is reversed and this cause is remanded with directions to enter an order quieting appellants' title to the exclusion of any claim for easement for the passage of the gas line.

MAYFIELD, C.J., concurs.

GLAZE, J., agrees.

MELVIN MAYFIELD, Chief Judge, concurring. Rule 52(a) of the Rules of Civil Procedure provides that we affirm the findings of fact made by the chancellor unless they are clearly contrary to the preponderance of the evidence. The question here is whether, at the time the appellants purchased their lot, the existence of the gas line across the lot would have been apparent upon ordinary inspection.

Apparently the chancellor was not very certain that appellees had a prescriptive easement for the line or he would not have required them to pay half the cost of relocating it. The evidence from which an easement could be found is meager. Under the circumstances, I concur in the result of the majority opinion.

Eugene FRANKLIN *v.* ARKANSAS KRAFT, INC. and EMPLOYERS INSURANCE OF WAUSAU

CA 83-431 670 S.W.2d 815

Court of Appeals of Arkansas
Division II
Opinion delivered June 20, 1984

Bethell, Callaway, Robertson & Beasley, by: *John R. Beasley,* for appellant.

Harper, Young, Smith & Maurras, by: *Tom Harper, Jr.,* for appellee.

TOM GLAZE, Judge. This is the second time this workers' compensation case has been appealed to our Court. The sole issue on the first appeal was whether appellant was an employee of or an independent contractor for the appellee company. *Franklin* v. *Arkansas Kraft, Inc.,* 5 Ark. App. 264, 635 S.W.2d 286 (1982). We thought that in reversing the administrative law judge's finding that Franklin was an employee, the Commission indicated that it believed the "control" test was the only test available under Arkansas law to determine whether one is an employee or an independent contractor. We reversed and remanded for the Commission to consider factors other than control. We noted that the Arkansas Supreme Court had considered the "relative nature of the work" test in *Sandy* v. *Salter,* 260 Ark. 486, 541 S.W.2d 929 (1976). *See also* 1C A. Larson *The Law of Workmen's Compensation* §§ 43.50—43.52 (1980). On remand, the Commission found that Franklin was an independent contractor under either the "control" test or the "relative nature of the work" test, and therefore not entitled to compensation. In addition, the Commission found that Franklin failed to show by a preponderance of the evidence that the appellee company was estopped to deny benefits.

On this appeal, the appellant Franklin contends that (1) substantial evidence does not support the Commission's denial of benefits, (2) the Commission erred by readopting the "control" test, and (3) appellant is entitled to benefits by estoppel. We find substantial evidence supports the decision of the Commission; therefore, we affirm.

The appellant Franklin was a pulpwood cutter who injured his back on June 15, 1978, while cutting timber under a contract with appellee Arkansas Kraft. The question of compensability has at all phases revolved around Frank-

lin's status—whether he was an employee or an independent contractor. The Commission has twice decided that he was an independent contractor. Our question in this appeal is whether the Commission had substantial evidence to find that Franklin was an independent contractor. He contends that the facts of this case are almost indistinguishable from the facts in *Silvicraft, Inc.* v. *Lambert,* 10 Ark. App. 28, 661 S.W.2d 403 (1983), wherein both the administrative law judge and the Commission found that Lambert was an employee. We affirmed the Commission's decision in *Silvicraft.* It is well settled that the determination of whether, at the time of injury, a person was an employee or an independent contractor, is a factual one, and the Commission is required to follow a liberal approach, resolving doubts in favor of employment status for the worker. *Id.* at 33, 661 S.W.2d 405. Once the Commission makes that factual determination, we view the evidence in the light most favorable to the Commission's decision, and affirm if it is supported by substantial evidence. In order to reverse a decision of the Commission, we must be convinced that fair-minded persons, with the same facts before them, could not have arrived at the conclusion reached by the Commission. *Id.*

The question on appeal is not whether the facts at bar would have supported the opposite conclusion, but whether these facts supported the decision the Commission made. In his brief, the appellant has set out the nine factors this Court enumerated in *Franklin* v. *Arkansas Kraft, Inc.,* 5 Ark. App. at 269-70, 635 S.W.2d at 289, as guidelines for the Commission to follow in determining whether one is an employee or an independent contractor for purposes of workers' compensation coverage. Appellant has compared the pertinent facts of this case and *Silvicraft* under each factor. Without setting out all nine factors or rehashing all of the facts of both cases, we note the following distinctions:

(1) *The right to control the means and method by which the work is done.* A primary distinction between *Silvicraft* and the case at bar is that in the former, the company expected the pulpwood cutter to haul wood exclusively for that company. The employee was told

that promissory notes on equipment held by a bank and endorsed by the company would have been called had claimant worked for any other company. In the case at bar, it is undisputed that Franklin did not cut and haul wood exclusively for the appellee company, but instead worked for others as much as fifty percent of the time.

(2) *The length of time for which the person is employed.* In *Silvicraft,* the claimant had worked exclusively for and under an oral contract with the company for about a year and a half before he was injured. In the instant case, Franklin had worked under a written contract for the appellee company for five or ten years, but during that time he also worked for other lumberyards.

(3) In *Silvicraft,* the employment agreement between the parties was oral, whereas in the instant case they had a written contract that set out their respective rights and duties.

We believe that the Commission carefully considered the facts of this case that were pertinent to its determining whether appellant was an employee or an independent contractor and that substantial evidence supports its determination that he was an independent contractor.

Appellant also contends the Commission erroneously "readopted" the "control" test. In the first appeal of this case, we remanded to the Commission because no findings of fact were included in its opinion, and we could not determine what factors the Commission had considered in reaching its decision. We said that the nine factors we set out were not the only factors that conceivably could be considered in a given case and that, traditionally, the control test had been sufficient to decide most cases. On remand, the Commission set out its findings under each of the nine factors and found that Franklin failed to meet his burden of proof under either the "control" or the "relative nature of the work" test. The Commission stated that in the normal situation, the "control" test is the most important test and that the "relative nature of the work" test is only a factor to

be considered. We do not find that to be a "readoption" of the control test; the control test has not been abandoned by this Court. The Commission clearly followed our direction upon remand and considered the facts of the case in light of the various factors we set out. We find no error in that regard.

The appellant's final contention is that he is entitled to workers' compensation benefits by estoppel. Claimant again relies upon the *Silvicraft* case, here for the proposition that the company's method of calculating the workers' compensation insurance premium precludes the company's denying that appellant is covered by that insurance. However, we did not decide the estoppel issue in *Silvicraft* because our finding that substantial evidence supported the Commission's decision that Lambert was an employee made it unnecessary to reach the estoppel question.

In the instant case, we do not find that the employer's method of calculating premiums for workers' compensation benefits estops the company to deny that claimant is covered. The appellees' workers' compensation premiums are figured on the number of cords of wood delivered to Arkansas Kraft by *all* workers who are not self-insured. The method of computation is required by the Arkansas Insurance Department; it is not voluntary, but is imposed by state law upon the company. The appellant was not charged a premium for workers' compensation coverage, nor would appellant have been paid more money per cord of wood delivered had the company used some other method of computation. Appellant's employees *were* covered under the appellee's workers' compensation policy. By the method of computing premiums for companies that employ workers such as Franklin, who choose not to purchase workers' compensation insurance, the State assures protection for workers such as those Franklin hired to work for him. This case is factually different from *Stillman* v. *Jim Walter Corp.*, 236 Ark. 808, 368 S.W.2d 270 (1963), wherein the company contractually agreed to pay workers' compensation premiums and the premiums were in fact deducted from payments made to the claimant. In *Stillman,* the Court found the employer estopped to deny that Stillman was covered. *See also Voss* v. *Ward's Pulpwood Yard,* 248 Ark. 465, 452 S.W.2d 629 (1970)

(Supreme Court affirmed denial of benefits when there was neither an agreement that the company would pay premiums nor evidence that premiums were deducted from claimant's pay). We therefore find that substantial evidence supported the Commission's finding that claimant failed to meet his burden of proof under the estoppel theory.

We affirm.

Affirmed.

CRACRAFT and CORBIN, JJ., agree.

Randy Lewis BAIRD, Henry Edward HEIMEYER and Terry L. FORGY *v.* STATE of Arkansas

CA CR 83-187 671 S.W.2d 191

Court of Appeals of Arkansas
En Banc
Opinion delivered June 20, 1984

Clyde E. Lee, for appellants Baird and Heimeyer.

Louis F. Mathis, for appellant Forgy.

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

TOM GLAZE, Judge. Appellants Terry Forgy, Randy

Baird and Henry Heimeyer were charged with violation of Ark. Stat. Ann. § 41-3553 (Repl. 1977), which prohibits the sale and circulation of obscene periodicals. Appellant Forgy is the owner of the State Line Book Store in Texarkana, and the other appellants are employees there. They were convicted in Texarkana Municipal Court and appealed to the Circuit Court of Miller County. After a trial *de novo* before a jury, they were again convicted. Baird was fined $250; Heimeyer was fined $250 and sentenced to thirty days in the county jail; and Forgy was fined $500 and sentenced to sixty day in the county jail. After careful deliberation of the points raised by appellants on appeal, we affirm the conviction of Forgy and reverse the convictions of Baird and Heimeyer.

On February 28, 1983, Major Cowart of the Texarkana Police Department entered the State Line Book Store and told Forgy, who was alone, that he was there to check on some permits for the store and to see if a city occupational tax had been paid. Major Cowart left the store, returned to police headquarters and ordered Officer Adcock to go to the store and buy two "obscene" magazines. Officer Adcock purchased two magazines from Forgy. After the purchases, the officers sought advice from the prosecuting attorney's office concerning whether they needed a search warrant before returning to the store. Based on that advice, the police believed that they had probable cause to arrest Forgy and returned to the book store to make the arrest and seize other obscene material. At approximately 4:00 P.M., February 28, five police officers — armed with an arrest warrant for Forgy — went to the book store to arrest him, but they found Baird in the store alone. Baird testified that the officers first began taking magazines off the rack and then asked if Forgy was there. He confirmed the officers did not have a search warrant to search the premises. After seizing forty-seven different magazines and simultaneously making a list of their titles, the officers arrested Baird and Heimeyer, who had entered the store sometime after the seizure of the magazines had begun. The officers determined the magazines were obscene by looking only at the covers of the magazines.

At trial, in addition to testimonies of the officers

describing the magazine covers they saw in the book store, the State introduced the two magazines purchased as proof of the appellants' violation of the statute. The State chose not to offer into evidence the forty-seven magazines seized by the officers when they returned to arrest Forgy, but it did introduce a list of the titles of the forty-seven magazines. Vulgar titles typical of those on the list were: "The Fucking Sucking Sisters," "Pussies For Sale," "Lez Pussy Lickers," "Ass Slappin'," and the like. The trial court admitted the two magazines and the list of titles into evidence; however, it refused to admit an "adult film" offered by the defense in their efforts to show Texarkana's relaxed community standard regarding obscene material.

Appellants raise eight points for reversal. However, only four of the arguments are based on objections made at trial, and according to *Wicks* v. *State,* 270 Ark. 781, 606 S.W.2d 366 (1980), only those arguments can be heard by this Court. Two of the remaining four arguments can be easily resolved, and we will do so before addressing the other, more complicated issues.

Appellants Baird and Heimeyer contend that because Forgy had actually sold some magazines and they had not, the trial court erred in not granting their motion to sever. This argument is, in effect, a claim that the State's evidence against Forgy is stronger than the evidence against them. The relative strength of the State's case against each co-defendant is a proper factor for a court to consider when ruling on a motion to sever; however, it is only one of several factors for the court to consider. *See McDaniel* v. *State,* 278 Ark. 631, 648 S.W.2d 57 (1983). Significantly, the evidence offered against the appellants was essentially the same, differing mainly in that Forgy sold two obscene magazines, but the other appellants kept or exposed obscene magazines. Given the totality of circumstances present in this case, particularly the absence of antagonistic defenses between Baird and Heimeyer and Forgy, the trial court's refusal to grant the motion to sever was not an abuse of discretion, and this Court will not disturb it on appeal. *See Daniel, supra.*

All of the appellants also urge this Court to reverse their

convictions because of the trial court's refusal to admit into evidence an adult movie then playing in Texarkana. Appellants offered the film in support of their claim that relaxed community standards regarding pornography existed in Texarkana. The State objected to the film's introduction on irrelevancy, lack of foundation and best evidence grounds. The trial court refused to let the jury see the film, stating, "[T]he jury itself represents the community and is in a (sic) inherent position to apply community standards to the case before it." The trial judge did permit the manager of the theater then showing the adult film to testify. The manager stated that the film contained scenes of "sexual acts and simulated sexual acts," and that the film was available to adults in the community.

Relevancy rulings are, of course, within the trial court's discretion and will only be reversed for an abuse of that discretion. *Hamblin* v. *State,* 268 Ark. 497, 597 S.W.2d 589 (1980). Given the possibility of confusion on the part of the jurors, we do not think the trial judge abused his discretion in refusing to admit the film into evidence. Also, the film should not have been admitted into evidence because the proffered evidence showed only that the film was available in Texarkana. Before a proffer of material is admissible as probative of community standards on obscenity, the proponent must establish a reasonable degree of community acceptance of the proffered material; however, mere availability in the community of the proffered material does not, of itself, prove the material measures up to the community standard. *See Hamling* v. *United States,* 418 U.S. 87, 125-26 (1974); *United States* v. *Pinkus,* 579 F.2d 1174, *cert. dismissed* 439 U.S. 999 (1978).

We now turn to the issue that gives us the most difficulty. Appellants argue that the seizure of the magazines by the police officers violated their rights protected by the First and Fourth Amendments to the United States Constitution. Because the seizure of the magazines was unconstitutional, the appellants contend that the list of the titles of the magazines that was compiled as part of that seizure was inadmissible against them. Citing *Roaden* v. *Kentucky,* 413 U.S. 496 (1973), appellants contend the police seizure of the

magazines was unreasonable. In *Roaden,* a county sheriff in Kentucky viewed a film at a drive-in theater and, based on his own predisposition, concluded that it was obscene. Without a prior determination by an impartial magistrate of the obscene nature of the film or a search warrant, the sheriff arrested the manager of the theater and seized the film. The United States Supreme Court held that such a seizure was invalid. Reiterating that the seizure of books and film arguably protected by the First Amendment is to be assessed in light of a "higher hurdle in the evaluation of reasonableness" than the seizure of dangerous weapons or stolen goods, the Court concluded that police officers should not make this determination based upon their own subjective determinations of obscenity. In order to fully protect First Amendment rights, the police should let an impartial and neutral magistrate determine whether probable cause exists for the seizure of the allegedly obscene materials.

In the instant case, as in *Roaden,* the police officers had no search warrant when they made the seizure of the allegedly obscene material; there had been no prior independent judicial determination concerning whether the allegedly obscene material was, in fact, obscene and the seizure of the material was based solely on the observations of the police officers. Given the holding of *Roaden,* we must conclude that the police officers' seizure of the magazines in this case violated the appellants' First Amendment right of free speech and their Fourth Amendment right to be free of unreasonable searches and seizures. *See also Gibbs* v. *State,* 255 Ark. 997, 504 S.W.2d 719 (1974). Because the list was part of the unlawful seizure, it, too, must be suppressed. *Mapp* v. *Ohio,* 367 U.S. 643 (1961). So long as police officers do not conduct an illegal seizure of material protected by the First Amendment, they are at liberty, just as other members of the public, to enter book stores. Once the police are lawfully present in the book store, they may take notes and compile lists to prepare themselves to go before an impartial magistrate and testify in order to obtain a proper search warrant. That procedure simply was not employed here. Thus, given the doctrine of *Roaden,* the admission of the list of the magazine titles was error warranting at least a reversal and a remand for a new trial for appellants Baird and Heimeyer.

Forgy's situation differs, and we hold he is not entitled to a new trial even though the list was erroneously admitted into evidence against him. The inadmissibility of the list of the vulgar titles in no way taints the admissibility of the two obscene magazines that Forgy undisputedly sold to the police.[1]

The sale of these magazines was not, of course, a "seizure" of the magazines. *See Johnson* v. *State,* 351 So.2d 10 (Fla. 1977); *Wood* v. *State,* 144 Ga.App. 236, 240 S.E.2d 743 (1977), *cert. den.* 439 U.S. 899 (1978); *State* v. *Hughes,* 519 S.W.2d 19 (Mo. 1975); *People* v. *Peters,* 82 N.Y.Misc.2d, 138, 368 N.Y.S.2d 753 (1975); *Carlock* v. *State* 609 S.W.2d 787 (Tex.Crim.App. 1981). Therefore, because the sale of the magazines was not a seizure of protected First Amendment material, the *Roaden* doctrine does not apply to the admission of the two magazines that were purchased. Even though the list should not have been admitted against Forgy, the evidence, in the form of the two magazines that he sold, is so overwhelming that the error, even if it is of constitutional proportions, is harmless beyond a reasonable doubt. Ark. R. Civ. P. 61; *Pace* v. *State,* 265 Ark. 712, 580 S.W.2d 689 (1979).

Appellants Baird and Heimeyer also question the sufficiency of the evidence against them as their eighth point for reversal. Given our disposition of their constitutional argument, we will not decide this issue. *Vowell* v. *State,* 4 Ark. App. 175, 628 S.W.2d 599, *rev'd on other grounds,* 276 Ark. 258, 634 S.W.2d 118 (1982).

In sum, because of the constitutional violation of Baird's and Heimeyer's First and Fourth Amendment rights, we reverse their convictions and remand to the trial court. We affirm the conviction of appellant Forgy.

Affirmed in part and reversed in part.

CRACRAFT, J., concurs.

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[1]In this appeal, no one challenges the obscenity law under which appellants were charged; nor do they contend the two magazines were not obscene.

COOPER, J., concurs in part and dissents in part.

MAYFIELD, C.J., dissents as to Heimeyer and Baird.

JAMES R. COOPER, Judge, concurring in part, dissenting in part. I concur in the majority opinion insofar as it reverses the convictions of the appellants Baird and Heimeyer because of the prejudicial error inherent in the introduction of the list of magazine titles. I respectfully dissent from the majority's affirmance of the appellant Forgy's conviction when that same error is present as to him. Although the majority says it, I disagree that the admitted error was "harmless beyond a reasonable doubt." Two slightly inconsistent rules apply where error occurs in a criminal case: first, the Arkansas Supreme Court has stated that to reverse in a criminal case, the error must be prejudicial, not harmless, and that the appellant must demonstrate error. *Wilson* v. *State,* 272 Ark. 361, 614 S.W.2d 663 (1981). However, the Supreme Court has also stated that, "[O]ur settled rule is that error is presumed to be prejudicial unless we can say with confidence that it was not. "*Vaughn and Wilkins* v. *State,* 252 Ark. 505, 479 S.W.2d 873 (1972). Whichever rule one chooses to apply, I think that the introduction of the list was just as much a prejudicial error as to Forgy as it was to the other two appellants. Although there is other evidence against Forgy, I am unwilling to agree that, with confidence, this Court should say that the error was harmless. I would reverse and remand for a new trial for Forgy, as the majority has seen fit to do as to Baird and Heimeyer.

MELVIN MAYFIELD, Chief Judge, dissenting. I do not agree with the conclusion of the majority opinion that "given the doctrine of *Roaden,* the admission of the list of the magazine titles was error warranting . . . a reversal and a remand for a new trial for appellants Baird and Heimeyer."

The majority holds that the "list was a part of the unlawful seizure" of forty-seven magazines that the police officers took off the rack of the bookstore when they went there with a warrant to arrest the owner of the store. The magazines were not offered in evidence; and, in my view, the list was not even "seized" much the less part of an "unlawful

seizure." All the police did to obtain the list was to write the titles of the magazines on a piece of paper. They didn't have to even touch the magazines to do that. They were rightly in the store and they could stand in front of the rack, read the magnificently descriptive titles, and simply write them down. Indeed, without writing anything, the officers would have to remember only a half-dozen words to adequately describe most of the titles.

The *Roaden* case has nothing to do with the admission of the officers' list into evidence. The "fruit of the poisonous tree" doctrine does not apply here because the list introduced into evidence did not result from an illegal search, seizure, or arrest. *Wong Sun* v. *United States,* 371 U.S. 471 (1963). Baird and Heimeyer do not contend that the forty-seven magazines were not obscene. The evidence supports the convictions. I would affirm.

Hershell L. DAVIS and James L. DAVIS
v. STATE of Arkansas

CA CR 84-24 670 S.W.2d 472

Court of Appeals of Arkansas
Division II
Opinion delivered June 20, 1984

Richard Garrett and *James H. Phillips,* for appellant.

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

TOM GLAZE, Judge. Appellants were convicted in Saline County Circuit Court of terroristic threatening in the first degree, a violation of Ark. Stat. Ann. § 41-1608 (Supp. 1983). They raised three points for reversal: (1) the trial court erred by refusing to allow the felony information to be read to the jury; (2) the charge of terroristic threatening is not supported by the proof; and (3) the trial court erred by refusing to give an instruction to the jury on voluntary intoxication as a defense for appellant Hershell Davis.

The essential fact of this case, the commission of the terroristic threat by the appellants, is not disputed by them. The terroristic threat occurred during a car chase on a dark, deserted, winding county road. According to the testimony of the victims, the appellants tried to run them off the road and into a ditch. At the end of the three-mile chase, appellant Jim Davis pulled his van alongside the victims' automobile, and appellant Hershall Davis leaned out of the van and struck the automobile twice on its roof with a leg from a chair. Appellants testified that they thought they were being followed by some men who had, earlier in the evening, attacked them with bottles and a club at a local parking lot. They stated that appellant Hershell Davis struck the car to ward off another attack by their former assailants. The

occupants of the car were, in fact, a woman and her three children, the youngest an eight-year-old boy. The terror that gripped this innocent family during this ordeal is manifest in their testimony. They managed to evade the appellants and made their way home, where they called the sheriff's department.

Deputy sheriffs arrested the appellants at a local pool hall. The arresting officer testified that appellant Hershell Davis "appeared to be a whole lot" intoxicated. Appellant Hershell Davis testified that he was "pretty bad drunk" on the night in question. Appellant Jim Davis stated that he was not drunk during this time.

Appellants cite no authority that directly supports their first argument for reversal — the trial court's refusal to allow the felony information to be read to the jury. The appellants argue that if the jury had been made aware of the statements contained in the information, then they could have used the information as a prior inconsistent statement to show inconsistencies in the victims' testimonies. Appellants cite two cases that hold it is not error for the prosecutor to read the felony information to the jury. *Graham* v. *State*, 202 Ark. 981, 154 S.W.2d 584 (1941); *Malone* v. *State*, 202 Ark. 796, 152 S.W.2d 1019 (1941). Such cases, however, simply fail to support appellants' argument. Assignment of error by counsel in briefs unsupported by convincing argument or authority will not be considered on appeal unless it is apparent without further research that the assignments of error are well taken. *Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977). In any case, the appellants had the opportunity to show inconsistencies in the victims' testimonies on cross-examination; their failure to do so cannot be attributed to the trial court's refusal to allow the information to be read to the jury.

Appellants also argue that the charge of terroristic threatening was not supported by the proof adduced by the State. Ark. Stat. Ann. § 41-1608 states that a person commits terroristic threatening in the first degree if, with the purpose of terrorizing another person, he threatens to cause death or serious physical injury or substantial property damage to

the property of another person. The Commentary to § 41-1608 states that its main application is to conduct creating a prolonged sense of terror. Appellants argue that while they may have sparked a short-lived sensation of terror in the woman and her children, the State did not prove that they instilled a prolonged sense of terror in them. In essence, appellants argue that the State charged them with terroristic threatening but, instead, proved that they had committed assault in the third degree [Ark. Stat. Ann. § 41-1607 (Repl. 1977)]. The short answer to this argument is that it was flatly rejected in *Warren* v. *State,* 272 Ark. 231, 613 S.W.2d 97 (1981). There, the Arkansas Supreme Court interpreted § 41-1608 and held:

> While we strictly construe a penal statute, we find no language which requires terrorizing over a prolonged period of time.

Id. at 233, 613 S.W.2d at 98.

In *Warren,* the defendant was convicted of terroristic threatening because he pointed a rifle at two men and threatened to shoot them. If this conduct was prolonged enough to sustain a conviction of terroristic threatening, then, *a fortiori,* the appellant's conduct in this case — a car chase lasting over three miles in which appellants tried to run the victims into a ditch — was certainly prolonged enough.

Appellant Hershell Davis' final allegation of error below is the trial court's refusal to give the jury an instruction on voluntary intoxication as a defense for him. In Arkansas, voluntary intoxication is a defense to a crime requiring a specific intent where the accused was so drunk as to be incapable of forming the necessary intent. *Varnedare* v. *State,* 264 Ark. 596, 573 S.W.2d 57 (1978). Because terroristic threatening requires a purposeful mental state, the defense of voluntary intoxication is available to appellant Hershell Davis.[1] *See Johns* v. *State,* 6 Ark. App. 74, 637 S.W.2d 623

[1]The Arkansas Criminal Code defines "purposefully" as follows: a person acts purposefully 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).

(1982). This defense is available only if there is evidence from which a jury might find that appellant was intoxicated to such a degree as to be unable to form the requisite intent to commit the crime. In this respect, appellant was required to show that he was incapacitated by drinking alcohol — not merely that he drank alcohol — to obtain an instruction on voluntary intoxication as a defense. *Bailey* v. *State,* 263 Ark. 470, 565 S.W.2d 603 (1978); *Johnson* v. *State,* 6 Ark. App. 342, 642 S.W.2d 324 (1982). Appellant's evidence proves only that he had been drinking beer and that he appeared intoxicated to the officer who arrested him *one hour after* the chase incident. Appellant's own testimony proves that he was not incapacitated at the time the crime was committed. At trial, he gave a detailed account of the events of the evening before, during and after the terroristic threat. During the car chase, appellant Hershell Davis had sufficient physical coordination to lean halfway out of a van moving at forty-five miles per hour and twice club the victims' automobile with a chair leg. Because appellant Hershell Davis did not sustain his burden of proof on this point, the trial court did not err in refusing to give the jury an instruction on voluntary intoxication.

In sum, we affirm the decision below.

Affirmed.

CRACRAFT and CORBIN, JJ., agree.

Patricia Susanne WING *v.* Larry Dale WING

CA 83-235 671 S.W.2d 204

Court of Appeals of Arkansas
Division I
Opinion delivered June 27, 1984

Coffelt, Burrow & Sawyer, for appellant.

Paul L. Davidson, for appellee.

MELVIN MAYFIELD, Chief Judge. The parties in this case were divorced by the Benton County Chancery Court March 10, 1983. They have a child, Misty, who was born April 1, 1982. The decree provides that custody of the child is awarded to each party for a period of six months each year until she begins to attend school on a full-time basis, and at that time primary custody shall be vested in the mother. Specific visitation rights are fixed for the noncustodial parent both before and after the child begins to attend

school, with alternative visitation arrangements in the event both parents do not continue to live in Benton County, Arkansas.

The mother appeals asking that we reverse the split custody arrangement and award her full custody; she also wants a change in regard to support payments by the father. The appellee asks only that we affirm the chancellor's decision.

The evidence shows that the parties had been married approximately two years when they separated. Appellant had been married five times previously, twice to the same man, and had given up a child by a previous marriage to its father because she "thought that it was best" for the child. She was twenty-eight years old at the time of trial. She was not then employed, but said she had been a nurse's aide and that she wanted to move back to Texas, which was her home state and where she lived when she met the appellee. She thought she could find employment there; she would live with her mother and step-father; and her mother, who did not work, would help take care of Misty.

Appellant's friend, Jenny Burr, testified that appellant was hardworking and not an abusive or profane person. She said appellant was a good mother and took very good care of her child. She admitted that appellant had not told her the truth once or twice and she was aware of times when appellant had lied to her husband to get money from him. She denied making the statement that appellant was too unstable to care for Misty but later admitted that she might have said it around the time appellant and appellee separated because the appellant was upset at that time over the separation. The witness thought that appellant took good care of Misty, but said appellee shared in that care and saw nothing objectionable in the way he took care of the child.

The appellant's mother testified that appellant and Misty were welcome. She said it would be up to the stepfather to support them financially because she had no money of her own. The stepfather testified that he would let them move in until appellant found a job and could get a

place of her own, but he said at "this point" in his life he would not raise the child for appellant as he did not believe that would be in either his or the child's best interest.

In the appellee's behalf, there was testimony that he was a fine upstanding young man who loved his daughter and was very good at taking care of her. He had lived in Benton County for about ten years. His parents had been married twenty-nine years and had three children of which the appellee was the oldest. They had lived in the same two-story farm house with three bedrooms on 100 acres of land for all those ten years. They had a married daughter who lived with her husband in a house trailer right next to the farm house, and a younger son who was still living at home. The appellee had been granted temporary custody of Misty and they had been living with his parents while awaiting the trial of this suit. His mother testified that she would be glad to assist in caring for Misty. She was employed but said she could devote Saturdays and Sundays to Misty and would be willing to give up her employment entirely to help take care of the child. She thought her son could provide Misty the physical, emotional, and spiritual stability she needed, but had reservations about the appellant's ability in that regard.

There was evidence that the appellee held a full-time job driving a truck and delivering feed. He also raised cattle and helped his father on the farm. Several witnesses testified that the appellant was kind and loving toward Misty and looked after all her needs. During appellee's temporary custody, in addition to the father, grandparents, and aunt, Misty had been cared for at times in a day care center.

The appellant quotes from *Drewry* v. *Drewry*, 3 Ark. App. 97, 101, 622 S.W.2d 206 (1981), where it states that "our courts have held that divided custody of a minor child is not favored unless circumstances clearly warrant such action," and *DeCroo* v. *DeCroo*, 266 Ark. 275, 276, 583 S.W.2d 80 (1979), where it was said "it is often in the best interest of the children, especially when they are very young, that they be awarded to the mother." The appellant also suggests that the trial court "may have stepped into the quagmire this court warned chancellors of, when [a concurring opinion]

stated in *Drewry, supra,* that it is hoped any idea that the tender years doctrine has been repealed will not cause chancellors to think they must divide the custody of children in order to avoid the claim that there was a preference based on gender."

On the other hand, the appellee notes that Act 278 of 1979, Ark. Stat. Ann. § 34-2726 (Supp. 1983), mandates that custody should be made "solely in accordance with the welfare and best interest of the children" and "without regard to the sex of the parent," and he relies upon *Drewry* for its affirmance of a split custody award and for the statement of the prevailing opinion which said that Act 278 "abolished" the tender-years doctrine.

The reliance by both parties, in well-written briefs, upon *Drewry* makes it appropriate to suggest that the four separate opinions handed down in that case may indicate that the court was more fractured than it really was. Despite the different approaches, the opinions agree that the goal involved is the welfare and best interest of the child. Either expressly or by implication, each opinion also recognizes the superior position of the chancellor to see the witnesses, hear the testimony, and find the facts. It is our duty on appeal to affirm the chancellor's findings of fact unless they are clearly against the preponderance of the evidence. ARCP Rule 52(a). In the instant case, the precise custodial issue before us is whether the judge's failure to grant full custody to the appellant is clearly against the preponderance of the evidence. Applying the law to the evidence in the case, we hold that the judge's decision on this issue was not clearly wrong.

Appellant also contends that the chancellor erred in regard to the child support provision made by the decree. It is provided that after the child begins attending school full-time, the father shall pay the mother (who the decree contemplates will at that time have full custody) child support in accordance with the family support chart then used by the court; except payment shall be abated during any period of a week or more that the child is visiting with the father. Nothing is said about support until the child begins

full-time school attendance. Appellant says this is unfair to both parties since the child might have a series of injuries or catastrophic illnesses and the non-custodial parent would have no obligation to assist financially. The appellee replies that both parties are required to share the care of the child on an equal basis and, in any of the events assumed by appellant, there is no indication in the record that a different appropriation would be applicable. We agree that the intent of the decree is to place the financial burden of Misty's care upon both parties equally. The evidence before the chancellor at the time of the decree supports that decision.

Affirmed.

CLONINGER, J., agrees.

CRACRAFT, J., concurs.

GEORGE K. CRACRAFT, Judge, concurring. By concurring in this case I make no departure from the views I expressed in the majority opinion in *Hansen* v. *Hansen,* 11 Ark. App. 104, 666 S.W.2d 726 (1984) and my dissent in *Williams* v. *Williams,* 12 Ark. App. 89, 671 S.W.2d 201 (1984). The only issue raised on this appeal was whether the chancellor's failure to grant full custody to the mother was clearly erroneous. There was no cross-appeal challenging the sufficiency of the evidence to support a finding that divided custody was in the best interest of the child or that full custody should have been awarded to the father. Even on *de novo* review we do not reverse on issues not raised or argued on appeal. I concur for no other reason.

Deborah Lisa WILLIAMS *v.*
James Sloan WILLIAMS

CA 83-250 671 S.W.2d 201

Court of Appeals of Arkansas
En Banc
Opinion delivered June 27, 1984

Richard L. Walloch, for appellant.

Moody & Nye, by: *Edward O. Moody,* for appellee.

MELVIN MAYFIELD, Chief Judge. Deborah Lisa Williams appeals from a decree of divorce granted James Sloan Williams and from the court's order of split custody of their two minor children.

Debby and Jim were married in March of 1979, when he was in the Marine Corps stationed in California. They lived there until he got out of the Marines in February of 1981 at which time they moved to Arkansas, his home state. Debby is of Chinese ancestry but was born and raised in this country. She had been married before and has a child by that marriage. She and James have two children.

There is evidence to indicate that Debby did not like Arkansas; that she began corresponding with her ex-husband, Chuck; and that she was making plans to leave Jim and return to Chuck. One day her mother arrived here from California and Debby moved out of the house she shared with Jim, and announced she was going back with her mother to California to live. Jim filed suit for divorce that same day. Debby filed a counterclaim in which she asked for divorce and on August 10, 1982, the case was tried.

Jim was granted divorce on the grounds of general indignities. He testified that Debby had accused him numerous times of being unfaithful, had called him a bastard in front of the children, and was engaged in a long distance love affair with her ex-husband. (She admitted that during the short time she had lived in Arkansas, she had gone back to California at least one time and had seen Chuck while she was there.) Jim's testimony was corroborated by a woman who said she was a friend of both of the Williams. She testified she had heard Debby accuse Jim of being with other women, had known Debby was corresponding with her ex-husband, and that Debby was planning to remarry him as soon as she could get back to California.

In short, we think there was sufficient evidence of indignities, independently corroborated, to sustain the finding of the trial court that Jim had met his burden of proof as required by such cases as *Anderson* v. *Anderson*, 269 Ark. 751, 600 S.W.2d 438 (Ark. App. 1980). We do not reverse

the chancellor's findings of fact unless they are clearly wrong, ARCP Rule 52(a), and we cannot say he erred in granting the divorce to Jim. Parenthetically, the evidence would have sustained the granting of the divorce to Debby had the chancellor made that decision.

At the time of the trial in August of 1982, one of the parties' children was a year old and one was two years old. The court held that Debby could have custody of them for six months and Jim could have custody for six months. Recently, in *Hansen* v. *Hansen,* 11 Ark. App. 104, 666 S.W.2d 726 (1984), this court said:

> 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 the instant case, it might be said that the evidence does not show that it would be in the best interest of the children for either of the parents to have custody of them. Jim had been disciplined in the military for smoking marijuana and he had been AWOL. He also admitted he had been in possession of certain drugs (Tylenol, he said) and hypodermic needles and syringes which had been stolen from a doctor's office; and that he had offered marijuana to the daughter of his corroborating witness. However, he said he no longer used drugs or alcohol and had not for about a year.

On the other hand, Jim said that Debby did not take good care of the children. He said she didn't bathe them or feed them properly, giving them only fruit, cheese, yogurt and chicken — not meat and potatoes that would stick to their ribs — and that sometimes she let them run around in diapers. Debby testified that she was living in California

with her mother; that she was willing to split custody with Jim although she would rather have the children herself; and that she might remarry her ex-husband, Chuck, who was with her at the trial. She testified that she had no job, had not finished high school, and lived off her mother and a $500 per month government allotment she got for her oldest child because Chuck was still in the service.

In *Hansen* we said that, unlike *Drewry*, the child in *Hansen* had two homes in different states; that she would be subjected 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." Much of what we said in *Hansen* applies here. Of course, in this case the chancellor did not have a perfect choice. These children are actually going to live with grandparents most of the time. Jim admits his parents keep the children when he has their custody, and Debby's mother will keep the children if Debby works while they are in her custody. The children are now two and four years old. Undoubtedly the chancellor will be called upon in the next couple of years to make a new decision about the children's custody. By then his choice may be clear, based on past experience and changes in circumstances.

In *Calhoun* v. *Calhoun*, 3 Ark. App. 270, 625 S.W.2d 545 (1981), we said, "We know of no case in which the superior position, ability and opportunity of the chancellor to observe the parties carry as great a weight as one involving minor children." We cannot say that the chancellor was clearly wrong in this finding in regard to the custody of the children in the case at bar.

One other point needs to be noticed. After the trial on August 10, 1982, Debby's attorney filed a motion for a new trial alleging that the chancellor, at the temporary custody hearing in October of 1981, had referred to Debby as a foreigner and that this statement indicated a prejudice toward her and a new trial should be granted for that reason. The judge denied the motion and on the authority of *Harrison* v. *The State*, 35 Ark. 458 (1880), found the attorney in contempt and fined him $100.00. The attorney asserts in

the brief he has filed for the appellant Debby Williams that the chancellor was in error in the contempt matter. Suffice it to say, that matter is not before us. The attorney is not a party to this case, and the notice of appeal does not mention the contempt matter. Moreover, the proper remedy for relief from an order of contempt is by certiorari and not by appeal. *Johnson* v. *Johnson,* 243 Ark. 656, 421 S.W.2d 605 (1967); *Beene* v. *The State,* 22 Ark. 149 (1860).

The decree appealed from is affirmed.

CRACRAFT and CLONINGER, JJ., dissent.

GEORGE K. CRACRAFT, Judge, dissenting. For even stronger reasons than I voiced on behalf of the court in *Hansen,* I respectfully dissent. In *Drewry* we affirmed a chancellor's finding that a child's best interest could be fostered while in split custody. There the parents were in full accord as to how the child was to be raised and they lived in the same neighborhood. The only effect of that order was to change the child's principal place of abode biannually. In *Hansen* we reversed such a finding where there was parental discord as to the raising of the child, the parents lived in different states, and divided custody would require the child to adjust to two environments, schools, diets and disciplinary rules every three months.

Here we are affirming such an award where the situation is much worse and more detrimental to the children than in *Hansen.* Here there is not only discord between the parents, but the primary care of the children will be left to two sets of grandparents in two homes over 2,000 miles apart. For six months they will be required to adjust to an urban California environment and then to readjust to a rural Arkansas one the following six months. They must adjust to the discipline, diet and environment of an oriental culture and then readjust to an occidental one. The emotional and psychological trauma to which this subjects the children cannot be erased by a reevaluation of the situation on a change of circumstances several years hence, as the majority suggests. The children need to develop a sense of "belonging" in one or the other of these

two worlds and "visiting" in the other. Although the choices presented to the chancellor were less than desirable, in my opinion, a wrong choice of principal custodian would be preferable to the dilemma in which we have placed these children.

I am authorized to state that Cloninger, J., concurs with these views and joins in this dissent.

BRIARWOOD APARTMENTS, A Limited Partnership, Gary VINCENT, Managing Partner *v.* Blake LIEBLONG and Wife, Sally LIEBLONG; Danny AKERS and Wife, Pam AKERS

CA 83-343 671 S.W.2d 207

Court of Appeals of Arkansas
Division II
Opinion delivered June 27, 1984

John C. Gregg, for appellants.

Brazil & Clawson, for appellees.

GEORGE K. CRACRAFT, Judge. Blake Lieblong and Sally Lieblong are the owners of Lot 30 in Brookwood Subdivision. Appellees Danny Akers and Pam Akers are the owners of Lot 29 in that subdivison. The appellant, Briarwood Apartments, is the owner of Lot 33, Brookwood Subdivision. At the time Brookwood Subdivision was dedicated all of the lots in the subdivision were made subject to a bill of assurances which contained the following restriction:

> LAND USE AND BUILDING TYPE. No lot shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than one detached single-family dwelling not to exceed two and one-half stories in height. . . .

The appellant also owns a tract of land which adjoins Lots 29, 30 and 33 of Brookwood Subdivision to the north, but is not located in the subdivision or subject to the bill of assurances. In 1982 the appellant began construction of a twelve apartment complex for the elderly and handicapped on its land lying outside the subdivision. At that time despite the protest of the owners within the subdivision it scraped a roadway across Lot 33 for access for the construction workers on its property. In October it put down some crushed stone on the roadway. In early November when the apartment complex was from 80% to 90% complete the appellant began paving the roadway to provide access to the complex for its inhabitants. The appellees commenced this action on

November 24, 1982 seeking injunctive relief against further use of Lot 33 for other than residential purposes. The appellant answered denying that the use it made of the lot was violative of the bill of assurances and raising the affirmative defenses of laches and estoppel. The chancellor ruled that the use of the lot as a roadway connecting with another roadway outside the subdivision was a violation of the restrictive covenant and that the appellees were not barred by delay in enforcing their rights under the bill of assurances. This appeal follows.

Appellant contends that the chancellor erred in concluding that the appellant's use of Lot 33 as a means of access to an apartment complex which was not part of the subdivision violated the bill of assurances. We do not agree.

In *Casebeer* v. *Beacon Realty, Inc.*, 248 Ark. 22, 449 S.W.2d 701 (1970) our court held that the opening of a street or right-of-way across a lot does not violate a covenant restricting the property to residential uses where it is the intention of the owner to designate the property as a private drive to be used only by individuals with land abutting on the passageway and where there is no connection of the proposed right-of-way with any street or property outside the subdivision. While the court did not have before it the precise issue we now address, its discussion of the cases on which it relied leads us to our conclusion. In *Casebeer* the court adopted the rule announced in *Callaham* v. *Arenson*, 239 N.C. 619, 80 S.E.2d 619 (1954) on similar facts. In doing so the *Casebeer* court recognized the clear distinction made by the North Carolina court in the subsequent case of *Long* v. *Branham*, 271 N.C. 264, 156 S.E.2d 235 (1967) in the following language:

> We also feel that the *Long* case is readily distinguishable from the case before us, because the construction of this passageway will *not* make it or any street in the subdivision a thoroughfare carrying traffic from another subdivision *contrary to the objectives of the restrictive covenants,* as would have been the case in *Long*. [Emphasis supplied]

This same distinction was recognized by the Supreme Court of Mississippi in *A.A. Home Imp. Co.* v. *Hide-A-Way Lake,* 393 So.2d 1333, (Miss. 1981) which discusses *Casebeer, Callaham* and *Long.* The Mississippi Court declared that the owner of property within a subdivision could construct a beneficial roadway across the land owned by him connecting two streets within the same subdivision without violating the covenant but where the roadway is intended, not as a connecting street within the subdivision, but as one furnishing access to lots and streets outside the subdivision it should be enjoined as violating the bill of assurances. The Mississippi Court stated:

> There is no ambiguity in the expression 'No lot shall be used for other than residential purposes.' Any additional use must be *reasonably incidental* to residential uses and such an inconsequential breach of the covenant as to be in substantial harmony with the purposes of the parties in making the covenants, and without substantial injury to the neighborhood. See *Thompson* v. *Squibb,* 183 So.2d 30 (Fla. D.C. App.2d 1966). *It is obvious that the use of Lot 52 on which there is no residence as a connecting roadway to an adjoining subdivision is not in any sense a residential use or a use incidental thereto.* In this case, the sole purpose of the roadway is to provide a means of ingress and egress between two subdivisions. It destroys the self-contained aspect of the subdivision, and the security that goes along with it. [Emphasis supplied]

In *Thompson* v. *Squibb, supra,* referred to above, it was stated:

> It is obvious that the use of defendant's lot as a connecting street so that there would be access from the streets of the adjoining subdivision to those of the subdivision for whose benefit the covenants were made is not in any sense a residential use or a use incidental thereto.

We conclude that the trial court was correct in finding that the use appellant intended to make of the roadway was violative of the bill of assurances.

The appellant next contends that the chancellor erred in not holding that the appellees were barred by laches and estoppel from asserting the violations of the restrictive covenants. Appellant argues that the appellees were aware for a period of four months of the intended use of Lot 33 and allowed the appellant to spend approximately $300,000 in the construction of the apartment complex before bringing this action. Appellant relies on *Borssuck* v. *Pantaleo*, 183 Md. 148, 36 A.2d 527, 156 A.L.R. 1140 (1944) and other cases from sister states, some of which are discussed in the annotation to *Archambault* v. *Sprouse*, 215 S.C. 336, 55 S.E.2d 70, 12 A.L.R.2d 388 (1949), which have held that where the owners of lots in a subdivision sit idly by while large expenditures are made in the erection of a non-conforming dwelling they are barred by the delay from obtaining injunctive relief. This argument is not persuasive because cases relied on are clearly distinguishable.

Here the apartment complex on which the expenditures were made was located on property not subject to the covenants restricting land use. The owners of property in Brookwood Subdivision had no basis to seek injunctive relief against the erection of the apartment building. The application of the equitable doctrines of laches and estoppel must be determined from the facts and circumstances surrounding appellant's use of Lot 33 and the expenditures made on that lot.

The doctrine of laches is based on a number of equitable principles, and here it is based on the assumptions that the party to whom laches is imputed has knowledge of his rights and an opportunity to assert them, that by reason of his delay the adverse party has good reason to believe those rights are worthless to have been abandoned, and that because of a change of conditions or relations during this delay it would be unjust to the latter to permit him to assert them. *Rhodes* v. *Cissell*, 82 Ark. 367, 101 S.W. 758 (1907). Laches is a species of estoppel and rests upon the principle that if one maintains silence when in conscience he ought to speak, equity will bar him from speaking when in conscience he ought to remain silent. *Page* v. *Woodson*, 211 Ark. 289, 200 S.W.2d 768 (1947). It is the unreasonable delay of the party

seeking relief under such circumstances as to make it unjust or inequitable for him to seek it now. *Langston* v. *Langston*, 3 Ark. App. 286, 625 S.W.2d 554 (1981). These equitable principles are premised on some detrimental change in position made in reliance upon the action or inaction of the other party. The length of time after which inaction constitutes laches is a question to be answered in the light of the facts presented in each individual case.

Here the appellant began construction of the complex in early August 1982 and, with full knowledge of the restrictive covenants obtained in the bill of assurances and of the continuing protest of the use he was making of Lot 33 by the property owners in Brookwood Subdivision, scraped a roadway across Lot 33 for its use in construction of the complex. One appellee testified that he protested three or four times and that there was a city council meeting which the appellant's representative attended where protest was made by a number of persons. One of the appellants testified that despite knowledge of the restrictive covenants and the protest of the owners in the subdivison they scraped and used the roadway anyway. Around the 1st of October the appellant put some crushed stone on the scraped roadway to facilitate access. In early November the appellant constructed gutters and curbing and laid an asphalt roadway across the lot. Appellees brought this action twenty-four days later. The cost of laying the asphalt for the roadway was not shown in the record.

As the appellees argue, there was no way for them to know that the roadway was to be a permanent one rather than a temporary access during construction until the curbing and laying of the asphalt was undertaken. The appellants knew of the restrictions and knew of the appellees' objections to the use they intended to make of it. One who openly defies a known right in the absence of anything to mislead him or to indicate assent or abandonment of opposition to that action by others is not in a strong position to urge as a bar to relief a failure to take the most instant resort to the courts. We conclude that the trial court's ruling that the appellees' right to enforce the

restrictive covenants was not lost by laches, under the circumstances of this case was correct.

Affirmed.

CORBIN and GLAZE, JJ., agree.

Myrna Inez WALLIS *v.*
WHIRLPOOL CORPORATION

CA 84-8 671 S.W.2d 760

Court of Appeals of Arkansas
En Banc
Opinion delivered June 27, 1984

James R. Filyaw, for appellant.

Jones, Gilbreath & Jones, for appellee.

GEORGE K. CRACRAFT, Judge. Appellant Myrna Wallis, an employee of appellee, Whirlpool Corporation, sustained injuries to both wrists on February 9, 1981. Appellant initially filed an application for benefits under her employer's group health insurance plan, contending that the injuries resulted from a non-job-related fall at home. She maintained that the injuries were non-job-related until about August 19, 1981, at which time she filed for workers' compensation benefits. Appellee controverted the claim in its entirety and raised the defense of lack of notice as required by Ark. Stat. Ann. § 81-1317 (Supp. 1983).

The administrative law judge held that the injuries to appellant's wrists had been sustained out of and in the course of her employment with appellee, and that appellee had not been prejudiced by the untimely filing of the claim. However, the law judge held that appellant was disqualified from receiving benefits because she failed to comply with the timely notice requirements and that no satisfactory reason had been shown by appellant to excuse her from compliance. The full Commission affirmed.

Appellant's first point for reversal is that the Commission erred in its interpretation of Ark. Stat. Ann. § 81-1317, which provides as follows:

> (a) Notice of injury or death for which compensation is payable shall be given within sixty (60) days after the date of such injury or death to the employer, or written notice to the Commission which shall notify the employer immediately.
>
> (b) Failure to give such notice shall not bar any claim (1) if the employer had knowledge of the injury or death, (2) if the employee had no knowledge that the condition or disease arose out of and in the course of employment, or (3) if the Commission excuses such failure on the grounds that for some satisfactory reason such notice could not be given. Objection to failure to give notice must be made at or before the first hearing on the claim.

The Commission found that appellant had not brought herself within the limits of any of the statutory exceptions which excuse a claimant from the responsibility to give notice of injury within sixty days. There was no allegation, and the evidence does not support any finding, that the employer had knowledge of the injury; in fact, the employer was notified that the injury was non-job-related. There is evidence that appellant had knowledge, or belief, that her condition arose out of and in the course of her employment. She testified that she had believed since February 1981 that her injury arose out of her employment, but was afraid to tell her employer because she had been harassed about a previous claim for workers' compensation benefits. The third statutory exception gives the Commission discretion to excuse failure to give notice on grounds that for some satisfactory reason such notice could not be given. It was the Commmission's conclusion that appellant gave no satisfactory reason why the notice could not be given.

The court has held that it must review the evidence in the light most favorable to the Commission's decision. *Silvicraft, Inc.* v. *Lambert,* 10 Ark. App. 28, 661 S.W.2d 403 (1983). The Commission's findings will be upheld if there is any substantial evidence to support their action. *Hawthorne* v. *Davis,* 268 Ark. 131, 594 S.W.2d 844 (1980). It is our opinion that there is substantial evidence to support the Commission's finding that the appellant's reason for not providing notice did not come within any of the three statutory exceptions.

It is true that there is evidence that the employer in this case was not prejudiced by appellant's failure to make a timely report of her injury. However, § 81-1317, *supra,* was amended by the legislature in 1979 to remove that part of the section which provided that failure to give a timely notice would not bar a claim if the Commission determined that the employer had not been prejudiced by the failure.

Appellant next contends that the Commission erred in ignoring her argument that her failure to give the notice should be excused under the provision of § 81-1343 (Repl. 1976) which enumerates the powers and duties of the

Commission, including the power to "excuse failure to give notice either of injury or death of any employee." She argues that this section enlarges the provisions of Ark. Stat. Ann. § 81-1317 (Supp. 1983) and gives the Commission full discretionary power to excuse the failure for reasons other than the three enumerated in the earlier section. Appellee concedes in its brief that § 81-1343 does have that effect but contends that the Commission did not ignore this section.

We need not determine what effect § 81-1343 has upon the provisions of § 81-1317. Even assuming that the section does have that effect, we agree with appellee that on the evidence we find no basis for the exercise of that power. It is clear to us that the Commission fully considered appellant's excuse for failing to give notice and found it insufficient. In its opinion the Commission stated:

> We have carefully examined the three bases set out in subsection (b) of the statute for excusing failure to give notice, and we find none of them applicable to this case. . .Ark. Stat. Ann. § 81-1317 is plain and unambiguous as applied to the facts in this case. *In such a situation we cannot distort the obvious and intendment of the statute by applying the well known and laudable principles of liberal statutory construction operative in workers' compensation law.* [Emphasis supplied]

The opinion of the administrative law judge adopted by the Commission contained the following finding and conclusion:

> The only evidence presented to explain why proper notice of the injury was not given, was the claimant's own testimony that she intentionally concealed the fact that her wrist condition may have been related to her employment activities until August of 1981 for fear of harassment by her employer. *In light of the evidence presented in this case it is my opinion that this has not been sufficiently established to be a satisfactory reason as to why such notice 'could' not be given.* [Emphasis supplied]

We find no error and affirm.

COOPER, CLONINGER and GLAZE, JJ., dissent.

LAWSON CLONINGER, Judge, dissenting. I respectfully dissent. I agree with the majority to the extent that claimant did not come within the exception to the notice requirements of Ark. Stat. Ann. § 81-1317 (Supp. 1983). It is my contention that Ark. Stat. Ann. § 81-1343 (Repl. 1976) enlarges the scope of the Commission's discretion to excuse failure to give notice of injury. The majority states that it agrees with appellee that "on the evidence we find no basis for the exercise of that power." However, that is for the Commission to decide, not this court. I am convinced that the Commission did not consider appellant's claim in light of § 81-1343, and I would remand this case back to the Commission with directions that it make such a determination.

COOPER, J., joins in this dissent.

TOM GLAZE, Judge, concurring in part and dissenting in part. I agree with the majority that the Commission did not err in interpreting Ark. Stat. Ann. § 81-1317 (Supp. 1983). However, I agree with Judges Cloninger and Cooper that the Commission never considered appellant's second point, *viz.*, although appellant failed to prove grounds under Ark. Stat. Ann. § 81-1317(b) (Supp. 1983), which would excuse her failure to give notice of her injury to the employer, the Commission may still excuse such failure under Ark. Stat. Ann. § 81-1343(4) (Repl. 1976).

In sum, appellant's failure to give notice of her injury is no bar to a claim if she had shown any one of the grounds under § 81-1317(b). All members of this Court agree that appellant failed in her proof under § 81-1317(b), and in this respect, the Commission should be affirmed. Even though appellant failed in that proof, the Commission still had the discretion to excuse appellant's failure to give notice under § 81-1343(4), but the Commission apparently chose not to exercise any discretion it may have under that provision.

If this case were remanded, I believe it is obvious that the Commission would not excuse appellant's failure to give notice to her employer, but it is not this Court's place to exercise the Commission's discretion under § 81-1343(4). Although the judges affirming this cause state the Commission fully considered appellant's request under § 81-1343(4), the prevailing opinion recites only findings by the Commission that support its denial of appellant's claim for her failure to comply with the requirements under § 81-1317(b). For the reasons stated, I believe this cause should be remanded, directing the Commission to exercise its discretion under § 81-1343(4).

Charles A. VAUGHN *v.* Ronnie A. MORRIS and Linda L. MORRIS, Husband and Wife

CA 83-329 671 S.W.2d 195

Court of Appeals of Arkansas
Division II
Opinion delivered June 27, 1984

Ball & Lindsay, by: *Wayne B. Ball*, for appellant.

George M. Hunt, Sr., and *Esther M. White*, for appellees.

LAWSON CLONINGER, Judge. This is a case in which appellees, Ronnie A. and Linda L. Morris, sought specific performance of a sales contract for the sale of land and damages in the amount of $5,000 against the appellant, Charles A. Vaughn, and Virginia Vaughn, his wife. Appellant alleged that he was uncertain regarding the possession of appellees of the property described and asked that the complaint be dismissed. Appellant further alleged that appellees were put on actual notice of an adverse claim of possession to the lands which were the subject of the sales contract. After trial on April 28, 1983, the chancellor dismissed appellees' cause of action against Mrs. Vaughn and ordered the appellant, Charles A. Vaughn, to specifically perform the contract between the parties.

Appellant's first point for reversal is that the chancellor erred in granting specific performance. Specifically, he argues that appellees acquired their interest by virtue of a tax deed which was void and that the property was pasture land under fence and in actual possession of Leon Wilcox, who claimed titled adversely.

At trial, Mr. Vaughn testified that he entered into this contract with the intention of either selling the property to

his neighbor, Mr. Wilcox, or trading it to him for other property more desirable. When he approached Mr. Wilcox with the proposal, Mr. Wilcox indicated that he was not interested in purchasing the property because it already belonged to him. Appellant's attorney subsequently rendered a title opinion, to the effect that the tax deed was void and did not constitute color of title. The attorney further stated that the order of quiet title of June 11, 1979, would not be binding on the record owners since there was no actual or constructive notice given to them. He concluded that the title was "not only incomplete, but also not even insurable." Subsequently, appellees hired an attorney in order to make the title marketable. Addititional quitclaim deeds and an affidavit were recorded. Appellant's attorney then rendered a supplemental title opinion, stating that all requirements of his original title opinion had been met.

The chancellor found that appellees had provided marketable title within a reasonable time as provided by the contract. He further held that although he could not guarantee that Mr. Wilcox would not bring an action for adverse possession, he found that Mr. and Mrs. Wilcox recognized title of the property in the Morrises when they were parties in a lawsuit in July of 1980. Since Mr. Wilcox acknowledged that the Morrises owned the property, he cannot now claim title by adverse possession.

A party seeking specific performance of a contract must show that he has at all times been ready, able, and willing to perform his part of the contract, and that he has complied with the terms of the contract by performing, or offering to perform the acts which form consideration of undertaking on the part of the other party. *Lawson* v. *Taylor Hotels, Inc.*, 242 Ark. 6, 411 S.W.2d 666 (1967).

In *Holt* v. *Manuel*, 186 Ark. 435, 54 S.W.2d 66 (1932), the Arkansas Supreme Court stated that it will never compel a purchaser to take a title where "the point on which it depends is too doubtful to be settled without litigation, or where the purchase would expose him to the hazard of such proceedings; or, as it is usually expressed, it will not compel him to buy a lawsuit."

The court further stated:

> It is not sufficient to create a reasonable doubt that the owner might be exposed merely to idle litigation, but it must be a reasonable apprehension that the purchaser taking the title might be subjected to litigation of a substantial nature from which his title might be placed in jeopardy. In determining whether or not reasonable doubt exists, it appears to be the general rule that the opinion of an attorney that the title to property is bad is not sufficient to raise such a doubt, although, as in the instant case, the attorney may be one of admitted standing and ability. Such opinion that the title is invalid, if erroneous, will not justify the purchaser in receding from his contract. [cases omitted]. If it should appear to the court, upon generally familiar principles of law, that the title is valid, then the doubt as to the title would be unfounded, and there could be no basis for any reasonable apprehension that the purchaser would be subjected to substantial litigation.

In *Holt, supra,* the attorney, in his title opinion, based his opinion that the title was bad on the fact that minor heirs of a trust which was terminated were not properly served with process in the termination of the trust. The chancellor found that actual service was had on the minors and further a guardian ad litem was appointed in the cause for the minors. See also *Baugh* v. *Johnson,* 6 Ark. App. 308, 641 S.W.2d 730 (1982).

We find that the chancellor's decision is not clearly against a preponderance of the evidence. As was stated in *Holt, supra,* an opinion by an attorney that the title is not marketable, if erroneous, will not justify the purchaser in rescinding the contract. In this case, appellant's attorney initially found that the title was unmarketable, but later rendered a supplemental title opinion, stating that all requirements which he had set out in his initial opinion had been met. Further, the chancellor found that Mr. Wicox had recognized appellees' title to the property in a previous lawsuit and, therefore, any claim of adverse possession would be "idle litigation." We uphold the chancellor's

decision to grant appellees specific performance on the contract of purchase.

Appellant argues secondly that the chancellor erred in granting specific performance because the appellees sued appellant for a private roadway or access to the tract across other property owned by the appellant. He argues that this was inconsistent with one seeking specific performance, and cites *Walworth* v. *Miles,* 23 Ark. 653 (1861). A review of the pleadings and the transcript indicates that this argument was never raised in the trial court and cannot be considered on appeal. *Gregory* v. *Gordon,* 243 Ark. 635, 420 S.W.2d 825 (1967).

Appellees argue on cross appeal that they are entitled to pre-judgment interest. Although appellees-cross appellants asked for interest in their pleadings, we do not find in the record that they presented the issue to the chancellor. The chancellor specifically awarded interest from the date of judgment and no objection was raised. Cross appellants cannot now raise the issue on appeal. *Arkla Exploration Company* v. *Boren,* 411 F.2d 879 (8th Cir. 1969).

Affirmed.

CRACRAFT and COOPER, JJ., agree.

COULSON OIL COMPANY, INC. *v.*
Kenneth WILCOX, d/b/a WILCOX OIL COMPANY

CA 83-461 671 S.W.2d 198

Court of Appeals of Arkansas
Division I
Opinion delivered June 27, 1984

Plegge & Church, by: *Beresford L. Church, Jr.,* for appellant.

Brazil & Clawson, by: *Ed Clawson;* and *Gordon & Gordon, P.A.,* by: *Allen Gordon,* for appellee.

TOM GLAZE, Judge. This case involves a commercial lease dispute. The twenty-year lease in controversy was first entered into between Nickerson & Nickerson, Inc. (Nickerson) and appellee on March 9, 1969. Until 1979, Nickerson used the leased site for a Nickerson Farms Store which sold food, gifts, candy and petroleum products. During the period Nickerson operated its store, it sold gasoline only and its rental payment to appellee was in part based upon the amount of gasoline sold each month. In 1980, Nickerson assigned its lease to appellant. Appellant continued to sell gasoline, but it also altered the business facility to sell diesel fuel and to service large trucks. In June, 1981, appellee filed suit to reform the original lease agreement to require appellant to pay rent based both on gasoline and diesel sales or alternatively to cancel the lease. Appellee later amended its complaint, requesting that appellee be enjoined from selling petroleum products other than gasoline and from operating the premises as a truck stop. Appellant answered, asserting it had complied with the lease provisions and requesting dismissal of appellee's complaint. After a full trial and the submission of briefs by the parties, the chancellor granted the injunction appellee requested but alternatively permitted appellant to elect to pay rental based upon monthly sales of both gasoline and diesel. On appeal, appellant contends the chancellor erred in admitting parol testimony which served as the basis for finding the appellant violated the stated or primary purpose of the parties' lease. We agree with appellant's contention, and therefore reverse.

Under the lease agreement, appellant is required monthly to pay $150 plus one-half cent per gallon on gasoline sales. The primary purpose of the lease, set forth in paragraph 7, provides:

> The leased premises are to be used as a site for a Nickerson Farms Store for the sale of food, gifts, candy, petroleum products and other merchandise customarily handled by such stores; and for the conduct of any other lawful business; and the Lessee is hereby given

> the right to sublease or underlet said premises or to assign the whole or any part of the term of this lease.

Although the foregoing provision provides for the sale of "petroleum products," the trial judge determined the parties contemplated the sale of gasoline only. The chancellor based this finding in large part upon appellee's testimony, and his purported conversations with Nickerson's president. Appellee indicated these conversations took place prior to their executing the lease. In sum, appellee testified (over appellant's objection on hearsay and parol evidence grounds) concerning what the parties meant by the term "Nickerson Farms Store" as that term was used in paragraph 7 of the lease. Appellee stated that Nickerson's president said that he intended Nickerson to cater to the "elite motoring public" which he defined as the "people who would travel the freeway in good cars. . . . " He quoted Nickerson's president as also saying, "he didn't want diesel pumped there," and "[h]e was only going to pump gasoline, because it degraded into the type thing that didn't work good for his cafe operation [and] his gift shop operation. . . . " Appellee further testified that he owned property adjacent to the leased tract and that his development of that property depended upon the family traffic to which Nickerson catered.[1]

Given the appellee's parol testimony and its significant import, we must determine if its admission violated the parol evidence rule. Of course, that rule excludes oral testimony that would contradict or vary the terms of a written contract, but the rule does not preclude an oral explanation of an ambiguity in the agreement. *Peevy* v. *Bell,* 255 Ark. 663, 501 S.W.2d 767 (1973). Appellee cites the *Peevy* case as an example of when the admission of parol evidence is proper. There Peevy sold Bell "the Tandy Homes Franchise" for Springdale, Arkansas, and the surrounding area. Bell later brought suit for breach of contract, alleging Peevy failed to assign him three contracts that existed at the time of the sale and which were for the construction of Tandy

[1]The record reflects the appellee made no effort to develop his adjacent property during the more than ten-year period the leased tract was operated by Nickerson.

homes. Under the franchise purchased by Bell, no one else could build a Tandy home; thus, a factual issue arose regarding what was meant by the description, "the Tandy Homes Franchise," and whether the three construction contracts in question came within that description. The Supreme Court permitted parol testimony on what a Tandy Homes Franchise was because the parties' agreement merely recited the term without one syllable in the instrument explaining what a Tandy home was or what the franchise included.

The instant case significantly differs from the facts in *Peevy* because the purpose clause (paragraph 7) of the parties' lease agreement does set forth specifics from which their intent can be gained. First, Nickerson, among other things, could sell petroleum products, and even appellee does not argue that diesel fuel is not generically, at least, a petroleum product. Clearly, if appellee had desired to exclude diesel, he could have required that exclusion in his original lease with Nickerson. Second, the parties also permitted Nickerson to conduct "any other lawful business" on the premises. No question is raised that diesel could not lawfully be sold on the site; appellee only argues that the parties did not intend for it to be sold. Neither was a restriction placed on other types of business to be conducted, except that they be lawful. Again, if appellee had intended to exclude diesel sales, he easily could have inserted that restriction in the lease. Third, as appellant points out, Nickerson was given the unfettered right to assign or sublease to *anyone*. In fact, Nickerson had assigned its lease to others before appellant acquired the business site, and the only difference in the business operation occurred when appellant began selling diesel. From our review of the lease agreement, we see no ambiguity in its terms, and the only real confusion over what the parties intended arises from the parol testimony given by appellee. That testimony is simply in conflict with the plain written terms in the lease.

In reaching the conclusion that the trial court erred in permitting appellee's parol testimony, we must also consider the chancellor's legitimate concern that if allowed to sell diesel, appellant might halt the sale of gasoline and sell

diesel fuel exclusively. If this were to occur, appellant would not pay monthly-gallonage rent since the lease required such rent only on gasoline sales, not diesel. Under these circumstances appellant would pay only its base rent of $150 per month. We quickly add that at this stage, appellant not only has continued gasoline sales, but the gasoline gallonage rent it has paid appellee is almost double the amount received from the prior operators. Our Supreme Court, quoting from 51 C.J.S. Landlord and Tenant, § 337b said:

> [A] covenant that premises shall be used for a specified purpose does not impliedly forbid their use for a similar lawful purpose *which is not injurious to the rights of the landlord.*

Amisano v. *Shaw*, 214 Ark. 874, 218 S.W.2d 707 (1949) (emphasis supplied).

Here, appellant altered the two gasoline islands operated by Nickerson so diesel could be pumped. Nevertheless, it retained one gasoline island, added two hoses and continued use of the same number of hoses (4) to pump gasoline as did Nickerson. These changes certainly did not injure appellee or reduce his rental receipts. To the contrary, appellant's gasoline sales have exceeded those of the prior lessees, including Nickerson. Clearly, had appellant chosen to halt its sale of gasoline, our decision, applying the rule in *Amisano, supra,* would be different. Also, should appellant choose to stop gasoline sales, it runs the risk of violating another rule that sometimes arises in situations (similar to the one here) in which rent is based on a percentage of yield from a particular use designated under the lease. In such situations, courts have found an implied covenant under the percentage-rental lease agreements and have required the lessee to continue the designated use and sales. *See Sinclair Refining Co.* v. *Giddens,* 54 Ga.App. 69, 187 S.E. 201 (1936) (citing *Davis,* court reached same result); *Sinclair Refining Co.* v. *Davis,* 47 Ga. App. 601, 171 S.E. 150 (1933) (court found that failure to continue operating for sale of gasoline defeated object of lease); *Mutual Life Insurance Co.* v. *The Tailored Woman, Inc.,* 123 N.Y.S.2d 349 (953) (court found implied covenant to conduct business in substantially

same manner as before); *Cissna Loan Co.* v. *Baron,* 149 Wash. 386, 270 P. 1022 (1928) (court found lessee leasing on sales percentage basis liable for percentage of total sales even though he moved two departments into adjoining building); *see also* Annot., 170 A.L.R. 1113 (1947); Annot., 38 A.L.R.2d 1113 (1954); and 3 G. Thompson, *Commentaries on the Modern Law of Real Property* § 1147 (1980). *Contra Percoff* v. *Solomon,* 259 Ala. 482, 67 So.2d 31 (1953) (court found no implied covenant when a guaranteed substantial minimum rental was paid); *Hicks* v. *Whelan Drug Co.,* 131 Cal. App. 2d 110, 280 P.2d 104 (1955) (court discussed, but did not find, an implied covenant to operate business for mutual profit of lessor and lessee). The foregoing cases involving implied covenants prove only instructive because here the chancellor's concern over appellant's possible curtailment of or reduction in gasoline sales has not been realized. Thus, we need not reach that issue.

Because we find that the parties' lease agreement was unambiguous and that the trial court erred in admitting parol testimony explaining it, we reverse this cause with directions to dismiss appellee's complaint.

Reversed and dismissed.

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

James E. MAGNESS *v.* MASONITE CORPORATION

CA 83-147 671 S.W.2d 230

Court of Appeals of Arkansas
Division II
Opinion delivered July 5, 1984

Hulen & Cuffman, for appellant.

Haley & Claycomb, by: *Stark Ligon,* for appellee.

MELVIN MAYFIELD, Chief Judge. Masonite Corporation filed suit in circuit court to collect the balance due on a promissory note executed by James Magness. It was alleged that the note represented an "employee advance" and that the sum of $8,800.62 was due and payable. Masonite also alleged that it was indebted to Magness for unpaid wages and vacation pay and asked that it be allowed to credit that amount on the note.

Magness filed a pro se hand-written answer in which he admitted an indebtedness on the promissory note but alleged that he was entitled to pay that amount in monthly payments. He also alleged that Masonite owed him an unspecified amount for unpaid wages, vacation pay, an 8% merit increase granted but never paid, plus penalties under "Arkansas Statute 81-308."

More than six months after the Magness pleading was filed, Masonite filed an amendment to its complaint in which it alleged as "Count II" that Magness had received cash advances and credit card privileges for travel and entertainment expenses and had violated an agreement between the parties to make proper reports concerning those advances and expenses. The amendment alleged that the advances and expenses charged to appellee and not accounted for amounted to $21,796.01 and asked that a full accounting be made and that Masonite have judgment for any amount due it.

The same day this amendment was filed, Masonite also filed a motion to transfer the case to chancery because the suit was one for an accounting. An order transferring the matter to chancery was filed the next day. On April 5, 1982, an order was entered by the chancellor setting the case for trial at 9:30 a.m. on July 21, 1982. Two days later, April 7, 1982, judgment was entered against Magness for $21,796.01, the total amount mentioned under Count II contained in Masonite's amendment to its complaint. The judgment

recites that Magness was informed by registered mail of the filing of the amendment, that no reply had been made to the amendment and that Magness was, therefore, in default.

On July 2, 1982, 86 days after the entry of the default judgment, Magness, by an attorney, filed a motion to set the judgment aside. The motion alleges that Magness was never informed that he had an affirmative obligation to file a response at any time subsequent to his first answer; that failure to file any required response was due to excusable neglect or other just cause; and that, under Rules 55 and 60 of the Arkansas Rules of Civil Procedure, he was entitled to have the default judgment set aside.

On December 2, 1982, the trial court entered an order denying Magness's motion to set aside the default judgment. That order recites that the motion was not presented to the court within 30 days from the date of its filing; that Magness did not, within 30 days of the filing of the motion, request the trial court to set a definite date for a hearing; and that the trial court did not take the motion under advisement within 30 days from the date of its filing. It then states that 90 days had elapsed between the filing of the default judgment and the filing of the order setting the hearing and that the court "is without jurisdiction to consider the motion" and it "is hereby denied."

Magness has appealed to this court and argues that the trial court was in error in holding that it had no jurisdiction to hear the motion. The appellant cites ARCP Rule 55(b) which provides that no judgment by default shall be entered against a party who has appeared in the action unless the party "shall be served with written notice of the application for judgment at least three days prior to the hearing on such application." He correctly contends that the record is clear that the case was set for trial on July 21, 1982, and that the default judgment as to Count II alleged in the first amendment to the complaint was taken on April 7, 1982. The appellant admits that he received by mail a copy of the amendment to the complaint prior to the date that the case was set for trial but argues that the default judgment should be set aside because he did not receive the three-day notice of

the hearing on the application for the default judgment as required by Rule 55(b).

The Reporter's Notes to ARCP Rule 55(b) contains this statement: "Also, where any defendant has appeared in an action, three days' notice must be given to him on application for default judgment." The notice requirement comes from the Federal Civil Procedure Rule 55(b). In 10 Wright & Miller, *Federal Practice and Procedure* 2d § 2687 (1983), it is said, "A failure to give the three days' notice when it is required generally is considered a serious procedural error that justifies the reversal or the setting aside of a default judgment." One of the cases cited in support of that statement is *Marshall* v. *Boyd,* 658 F.2d 552 (8th Cir. 1981) (opinion by Henley, J.).

The appellee argues that the trial court was correct in holding that it had no jurisdiction to consider the appellant's motion since 90 days had elapsed from the date the default judgment was entered. We are not clear, however, as to the basis of that argument. In its brief, the case of *Coking Coal, Inc.* v. *Arkoma Coal Corp.,* 278 Ark. 446, 646 S.W.2d 12 (1983), is cited. That case, however, is simply concerned with the question of the timely filing of a notice of appeal after a motion for new trial has been filed. It holds that under Rule 4 of the Rules of Appellate Procedure a motion for new trial is deemed overruled at the end of 30 days if it has not been acted upon, taken under advisement, or set for a hearing on a date certain. In that situation, the rule provides, and *Coking* holds, that a notice of appeal must be filed within 10 days after the expiration of the 30-day period in order to appeal from the judgment which has been entered. That situation, however, is not involved here since this is an appeal from the order of the court denying the appellant's motion to set aside the default judgment. The notice of appeal from that order was timely filed and that order is properly before us on appeal.

A letter brief in the record reveals that counsel for appellee argued to the trial court that *Jones* v. *Benton Co. Circuit Court,* 260 Ark. 893, 545 S.W.2d 621 (1977), and *State Farm Fire & Casualty Ins. Co.* v. *Mobley,* 5 Ark. App. 293,

636 S.W.2d 299 (1982), constituted authority for the trial court to hold it had no jurisdiction to grant the appellant's motion after the 90-day period had expired. Those cases refer to the procedure established by Act 123 of 1963, which was compiled as Ark. Stat. Ann. §§ 27-2106.3 — 27-2106.6 (Repl. 1979), and those sections are now referred to by the Reporter's Notes to Appellate Procedure Rule 4 as being superseded by the substantially same procedure of Rule 4. In the *Jones* case, the point involved was an attempt to avoid the fact that the trial court's discretionary jurisdiction to grant a new trial lapsed with the term of court. The argument was that the Act 123 procedure extended the time past the end of the term during which the court could act on the motion for new trial. The *State Farm* case involved the same point; however, the time element was 90 days because ARCP Rule 60(b) had substituted that period for the term of court period involved in *Jones.*

In this case we believe the court had jurisdiction to grant appellant's motion even though the 90-day period of Rule 60(b) had expired. Here, we have a motion to set aside a default judgment because it was granted without giving the appellant, who had answered in the case, a three days' written notice of the hearing on the application for the default as required by ARCP Rule 55(b). We think this constitutes sufficient grounds for setting the judgment aside under ARCP Rule 60(c) (7). Under that provision a judgment may be vacated after 90 days for "unavoidable casualty or misfortune preventing a party from appearing or defending." The appellant cites *Hensley* v. *Brown,* 2 Ark. App. 175, 617 S.W.2d 867 (1981), where we said that the failure of the post office to deliver a letter containing an answer mailed to the clerk constituted excusable neglect, unavoidable casualty or other just cause for failure to file the answer on time. That case cited *Perry* v. *Bale Chevrolet Co.,* 263 Ark. 552, 566 S.W.2d 150 (1978), where the court said that default judgments are not favorites of the law and pointed out it had held that where "a responsive pleading should have been in the hands of the clerk within the time allotted for answering, had the clerk's office not been closed for a five-day holiday period, the plaintiff was prevented from filing a timely answer by unavoidable casualty or misfortune." In *Berringer* v. *Stevens,* 145 Ark. 293, 225 S.W. 14 (1920), a judgment

was set aside for "unavoidable casualty" where the court inadvertently granted a default judgment after excusing defendant's counsel for the term. We think the appellant had proper grounds, under ARCP Rule 60(c) (7), for setting aside the default judgment after the 90 days had expired.

Rule 60 (d) requires that one seeking to have a judgment set aside must assert a valid defense and, upon hearing, make a prima facie showing of such defense. In this case the appellant's motion alleged he had a meritorious defense to Count II of the first amendment to the complaint and asked that he be allowed to present evidence of that defense at the hearing on the motion. The record does not show the proffer of any such evidence but the order overruling his motion definitely finds that the court has no jurisdiction to grant it and specifically states that the motion is "hereby denied because the court is without jurisdiction to consider said motion because of the lapse of more than 90 days after the filing of the default judgment." It seems apparent that if the court holds it has no jurisdiction to consider the motion to set aside the default judgment, everyone present would consider the proffer of evidence of a meritorious defense to be moot. At any event, we hold that the court had jurisdiction to grant the motion and we reverse and remand for the court to consider the motion on its merits.

We are holding that the record before us establishes that appellant has sufficient and proper grounds for the court to set aside the default judgment under ARCP 60(c) (7). We also hold that appellant must be given an opportunity to introduce evidence to show a meritorious defense. In that connection, *Tucker* v. *Johnson,* 275 Ark. 61, 628 S.W.2d 281 (1982), defines the term "meritorious defense."

Reversed and remanded.

CRACRAFT and COOPER, JJ., agree.

A. H. BARNHILL, Jr. *v.* FARM BUREAU MUTUAL INSURANCE COMPANY OF ARKANSAS, INC.

CA 83-333 671 S.W.2d 233

Court of Appeals of Arkansas
Division I
Opinion delivered July 5, 1984

McDaniel, Gott & Wells, P.A., by: *Phillip Wells*, for appellant.

Barrett, Wheatley, Smith & Deacon, for appellee.

MELVIN MAYFIELD, Chief Judge. This is an appeal from a declaratory judgment action. The appellant owned four motor vehicles. The appellee issued a comprehensive automobile policy providing insurance coverage on each vehicle, and appellant paid separate premiums for uninsured motorist coverage in the minimum amount of

$10,000.00 per person for each vehicle.

While driving one of the insured vehicles, the appellant was seriously injured in an accident with an uninsured motorist. Seeking to recover as much of his expense and damage as possible, appellant claimed coverage under each of the four policies. Based upon the pleadings and briefs of counsel the trial court entered a judgment declaring that appellant could not "stack" the uninsured motorist coverage but could recover the limits on only one coverage. We do not agree.

The policy in question contained an "other insurance" clause which provided:

> [I]f the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the Company shall not be liable for a greater proportion of any loss to which this Coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.

Appellant contends that this "other insurance" clause does not apply to other uninsured motorist policies issued by the *same company* and, therefore, cannot limit his uninsured motorist coverage to $10,000.00. Appellee, however, relies on *M.F.A. Mutual Ins. Co.* v. *Wallace,* 245 Ark. 230, 431 S.W.2d 742 (1968), which it claims takes a "position" against stacking in Arkansas. We do not believe *Wallace* supports the appellee's contention in this regard.

In *Wallace,* the Arkansas Supreme Court simply held that a clause in an automobile insurance policy which limited the company's liability to the maximum limits of any one policy was not *repugnant* to the Arkansas uninsured motorist statute, Ark. Stat. Ann. § 66-4003 (Repl. 1980). The particular clause the court considered in *Wallace* provided:

5. Other Automobile Insurance *in the Company* —

> With respect to any occurrence, accident, death, or loss to which this and any other automobile insurance policy issued to the named insured or spouse *by the Company* also applies, the total limit of the Company's liability under all such policies shall not exceed the highest applicable limit of liability or benefit amount under any one policy. [Emphasis added.]

Thus, it can be readily seen that *Wallace* only validated a clause in a policy that limited the company's contractual liability to the minimum required by law. It does not *prohibit* stacking.

Wallace was considered by the United States District Court for the Western District of Arkansas in *Woolston* v. *State Farm Mutual Ins. Co.*, 306 F. Supp. 738 (W.D. Ark. 1969), where two policies had been issued by the same company. The court said the "other insurance clauses" in each policy would give it no trouble in a situation involving two or more companies but it had "considerable difficulty in this case because only one insurance company is involved." The court pointed out that this problem was not before the Supreme Court of Arkansas in the *Wallace* case because "the 'other insurance clause' in that case specifically referred to other insurance issued to the named insured or his spouse 'by the company'." The court explained the problem in the case before him in this way:

> In a context other than uninsured motorist coverage, an insured is entitled to recover his total loss up to the limits of all available, valid coverage, and the loss is then prorated between or among his insurers on the basis of the proportion of the insurance provided by each to the total coverage provided by both or all. In such a case if the insured has two policies issued by the same company there is no practical point in the company prorating the loss between its two policies; it simply pays the loss up to the limits of both policies. Thus, in the conventional situation the "other insurance clause" in a particular policy ordinarily assumes the existence of other insurance issued by another insurance company.

> As has been pointed out, however, defendant's policy provisions seek not only to prorate the loss but also to fix the limit thereof; and the defendant seeks to limit its liability under each of its policies by reference to the limits of its other policy on the theory that the other policy is "other insurance."

The court went on to find the "other insurance clause" ambiguous, that it must be construed most strongly in favor of the insured, and that stacking should be allowed.

In *Dugal* v. *Commercial Standard Insurance Co.*, 456 F. Supp. 290 (W.D. Ark. 1978), the federal district court had a case with an "other insurance" clause identical to the one in the instant case. In that case, the insured's two-year-old daughter was killed when she was riding on a tractor with her grandfather and was struck by a car being driven by an uninsured motorist. The child's father had a policy that provided uninsured motorist coverage for twelve separate vehicles and he had paid a premium calculated on each one. The court considered whether the "other insurance" clause limited the company's liability to $5,000 or whether it could be interpreted to provide a $5,000 limit for each policy, thereby providing maximum coverage of $60,000. After a comprehensive review of Arkansas law, the court concluded that the appellant should recover under each uninsured motorist policy because premiums had been paid by the insured for each policy. The court said:

> Had [the insurance company] wished to preclude any "stacking" under these decisions, it had merely to follow the language used in the *Wallace* policies. Having failed to do so, it must suffer the consequences of the language of the policy being construed against it, the exact language of the policy having previously been held ambiguous.

We think the *Woolston* and *Dugal* opinions are sound and persuasive. Our attention has not been called to an Arkansas appellate court case that reaches a different result in the same factual situation.

The appellee says, however, that the "other insurance clause" is not the only clause that excludes stacking, and that the "Limits of Liability" section does the same thing with this provision:

> Regardless of the number of automobiles to which this policy applies, the limit for uninsured motorist coverage stated in the declarations as applicable to each accident is the total limit of the company's liability for all damages because of bodily injury sustained by any one or more persons as the result of any one accident.

The appellant's answer is that the above provision does not prevent stacking in this case because, first, he paid four separate premiums for the uninsured motorist coverage on his four vehicles. He points to the policy provision that states "When two or more automobiles are insured hereunder the terms of this policy shall apply separately to each. . . ." It is appellant's contention that this provision and the fact that he paid separate premiums for the coverage on each vehicle precludes the appellee from claiming that the limit for one coverage applies "regardless of the number of automobiles to which this policy applies." We agree.

The appellant also points out that appellee is really arguing "regardless of the number of *insured* automobiles to which this policy applies" but the contract provision leaves out the word "insured" and thus appellee's argument falls. Other points are made by appellant but we need not discuss them as we agree that the provision of the "Limits of Liability" section relied upon by the appellee does not prevent "stacking" the coverages for the four vehicles involved.

We reverse and remand for proceedings consistent with this opinion.

COOPER and CLONINGER, JJ., agree.

BEMBERG IRON WORKS and
THE HOME INSURANCE COMPANY
v. John H. MARTIN

CA 83-459 671 S.W.2d 768
Court of Appeals of Arkansas
Division I
Opinion delivered July 5, 1984

Tom Forest Lovett, P.A., for appellant.

Richard J. Orintas, for appellee.

MELVIN MAYFIELD, Chief Judge. This is an appeal from a decision of the Workers' Compensation Commission which held that: (1) appellee is currently totally disabled; (2) appellants controverted payment of all benefits after June 3, 1981; (3) the accident in which appellee was injured, when his work basket fell twenty-five feet from a crane to the ground, resulted from improper safety measures. We find substantial evidence to support the Commission's decision and thus affirm.

Appellants contend that appellee's injuries fall within the schedule set forth in Ark. Stat. Ann. § 81-1313(c) (Repl. 1976) and that the Commission's finding of "current" total disability is reversible error. Although they correctly cite *Anchor Constr. Co.* v. *Rice,* 252 Ark. 460, 479 S.W.2d 573 (1972), for the principle that a scheduled injury cannot be apportioned to the body as a whole in determining the extent of permanent partial disability as distinguished from permanent total disability, appellants ignore a line of cases that began with *McNeely* v. *Clem Mill & Gin Co.,* 241 Ark. 498, 409 S.W.2d 502 (1966).

In *McNeely,* which involved the same point as the

instant case, the Arkansas Supreme Court upheld a Commission finding of total disability of indeterminable duration. The court observed that "Inasmuch as there was substantial evidence that might have sustained a finding of permanency . . . we fail to see how appellees are hurt by the Commission's deferment of this question until the exact extent of the disability might become clearer."

McNeely gave expression to a concept of applied law that remained without a label until *City of Humphrey* v. *Woodward,* 4 Ark. App. 64, 66, 628 S.W.2d 574 (1982), almost 16 years later. In that case, we adopted a phrase used for convenience by the Commission in its opinions and upheld the indefinite benefits of an employee found to be "currently totally disabled." We discussed the development of this area of the law and observed that

> now when we speak of total disability, such benefits may be denominated further in terms of "current" total, "limited" total or total disability benefits "until such time as total disability ceases." . . . Obviously, in making such an award, the Commission remains hopeful that the claimant's disability is not permanent and that he will eventually return to work.

In the instant case, we agree with appellee's argument based upon *McNeely, supra,* and *Taylor* v. *Pfeiffer Plbg. & Htg. Co.,* 8 Ark. App. 144, 648 S.W.2d 526 (1983), that a claimant's benefits for a scheduled injury are not limited to the benefits provided by Ark. Stat. Ann. § 81-1313(c) when the scheduled injury renders the claimant totally disabled. Here, the Commission found that appellee's injuries rendered him totally disabled. The fact that the Commission found the total disability to be "currently" total seems to be no different from the situation in *McNeely.* We fail to see how the appellants are hurt by the possibility that the total disability in the instant case may not last forever.

On appeal, we must affirm if the Commission's finding is supported by substantial evidence; even when a preponderance of the evidence might indicate a contrary result,

we affirm if reasonable minds could reach the Commission's conclusion. *Bearden Lumber Co.* v. *Bond,* 7 Ark. App. 65, 644 S.W.2d 321 (1983). Questions of credibility and the weight and sufficiency of evidence are matters for determination by the Commission. *Central Maloney, Inc.* v. *York,* 10 Ark. App. 254, 663 S.W.2d 196 (1984). The Workers' Compensation Commission is better equipped, by specialization and experience, to analyze and translate evidence into findings of fact than we are. *Central Maloney, Inc.* v. *York, supra.* With these considerations in mind, we find sufficient evidence to support the Commission's finding of current total disability.

In their second point for reversal, appellants insist that the finding by the Commission that all benefits after June 30, 1981, were controverted was not supported by substantial evidence. Appellants maintain that the record reflects no controversion of any benefits other than a reported statement by their lawyer: "[W]e contend the matter is in controversion in this case." This remark, they say, was made in the context of a change of physician hearing and had no reference to a change of benefits.

Controversion is a question of fact for the Commission. *Climer* v. *Drake's Backhoe,* 7 Ark. App. 148, 644 S.W.2d 637 (1983). *See also Revere Copper & Brass, Inc.* v. *Talley,* 7 Ark. App. 234, 647 S.W.2d 477 (1983). The Commission could easily have found substantial evidence of controversion based upon appellants' (1) failure to agree to a change of physician; (2) insistence that appellee's injuries were merely scheduled injuries; (3) denial of the violation of a safety standard; (4) assertion that the Second Injury Fund was a necessary party; (5) claim that appellee was not totally disabled. We find substantial evidence to support the Commission's finding that appellants controverted appellee's claim.

Appellants argue in their third point that the Commission's holding that the accident was the result of improper safety measures was not supported by "clear and convincing evidence." *Ryan* v. *NAPA,* 266 Ark. 802, 586 S.W.2d 6 (1979). Ark. Stat. Ann. § 81-1310(d) (Supp. 1983)

provides that compensation will be increased by 15% when a claimant establishes by "clear and convincing evidence" that his injury was caused in substantial part by the employer's failure to comply with statutes or regulations. Appellants contend that the employer made efforts to see that the safety latch remained on the hook. Three witnesses, however, testified that the hook on the basket had no safety latch as required by Arkansas law. Under this section of the law, the Commission must base its decision of non-compliance upon clear and convincing evidence. Our duty is to affirm the Commission when its decision is supported by substantial evidence. *Georgia Pacific Corp.* v. *Ray,* 273 Ark. 343, 619 S.W.2d 648 (1981); *Bunny Bread* v. *Shipman,* 267 Ark. 926, 591 S.W.2d 692 (1980). We hold that the Commission's finding on this point was supported by substantial evidence.

Affirmed.

CRACRAFT and CLONINGER, JJ., agree.

George Randolph BROWN *v.*
STATE of Arkansas

CA CR 83-109 671 S.W.2d 228

Court of Appeals of Arkansas
Division I
Opinion delivered July 5, 1984

Howell, Price & Trice, P.A., by: *Robert J. Price*, for appellant.

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

MELVIN MAYFIELD, Chief Judge. Appellant was arrested when a police officer passing a drugstore at Baseline and Scott Hamilton Drive in Little Rock, Arkansas, shortly after 1:00 a.m. on August 11, 1981, heard a burglar alarm sounding and found appellant inside the pharmacy putting bottles into a cardboard box. He was charged with burglary, tried to a jury and convicted, and, as an habitual offender, received a sentence of 20 years in prison.

The appellant asked for a jury instruction on criminal trespass as a lesser included offense and it is the refusal of the

trial court to give this instruction that is the basis of the argument on appeal.

Burglary is defined as entering or remaining unlawfully in an occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment.[1] Ark. Stat. Ann. § 41-2002 (Repl. 1977). Criminal trespass is purposely entering or remaining unlawfully in or upon a vehicle or the premises of another person. Ark. Stat. Ann. § 41-2004 (Repl. 1977). Criminal trespass is complete upon the making of an unlawful entry. No intent to engage in further unlawful conduct is necessary.

Criminal trespass was held to be a lesser included offense of burglary in the case of *Bongfeldt* v. *State,* 6 Ark. App. 102, 639 S.W.2d 70 (1982). That case involved a man who broke into his former employer's place of business and took some gasoline. He testified that he entered the building only intending to borrow the gasoline and was going to pay for it the next morning. We reversed his conviction on the basis that the lesser included offense of criminal trespass should have been included in the instructions to the jury. We said if there is the slightest evidence tending to disprove one of the elements of the larger offense, it is error to refuse to instruct on the lesser included offense. Appellant points to evidence that he had been drinking heavily for at least twelve hours prior to the time he was arrested and contends he was too intoxicated to form the necessary mental intent to commit an offense punishable by imprisonment. Therefore, he argues it was error to refuse to instruct on criminal trespass.

We agree that the court should have given an instruction on the lesser included offense of criminal trespass. That offense requires a purposeful intent. We have held that voluntary intoxication is an affirmative defense to a crime that requires a purposeful intent. *Gonce* v. *State,* 11 Ark. App. 278, 669 S.W.2d 490 (1984); *Bowen* v. *State,* 268 Ark. 1088, 598 S.W.2d 447 (Ark. App. 1980). Certainly the

[1]Entry to commit a misdemeanor punishable by imprisonment in county jail is sufficient to constitute burglary. See the Commentary to Ark. Stat. Ann. § 41-2002 (Repl. 1977).

appellant could have been too intoxicated to have the specific intent to commit one of the crimes but not the other and he was entitled to an instruction on the lesser included offense of criminal trespass. *Caton & Headley* v. *State,* 252 Ark. 420, 479 S.W.2d 537 (1972).

Reversed and remanded.

CRACRAFT and GLAZE, JJ., agree.

Beverly BALDRIDGE *v.*
Dewey STILES, Director of Labor

E 84-29 671 S.W.2d 770

Court of Appeals of Arkansas
Division II
Opinion delivered July 5, 1984

Appellant, *pro se.*

Allan Pruitt, for appellee.

GEORGE K. CRACRAFT, Judge. Beverly Baldridge appeals from a ruling of the Board of Review that she was disqualified from receiving benefits under the Employment Security Act on a finding that she had voluntarily quit her last employment without good cause connected with the work. We agree that the finding is not supported by the evidence. The appellant was employed at American Greetings in Osceola. In June 1983 her husband obtained new employment in Melbourne and moved there. The appellant gave due notice to her employer that she was terminating her employment to move to a new location with her husband and left her job on June 24th. On June 26th she joined her husband in Melbourne. At the time she left her employment appellant had accrued vacation time and therefore her employer carried her on the payroll until July 5, 1983.

Prior to July 1, 1983 Ark. Stat. Ann. § 81-1106 (Repl. 1976) provided that a person who voluntarily leaves his work without good cause connected with the work is not qualified to draw benefits. That section, however, contained the following proviso:

> Provided no claimant shall be disqualified if he has voluntarily left his work to accompany, follow, or join the other spouse in a new place of residence if he has clearly shown upon arrival at the new place of residence an immediate entry into the new labor market and is in all respects, available for suitable work.

1983 Ark. Acts 482 §§ 16-21 declared this proviso to be ineffective after July 1, 1983. On finding that appellant's last day of work was July 5, 1983, the Board of Review applied the 1983 Act and ruled that appellant had voluntarily quit her job without good cause connected with the work.

The record clearly discloses that the last day the appellant worked for her employer was June 24, 1983. She performed no services for her employer thereafter for which wages were payable. She was carried on the payroll of the employer until July 5th solely on account of vacation pay which had already accrued for past services performed, not for wages earned after June 24th. It was undisputed that she left her place of employment on June 24th for the purpose of accompanying her spouse to their new place of residence on June 26th. We conclude that under the circumstances of this case the Board of Review erred as a matter of law in applying the 1983 Act which was not effective until after July 1st.

The mere fact that appellant left her last employment for the purpose of following her spouse is not enough to qualify her for benefits. She must also show an immediate entry into the job market upon arrival at her new place of residence. As the Board made no finding on that issue the cause is remanded to enable it to do so.

Reversed and remanded.

COOPER and CLONINGER, JJ., agree.

Kris MURADIAN d/b/a/ MURADIAN-FISER REALTY *v.* Harold HALEY d/b/a THE RIB RACK BBQ

CA 83-348 671 S.W.2d 210

Court of Appeals of Arkansas
Division I
Opinion delivered July 5, 1984

Richardson & Richardson, P. A., by: *F.E. Richardson, Jr.,* for appellant.

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

JAMES R. COOPER, Judge. The appellant real estate broker sued the appellee for his alleged wrongful revocation of an exclusive listing contract which covered the Rib Rack BBQ restaurant. The trial court found that the appellant was entitled to 50% of the liquidated damages specified in the contract. On appeal, the appellant argues that he is entitled to the total liquidated damages, and, on cross-appeal, the appellee argues that the appellant should only recover his actual damages. We agree with the appellee and therefore we affirm as to the direct appeal, and we reverse on the cross-appeal. The case is remanded to the trial court for a new trial on the issue of the appellant's actual damages.

On January 5, 1982, the parties entered into the exclusive listing contract, with the listing price set at $24,500.00. The commission was fixed at 10% of the selling price, or $3,500.00, whichever was greater. The contract provided that the commission was due if the listing contract was cancelled or the property withdrawn from the market during the listing period. On January 22, 1982, the appellee notified the appellant that he was withdrawing the property from the market. The appellant made demand for the $3,500.00 commission, the appellee refused to pay, and this suit resulted. The trial court, as noted above, awarded the appellant $1,750.00 plus interest.

For reversal, the appellant argues that the trial court erred in finding the stipulated sum was a penalty, since the contractual provision had resulted from a mutual agreement, damages were impossible to predict, and the sum agreed to was a reasonable estimate of just compensation for the appellant's damages.

In *Earls* v. *Long,* 224 Ark. 57, 271 S.W.2d 784 (1954), the Arkansas Supreme Court stated:

> The law is well settled that when a real estate broker has an exclusive listing for a definite time, then if the landowner wrongfully cancels the contract before

> the time expiration, the broker may sue either (a) for the commission he would have earned if he found a purchaser ready, able and willing to buy according to the terms of the contract; or (b) for damages for wrongful revocation. *Nance* v. *McDougald,* 211 Ark. 800 202 S.W.2d 583; *Manzo* v. *Park,* 220 Ark. 216, 247 S.W.2d 12.

In *Manzo* v. *Park, supra,* the Court held that the commission can only become the broker's measure of damages when he can prove that he found a buyer ready, willing and able to purchase on the seller's terms. In the case at bar there was no proof, and the appellant admits, that he did not produce a ready, willing, and able buyer. Therefore, the only recoverable damages are those which proximately resulted from the seller's wrongful cancellation of the listing contract. *See,* 12 Am.Jur. 2d, *Brokers,* § 64.

Generally, the rule as to liquidated damages is that, where a contract is of such a nature that the damages resulting from a breach are uncertain and difficult to prove, the amount agreed upon by the parties is held to be liquidated damages. However, where the sum agreed upon bears no reasonable relationship to the damages which likely would result following a breach, the amount agreed upon will be held to be a penalty. *Quaile & Co.* v. *William Kelly Mining Company,* 184 Ark. 717, 43 S.W.2d 369 (1931). In the case at bar, the trial court found that the sum agreed upon by the parties, $3,500.00, was a penalty. We agree that the sum agreed upon bore no reasonable relationship to the actual damages likely in the event of a breach. However, we disagree with the trial court's decision to award one-half of that amount, since the sum of $1,750.00 does not bear any reasonable relationship to the damages likely to be incurred in the event of a breach, that was not the sum agreed upon by the parties, and there is no proof showing that sum to represent the broker's actual damages.

Where we find the trial court's findings of fact to be clearly erroneous or against the preponderance of the evidence, we must reverse. ARCP, Rule 52(a). We reverse and remand this case for a new trial on the issue of the actual

damages suffered by the appellant because of the breach of the listing contract by the appellee.

Affirmed in part, reversed in part, and remanded.

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

Kay D. McGIBBONY *v.*
F. Michael McGIBBONY

CA 83-360 671 S.W.2d 212

Court of Appeals of Arkansas
Division I
Opinion delivered July 5, 1984

Thorp Thomas, for appellant.

Laser Sharp & Huckabay, P.A., by: *Ralph R. Wilson,* for appellee.

JAMES R. COOPER, Judge. This appeal is from an order by the chancellor correcting his prior order regarding child support payments due from the appellee to the appellant.

The parties were divorced in 1976 and their three children were placed in the appellant's custody. The appellee was ordered to pay child support in the amount of $133.00 per month per child. In January of 1980 the appellant went to California and left the children in the appellee's custody. During this period, the two male children decided they would rather stay with the appellee. Upon the appellant's return from California later that summer, a hearing was held in which the court gave the appellee custody of his two sons and the appellant was awarded custody of her daughter. The chancellor also awarded the appellant child support from the appellee in the amount "of $117.00 on the first and fifteenth of each month." This was done on August 11, 1980, but the order was not entered until January of 1981 — *nunc pro tunc*. The appellant accepted payments of $117.00 per month for a period of nineteen months. She then filed a petition for arrearages alleging that the August 11, 1980 order required the appellant to pay support in the amount of $234.00 per month, rather than the $117.00 per month. After taking testimony, the chancellor ruled that the order of August 11, 1980 was capable of more than one interpretation, and that he would correct it to reflect what he actually ordered in August of 1980, *i.e.*, child support payments of $117.00 per month, payable in two equal installments on the first and fifteenth of each month.

For reversal, the appellant argues that the chancellor was without authority to modify the August 11, 1980 order because more than 90 days had elapsed since the filing of the decree and ARCP, Rule 60 (c) prohibits such modification after 90 days from the entry of the decree. We hold that ARCP, Rule 60 (c) has no application to the facts of this case and we affirm.

Our appellate courts have long recognized the inherent power of the courts of this state to enter orders correcting their judgments where necessary to make them speak the truth and reflect actions accurately. *Harrison* v. *Bradford*, 9 Ark. App. 156, 655 S.W.2d 466 (1983). "This power, however, is confined to correction of the record to the extent of making it conform to the action which was in reality taken at the time. It does not permit the change of a record to

provide something that in retrospect should have been done but was not done." *Id.*

After reviewing the chancellor's letter order in this matter, as well as the testimony at the hearing on the appellant's petition, we find that the chancellor acted properly in correcting his order of August 11, 1980. He simply made his earlier order say clearly what he intended it to say when he made it. The evidence is overwhelming that he intended in August of 1980 to modify the appellee's support obligation downward since the circumstances had changed in that the appellee now had custody of two of his three children.

Affirmed.

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

Mary E. ARMSTRONG *v.* STATE of Arkansas

CA CR 83-174 671 S.W.2d 772

Court of Appeals of Arkansas
Division I
Opinion delivered July 5, 1984

The McMath Law Firm, P.A., by: *Sandy S. McMath,* and *Charles R. Hicks, P.A.,* 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 theft of property by deception in violation of Ark. Stat. Ann. § 41-2203 (Repl. 1977). After a trial by jury, she was convicted and sentenced to four years in the Arkansas Department of Correction and a fine of $5,000.00. From that decision comes this appeal.

The appellant was employed as the commercial bookkeeper at the Montgomery Ward store in Little Rock. During the time she was employed in this capacity, it came to the attention of another employee that there was a discrepency in the cash register used by the appellant. An investigation ensued and resulted in the charges of theft being filed against the appellant.

The appellant argues that the trial court erred in failing to grant her motion for a directed verdict at the close of the State's case. Her grounds for the directed verdict were that

the State had failed to eliminate every other reasonable hypothesis for the alleged theft. The appellant relies on *Green* v. *State,* 269 Ark. 953, 601 S.W.2d 273 (Ark. App. 1980), for the proposition that the appellant's conviction cannot be sustained where the State failed to exclude every reasonable possibility that someone other than the appellant had the opportunity to have taken the money. We cannot agree with the appellant that the State failed in meeting its burden of proof. The State introduced evidence that showed the appellant had manipulated company records to conceal cash shortages. Although she was not observed taking the money or manipulating the records, the evidence presented was certainly adequate to present a jury question.

The appellant's second point for reversal deals with the trial court's rulings concerning expert testimony. Dr. Douglas Stevens testified concerning his examination of the appellant and the results of several tests which dealt with her mental capacity and mathematical abilities. The defense then called a certified public accountant, Mr. Rick Ruffin, and sought to elicit testimony from him that, based on Dr. Stevens' testimony, and the nature of the embezzlement scheme, the appellant would not have been able to carry out the scheme. The trial court limited Mr. Ruffin's testimony to stating the level of accounting or mathematical ability which he believed an individual would need to possess to successfully engage in the type of scheme the appellant was charged with. The trial court noted that Mr. Ruffin's proposed testimony would invade the province of the jury. We hold that the trial court correctly limited Mr. Ruffin's testimony.

In *Ethridge* v. *State,* 9 Ark. App. 111, 654 S.W.2d 595 (1983), this Court dealt with this issue and held that when the jury can just as easily determine the fact question in issue from the opinion testimony before it, it is improper for an expert witness to, in effect, tell the jury which result to reach. Here, the situation is similar. Mr. Ruffin was properly allowed to testify as to his opinion of the level of mental functioning it would take to conduct the scheme the appellant was accused of. Dr. Stevens had testified as to his opinion of the appellant's abilities. To allow Mr. Ruffin to

go further and state the appellant could not have been responsible for the acts with which she was charged would, we agree, indeed invade the province of the jury.

The appellant's third point for reversal deals with the conduct of a spectator during the appellant's trial. During the testimony of several of the State's witnesses, Mr. William Terry, an official with Montgomery Ward, was observed nodding his head as if to signal the witness as to how to respond to the questions. This was brought to the trial court's attention, and a mistrial was requested. During a hearing in the judge's chambers, the defense admitted that the testimony of the witnesses who were allegedly signalled was no different than that which came out during their discovery depositions, and defense counsel advised the trial court that the signaling, if it occurred, did not prejudice the appellant because the defense was able to effectively cross-examine the witnesses.

A mistrial is an extreme remedy which will be granted only when no other action by the court will remove prejudice or insure a fair trial. Also, the decision as to whether to grant a mistrial is within the sound discretion of the trial court and the trial court's decision should not be disturbed unless an abuse of that discretion is shown. *Brewer* v. *State,* 269 Ark. 185, 599 S.W.2d 141 (1980). We believe that when the fact is considered that the appellant's counsel admitted that she suffered no harm by the alleged acts of Mr. Terry, it is clear that the trial judge did not abuse his discretion in refusing to grant a mistrial.

Finally, the appellant argues that her conviction is not supported by substantial evidence. As we have discussed in Point I of the appellant's argument, we feel that there was a fact question presented for the resolution of the jury. A motion for a directed verdict is a challenge to the sufficiency of the evidence, *Glick* v. *State,* 275 Ark. 34, 627 S.W.2d 14 (1982), and the fact that we feel the denial of the directed verdict was proper, demonstrates that there is substantial evidence to support the verdict of the jury.

Affirmed.

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

Benny BOWEN *v.*
STATE of Arkansas

CA CR 84-35 671 S.W.2d 763

Court of Appeals of Arkansas
Division I
Opinion delivered July 5, 1984

Henry C. Morris, for appellant.

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

JAMES R. COOPER, Judge. This appeal arises from the revocation of the appellant's suspended sentence resulting from a plea of guilty to the charge of felony theft of property. In November of 1981, the appellant, in exchange for his testimony against two others, pleaded guilty and received a five year suspended sentence. He was ordered to pay a $5,000.00 fine as a condition of his suspended sentence, along with $70.00 restitution. On January 17, 1983, the State

filed a motion to revoke the appellant's suspended sentence due to his failure to make payments toward his fine in over one year. A hearing was held on February 14, 1983, at which time the trial court lowered his payments from $150.00 to $100.00 per month. On March 7, 1983, the appellant made a $200.00 payment on his fine, for the months of February and March. The appellant made no further payments and on August 26, 1983, the State filed a second petition to revoke the appellant's suspended sentence. A final hearing was held on this motion on November 4, 1983, and at this hearing, the trial court made a finding that the appellant had willfully failed to make payments toward his fine, and sentenced him to three years in the Arkansas Department of Correction. From that decision, comes this appeal.

For reversal, the appellant alleges the trial court erred in revoking his suspended sentence due to the fact that his failure to make payments toward his fine was due to his inability to pay rather than a willful refusal to make the payments. We do not agree, and therefore we affirm.

The appellant relies on the recent United States Supreme Court case of *Bearden* v. *Georgia,* 103 S.Ct. 2064 (1983), for the proposition that the appellant cannot be jailed for his inability to pay the fine. He argues that he sought employment during the period between March of 1983 and October of 1983, when the petition to revoke the suspended sentence was filed by the State. During this period, the appellant states that he was employed for a short period of time in Oklahoma, and later in Ohio, painting apartments. The remaining time in this period, the appellant travelled around looking for employment unsuccessfully. The appellant alleges that he did not have the money to make payments toward his fine during this period due to his inability to find steady employment.

The evidence adduced at the revocation hearing, however, indicated the appellant held the job in Ohio for two months during this period, and saved $1,000.00 with which he could have made the payments. He made no payments during this time, despite the fact that the court had lowered his payments from $150.00 to $100.00 per month in

February, 1983. It is true that *Bearden* v. *Georgia, supra,* prohibits the trial court from imprisoning the appellant for his failure to pay when such failure is not willful, and requires the trial court to explore alternatives to imprisonment in such situations. However, when the trial court finds that such non-payment is willful, it does not have to explore alternatives to imprisonment and can revoke the suspended sentence and impose a term of imprisonment. Here, the trial court found that the appellant's failure to make payments toward his fine was willful, and we hold that this finding is amply supported by the evidence.

Affirmed.

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

Donna Loyce CAMP *v.*
FIRST FEDERAL SAVINGS AND LOAN and
SULLIVANT CROSS REALTY, INC.

CA 83-427 671 S.W.2d 213

Court of Appeals of Arkansas
Division II
Opinion delivered July 5, 1984

[redacted]

Gibson & Gibson, P.A., by: *R. Bynum Gibson,* for appellant.

Ramsey, Cox, Lile, Bridgeforth, Gilbert, Harrelson & Starling, by: *Rick Ramsay, Alan Humphries, R.T. Beard. III,* and *Mark Chadick,* for appellee First Federal Savings & Loan.

Bridges, Young, Matthews, Holmes & Drake, for Sullivant Cross Realty, Inc.

LAWSON CLONINGER, Judge. This case is an appeal of directed verdicts in an action based on fraud and deceit. The primary issue is whether appellant made a *prima facie* case of misrepresentation against appellees First Federal Savings and Loan (now First South) and Sullivant Cross Realty, Inc. At trial, appellant recovered from Mr. & Mrs. J. D. Roberts for breach of implied warranty of habitability, but the trial judge directed verdicts in favor of First Federal and Sullivant Cross on the basis that appellant failed to sustain her burden of proof on the elements of fraud. Appellant now contends that the trial court's actions were error because fact questions were presented concerning First Federal's alleged duty to disclose information and Sullivant Cross's representations.

The Arkansas Supreme Court has adopted from Prosser, *Law of Torts* (4th Ed. 1971), at 685, a statement of the elements of the tort cause of action in deceit:

> 1. A false representation made by the defendant. In the ordinary case, this representation must be one of fact.
>
> 2. Knowledge or belief on the part of the defendant that the representation is false — or, what is regarded as equivalent, that he has not a sufficient basis of information to make it. This element often is given the technical name of 'scienter.'
>
> 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 the plaintiff, resulting from such reliance.

MFA Mutual Ins. Co. v. *Keller,* 274 Ark. 281, 623 S.W.2d 841 (1981); *Beam* v. *Monsanto Co., Inc.,* 259 Ark. 253, 532 S.W.2d 175 (1976). Appellant argues that each of the above elements is applicable to the facts of the present case with regard to both appellees.

Although we do not address the substantive merits of appellant's claim, we must determine whether the proof, viewed in the light most favorable to appellant, could have presented a question of fact for the jury had a directed verdict not been granted. *Henley's Wholesale Meats, Inc.* v. *Walt Bennett Ford, Inc.,* 4 Ark. App. 362, 631 S.W.2d 316 (1982); *Ralston Purina Company* v. *McCollum,* 271 Ark. 840, 611 S.W.2d 201 (Ark. App. 1981). The trial court has a duty, when requested to render a directed verdict, to consider whether the evidence against whom the verdict is directed, when given its strongest probative force, presents a *prima facie* case; only if the evidence viewed in that light, would require the setting aside of a jury verdict should a trial court grant a motion for directed verdict. *Henley's Wholesale*

Meats, Inc. v. *Walt Bennett Ford, Inc., supra.* We find, on the basis of the facts set forth in the record, that a *prima facie* case was made against appellees Sullivant Cross, Inc., and First Federal Savings and Loan. We therefore reverse the decision of the trial court with respect to both appellees.

Appellant purchased a newly constructed house from J. D. Roberts, a builder, who had borrowed construction money from First Federal. Sullivant Cross was the real estate agency with which Mr. Roberts and his wife had entered into an exclusive-listing contract to sell the property. Appellant signed an offer and acceptance in the office of Sullivant Cross and tendered earnest money. A little more than a week later, appellant paid the balance of the purchase price in a First Federal office. Between the time of the purchase and the trial, the house and surrounding realty were flooded three times.

In her action for deceit, appellant alleged that Sullivant Cross represented to her that the property was not located in a designated flood area. She contended that she relied upon these representations throughout the transaction and suffered damages in consequence. Appellant did not argue that First Federal actively made false representations to her but instead insisted that First Federal owed her a duty to disclose the information that the property was located in a flood area.

A question of fact appears to have been presented with respect to Sullivant Cross. Appellant testified that at the closing of the sale she stated that she was purchasing the property on the condition that it would not flood. She further testified that a representative of Sullivant Cross assured her at that time that the real estate was not in a flood area. It is her contention that a survey depicting the flood stage on the lot in question was known to representatives of Sullivant Cross and that this indicates that statements made by them were knowingly false. We agree that appellant presented a question of fact for the jury's consideration. In finding that a *prima facie* case was established against Sullivant Cross, we do not hold that appellant was entitled to recover from the real estate agency; rather, we simply find that she is entitled to submit her case against Sullivant Cross to a jury.

Appellant's contention that First Federal owed her a duty to disclose information on the potential for flooding demands closer scrutiny. First Federal maintains that no confidential relationship existed between it and appellant. The institution had merely loaned construction money to J. D. Roberts and to that extent had an interest in the transaction, but, it claims, apart from offering the use of its offices for completion of the transaction and having representatives present to see that its loan was repaid by Roberts, it had no direct connection with appellant.

Appellant cites 37 Am.Jur.2d, *Fraud and Deceit,* § 146, for the general rule that "there are times and occasions when the law imposes upon a party a duty to speak rather than to remain silent in respect of certain facts within his knowledge" and failure to speak "is actually equivalent to a fraudulent concealment and amounts to fraud just as much as an affirmative falsehood." As the Arkansas Supreme Court has noted, however, in *Berkeley Pump Co.* v. *Reed-Joseph Land Co.,* 279 Ark. 384, 397, 653 S.W.2d 128 (1983), this rule is applicable only under "special circumstances. . . such as a confidential relationship." The question thus is whether there was sufficient evidence for a jury's consideration of a confidential or other similar relationship. It is significant that the Court did not limit the circumstances under which a duty to speak exists to a confidential relationship but left open-ended the nature of the connection between the parties. What is of greater importance, therefore, in determining whether a directed verdict was improper in this instance is for us to make an examination of what the Court termed "special circumstances" rather than an effort to fit the facts of the case to that narrower example, a confidential relationship.

Appellant directs our attention to the following passage from 37 Am. Jur. 2d, *Fraud and Deceit,* § 146, which helps to define the extent of the question:

> [T]he law does not, except in broad terms, attempt to define the occasions when a duty to speak arises. On the contrary, there has been adopted, as a leading principle, the proposition that whether a duty to speak

> exists is determinable by reference to all the circumstances of the case, and by comparing the facts not disclosed with the object and end sought by the contracting parties. The difficulty is not so much in stating the general principles of law, which are fairly well understood, as in applying the law to particular groups of facts.

In the light of this language and that of *Berkeley Pump, supra,* we hold that the circumstances suggest a relationship between First Federal and appellant substantial enough to warrant the trial court's submitting the question of whether there was a duty to speak to a jury.

First Federal had a pecuniary interest in the sale and stood to gain by it. The institution made its offices availabe for the conclusion of the transaction and had representatives present to protect its own interest in the contract. Without speculating on the underlying reasons for First Federal's silence, we can conclude that the circumstances indicate that the repayment of the institution's loan was a matter of no small importance to its officials.

First Federal acknowledges as much, and yet places emphasis on the fact that, strictly speaking, there was no confidential relationship between it and appellant. The Arkansas Supreme Court held, however, in *Hanson Motor Co.* v. *Young,* 223 Ark. 191, 265 S.W.2d 501 (1954) that:

> The duty of disclosure . . . arises where one person is in position to have and to exercise influence over another who reposes confidence in him whether a fiduciary relationship in the strict sense of the term exists between them or not.

In the present case, appellant's testimony revealed that she had moved recently from a less flood-prone part of the state, and had relied considerably upon the integrity of First Federal throughout the negotiations. We believe that a jury should have had the opportunity to weigh these factors in deciding whether or not First Federal owed appellant a duty to speak.

The trial court refused to allow appellant to testify further on her reliance on First Federal's integrity on the grounds that she had no contractual relationship with the institution. In view of our holding with respect to First Federal, we find error in that decision of the court.

Reversed and remanded for further proceedings not inconsistent with this opinion.

CRACRAFT and COOPER, JJ., agree.

Susan L. CELLA (GARGAIN) *v.*
John T. CELLA

CA 83-442 671 S.W.2d 764

Court of Appeals of Arkansas
Division I
Opinion delivered July 5, 1984

Virginia (Ginger) Atkinson, for appellant.

Friday, Eldredge & Clark, by: *Barry E. Caplin,* for appellee.

LAWSON CLONINGER, Judge. The single issue on this appeal is whether the chancellor erred in denying full faith and credit to a New York court's award of custody of a divorced couple's two children to the mother.

Appellant, the mother of the children, and appellee, the father, were divorced in New York in 1979. At that time appellant was admittedly suffering physical and psychological problems, and appellee was awarded temporary custody. In 1980 appellant moved for an order directing that she be awarded custody. The Supreme Court, Putnam County, New York, granted her motion, but the Appellate Division reversed, holding that the fact that the mother had by that date become a suitable parent did not constitute sufficiently changed circumstances. *Cella* v. *Cella,* 439 N.Y.S.2d 219 (1981). The matter was returned to the trial

court for the determination of appellant's visitation rights.

In the meantime, appellee and the two children had moved to Atlanta, Georgia. Appellant last saw her children in March 1982, when they had been sent to New York for a visit. Appellant was unable to communicate with appellee after his telephone in Atlanta was disconnected and he had apparently moved. A private investigator in Atlanta informed appellant of appellee's presence in Little Rock. In October, 1982, appellant filed an action in Putnam County, New York, seeking a change of custody; notice was served on appellee's counsel of record. Appellee did not appear, and an order was issued in June, 1983, awarding custody to appellant, who then filed her New York order as a foreign judgment in Pulaski County, Arkansas, Chancery Court on July 13, 1983. On July 15, 1983, appellant obtained a writ of habeus corpus against appellee, who, on the same day, filed a motion for relief on the grounds that the order was procured by fraud and that the New York court lacked personal jurisdiction over him.

The matter was heard in the Arkansas court on July 18, 1983, and the special chancellor held that the New York order was not entitled to full faith and credit in the state of Arkansas because of the New York court's failure to acquire personal jurisdiction over appellant by proper service of process in compliance with the laws of the States of New York and Arkansas and the due process requirements of the United States Constitution. From that ruling this appeal arises. We find no error and we affirm.

Under the full faith and credit clause of the United States Constitution, Art. 4, § 1, a foreign judgment is as conclusive on collateral attack, except for defenses of fraud in the procurement of the judgment or want of jurisdiction in the rendering court, as a domestic judgment would be. *Purser* v. *Corpus Christi State National Bank,* 256 Ark. 452, 508 S.W.2d 549 (1974); *Phillips* v. *Phillips,* 224 Ark. 225, 272 S.W.2d 433 (1954). A judgment entered by default, such as the one in the present case, is entitled to full faith and credit, except for the defenses mentioned above, and is as conclusive against collateral attack as any other judgment. *Purser,*

supra. Because the chancellor's denial of full faith and credit was based on the asserted absence of personal jurisdiction on the part of the New York court, we need only determine if the service of notice was defective.

The New York Supreme Court, Putnam County, found that appellant and her children had a significant connection with New York and that it would be in the best interests of the children for jurisdiction to be retained. Further, the court said in its order awarding appellant custody that appellee's serious misconduct in severing communication and visitation between appellant and her children constituted sufficiently changed circumstances to terminate appellee's right to custody. Service upon appellee's attorney in the previous litigation was deemed adequate notice.

Both Arkansas and New York have adopted the Uniform Child Custody Jurisdiction Act, the general purpose of which are set out in Ark. Stat. Ann. § 34-2701 (Supp. 1983), as follows:

> (1) [to] avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects of their well-being;
>
> (2) [to] promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child'
>
> (3) [to] assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships are most readily available, and that courts of this State decline the exercise of jurisdiction when the child and his family have a closer connection with another state;
>
> (4) [to] discourage continuing controversies over child custody in the interest of greater stability of home

environment and of secure family relationships for the child;

(5) [to] avoid re-litigation of custody decisions of other states in this State insofar as feasible.

The denial of full faith and credit to a foreign court order issued under the shield of the UCCJA should not be made without an awareness of the strong policy considerations which prompted the adoption of the Act.

At issue are the notice provisions of the Arkansas and New York acts. Ark. Stat. Ann. § 34-2705(a) (2) (Supp. 1983) reads as follows:

(a) Notice required for the exercise of jurisdiction over a person outside this State shall be given in a manner reasonably calulated to give actual notice, and may be: . . .

(2) in the manner prescribed by the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction . . .

New York's Dom. Rel. Law § 75-f(1) (McKinney 1983) provides that:

(1) If a person cannot be personally served with notice within the state, the court shall require that such person be served in a manner reasonably calculated to give actual notice, as follows:

(a) by personal delivery outside the state in the manner prescribed in section three hundred thirteen of the civil practice law and rules;

(b) by any form of mail addressed to the person and requesting a receipt; or

(c) in such manner as the court, upon motion, directs, including publication, if service is impracticable under paragraph (a) or (b) of subdivision one of this section.

Appellant in this case availed herself of the option codified in subdivision (c) of Dom. Rel. Law § 75-f. The question remains whether the methods required by subdivisions (a) and (b) were indeed "impracticable."

The record reveals that for a period of about four months appellant did not know of her former husband's whereabouts. By September, 1982, through the efforts of a private investigator, she learned that he was in Little Rock. In October, 1982, she filed her motion for change of custody and served notice on appellee's New York attorney, who, the next day, applied to the court to be relieved as counsel. The attorney stated that he no longer represented appellee and that he did not know appellee's whereabouts. The lawyer's motion was denied and the matter proceeded. By December, 1982, appellant's mother, with whom appellant maintains a close relationship, was in correspondence with appellant's children at an address in Little Rock. The order mandating a change of custody was not issued until June, 1983. Thus, appellant had over six months in which to serve in a manner reasonably calculated to give actual notice.

In *Pawlik* v. *Pawlik,* 2 Ark. App. 257, 620 S.W.2d 310 (1981), we denied full faith and credit to an Illinois child custody judgment where one party failed to comply with Arkansas law regarding proper notice, despite the fact that both states employed the UCCJA. We focused on the Arkansas law because the party had served notice by publication, a procedure allowed under the Arkansas act but not recognized in Illinois. Here, service upon an attorney is permitted under New York Civil Practice Law and Rules 2103(b) and, apparently, under the inclusive language of Dom. Re. Law § 75-f(1) (c), if directed by the court. Arkansas law recognizes as adequate notice given "in the manner prescribed by the law of the place in which the service is made." Hence, in the instant case, we must look for compliance with the New York statutes.

In *Cann* v. *Cann,* 127 N.Y.S.2d 55 (1954), the New York court held that a husband remained bound by an attorney's representation of record when the attorney had appeared for him in his wife's divorce action so that even if he had ended

the attorney-client relationship, the wife could still serve motion papers upon the attorney. This situation is somewhat analogous to the present case, where the attorney for appellee contended that the attorney-client relationship no longer existed. Nonetheless, the fact remains that for half a year, this appellant had reason to know of appellee's Little Rock address. The New York Supreme Court's Appellate Division held in *Simens* v. *Sedrish,* 440 N.Y.S.2d 687 (App. Div. 1981), that a party who sought to effect expedient service in an action to set aside the conveyance of real property failed to make a showing that other prescribed methods of service could not be made and that service was ineffective. Such considerations are yet more compelling in the instance of a change of custody action.

We therefore affirm the special chancellor's refusal to grant full faith and credit to the New York custody decree.

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

Deborah A. BONE *v.* James R. BONE, Jr.

CA 84-17 671 S.W.2d 217

Court of Appeals of Arkansas
En Banc
Opinion delivered July 5, 1984

Gibson Law Firm, by: *John F. Gibson, Jr.,* for appellant.

Tarvin & Byrd, by: *John R. Byrd,* for appellee.

LAWSON CLONINGER, Judge. The chancellor granted a petition for a change of custody of Amber, the five-year-old child of the parties, from appellant, Deborah A. Bone, to the appellee, James R. Bone, Jr. Appellee was granted custody of the child for nine months each year, and appellant was given custody for three months of each year beginning on June 5.

On this appeal, appellant urges six points for reversal,

and appellee urges two points on his cross appeal. Each point raised by the parties will be discussed, but not necessarily in the order presented. We find no merit in any of the contentions of the parties except for appellee's first point, in which appellee argues that the chancellor erred in failing to restrict appellant to visitation privileges under specific limited circumstances. The decision of the chancellor is reversed on that issue and the case is remanded.

Chancery cases are tried *de novo* on appeal, but findings of fact will not be disturbed unless they are clearly against the preponderance of the evidence. Arkansas Rules of Civil Procedure, Rule 52(a); *Warren* v. *Warren,* 270 Ark. 163, 603 S.W.2d 472 (1980).

Appellant's first point for reversal is that the court erred in finding that appellant and a male companion spent the night in a motel room with the appellant's minor child present. The transcript reveals that at the end of the trial, the chancellor took the case under advisement and, the next morning, he held that pursuant to the rule stated in *Digby* v. *Digby,* 263 Ark. 813, 567 S.W.2d 290 (1978), he was modifying the custody decree to the extent that the appellant, Mrs. Bone, would have custody for nine months and appellee would have custody for three months. Thereupon, appellee moved to reopen the case to call an additional witness, Mrs. Jessie Lee Coody, who had been in the hospital and was unable to testify. Initially, the chancellor denied the motion to reopen, but upon appellant's joining in the motion, he granted it. At the end of Mrs. Coody's testimony, the chancellor made note of the fact that one of appellant's suitors, Dr. Andrew David, had gone to a motel with the appellant and the minor child, according to Mrs. Coody's testimony. The chancellor stated that because of Mrs. Coody's testimony, he was again changing the custody and held that appellee would have custody for nine months and appellant for three months.

The chancellor did make the observation that Mrs. Coody's testimony was shaky and a bit overzealous. The rule is that an appellate court gives due regard to the chancellor's opportunity to judge the credibility and demeanor of the

witnesses. See *Baugh* v. *Johnson,* 6 Ark. App. 308, 641 S.W.2d 730 (1982). Since this is a question of fact, the chancellor was in a much better position to judge the credibility of Mrs. Coody as a witness, and we see no error on this issue.

Appellant's second point for reversal is that the court abused its discretion in refusing to grant appellant's motion for a continuance. Appellant based her motion on the premise that Dr. David and Carol Sawyer were needed to testify to contradict and discredit Mrs. Coody's testimony. Arkansas Rules of Civil Procedure, Rule 40(b) states, "The court may, upon motion and for good cause shown, continue any case previously set for trial." A trial judge does not abuse his discretion in denying a motion for a continuance based on the absence of witneses where no proffer is made of what the witnesses would testify to. See *Bolden* v. *Carter,* 269 Ark. 391, 602 S.W.2d 640 (1980). Whether a motion for continuance should be granted is addressed to the discretion of the trial judge, and his decision will not be overturned unless that discretion is manifestly abused. *Johnson* v. *Coleman,* 4 Ark. App. 58, 627 S.W.2d 565 (1982). Here, no proffer was made by appellant's attorney as to what the witnesses would testify to, and we hold that the chancellor did not abuse his discretion in denying the motion.

Thirdly, appellant argues that the trial judge erred in refusing to determine the credibility of the testimony of Mrs. Jessie Lee Coody. We do not understand this point. In all cases the trial judge determines the credibility of the witnesses. In this case, the chancellor specifically found that although Mrs. Coody's testimony was overzealous at times and was shaky in certain respects, he did find that her testimony with regard to appellant and Dr. David was credible. Specifically, he noted that Mrs. Coody testified that she followed Dr. David and appellant to the Best Western Motel in Monticello, Arkansas. She stated that she observed them go into a motel room with the minor child. The chancellor found this testimony to be credible, and he based his modification of the custody decree on that particular incident. We cannot say that he abused his discretion.

Appellant argues next that the chancellor abused his discretion in refusing to allow John Frank Gibson the right to withdraw as appellant's attorney and to testify. From a review of the record, we do not find any motion made by appellant's counsel to withdraw from the case. He did request that the chancellor allow him to testify as a rebuttal witness in response to Mrs. Coody's testimony. Further, the chancellor's decision to change the custody from appellant to appellee was based on Mrs. Coody's testimony with regard to one particular incident: that appellant and Dr. David had taken the minor chlid to a motel. From a reading of the chancellor's decision, any other testimony of Mrs. Coody's was not a factor and, at most, cumulative. Mr. Gibson's testimony was to rebut Mrs. Coody's testimony on another matter. We find no error in the chancellor's decision to disallow appellant's counsel to testify.

Appellant's fifth point for reversal is that the court erred in refusing to grant appellant's motion for a new trial. Appellant based her motion on the fact that Carol Sawyer could not testify because she was not present on the last day the testimony was taken. An affidavit was attached to the motion in which she stated that she was not present because she was intimidated by appellee's present wife. A motion for new trial is addressed to the sound discretion of the trial judge and a refusal to grant such a motion should not be reversed unless the judge has clearly abused his discretion. *Black* v. *Johnson,* 252 Ark. 889, 481 S.W.2d 701 (1972). There is no indication that Carol Sawyer was ever subpoenaed, and because of this lack of diligence on the part of appellant to attempt to secure this witness at trial, she cannot now make this a legitimate basis for a motion for a new trial.

Lastly, appellant argues that the chancellor's findings were clearly against a preponderance of the evidence. The primary consideration in awarding custody of children is the welfare and best interest of the children involved. *Digby* v. *Digby, supra.* A chancellor's findings in custody matters will not be reversed unless they are clearly contrary to a preponderance of the evidence. *Digby* v. *Digby, supra.* The chancellor essentially based the modification of the custody decree on the ruling in *Digby.* In that case, the Arkansas

Supreme Court reversed a finding by the chancellor and held that the mother was unfit to have custody of her two sons. The Supreme Court reviewed the evidence and noted that the mother had participated in several affairs with married men and testified that she saw nothing morally wrong with having had sexual relationships with married men as long as the relationship took place outside of the presence of her children. The Supreme Court noted other factors in reversing the chancellor, including the fact that the mother had no religious affiliations or church attendance and testimony that she did not have a good reputation in the community for truthfulness.

In this case, appellant had sexual relationships with at least eight different men over an eighteen-month period. Three of the men were married and appellant did not know the last name of one of the men. She testified that she did not see anything morally wrong with her conduct. Appellant admits that a number of the men visited regularly in her home when the child was there, but insists that the child was not present during the acts of intercourse.

Two observations of the Arkansas Supreme Court in *Digby* seem particularly pertinent to the facts of this case:

> Appellee's own testimony shows that she does not see anything morally wrong with her having the sexual relationship with the married man so long as these matters took place outside the presence of the boys and after the divorce.
>
> While the chancellor stated that the appellee may have repented for her previous actions, nothing in the record supports this conclusion.

In *Digby,* as here, the mother recognized no moral wrong and gave no indication that she had any intention of changing her conduct.

The chancellor found that the father's home environment was more stable and conducive to better moral values for the child. It is noteworthy that the chancellor changed

the custody of the child after Mrs. Coody's testimony that appellant had gone to a motel with one of the men and was accompanied by the child. The chancellor also stated that he could not distinguish between *Digby* and the present case. Then, however, the chancellor permitted the child to be in the custody of the mother for three months of each year. The findings of the chancellor are clearly supported by the evidence, but we do not agree that the child should be in the unsupervised custody of appellant for a period of three months each year.

As in *Digby*, we find that when the evidence is reviewed in its entirety, it clearly preponderates to the effect that the child would have a more stable home relationship and a better sense of moral value if she were in the custody of appellee. We reverse the decision of the chancellor on the issue of custody with directions to enter an order granting custody to appellee, the father, with such visitation rights granted appellant, the mother, as the chancellor deems best for the interest of the child.

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

MELVIN MAYFIELD, Chief Judge, dissenting. I would affirm the chancellor's decision because it is our duty to affirm his factual findings unless they are clearly against the preponderance of the evidence, ARCP Rule 52(a), and I cannot say he was clearly wrong in this case.

JAMES R. COOPER, Judge, dissenting. I dissent. First, as to the motel incident, it is a misstatement to characterize Ms. Coody's testimony as credible. She, after all, is the neighbor who characterized Ms. Bone's dates as "customers." As far as I am concerned, she was an unbelievable witness, and any finding of fact based on her testimony is clearly erroneous.

Although several other points are raised, I am primarily concerned with the change in custody. First, I think the majority opinion is wrong to restrict Ms. Bone to visitation rather than three months custody. Implicit in the chancellor's finding that Ms. Bone should have custody is the

finding that she was fit to have custody. If she is fit to have custody for three months, as the chancellor obviously found, how then can the decision to take primary custody from her be justified?

There is no evidence in this record which indicates that the child has been harmed by the appellant's conduct. Further, there is no evidence that, through the mother's care, the child is not well-adjusted and cared for properly in every respect. It appears to me that the trial court erroneously relied on *Digby* v. *Digby,* 263 Ark. 813, 567 S.W.2d 290 (1978). Although at first glance *Digby* seems to control, it is quite different factually. In that case, the mother was engaging in affairs before, during, and after the divorce, making extended out-of-state trips with other men while she was married. Further, she allowed a man (whose name she could not remember) to spend the night with her while her children were present. Further, in *Digby,* there was evidence that Ms. Digby left one of her sons unsupervised for extended periods of time. Ms. Digby was also not a particularly credible witness. Her testimony about her sexual relationships was markedly different from the testimony of her oldest son. Also, she apparently perjured herself concerning a desired move to Memphis.

The appellant does not deserve to be punished for her lifestyle where it is not demonstrated that her child has, or will suffer because of it. I would reverse the chancellor's decision to change custody, thus leaving custody in Ms. Bone. However, I would modify the order to provide that Ms. Bone refrain from allowing men to spend the night with her when the child is present.

OUACHITA ELECTRIC COOPERATIVE CORPORATION *v.* EVANS-ST. CLAIR

CA 83-363 672 S.W.2d 660

Court of Appeals of Arkansas
Division II
Opinion delivered July 5, 1984

Roberts, Harrell, Lindsey & Foster, P. A., by: *Searcy W. Harrell, Jr.,* for appellant.

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

DONALD L. CORBIN, Judge. Appellant, Ouachita Electric Cooperative Corporation, sued for the collection of past

due electric bills in the amount of $37,676.80 for electricity furnished to St. Clair Rubber Company of Arkansas. Appellant sought to charge appellee, Evans-St. Clair, Inc., the purchaser of certain assets of St. Clair Rubber Company of Arkansas, with this responsibility. Appellant alleged below and here on appeal that the transfer of assets violated the Bulk Sales Act of Arkansas, Ark. Stat. Ann. §§ 85-6-101—109 (Add. 1961), and that the transfer was a fraudulent conveyance. The chancellor found to the contrary on both issues, but awarded judgment to appellant in the amount of $37,676.80 against St. Clair Rubber Company of Arkansas. We affirm.

On August 3, 1982, St. Clair Rubber Company of Arkansas ("St. Clair"), St. Clair Rubber Company located in Michigan ("St. Clair-Michigan"), National Acceptance Company of America ("NAC") and Evans-St. Clair, Inc. ("Evans-St. Clair") entered into an agreement whereby St. Clair and St. Clair-Michigan would transfer certain machinery, equipment, tools and other property they owned to Evans-St. Clair. In return for the transfer, Evans-St. Clair paid NAC $200,000.00 in cash and signed a promissory note to NAC in the sum of $500,000.00. NAC had previously made loans to St. Clair and St. Clair-Michigan totaling $2,244,524.21 and had a blanket perfected security interest in all the assets transferred to Evans-St. Clair which was cross-collateralized so that the assets of both St. Clair companies secured the full indebtedness. NAC agreed not to sue St. Clair, St. Clair-Michigan, or Mr. S. S. Livingstone, the prior owner and seller of St. Clair, if Evans-St. Clair defaulted on the $500,000.00 promissory note, and further agreed to release any and all security interest which it had in the remaining assets of St. Clair, St. Clair-Michigan and Mr. Livingstone upon payment of $1,544,524.21, a net reduction of indebtedness by $700,000.00.

No inventory was transferred as part of the asset purchase. Evans-St. Clair did receive an option to purchase the inventory at a price equal to 50% of the St. Clair companies' book value, subject to the right of these companies to sell the inventory to anyone else at any time as part of the transaction. If Evans-St. Clair had not purchased the

inventory at the end of one year, the St. Clair companies had the right to demand that Evans-St. Clair purchase the inventory still on hand at its wholesale fair market value. At the date of trial, approximately 1/3 of the inventory had been used on an as-needed basis by Evans-St. Clair. The remaining 2/3's of the inventory was still located at the Evans-St. Clair plant in East Camden and was identifiable as the St. Clair companies' property. The value paid for the assets purchased was arrived at by Evans-St. Clair in reliance upon appraisals furnished by an appraisal company which had a good reputation and had been relied upon in the past by Evans Industries, the parent company of Evans-St. Clair. The representations of the St. Clair companies' owner, Mr. S. S. Livingstone, were also relied upon in arriving at the amount of consideration to be paid. The machinery and equipment located in Michigan were appaised at a forced liquidation value of $167,787.00; the machinery and equipment in Arkansas were appraised at a forced liquidation value of $497,731.00, with $56,925.00 to be subtracted for the toxological boot equipment which was deleted from the transfer; and the real estate in Michigan conveyed was valued at approximately $100,000.00, based upon a three-year old appraisal. Evans-St. Clair negotiated for these assets as a whole package, and not as separate purchases. The allocation of purchase prices set forth in the Bills of Sale was made at the request of NAC, for its own internal accounting purposes.

Appellant contends that the transfer was in violation of the Bulk Sales Act. Ark. Stat. Ann. § 85-6-102 (Add. 1961), defines bulk transfers as follows:

> (1) A 'bulk transfer' is any transfer in bulk and not in the ordinary course of the transferor's business of a major part of the materials, supplies, merchandise or other inventory (Section 9-109 [§ 85-9-109]) of an enterprise subject to this Article [chapter].
>
> (2) A transfer of a substantial part of the equipment (Section 9-109 [§ 85-9-109]) of such an enterprise is a bulk transfer if it is made in connection with a bulk transfer of inventory, but not otherwise.

(3) The enterprises subject to this Article [chapter] are all those whose principal business is the sale of merchandise from stock, including those who manufacture what they sell.

(4) Except as limited by the following section all bulk transfers of goods located within this state are subject to this Article [chapter].

Appellant Ouachita Electric Cooperative Corporation argues that a bulk transfer between appellees took place since a major part of the materials, supplies, merchandise and other inventory was sold as well as a substantial part of the equipment as evidenced by the Bill of Sale. Appellant also contends that the fact that title to the inventory did not pass immediately should not be decisive in a determination of a bulk transfer. Finally, appellant argues that although a transfer to a lien creditor in lieu of foreclosure would be within the provisions set out above, the facts in the instant case do not establish a transfer to NAC. We do not agree.

The provisions of the Bulk Sales Act are primarily for the protection of creditors of the seller and compliance with the Act is not compulsory, insofar as the seller is concerned, unless compliance is required by the buyer. *Herrick* v. *Robinson,* 267 Ark. 567, 595 S.W.2d 637 (1980). We believe the evidence clearly supports the chancellor's finding that the transaction between appellees was not in violation of the Act. The trial court in the case at bar based its finding on the following evidence: (1) no inventory was transferred by the August 3, 1982, agreement; (2) on the day of trial, approximately 2/3's of all the inventory on hand as of August 3, 1982, agreement to transfer had not been purchased by appellee; (3) the 1/3 of the inventory which had been used was purchased by appellee on a daily basis, when needed in its industrial process, but not in bulk; and (4) the transfer was in settlement of a valid security interest, and did not harm the position of any unsecured creditors.

Ark. Stat. Ann. § 85-6-103(3) (Supp. 1983), provides in part: "The following transfers are not subject to this Article [chapter]: transfers in settlement of realization of a lien or

other security interest." NAC had a perfected security interest in all the assets purchased from St. Clair and St. Clair-Michigan, and the assets of both of the companies stood as collateral for an indebtedness which was undisputedly far in excess of their value. Evans-St. Clair paid $700,000.00 to NAC, and the St. Clair companies transferred the assets to Evans-St. Clair. NAC reduced these companies' obligation to it by $700,000.00, and agreed not to sue or look to the St. Clair companies for payment in the event that Evans-St. Clair defaulted on the $500,000.00, note. The transfer was clearly in satisfaction of NAC's security interest. Appellant in its brief cites *Starman* v. *John Wolfe, Inc.,* 490 S.W.2d 377 (Mo. App. 1973), for the proposition that in order to come within the § 85-6-103(3) exception, the transfer should be made to the holder of the security interest and not to a transferee for the benefit of the security interest holder. We agree with appellee that *Starman, supra,* cannot be properly interpreted for such a broad proposition, since in that case the consideration paid for the transfer was not used entirely to pay the superior lien held by the secured creditor, but rather was used to pay in part other parties for the benefit of the transferor, resulting in a preference to some creditors. Furthermore, in *Starman, supra,* there was no evidence in the record to support the proposition that the alleged secured creditor even had a security interest in the property transferred.

In *American Metal Finishers, Inc.* v. *Palleschi,* 20 U.C.C. Rept. Ser. 1283 (1977), the plaintiff complained that the transfer would not qualify under U.C.C. § 6-103(3) because the property transfer was made to a third person who assumed the indebtedness of the transferor with a secured creditor who held a security interest in the property transferred. The New York court disagreed, stating as follows:

> The chief rationale of the Bulk Transfers article is the avoidance of the 'major bulk sales risk' of '[t]he merchant, owing debts, who sells out his stock in trade. . ., pockets the proceeds, and disappears leaving his creditors unpaid' (citations omitted). But where the transfer is in settlement of a lien or security interest,

> there are no cash proceeds with which the seller could abscond. Thus, where the consideration is settlement of an indebtedness with no receipt of cash proceeds, the protective purposes of the Bulk Transfers article do not apply.
>
> We see no reason to read subdivision (3) of § 6-103 of the Uniform Commercial Code so restrictively as to add a requirement that the transferee must be the holder of the security interest, thus ruling out transfer to one who in good faith takes over the position of the security holder. The interposition of such new party is not that of an officious volunteer; it serves a socially beneficial purpose of avoidance of foreclosure with its concomitant hardships to creditors, employees and the commercial community.

Similarly, we cannot say appellant in the instant case was prejudiced by the transaction. If St. Clair had closed its doors, NAC could have replevied the collateral and sold it in satisfaction of its security interest. If appellant had levied upon the collateral, any proceeds from a sale would have been subject to the prior security interest of NAC, which secured an indebtedness of $2,244,524.21. St. Clair could have transferred the property directly to NAC without any conceivable violation of the Bulk Sales Act.

The Bulk Sales Act of Arkansas does not purport to regulate agreements to sell inventory in the future. Here we have an option to purchase agreement for the sale of inventory in the future which is not a transfer of inventory and, therefore, is not subject to the Bulk Sales Act, since Ark. Stat. Ann. § 85-6-102(1) (Add. 1961), by its terms applies only to "transfers in bulk." The Bulk Sales Act does not purport to regulate agreements for the sale of inventory as opposed to actual transfers of inventory because until the inventory is actually sold, title to it remains in the seller and is at all times subject to being levied upon by the seller's creditor. An agreement to sell the inventory gives the purchaser no property interest in the inventory, but is merely an executory contractual right. Accordingly, we find no merit to this contention.

Appellant also contends that the trial court erred in finding that the transfer was not a fraudulent conveyance pursuant to Ark. Stat. Ann. § 68-1302 (Repl. 1979). This statute provides as follows:

> Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods and chattels, or things in action, or of any rents issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents and profits thereof, and every bond, suit, judgment, decree or execution, made or contrived with the intent to hinder, delay or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts or demands, as against creditors and purchasers prior and subsequent, shall be void.

Fraud is never presumed, but must be affirmatively proved, and the burden of proving fraud is upon the party who alleges it and relies on it. *Rees* v. *Craighead Inv. Co., Inc.,* 251 Ark. 336, 472 S.W.2d 92 (1971). In a suit to set aside a fraudulent conveyance, the allegation of fraud must be shown by a preponderance of the evidence. *Killian* v. *Hayes,* 251 Ark. 121, 470 S.W.2d 939 (1971). It has also been held that while fraud may be established by circumstantial evidence, the circumstances must be so strong and well connected as to clearly show fraud. *Stringer* v. *Georgia State Savings Assoc. of Savannah,* 218 Ark. 683, 238 S.W.2d 629 (1951). Badges or indica of fraudulent conveyances include insolvency or indebtedness of the transferor, inadequate or fictitious consideration, retention by the debtor of property, the pendency or threat of litigation, secrecy or concealment, and the fact that disputed transactions were conducted in a manner differing from usual business practices. *Harris* v. *Shaw,* 224 Ark. 150, 272 S.W.2d 53 (1954).

In the case at bar we cannot say that the finding of the chancellor that the transfer was not fraudulent is against the preponderance of the evidence. The assets transferred were the subject of a perfected security interest in favor of NAC which secured an indebtedness of $2,244,524.21 of St. Clair and St. Clair-Michigan. The assets purchased were nego-

tiated as an entire package and not as separate parcels. While the Bill of Sale for the Arkansas assets showed approximately $440,000.00 of assets being transferred at a stated purchase price of $225,000.00, the Michigan Bill of Sale showed assets having a liquidation value of only $167,787.00 and real property having a value of only $100,000.00 which was purchased from St. Clair-Michigan at a price of $475,000.00. All of the assets of both St. Clair companies were pledged to secure the $2,244,524.21 indebtedness to NAC. The allocation of the monies as reflected on the Bills of Sale was at the suggestion of and for the internal accounting purposes of NAC. Furthermore, appellant offered no evidence at trial which would contradict the appraised values of the property transferred.

The $700,000.00 was paid to the lienholder, NAC, in the form of $200,000.00 cash and a $500,000.00 promissory note. It was not paid to St. Clair. Consideration flowed to St. Clair in that NAC agreed not to look to St. Clair for payment in the event that Evans-St. Clair defaulted under the terms of the $500,000.00 promissory note, and further agreed to release the assets of St. Clair upon payment of $1,544,524.21, which constituted a reduction in St. Clair's liability to NAC by $700,000.00. A conveyance by a debtor to a third party of mortgaged property is supported by adequate consideration if the third party grantee agrees to pay the debts owed by the grantor and which are secured by the property. *First State Bank of Corning* v. *Gilchrist,* 190 Ark. 356, 79 S.W.2d 281 (1935).

In *Sieb's Hatcheries* v. *Lindley,* 111 F.Supp. 705 (W.D. Ark. 1953), the district court quoted from a prior Arkansas decision as follows:

> The creditor who seeks to set aside a conveyance as fraudulent must show that his debtor has disposed of property that might otherwise have been subjected to the satisfaction of his debt.

Here, the record is barren of any evidence which would demonstrate that the lien of NAC was not perfected, or that

the value of the assets transferred exceeded the amount secured by the assets.

The transfer would not have been fraudulent unless an inadequate consideration was established. The preference of one creditor over another does not in itself make the transfer to the preferred creditor void or voidable as a fraudulent conveyance. *Nicklaus* v. *Peoples Bank & Trust Co., Russellville, Ark.,* 258 F.Supp. 482 (E.D. Ark. 1965), *aff'd,* 369 F.2d 683 (8th Cir. 1966). The consideration in this case was clearly adequate. Appellant presented no evidence which would indicate that a greater price could have been obtained. In determining fraudulent intent on the part of the parties to a transaction, mere inadequacy of price for consideration is insufficient; it is only when the inadequacy of price is so gross that it shocks the conscience, and furnishes satisfactory and decisive evidence of fraud, that it will be sufficient proof that the purchase is not *bona fide. Fluke* v. *Sharum,* 118 Ark. 229, 176 S.W. 684 (1915). We find no merit to this point. In conclusion, we cannot say that the chancellor's findings were clearly erroneous (clearly against the preponderance of the evidence), A.R.C.P. Rule 52(a), and we affirm.

Affirmed.

CRACRAFT and GLAZE, JJ., agree.

Cullen Reed HARRIS and Sandra Kay HARRIS
v. STATE of Arkansas

CA CR 83-134 672 S.W.2d 905

Court of Appeals of Arkansas
Division I
Opinion delivered May, 9, 1984
Released for Publication July 5, 1984
[Supplemental Opinion on Denial of Rehearing July 5, 1984.]

James E. Davis, for appellants.

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

DONALD L. CORBIN, Judge. Appellants, Cullen Reed Harris and Sandra Kay Harris, were tried and convicted by a Sevier County jury of the offense of manufacturing a controlled substance. The trial court sentenced each appellant to fifteen years in the Arkansas Department of Correction and fined each the sum of $12,000.00. We reverse and remand for a new trial.

I.

THE TRIAL COURT ERRED IN OVERRULING APPELLANTS' MOTION FOR A DIRECTED VERDICT BECAUSE THE EVIDENCE WAS INSUFFICIENT.

We need not address this point for reversal challenging the sufficiency of the evidence inasmuch as we reverse and remand for procedural errors committed by the trial court.

II.

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF FINGERPRINT COMPARISONS BECAUSE APPELLANTS' FINGERPRINTS WERE OBTAINED AFTER AN UNLAWFUL ARREST.

The only witness to testify at the suppression hearing on the arrest was Bill Jones, The Chief of Police of DeQueen, Arkansas. He stated that Lt. Duval of the Arkansas State Police had contacted him stating that the state police would like to question appellants. Several days later, Jones observed appellants' car and followed it until he could confirm that the state police still wanted to question appellants. Jones then stopped appellants and when appellant Cullen Harris started to get out of the car, Jones observed a pistol. Appellant Cullen Harris was subsequently charged with illegal possession of a prohibited weapon. Appellants' fingerprints were taken and matched for comparison with prints taken from items in the van. Appellants were successful in municipal court in having the illegal possession of a handgun charge dismissed on the basis of the extended trip exception. We see no error here. It is clear from Chief Jones' testimony that the officer in this case made a proper determination of probable cause to arrest appellants without a warrant on the handgun charge following a proper stop of their vehicle in order to question

them about another offense. See Ark. Stat. Ann. § 43-429 (Repl. 1977), and A.R.Cr.P. Rule 2.2.

III.

THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR EITHER A MISTRIAL A CONTINUANCE OR SUPPRESSION OF THE EVIDENCE BECAUSE IT BECAME APPARENT DURING THE TRIAL THAT THE STATE HAD EITHER REFUSED TO OBEY THE COURT'S ORDER REGARDING DISCOVERY OR HAD KNOWINGLY OFFERED UNTRUE TESTIMONY.

The record reflects that defense counsel, prior to trial, filed two separate motions for discovery. Because the State failed to respond to the first motion, the case was continued. Once the discovery requests were complied with, it became apparent to defense counsel that persons other than appellants had made suspicious purchases of chemicals from several companies located in Little Rock and Conway. In an effort to find out who had been making these purchases, defense counsel filed a subsequent motion for discovery requesting the notes from interviews with the employees of these chemical companies and copies of any photographs shown to them. Information furnished by the State indicated that no witness had identified either appellant. The State further claimed that photographs of appellants were shown to the witnesses between April 11, and April 13, 1982. The photographs of appellants furnished by the State were photographs taken after their arrest on April 27, 1982, and could not possibly have been the photographs exhibited to the witnesses.

During trial, witness Betty Martin testified that she recognized appellant Sandra Harris as having been a passenger in a van driven by a person known to her as Jim Roberts when he purchased chemicals from Ms. Martin's employer, SIS, Incorporated, on three occasions in the

spring of 1981. She also claimed that an Officer Berry or some other officer had shown her four individual photographs of four different women, from which she selected a photograph of appellant Sandra Harris. This occurred on cross-examination by defense counsel. She did admit, however, that she could have selected a photograph of someone else, but insisted that police had shown her photographs on several occasions and that she had selected a photograph of the woman riding in a van with Jim Roberts. Officer Berry testified both before the jury and in an in-camera hearing that he had shown photographs to Ms. Martin on one occasion, that she had identified two photographs of Jim Roberts and that Ms. Martin had stated that a photograph of a woman looked like the person she saw as a passenger in the van. It was stipulated by the parties that this photograph of a woman was not in fact a photograph of appellant Sandra Harris.

The record reflects that the State was apparently as surprised as defense counsel in regard to the alleged out-of-court identification based upon photographs shown to Ms. Martin by a second officer, an Officer Stepp. No record of this identification was in Officer Berry's records or in any of the prosecution's files.

We do not agree with the State's contention that Officer Berry's testimony could be used as impeachment of Ms. Martin's testimony and that no error occurred. The argument of appellee is without merit as the harm was already done at this point and the prejudice to appellants obvious. Furthermore, it is of no avail to the State that defense counsel had equal access to witness Martin. The record reflects that defense counsel did have contact with Ms. Martin on several occasions, but in view of the State's responses to appellants' discovery motions, there was nothing provided to alert them to a possible out-of-court identification. We believe appellants had a right to rely on their earlier discovery motions. We do not believe this to be a case of a defendant in a criminal case relying on discovery as a total substitute for his own investigation, which is

impermissible. *Henry* v. *State*, 278 Ark. 478, 647 S.W.2d 419, *cert. denied,* 104 S.Ct. 121 (1983).

At this stage of the proceedings, the following alternatives were available within the discretion of the court: (1) grant appellants' motion for a continuance so they could obtain and inspect the evidence; (2) suppress the identification testimony or, (3) grant a mistrial. The fact that the trial court did suppress any further reference to the alleged out-of-court identification did not cure the problem. Witness Martin had already testified under oath to the out-of-court identification. Thus, only two of the three alternatives were available to the trial court. We do not believe the court abused its discretion in not granting a mistrial as a mistrial in an extreme remedy which should only be granted as a last resort when the error is so prejudicial that justice could not have been served by continuing the trial. *Pruitt* v. *State,* 8 Ark. App. 350, 652 S.W.2d 51 (1983). We believe the first alternative, granting a continuance, would have been the more prudent choice as the trial could possibly have resumed after a short delay. A continuance need only be granted upon a showing of good cause. A.R.Cr.P. Rule 27.3. The burden is upon the appellants to demonstrate that the trial court abused its discretion in denying a continuance. *Walls* v. *State,* 8 Ark. App. 315, 652 S.W.2d 37 (1983). Our review of the proceedings in the instant case leads us to the conclusion that appellants have met their burden and the trial court abused its discretion. We reverse and remand for a new trial on this point.

IV.

THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL WHEN THE PROSECUTOR DELIBERATELY ARGUED OUTSIDE THE RECORD ON THREE OCCASIONS.

Appellants allege reversible error in the trial court's rulings on three objections made by them during the

prosecuting attorney's closing argument. It has been uniformly held that in cases of denial of a motion for mistrial based upon prosecutorial improprieties, we will not reverse the judgment of the trial court in the absence of an abuse of the wide latitude of discretion vested in the trial judge. *Brown & Bettis* v. *State*, 259 Ark. 464, 534 S.W.2d 207 (1976). We have always recognized and given due regard to the trial judge's considerable degree of discretion in controlling and supervising arguments of attorneys at jury trials. *McGill* v. *State*, 253 Ark. 1045, 490 S.W.2d 449 (1973).

The first objection in the case at bar was in reference to comment by the prosecutor on the testimony of the president of Capital Chemical and Supply Company that appellant Sandra Harris ordered the platinum oxide through his company. The trial court agreed with appellants that this argument was outside the record and in fact opposite to the witness's testimony, but refused to grant a mistrial. Next, appellants objected to the prosecutor's comment on testimony by the chemist. The prosecutor started to show the jury State's Exhibit No. Seven, which was a box top with a chemical formula written on it, when appellants objected and correctly pointed out that the exhibit had never been introduced into evidence. Again, the court denied appellants' motion for mistrial. In each of these two instances, the trial court promptly admonished the jury to the effect that any statement not borne out by the evidence, made by the attorneys, was to be disregarded and that the jury was to disregard any testimony in regard to State's Exhibit No. 7. In addition, the jury had been instructed with the standard instruction AMCI 101(e) that "closing arguments of the attorneys are not evidence but are made only to help in understanding the evidence and applicable law." Instructions and admonitions to the jury generally suffice except where the comments of counsel are patently inflammatory and prejudicial or where improper tactics are so repetitious that fairness is overcome. *Abraham* v. *State*, 274 Ark. 506, 625 S.W.2d 518 (1981). We believe the above was sufficient to cure any possible prejudice to appellants and the trial court properly denied their motions for mistrial.

Finally, the court overruled appellants' objection when the prosecutor argued to the jury on the issue of punishment to the effect that he had seen 16, 17, 18 and 19-year old persons sent to prison for using less serious drugs than those involved in this case. These remarks regarding punishment were made on facts outside the record which could have caused the jury to be persuaded to punish appellants more severely and was thus prejudicial and highly improper. A mistrial should have been granted. See *Mays* v. *State*, 264 Ark. 353, 571 S.W.2d 429 (1978) and *Long* v. *State*, 260 Ark. 417, 542 S.W2d 742 (1976). As stated in *Mays, supra,* ". . .the desire to obtain a conviction is never proper inducement for a prosecutor to include in his closing argument anything except the evidence in the case and legitimately deducible conclusions that may be made from the law applicable to a case." We reverse and remand for a new trial on appellants' third objection to the prosecutor's remarks during closing argument.

V.

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE CONTENTS OF THE PLYMOUTH VAN OBTAINED THROUGH AN ILLEGAL SEARCH.

The evidence presented by the State at the suppression hearing reveals that Floyd Peterson, owner of a self-storage garage, became concerned over a chemical odor emanating from one of the rented compartments in his garage. His wife testified that she had rented the unit to an Allen Parson; that the contract provided that no combustibles should be stored and that property would be considered abandoned and disposed of after sixty days of unpaid rental; and that the rent on this unit was six months past due. Peterson called the police and requested assistance in investigating the odor. After cutting the lock, Peterson consented to Officer Sullivan entering the unit and the van located inside which was the apparent source of the odor.

The record reveals that the officer had previously worked with chemicals and recognized the odor as coming from a combustible chemical. When he entered the van, he observed an assortment of glassware and chemicals which had spilled out or rusted through their containers. Officers Sullivan and Sanderlin both testified that they were concerned over the possibility of an explosion or fire.

Rule 11.2 of the Arkansas Rules of Criminal Procedure provides:

> Persons From Whom Effective Consent May be Obtained.
>
> The consent justifying a search and seizure can only be given, in the case of:
>
> * * *
>
> (b) search of a vehicle, by a person registered as its owner or in apparent control of its operation or contents at the time consent is given; and
>
> (c) search of premises, by a person who, by ownership or otherwise, is apparently entitled to give or withhold consent.

Peterson was the owner of the premises and requested the search. By the terms of the rental contract, the van was abandoned property which was under Peterson's control. Other facts support a finding that the van was abandoned and that appellants had no expectation of privacy in it as follows: no rent had ever been paid following the initial contract; no address or telephone number was listed at which the Petersons could contact the presumed owner; and the license tag had been removed from the van before it was stored. The evidence is uncontroverted that Peterson had the authority to consent to the search. See *Spears* v. *State*, 270 Ark. 331, 605 S.W.2d 9 (1980). We find no error on this point for reversal.

Reversed and remanded.

COOPER and CRACRAFT, JJ., agree.

Supplemental Opinion on Denial of Rehearing
July 5, 1984

JAMES R. COOPER, Judge. Although we today deny the appellant's petition for rehearing, we are issuing this supplemental opinion because of the significant constitutional issue presented: when a reversal and remand based on trial error is required, must the appellate court also consider the sufficiency of the evidence to support the appellant's conviction? Our original decision in this case, *Harris* v. *State,* 12 Ark. App. 181, 672 S.W.2d 905 (1984), did not reach the sufficiency of the evidence, and now, on rehearing, the appellant argues that *Burks* v. *United States,* 437 U.S. 1, 98 S. Ct. 2141, 57 L.Ed. 2d 1 (1978) requires us to do so. We disagree with the appellant's argument.

We first note that this precise issue has not been decided by the United States Supreme Court, although several other appellate courts would disagree with that statement. The issue was left open in *Greene* v. *Massey,* 437 U.S. 19, 98 S.Ct. 2151, 57 L. Ed.2d 15 (1978), handed down the same day as *Burks.* Further, we note that the Arkansas Supreme Court has, apparently, never been faced with this precise issue, although that Court has, without explanation, considered the sufficiency of the evidence and has reversed and dismissed at least one case, *Nichols* v. *State,* 280 Ark. 173, 655 S.W.2d 450 (1983), without considering several alleged trial errors which were raised in that appeal. This Court, in *Vowell* v. *State,* 4 Ark. App. 175, 628 S.W.2d 599, (1982), declined to consider the sufficiency of the evidence since the case was reversed and remanded for various trial errors. The Arkansas Supreme Court reviewed *Vowell,* and reversed it, *Vowell* v. *State,* 276 Ark. 258, 634 S.W.2d 118 (1982). In so doing, the Court noted that because of our disposition of the case, it was necessary to examine the sufficiency question. We, therefore, have no clear answer to the question from the Arkansas Supreme Court. This is a question of first

impression in Arkansas, and while the case would certainly be one which could be certified to the Arkansas Supreme Court under Rule 29 of the Rules of the Supreme Court and Court of Appeals, we have not done so because the issue arises on petition for rehearing in this Court.

Burks, supra, involved 28 U.S.C. § 2106, which gave broad remand powers to the Courts of Appeals. The United States Supreme Court, in *Bryan* v. *United States,* 338 U.S. 552, 70 S. Ct. 317, 94 L. Ed. 335 (1950), held that § 2106 authorized a remand for a new trial even in a case where the judgment was reversed solely due to a lack of sufficient evidence to sustain the conviction.

Of course, § 2106 is limited by the United States Constitution. In *Bryan* the Court rejected the argument that remanding for a new trial after finding insufficient evidence to support the conviction violated rights under the double jeopardy clause of the Fifth Amendment. In *Burks* the Supreme Court decided the issue of "whether an accused may be subjected to a second trial when conviction in a prior trial was reversed by an appellate court solely for lack of sufficient evidence to sustain the jury's verdict." The Court held that such a retrial, under those circumstances, would violate the double jeopardy clause. However, the Court carefully pointed out that reversal for trial error was a different matter. The Court stated:

> . . . In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt

> free from error, just as society maintains a valid concern for insuring that the guilty are punished. See Note, Double Jeopardy: A New Trial After Appellate Reversal For Insufficient Evidence, 31 U. Chi. L. Rev. 365, 370 (1964). 437 U.S. at 15-16, 98 S.Ct. at 2149, 57 L.Ed. 2 at 12.

In sum, *Burks* only holds that if an appellate court *has* decided that there was insufficient evidence to support a conviction, a retrial is barred. *Burks* and *Green, supra,* do not decide whether an appellate court *must* (as alleged by the appellant) look at the sufficiency of the evidence in addition to evidentiary points which require reversal.

It is clear that remanding for a new trial, where the only issue on appeal is the sufficiency of the evidence, would give the State a second opportunity to prove the same points which were at issue in the first trial. *Burks* prohibits such retrials. Where, however, a case is reversed for trial errors, wholly different considerations are presented. Some of those considerations were outlined in *U.S.* v. *Mandel,* 591 F.2d 1347 (4th Cir., 1979), where the court stated:

> . . .In many cases, such as the one at bar, with a vast volume of evidence, it would be doing a distinct disservice to the defendants to decide on appellate review that if a part of the evidence had been omitted the balance would be sufficient to convict. Among other things, this rather invades the province of the jury and trial court on retrial. The jury is the proper trier of the facts, including the credibility of witnesses and the inferences to be drawn from the testimony. Perhaps the faulty evidence was the key to the jury's decision; perhaps it was not. Who can say? Certainly not a court of appeals which has neither seen the witnesses nor heard them testify.

Another reason for not requiring an appellate court

> to adjudge the sufficiency of the balance of the evidence, when a part of the evidence has been improperly admitted, is that it is impossible to say what other evidence the government might have produced had the faulty evidence not been admitted, and what theory of the case the government might have principally pursued had it been presented in the context of different evidence before the jury.
>
> Thus, we believe it does a service neither to the defendants nor to the government to adjudicate the sufficiency of the balance of the evidence when important evidence has been ruled to be inadmissible. To do so, it would be necessary to some extent to set ourselves up as triers of fact, which should be avoided, if possible. As well, we would be required to speculate as to whether or not the government would have conducted the prosecution in any different manner had the faulty evidence been excluded.
>
> We do not, then, pass upon the sufficiency of the evidence in this case, leaving that question in the first instance to the trial court and jury on retrial. *Id.* at 1373-74.

In *State* v. *Lamorie,* 610 P.2d 342 (Utah, 1980), the Utah Supreme Court dealt with this issue, and held that:

> Reversal and remand for a new trial does not place the accused in double jeopardy where the error giving rise to the reversal is merely trial error, as distinguished from insufficiency of the evidence. *Id.* at 347.

Numerous jurisdictions are in accord with the views expressed in *Mandrel* and *Lamorie. See, e.g.:*

United States v. *Tranowski,* 702 F.2d 668 (7th Cir.1983), *United States* v. *Sarmiento-Perez,* 667 F.2d 1239 (5th Cir.1982), *United States* v. *Harmon,* 632 F.2d 812 (9th Cir. 1980), *People* v. *Sisneros,* 44 Colo. App. 65, 606 P.2d 1317 (1980), *Hall* v. *State,* 244 Ga. 86, 259 S.E.2d 41 (1979), *Mulry* v. *State,* ___ Ind. App. ___, 399 N.E.2d 413 (1980), *Phillips* v. *Commonwealth,* 600 S.W.2d 485 (Ky.Ct. App. 1980), *State* v. *Boone,* 284 Md. 1, 393 A.2d 1361 (1978), *DiPasquale* v. *State,* 43 Md. App. 574, 406 A.2d 665 (1979), *Commonwealth* v. *Taylor,* 383 Mass. 272, 418 N.E.2d 1226 (1981), *State* v. *Wood,* 596 S.W.2d 394 (Mo. 1980), *State* v. *Longstreet,* 619 S.W.2d 97 (Tenn. 1981, *Ex parte Duran,* 581 S.W.2d 683 (Tex. Ct. App. 1979), *State* v. *Frazier,* 52 S.E.2d 39 (W. Va. 1979).

Other courts disagree, sometimes in the same jurisdictions, and hold that the sufficiency of the evidence must be considered. For example, in *Hooker* v. *State,* 621 S.W.2d 597 (Tex. Cr. App. 1980), the appellant's conviction was reversed for the failure to grant a change of venue. The appellant, on rehearing, alleged that, despite the court's reversal on procedural grounds, he was entitled to have his challenge to the sufficiency of the evidence decided. The court agreed, holding that:

> It now appears clear that in view of *Burks* and *Greene* a challenge to the sufficiency of the evidence should be considered before disposing of a case even though the reversal may be based on another ground. *Id.* at 598.

In *Mitchell* v. *State,* 44 Md. App. 451, 409 A.2d 260 (1979), the Court of Special Appeals stated:

> Thus, at least since *Burks,* when an appellant in a criminal case raises the sufficiency issue on appeal, he has a definite and Constitutionally based interest in having it determined. Because of *Burks,* the sufficiency issue can no longer become moot, notwithstanding the

existence of other grounds for reversal. Unless the appellant has in some way waived his right to appellate review on that issue, it must be decided, for it is upon that decision that the question of a retrial will hinge. *Id.* at 462, 409 A.2d at 267.

Other jurisdictions follow this view. *See, e.g.:*

United States v. *Till,* 609 F.2d 228 (5th Cir. 1980), *United States* v. *Watson,* 623 F.2d 1198 (7th Cir. 1980), *United States* v. *U. S. Gypsum Co.,* 600 F.2d 414 (3rd Cir. 1979), *United States* v. *Hemming,* 592 F.2d 866 (5th Cir. 1979), *United States* v. *Orrico,* 599 F.2d 113 (6th Cir. 1979), *United States* v. *Santora,* 600 F.2d 1317 (9th Cir. 1979), *United States* v. *Morris,* 612 F.2d 483 (10th Cir. 1979), *United States* v. *McManaman,* 606 F.2d 919 (10th Cir. 1979), *United States* v. *Meneses-Davila,* 580 F.2d 888 (5th Cir. 1978), *United States* v. *Vargas,* 583 F.2d 380 (7th Cir. 1978), *Griffin* v. *United States,* 396 A.2d 211 (D.C. 1978), *State* v. *Bannister,* 60 Haw. 658, 594 P.2d 133 (1979), *People* v. *Taylor,* 76 Ill.2d 289, 391 N.E.2d 366 (1979), *Ellerba* v. *State,* 41 Md.App. 712, 398 A.2d 1250 (1979), *Commonwealth* v. *Funches,* 379 Mass. 283, 397 N.E.2d 1097 (1979), *State* v. *Verdine,* 290 Or. 553, 624 P.2d 580 (1981), *Sloan* v. *State,* 584 S.W.2d 461 (Tenn.Cr.App. 1978).

Although it would be possible to examine the sufficiency issue first, as the Arkansas Supreme Court did in *Nichols, supra,* we decline to do so for the reasons stated in *Mandel, supra,* and those cases cited above. Where the appellant has alleged that his trial was tainted by error, and where the appellate court agrees, the court cannot properly enter into the province of the jury and determine if the remaining evidence is sufficient to sustain the conviction. The result of such an approach would be to force the State to overtry cases. As stated in *State* v. *Boone,* 284 Md. 1, 393 A.2d 1361 (1978):

By the same token if the trial court erroneously admits evidence, resulting in reversal, as in the case before us,

> the State should not be precluded from retrial even though when such evidence is discounted there is evidentiary insufficiency. The prosecution, we believe, in proving its case is entitled to rely upon the correctness of the rulings of the court and proceed accordingly. If the evidence offered by the State is received after challenge and is legally sufficient to establish the guilt of the accused, the State is not obligated to go further and adduce additional evidence that would be, for example, cumulative. Were it otherwise, the State, to be secure, would have to consider every ruling by the court on the evidence to be erroneous and marshall and offer every bit of relevant and competent evidence. The practical consequences of this would seriously affect the orderly administration of justice, if for no other reason, because of the time which would be required to prepare for trial and try the case. Futhermore, if retrial were precluded because discounting erroneously admitted evidence results in evidentiary insufficiency, there would be no opportunity to correct an error. . .*Id.* at 16-17, 393 A.2d 1369

We decline to examine the sufficiency of the evidence in the case at bar. The appellant will not be subjected to double jeopardy by a retrial, since we reversed and remanded for a new trial on issues outside the sufficiency question. His rights to due process have not been infringed either. This Court has afforded him all that the Constitutions of the United States and the State of Arkansas require, and, we note, relief which he sought: a fair trial, free from prejudicial error.

Petition denied.

MAYFIELD, C.J., dissents.

MELVIN MAYFIELD, Chief Judge, dissenting. The appellants in this case argued five points in their brief on appeal. Their first point was that the trial court erred in overruling their motion for directed verdict. A division of this court reversed and remanded for new trial on one of the other

four points urged and said it did not address the first point which "challenged" the sufficiency of the evidence "inasmuch as we reverse and remand for procedural errors committed by the trial court."

In their petition for rehearing, the appellants contend they are "entitled" to a ruling on their motion for directed verdict for the reason that the granting of that motion would result in dismissal rather than new trial. They cite *Burks* v. *United States,* 437 U.S. 1 (1978), and *Greene* v. *Massey,* 437 U.S. 19 (1978), as authority for their contention.

I agree with the supplemental opinion on rehearing that *Burks* and *Greene* do not require that the sufficiency of the evidence be passed upon before the other points urged for reversal, but where one of those points is that a directed verdict should have been granted, I think we should pass upon it first. I see no reason why we should first review the *trial court's action* in ruling upon the sufficiency of evidence where that action is urged on appeal as a reason for reversal. As I see it, all that is necessary in that situation is to pass upon the sufficiency of the evidence as it stood at the time the trial court ruled — not after we have reviewed motions and objections to evidence and have eliminated any improper evidence from the record.

Therefore, I would grant the petition for rehearing in this case for the purpose of passing upon the appellants' point that the trial court should have granted directed verdicts in their favor.

Polly ODOM *v.* TOSCO CORPORATION and HARTFORD INSURANCE COMPANY

CA 82-325 672 S.W.2d 915

Court of Appeals of Arkansas
Division I
Opinion delivered July 5, 1984

[redacted]

Denver L. Thornton, for appellant.

Griffin, Rainwater & Draper, for appellee.

TOM GLAZE, Judge. This workers' compensation appeal results from the Commission's refusal to enforce a joint petition settlement agreement, because the claimant died before a hearing was conducted on the joint petition. A review of the procedure by which this appeal has evolved is necessary to a clear understanding of our disposition of the case.

The claimant, Polly Odom, now deceased, suffered a compensable back injury when she fell on some stairs at work on September 5, 1978. She continued her job as an accounting clerk until October 20, 1978, when she became unable to work because of pain. She attempted to return to work on February 19, 1979, but the company fired her at that time, discontinued her salary on February 28, 1979, and stopped paying for her therapy in March of 1979. A hearing was conducted before an administrative law judge on November 14, 1979. Appellees admitted that claimant was entitled to 10% permanent partial disability, but through an oversight, appellees paid nothing until after a decision was rendered in a second hearing conducted on July 16, 1981. The law judge filed his opinion on March 11, 1982. He set

claimant's permanent partial disability at 35% to the body as a whole. He also found controversion of all benefits in excess of 10% to the body as a whole. On May 19, 1982, the appellees paid the claimant $3,937.50, representing 10% permanent partial disability benefits that had not been paid because of an "in-house oversight." On June 23, 1982, on appeal and cross-appeal, the Commission affirmed the decision of the administrative law judge except on the controversion issue. The Commission found the record inadequate to determine whether the initial 10% permanent partial disability had been controverted and, if so, which one of the claimant's two attorneys was entitled to the fee. The Commission said:

> [I]f the parties themselves have not resolved these two issues by negotiation and agreement when this decision has become final, these two questions will have to be presented to the Administrative Law Judge for appropriate evidentiary development and decision. It will be the responsibility of the parties to request such a hearing before the Administrative Law Judge.

The appellant appealed and the appellees cross-appealed the Commission's decision to this Court. While the appeal was pending, appellant filed a motion to remand to the Commission for the parties to enter a joint petition. We granted the motion to remand on December 2, 1982. A hearing on the joint petition was scheduled for December 15, 1982. On December 9, 1982, the claimant died from a condition unrelated to her compensable injury.

A hearing was held before an administrative law judge on March 1, 1983, to determine whether the joint petition settlement should be approved. Henry Odom, husband of Polly Odom, appeared as administrator of her estate. The law judge determined that, under § 19(1) of the Workers' Compensation Act, an agreement for settlement between the parties has no effect on the parties' rights until a hearing is conducted by the Commission. Ark. Stat. Ann. § 81-1319(1) (Repl. 1976). Therefore, the law judge denied the joint petition, not on substantive, but on procedural grounds. The Commission affirmed and adopted the decision of the law judge. On this appeal, appellant claims the Com-

mission erred in not approving and enforcing the joint petition settlement. Appellant asks this Court to enforce the settlement agreement or, in the alternative, to decide the original appeal on its merits.

In support of the contention that the Commission should have approved the joint petition settlement, appellant cites a number of cases to illustrate that the policy of the law is to favor, to encourage, and to enforce compromise settlements. *See, e.g., St. Paul Fire and Marine Insurance Co.* v. *Wood,* 242 Ark. 879, 416 S.W.2d 322 (1967); *Squires* v. *Beaumont,* 233 Ark. 489, 345 S.W.2d 465 (1961); and *Jacobs* v. *American Bank and Trust Co.,* 175 Ark. 507, 299 S.W. 749 (1927). However, the cases cited by appellant do not deal with the joint petition procedure required under the workers' compensation laws. *St. Paul Fire and Marine Co.* v. *Wood* dealt with a tort claim and subrogation under § 81-1340 (Repl. 1960); *Squires* v. *Beaumont* involved a lawsuit for damages between two business associates over a construction project in which they were involved; and *Jacobs* v. *American Bank and Trust Company* concerned an unlawful detainer action; the "settlement" was between the assignee of the mortgagee and the mortgagor.

Although the court in each of the foregoing cases stated that the law favors compromise settlements, that general rule does not apply to joint petition settlements. Section 81-1319(1) provides:

> (1) Joint petition. Upon petition filed by the employer or carrier and the injured employee, requesting that a final settlement be had between the parties, the Commission shall hear the petition and take such testimony and make such investigations as may be necessary to determine whether a final settlement should be had. If the Commission decides it is for the best interests of the claimant that a final award be made, it may order such an award that shall be final as to the rights of all parties to said petition, and thereafter the Commission shall not have jurisdiction over any claim for the same injury or any results arising from same. If the Commission shall deny the petition, such

> denial shall be without prejudice to either party. No appeal shall lie from an order or award allowing or denying a joint petition.

The Commission's own Rule 19 provides, in part, as follows:

> The Commission discourages the use of the Joint Petition as a means of settling cases except in unusual circumstances.

Rule 19, *Arkansas Workers' Compensation Law and Rules of the Commission* (1982).

In *Jacob Hartz Seed Co.* v. *Thomas,* 253 Ark. 176, 485 S.W.2d 200 (1972), the Court said about joint petition settlements:

> The necessity for extreme caution in approving such settlements so clearly recognized by the commission's procedural rule lies in the fact that any award based thereon finally concludes all rights of the parties, even foreclosing any right of appeal from the order of approval. This is the only procedure under our act which leaves the claimant without any further remedy, regardless of subsequent developments.

Id. at 179, 485 S.W.2d at 202.

We cannot agree with appellant's arguments that this joint petition settlement should be enforced as any other contract of settlement with the administrator serving as a substitute for the deceased claimant. Nor can we agree that the actual hearing required by our statute is purely administrative and does not affect the rights of the parties. The Commission's Rule 19, quoted in part above, provides further:

> No Joint Petition will be approved unless such Petition sets forth the nature of the unusual circumstances and unless such unusual circumstances are proved at a hearing.

. . .

> It shall be necessary for the claimant to appear and testify at a Joint Petition hearing. Petitions shall be signed by all parties, including the claimant, and must be verified.
>
> . . .
>
> Under certain circumstances, the Commission may designate or direct the parties to take claimant's testimony by deposition or interrogatories.

Rule 19, *Arkansas Workers' Compensation Laws and Rules of the Commission (1982).*

In Georgia-Pacific Corp. v. *Norsworthy,* 244 Ark. 399, 425 S.W.2d 320 (1968), the Court affirmed the Commission in finding that a settlement agreement was not final within the meaning of section 19. In that case, the employer and the claimant reached an agreement they referred to as a "final settlement." On the basis of letters to the Commission from the parties' attorneys, the Commission cancelled a scheduled hearing and entered an order incorporating the parties' agreed-upon terms of payment. When a claim was filed for payment of medical services outside the scope of the settlement, Georgia-Pacific refused to pay. The Court quoted the Commission's Rule 19 and found that Georgia-Pacific had made no attempt to comply with the rule. Therefore, the Court said, the Commission was justified in finding that its own order was not a final settlement within the meaning of the joint petition provision.

What the appellant asks us to do in this case would require that we ignore the Commission's own procedures and the prior Arkansas cases on joint petitions. Because the precise facts at bar have not been presented previously to us, we have examined cases from other jurisdictions. *See, e.g., Rogers* v. *Concrete Sciences, Inc.,* 394 So.2d 212 (Fla. Dist. Ct. App. 1981); *Denton* v. *United States Fidelity & Guaranty Co.,* 158 Ga. App. 849, 282 S.E.2d 350 (1981); *Barncord* v. *State Department of Transportation,* 4 Kan. App. 2d 368, 606 P.2d 501, *aff'd,* 228 Kan. 289, 613 P.2d 670 (1980); *Pepitone* v.

State Farm Mutual Insurance Co., 346 So.2d 266 (La. Ct. App. 1977); *Sherlin* v. *Liberty Mutual Insurance Co.,* 584 S.W.2d 455 (Tenn. 1979). In each of these cases, the claimant died between the time a settlement agreement was reached and the time of approval by the Commission — or the equivalent of our Commission — in each state.

In *Barncord* v. *Department of Transportation,* the claimant died on the day that a proposed oral settlement was to be presented to the Director of Workmen's Compensation Fund as the Kansas statute required. The Kansas Court of Appeals rejected the contention of the claimant's widow and children that the approval of a settlement agreement under Kansas law was merely a procedural formality. The Court quoted Larson as follows:

> If the statute requires that a settlement have Commission approval, a settlement lacking such approval amounts to nothing more than a voluntary payment of compensation. . . . [I]t does not give rise to an "award. . . ."

Barncord, 606 P.2d at 505 quoting 3 Larson, *Workmen's Compensation Law* § 82.60 (1976). The Kansas Court concluded that the negotiated amount was not due the claimant at the date of his death because the settlement had not yet been presented to the director in a form recognized by statute.

The Supreme Court of Tennessee also considered the precise question before our Court under similar facts in *Sherlin* v. *Liberty Mutual Insurance Company.* The parties' attorneys reached a written agreement that, in Tennessee, was subject to approval by a judge of chancery, circuit, or criminal court. The claimant died of a nonwork-related gunshot wound before that approval was attained. In deciding whether or not the decedent's claim survived his death, the Court analogized that unaccrued disability benefits do not survive a claimant's death and become payable to his personal representative. The Court pointed out the rationale for such a rule:

> [I]t is the purpose of workmen's compensation acts to make industry take care of its casualties. To that end compensation is provided for injured workmen in lieu of wages. Wages cease with death, and likewise compensation received in lieu of wages must cease with death. If the employee dies from natural causes, his representatives have no claim against the employer. If the death results from injuries received in the industry, there are special provisions to take care of the employee's dependents. It would put an additional burden on the employer, not contemplated by the statutes, to require him to pay either wages or compensation to representatives of an employee who died from natural causes. If an employee had a vested right in compensation, he could will it away, and the employer would be paying this substitute for wages to persons with whom he had no connection.

Sherlin v. *Liberty Mutual Insurance Co.,* 584 S.W.2d at 458. The court determined that the claimant's personal representative was entitled to temporary total benefits which had accrued at the time of his death, but not to the settlement amount that had not been approved prior to his death.

Our own workers' compensation statutes provide that no compensation for disability is payable for any period beyond a claimant's death. However, an award of compensation for disability may be made after the claimant's death for the period of disability preceding death. Ark. Stat. Ann. § 81-1323(e) (Repl. 1976). We agree with the reasoning of the courts in the above-cited jurisdictions and find that the settlement reached by the deceased claimant and the appellees is not effective because a joint petition hearing had not been conducted and Commission approval had not been rendered prior to the claimant's death.

The appellant also argues that the settlement agreement between the decedent and appellees is enforceable based upon estoppel and waiver. Appellant contends the appellees are estopped to deny the settlement because they caused the claimant to have her appeal remanded for the purposes of entering a joint petition and that the claimant

relied on appellees' conduct to her detriment or abandoned a legal right upon appellees' representations. The cases appellant cites in support of an estoppel theory are not workers' compensation cases. We have already held that our workers' compensation laws prevented the payment of the settlement agreement reached in this case. Accordingly, the claimant's death prior to the Commission's approval of the settlement caused the agreement not to be enforced; the failure to approve or enforce the agreement was not caused by appellees' conduct.

Appellant's argument based upon waiver is much the same as her estoppel argument. Because the appellees entered into the settlement agreement, appellant contends, they waived their rights to object to the settlement. Again, waiver simply does not apply in this instance, because it is not the appellees' actions that preclude enforcement of the settlement, but the claimant's untimely death.

Because we find that the settlement agreement was not effective prior to approval by the Commission pursuant to Ark. Stat. Ann. § 81-1319 (Repl. 1976), we consider appellant's alternative request for relief, that is, that we decide the issues presented in the original appeal. Both parties had appealed the Commission's award to the claimant of 35% permanent partial disability. The appellant raised five points for reversal, some of which we can consolidate for our discussion purposes.

The appellant's first allegation of error, that the Commission should have allowed the claimant's request to present additional evidence, was rendered moot by the claimant's death. However, we do not find error in the Commission's denial of the claimant's request. The statutory provisions that give the Commission the right to make investigations, order medical examinations or to take such action as it deems proper to ascertain and protect the rights of the parties, provide that these actions of the Commission are discretionary, not mandatory. Ark. Stat. Ann. § 81-1319(i), -1323(b), -1327 (Repl. 1976 and Supp. 1983). We do not find that the Commission abused its discretion in denying the claimant the right to additional time to be tested

and to introduce the results of a C. T. scan.

We consider the appellant's second and third points together, that the Commission applied an improper legal standard and failed to set out its findings of fact. Appellant contends the Commission based its decision upon whether the evidence supported the decision of the administrative law judge. However, the appellant has misconstrued what the Commission said. The Commission found the decision of the administrative law judge "supported by a preponderance of the evidence." In addition, the Commission affirmed and *adopted* the decision of the administrative law judge. That adoption had the effect of transferring to the Commission the findings of the law judge. *See Oller* v. *Champion Parts Rebuilders, Inc.,* 5 Ark. App. 307, 635 S.W.2d 276 (1982); *Dedmon* v. *Dillard Department Stores, Inc.,* 3 Ark. App. 108, 623 S.W.2d 207 (1981); *Jones* v. *Scheduled Skyways, Inc.,* 1 Ark. App. 45, 612 S.W.2d 333 (1981).

Appellant's fourth point is that the Commission erred in failing to resolve whether the appellees had controverted the 10% permanent partial disability benefits and if so, which of appellant's two lawyers was entitled to the fee. The Commission found the record inadequate to decide those questions. It instructed the parties to resolve those issues themselves or to request a hearing before the law judge to develop evidence on those points. We find no error in the Commission's determination. The appellant argues to us the argument she should have developed before the law judge. We cannot consider the merits of the question when it was not argued below. *Hamilton* v. *Jeffrey Stone Co.,* 6 Ark. App. 333, 641 S.W.2d 723 (1982).

Finally, the appellant contends the Commission's decision is not supported by substantial evidence. Appellant argues, based primarily upon the claimant's testimony, that the record clearly shows the claimant was totally disabled. However, what appellant argues is precisely the factual question that was before the Commission. We must affirm the Commission if substantial evidence supports its finding that the claimant suffered permanent partial disability of

35% to the body as a whole. We find substantial evidence does support that finding in light of all of the evidence: the claimant's testimony, Dr. Hartmann's rating of 10% to the body as a whole, and Dr. Lester's rating of 10-15% to the body as a whole. Dr. Giles found "chronic disability . . . without evidence of clinical radiculopathy." The Commission awarded disability in an amount greater than the medical evidence warranted, indicating that the Commission undoubtedly took into consideration the testimony of the claimant and her daughter, as well as factors other than medical evidence. *See Glass* v. *Edens,* 233 Ark. 786, 346 S.W.2d 685 (1961).

We have determined that the Commission was correct in finding the proposed settlement ineffective because a hearing was not conducted on the joint petition prior to the claimant's death. In addition, we affirm in all respects the Commission's decision that resulted in appellant's first appeal. The appellees are liable to the claimant's personal representative for all benefits that had accrued at the time of claimant's death, figured at 35% to the body as a whole.

Affirmed.

CRACRAFT and CORBIN, JJ., agree.

Charles T. SCHERM *v.* Linda S. SCHERM

CA 83-310 671 S.W.2d 224

Court of Appeals of Arkansas
En Banc
Opinion delivered July 5, 1984

Norman M. Smith, for appellant.

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

TOM GLAZE, Judge. This appeal arises from a post-

decretal divorce action wherein the appellant/father filed an action seeking custody of the parties' minor children, twin sons, ages four, and another son, age seven. Appellant contends the trial court erred in finding the evidence was not sufficient to warrant a change of custody. We agree and therefore reverse.

First, we recognize the oft-stated rule that this Court will not reverse the chancellor unless it is shown that the lower court decision is clearly contrary to a preponderance of the evidence. Particularly where the credibility of witneses appearing before the chancellor is concerned, this Court attaches substantial weight to the chancellor's findings on material issues of fact. *Digby* v. *Digby,* 263 Ark. 813, 567 S.W.2d 290 (1978). The primary consideration in awarding the custody of children is the welfare and best interests of the children involved, and other considerations are secondary. *Id.* These same standards are applicable in a change of custody case. *See Bond* v. *Rich,* 256 Ark. 51, 505 S.W.2d 488 (1974); and *Sweat* v. *Sweat,* 9 Ark. App. 326, 659 S.W.2d 516 (1983).

From our review of the entire record, we believe the evidence clearly and decidedly preponderates in favor of a change in custody. In this custody case, there is an unusual amount of consistent testimony, at least on an essential factual issue of importance here. Particularly, appellee concedes a style of life since the parties' divorce that includes entertaining overnight male visitors when her three sons are at home. She admits sexual activity with these men during these visits. In fact, appellee continued such conduct after appellant filed this action and up to one week prior to trial. The evidence in this respect involves appellee's relationships with two men — a married man, Mark Cress, and Jeffrey Bradbury. She first became acquainted with Bradbury sometime in the fall of 1981. Apparently, they saw each other for five to six months. He said that he had stayed at appellee's apartment when the children were there and engaged in sexual relations with her during that period of time. He also related occasions when appellee and the children spent the night with him in Little Rock, Arkansas. After Bradbury and appellee stopped seeing each other, she commenced her affair with Cress during the summer of 1982.

Cress admitted he had spent the night at appellee's home when the children were present, and that he had been in her home every day, including weekends. He conceded that he engaged in sexual activity with her when the children were at home, but he could not give an exact number of occasions. He stated that he did not remember observing appellee preparing the children for church, nor did he remember her taking them. Cress also admitted there were occasions when he and appellee left her home in the morning to take the three boys to their babysitter. He explained these were occasions when he had parked his truck somewhere else or when it was "broken down." Finally, appellee testified that she had engaged in sexual relationships eight or ten times with Mr. Cress at her home when the children were there. The most recent occurrence was a week prior to trial. She stated that "nothing ever happened in front of my children," but she also indicated, "I'm not saying that they . . . that they don't know. I'm just saying that I don't know that they know." Appellee testified that she did not have any plans "to stop that type activity." Appellee did indicate that, if she were so instructed by the court, she would refrain from sexual intercourse with males in the home when the children were present.

Appellant's testimony enlarged on that given by appellee, Bradbury and Cress. He enumerated countless times that he had observed Bradbury and Cress at appellee's home when the children were present. He stated that on one occasion appellee admitted that Bradbury had been staying in her home. Appellant also testified critically about specific matters concerning appellee's failure to properly clothe and care for the boys. He related that until he discussed the matter with appellee, she had failed to properly treat one son's case of scabies. Appellant concluded that he would provide more for the boys in the way of clothes and physical things and that they would be brought up in a more moral atmosphere. If given custody of the children, appellant intends to live in a farmhouse located about a half-mile from his parents' home. His extended family, including his mother and sister-in-law, have volunteered to assist him with the children. The sister-in-law, Mary Scherm, testified that appellant cooks dinner for the boys and that he provides them with a good environment.

At the conclusion of trial, the trial judge concluded that the evidence did not justify a change in custody, but he did order that appellee, while a single person, shall not permit any man romantically involved with her to stay overnight at her residence while the children are there. Obviously, in making such order, the chancellor recognized the precarious situation in which the children have been placed. Aside from any moral argument, appellee has had a relationship with three men since her divorce, and the children have experienced contact with at least two of them. Appellee's amenability to having men in the house on a regular, overnight basis provides the children with an impermanent, unstable situation. Appellee's actions during the two years preceding this action have been neither wholesome nor in the best interests of her children. Appellee clearly voiced no intention to change her promiscuous lifestyle unless ordered to do so by the court. Obviously, such an order places the court and the appellant in a position to continuously monitor appellee's conduct, which is a situation we feel is not demanded by the facts in this case. There is no evidence in the record indicating that since the parties' divorce decree appellant could not provide a good, stable environment for the children. To the contrary, the appellant, with the assistance of his extended family, is in a position to provide not only a good home, but also the physical and moral care these young children require. Of course, all of the evidence in this record is not unfavorable to the appellee. However, considering all circumstances in this case, we believe the greater weight of the evidence compels the conclusion that the children's best interests will be served by placing them in the custody of the appellant.

In reversing and remanding this cause, we direct that the trial court consider the parties' present circumstances in establishing visitation rights for the appellee.

Reversed and remanded.

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

MELVIN MAYFIELD, Chief Judge, dissenting. I would affirm the decision of the chancellor. It is interesting to note how cases reversing the chancellor's decision in child

custody cases so often leave out the following quotation so often used when the chancellor is affirmed.

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

Calhoun v. *Calhoun,* 3 Ark. App. 270, 625 S.W.2d 545 (1981).

I dissent.

JAMES R. COOPER, Judge, dissenting. The majority, in a move which recalls puritanical, seventeenth-century Boston, has branded the appellee an unfit mother. What was her sin? I cannot tell. Was it that she, while single, engaged in intercourse with three men in the twenty-eight months following her divorce? Was it that about twenty of these acts occurred in her home while the children were asleep in their separate rooms? Was it because she saw nothing morally wrong with having intercourse with persons with whom she was romantically involved, even though she was not married to them? I cannot tell, she will be unable to tell, and I doubt the chancellor can tell why his decision not to change custody is being reversed.

Today's opinion declines, I think, to follow the rule we ourselves stated in *Calhoun* v. *Calhoun,* 3 Ark. App. 270, 625 S.W.2d 545 (1981):

> . . . In cases involving child custody a heavier burden is cast upon the chancellor to utilize to the fullest extent all of his powers of perception in evaluating the witnesses, their testimony and the child's best interest. This court has no such opportunity. We know of no case in which the superior position, ability and opportunity of the chancellor to observe the parties carry as great weight as one involving minor children. *Wilson* v. *Wilson,* 228 Ark. 789, 310 S.W.2d 500 (1958); *Dennis* v. *Dennis,* 239 Ark. 384, 389 S.W.2d 631 (1965).

> It is well settled that the burden is upon the appellant to establish from the record that the chancellor's findings are incorrect, and such findings will not be reversed unless found to be clearly against a preponderance of the evidence. Since the question of preponderance of the evidence turns largely on the credibility of the witnesses, we defer to the superior position of the chancellor in that respect. *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W.2d 404 (1981); *Hackworth* v. *First National Bank of Crossett,* 265 Ark. 668, 580 S.W.2d 465 (1979); Rule 52(a), Arkansas Rules of Civil Procedure.

In *Sweat* v. *Sweat,* 9 Ark. App. 326, 659 S.W.2d 516 (1983), we stated:

> At the conclusion of the trial, the judge admonished the parties that they should not permit their child to be subjected to their use of marijuana in his presence. The chancellor has the right to retain control of this case, and he is in a superior position to ensure that Jason's welfare and best interests are protected. To this effect, *see Phifer* v. *Phifer,* 198 Ark. 567, 129 S.W.2d 939 (1939). Thus, if the parties fail to heed the chancellor's admonitions, he may choose to take more drastic steps to ensure Jason is provided a proper custodial environment.

As in *Sweat,* the chancellor prohibited the conduct the majority finds objectionable. I fail to see why we do not affirm the chancellor's decision in the case at bar as we did in *Sweat,* thus affirming our faith in the chancellor's ability to put up enforceable orders which protect the best interests of the children.

I think the majority has really decided to punish the appellee for her prior behavior, rather than to decide this case based on the best interests of the children. In so doing, the majority has engaged in some strong and unwarranted condemnation of the appellee. First, it is a gross misstatement to declare that she was amenable "to having men in the house on a regular, overnight basis." As to one of the men with whom the appellee had intercourse, they only dated three weeks. During that time, the children were out of

state for two weeks, and spent the third week with the appellant. Taking the evidence in the light most favorable to the appellant, there were no more than 15 to 20 such occasions over a 28 month period. This seems to me more "occasional" than "regular." Secondly, the majority's statement that such activity "provides the children with an impermanent, unstable situation" flies in the face of common sense, reason, and reality. The majority fails to explain how "contact" with two dates over a 28 month period could cause any problems. Impermanent it may be, as are most dating situations, but to label it as unstable is a large overstatement. Parenthetically, I wonder how realistic it is for anyone to believe that a single parent's dates would not have some contact with the children of a prior marriage in that person's custody.

Finally, I take issue with the majority's characterization of the appellee as "promiscuous." First, the chancellor did not find the appellee to be promiscuous, she has not, contrary to the majority's implication, exposed the children to wanton behavior, and last, there is not a scintilla of evidence in this record which indicates that the children have suffered, or will suffer, any harm whatsoever, particularly in light of the chancellor's order limiting her activities when the children are present, and in light of her assurance that she would obey such an order.

Since the majority opinion is so concerned with morality, despite a statement to the contrary, I feel constrained to point out that the appellant, whom the majority finds to be a better parental influence, testified that he had committed adultery prior to the divorce, and that one reason for the split between the families was that he had had intercourse with the appellee's sister.

I do not purport to know the implications of today's majority decision on the lives of single, custodial parents, but I am sure that the chancellors of this State are quite capable of restricting inappropriate behavior by custodial parents, *Sweat, supra,* and they are also better equipped than are we to decide what kind of behavior is inappropriate in a given case.

I would affirm the chancellor's decision, and therefore, I dissent.

Narvell COLEMAN *v.* STATE of Arkansas

CA CR 84-13 671 S.W.2d 221

Court of Appeals of Arkansas
En Banc
Opinion delivered July 5, 1984

V. Benton Rollins, for appellant.

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

TOM GLAZE, Judge. Appellant seeks reversal of her conviction of Battery in the First Degree and sentence of ten (10) years in the Arkansas Department of Correction. She

raises two issues, contending the trial court erred in failing to give: (1) an instruction based on AMCI 4002 (Culpable Mental State — General Provision), and (2) another instruction patterned after AMCI 4005.1 (Defense of Voluntary Intoxication). We hold the court ruled correctly in both instances and therefore affirm.

Appellant's battery charge resulted from her shooting Evelyn Marie Arnold, who shared an apartment with appellant's former boyfriend. She does not deny having shot Arnold — once in the leg and a second time in the side while Arnold was lying on the floor. Appellant argues only that she did not possess the required culpable mental state to be convicted of First Degree Battery. She further contends that (under the evidence presented) she was entitled to a voluntary intoxication defense instruction to negate the culpable mental state required under Ark. Stat. Ann. § 41-1601 (Repl. 1977). Appellant undisputedly had been drinking alcohol prior to the shooting, but the evidence was in conflict concerning whether she was intoxicated. Appellant's own testimony indicated she was "drinking hard" and could not "recall the names of anybody that [she] was drinking with that night." Although first testifying she did not recall shooting Arnold, appellant subsequently testified, "the only thing I recall about the shooting is when I realized I'd shot her." She said, "I just wanted to scare her, but I had shot her." Arnold's and her boyfriend's testimonies were that appellant had been drinking, but neither could say "if she was drunk." The police officer investigating the incident stated that appellant "appeared to have been drinking, but she didn't seem drunk."

Appellant first argues that in view of the battery charge and facts presented, she was entitled to the AMCI 4002 instruction requiring the State to prove she *purposely* engaged in a prohibited conduct. We cannot agree. The State's first degree battery case against appellant was based on two theories: (1) She acted with the *purpose* of causing serious physical injury to another person and she caused serious physical injury to another person by means of a deadly weapon, a violation of § 41-1601(1)(a); and (2) She caused serious physical injury to another person *under*

circumstances manifesting extreme indifference to the value of human life, a violation of § 41-1601(1)(c). Obviously, appellant's proffered instruction requiring purposeful conduct covers the State's theory under § 41-1601(1)(a) but not its theory under § 41-1601(1)(c). While § 41-1601(1)(c) does not contain or specify the culpable mental state required for its violation, Ark. Stat. Ann. § 41-204(2) (Repl. 1977), provides that if the statute defining an offense does not prescribe a culpable mental state, culpability is nonetheless required, and is established only if a person acts purposely, knowingly, or recklessly. *See Martin* v. *State,* 261 Ark. 80, 547 S.W.2d 81 (1977).[1] Thus, the Criminal Code recognizes three distinct culpable mental states under § 41-1601 to sustain a conviction for first degree battery. In the instant case, the evidence (especially considering the appellant's own testimony), tends to show the appellant acted knowingly or recklessly. In other words, the State was not limited under the facts in this case to an instruction requiring the jury to find the appellant acted purposely. After rejecting appellant's request for AMCI 4002 requiring only purposeful conduct, the trial court correctly gave, without objection, AMCI instructions 1601 and 1602, covering the State's alternative bases of liability for first degree battery as well as the lesser included offense of second degree battery.

Appellant contends the trial court erred in refusing to give AMCI 4005.1, an instruction allowing appellant to assert voluntary intoxication as an ordinary defense. Citing *Johns* v. *State,* 6 Ark. App. 74, 637 S.W.2d 623 (1982), the trial court ruled AMCI 4005.1 was incorrect because voluntary intoxication is an affirmative defense that must be proved by a preponderance of the evidence. We agree.

We concede that there may arguably have been some merit in appellant's contention if the Supreme Court had not held as it did in *Varnedare* v. *State,* 264 Ark. 596, 573 S.W.2d 57 (1978). The Court in *Varnedare* recognized that the Arkansas General Assembly, amending Ark. Stat. Ann. § 41-207 (Repl. 1977), removed self-induced intoxication as a statutory defense, but the Court found the common law

[1]*See* Ark. Stat. Ann. § 41-203 (Repl. 1977) (Definitions of the Culpable Mental States under the Code).

defense of voluntary intoxication was effectually reinstated. In reading the Court's decision in *Varnedare,* the parties apparently never argued, nor did the Court specifically consider, whether the Arkansas Criminal Code actually abrogated the common law principle which established voluntary intoxication as a defense when specific intent crimes are involved. *Cf. Starkey Construction, Inc.* v. *Elcon, Inc.,* 248 Ark. 958, 965, 457 S.W.2d 509, 513 (1970); *Barrentine* v. *State,* 194 Ark. 501, 108 S.W.2d 784 (1937); and *State* v. *One Ford Automobile,* 151 Ark. 29, 235 S.W. 378 (1921). In *State* v. *One Ford Automobile,* the Court stated the rule that a statute should not be held to be in derogation of the common law *unless* there is an irreconcilable repugnance, or unless the statute itself shows that such was the intention and object of the lawmakers. Except for the holding in *Varnedare,* we believe a persuasive case exists that the voluntary intoxication defense recognized at common law is repugnant to our Code provisions. As previously mentioned, the common law rule permitted voluntary intoxication as a defense when a defendant was charged with a specific intent crime, and although the courts never labeled the common law defense as an affirmative one, the courts instructed that the defendant had the burden to establish the defense by a preponderance of the evidence. *See Casat* v. *State,* 40 Ark. 511 (1883); *Wood* v. *State,* 34 Ark. 341 (1879); *Woodall* v. *State,* 150 Ark. 394, 234 S.W. 266 (1921); *see also Olles* v. *State,* 260 Ark. 571, 542 S.W.2d 755 (1976); *Johns* v. *State, supra; Gonce* v. *State,* 11 Ark. App. 278, 669 S.W.2d 490 (1984). Thus, while self-induced intoxication appears to be an affirmative defense at common law, it is not so recognized by the Code or by any statute. *See* § 41-110(4)(a)(b). Impliedly then, the statutory law and Code simply preclude common law voluntary intoxication as an affirmative defense. In fact, the Arkansas General Assembly expressly intended to eliminate the defense of self-induced intoxication altogether. *See* 1977 Ark. Acts 101, § 3. Given the clear intendment of the General Assembly's enactments, it seems incongruent to reinstate the common law on the subject. Of course, one still might argue that the common law voluntary intoxication defense could be applied as an ordinary defense, perhaps under the language employed in § 41-110(3)(c), but to do so would do damage to the rule, *viz.,*

the defendant could avail himself of the defense if he were charged with a specific intent crime, but he would no longer be required to prove the defense by a preponderance of the evidence.

Having stated our misgivings regarding the *Varnedare* decision, we are nevertheless bound to that holding, which reinstates the common law defense of voluntary intoxication. In our attempt to follow *Varnedare,* we have reocgnized that defense as an affirmative one and ruled that it is available when the offense charged requires a specific intent. *See Gonce* v. *State, supra; Johnson* v. *State,* 6 Ark. App. 342, 642 S.W.2d 324 (1982); and *Johns* v. *State, supra.* In the instant case, under one theory undertaken by the State, it offered evidence indicating the appellant acted purposefully under § 41-1601(1)(a) when committing first degree battery on the victim, Arnold. In so doing, the State undertook to prove appellant guilty of a specific intent crime. *Cf. Morgan* v. *State,* 273 Ark. 252, 618 S.W.2d 161 (1981); *see also* Guzman, *1976 Criminal Code — General Principles,* 30 Ark. L. Rev. 111, 112 (1976). Nonetheless, the appellant failed to offer a correct instruction setting forth the common law defense of voluntary intoxication; instead, she proffered AMCI 4005.1, an instruction defining voluntary intoxication as an ordinary defense, which was not in compliance with Arkansas precedents. We hereby hold that AMCI 4005.1 is an incorrect statement of the law insofar as it states that defendants need only raise a reasonable doubt in the jurors' minds that they had the capacity to form a purposeful mental state. Instead, the defendant must prove the defense by a preponderance of the evidence. The appellant may not complain of the refusal of the trial court to give an instruction which is only partly correct as it is his duty to submit a wholly correct instruction. *Jackson* v. *State,* 92 Ark. 71, 122 S.W. 101 (1909); and *Johnson* v. *State, supra.*

Affirmed.

MAYFIELD, C.J., and CORBIN, J., concur.

MELVIN MAYFIELD, Chief Judge, concurring. I think the majority reached the correct result in this case but they used

the wrong law to get there. Their opinion holds that voluntary intoxication is an affirmative defense that must be proved by a preponderance of the evidence rather than merely raising a reasonable doubt. That conclusion is made even though, as I read the opinion, the majority really thinks the conclusion is wrong, and even though Arkansas Model Criminal Instruction 4005.1 agrees that the conclusion is wrong.

Morgan v. *State,* 273 Ark. 252, 618 S.W.2d 161 (1981), alluded to the fact, 273 Ark. at 258, that the Committee on Criminal Jury Instructions had not yet drafted a model instruction applicable to the defense of voluntary intoxication in the wake of the amendment of Ark. Stat. Ann. § 41-207 (Repl. 1977) by Act 101 of 1977. The committee revised the AMCI book in 1982, *see* Introduction to 1982 Revisions, and AMCI 4005.1 is the result of that revision. The Arkansas Supreme Court's Per Curiam of January 29, 1979, provides that the AMCI instructions should be used unless they do not accurately state the law.

I would accept AMCI 4005.1, prepared by the committee appointed by the Arkansas Supreme Court, which includes one of the court's own members, as a correct instruction of the law — especially when the instruction is so obviously correct and has been for so long. See the dissent in *Casat* v. *State,* 40 Ark. 511 (1883), which says:

> After all, with due deference to the high courts and eminent jurists who have maintained the doctrine, is there not something absurd and illogical in saying that the jury must not convict any man of whose guilt they have a reasonable doubt, except the doubt be as to whether he was so unfortunate as to be incapable of guilt, but a doubt on that point must not save him.

This case should be affirmed, however, because the court instructed on the lesser included offense of battery in the second degree and the appellant could have been guilty of that crime as a result of reckless conduct. AMCI 4005.1, requested by appellant, would have applied to the second degree battery charge also. Thus, it was not a completely

correct instruction and, as the majority holds, there was no reversible error in refusing to give it.

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

ARKANSAS STATE HIGHWAY COMMISSION
v. Marvin V. PEARROW, et al.

CA 83-376 674 S.W.2d 1

Court of Appeals of Arkansas
Division II
Opinion delivered August 29, 1984

Thomas B. Keys and *Philip N. Gowan,* for appellant.

Boyett, Morgan & Millar, P.A. and *Charles O. Pearrow,* for appellee.

GEORGE K. CRACRAFT, Chief Judge. The Arkansas State Highway Commission appeals from a jury verdict awarding damages to the Pearrows for the taking of a portion of their property for highway purposes. The Commission contends that the trial court erred in not striking the testimony of appellees' expert witness because she had considered impermissible elements in her valuation of the property after the taking. The appellees cross-appealed contending that the trial court erred in not permitting their expert to testify with regard to a comparable sale made after the taking.

We find merit in the appellant's contention and reverse and remand the case for a new trial. The appellees' land was an irregularly shaped 16 acre tract lying just northeast of Bald Knob with easy access to the town along Highway 67. In 1974 the State Highway Department condemned approximately three acres of appellees' property leaving a 10 acre tract still fronting on Highway 67 and severing without access a tract of 1½ acres. After completion of the Interstate, Highway 67 became a secondary road and the route via Highway 67 to appellees' property was changed so as to contain a "dangerous double-S curve."

The appellees' expert witness testified that based upon comparable sales for a period of years preceding the taking of the property with proper adjustment for natural appreciation in land values it was her opinion that the fair market value of the entire 16 acres before the taking was $6,000 per acre for a total of $96,000. She testified that in her opinion the value of the property after the taking was $10,966. It is her testimony as to the manner in which she arrived at the value of the 10 acre parcel after the taking which gives rise to the issue presented.

The expert testified that the highest and best use of the property before the taking was for commercial or light industrial purposes. She stated that some of the diminution in value was attributable to a reduction of the acreage of the

tract to less than that usually desired for commercial or industrial purposes. Some diminution was attributable to a reduction in width and to the fact that the new highway had been raised 20 feet which caused drainage problems and a loss of visibility from town. She also took into consideration the fact that Highway 67 on which the property fronted had become a secondary road cut off from town. She considered some damage to the access because it now took longer to get to the tract from Bald Knob and now involved a dangerous curve.

She also stated that she had given consideration to the fact that the new highway had diverted the traffic and made the former highway a service road. On cross-examination she was asked the following questions:

> Q. Now, you have testified that this property now is cut off from Bald Knob. That was one of the elements you considered in arriving at your damage of five thousand dollars ($5,000) an acre, is that right?
>
> A. Yes, sir.
>
> . . . .
>
> A. It's been severed from the city. There is a barrier twenty (20) feet tall.
>
> . . . .
>
> Q. Are you saying that you can't go directly to Bald Knob, like you could before?
>
> A. That's correct.
>
> Q. Now, it's a little further to go, is that it?
>
> A. It's on a secondary road, and you are travelling in a curve.
>
> Q. I wanted to ask you about this secondary road business. Is that one of the elements that you took into

consideration, in arriving at your five thousand dollar ($5,000) an acre damages?

A. *It decreased the traffic pattern on that for commercial, yes, sir.*

Q. You damaged that, *and that is part of your five thousand dollar ($5,000) damages?*

A. *Yes, sir.*

. . . .

Q. That's good. That's the one I'm talking about of that five thousand dollars ($5,000) an acre damages, that you have attributed to the remaining lands, can you tell me how much of that five thousand dollars ($5,000) an acre you attributed to the fact that you have to go a little further to get to Bald Knob? Can you break it out?

A. Not into a dollar amount. I didn't do that, sir.

Q. What about the fact that now the property fronts a secondary highway, *with relocation of traffic? How much of the five thousand dollars ($5,000) an acre do you attribute to that?*

A. I took that into consideration. But I did not break down a dollar amount and place that on there.

Q. *You did consider those elements in arriving at your damages?*

A. *Yes sir.*

MR. GOWEN: Judge, we have a motion with reference to her testimony.

The parties agree as to the rule of law to be applied but they disagree concerning its application. In *Ark. State Hwy. Comm.* v. *Bingham,* 231 Ark. 934, 333 S.W.2d 728 (1960) the

court declared that a property owner has no vested right in the continuation of the flow of traffic past his property. Any diminution of value occasioned by a public improvement which diverts the main flow of traffic from in front of one's premises is not compensable. The change in traffic flow is the result of a lawful act on the part of the authorities and it not the taking or damaging of property. It was also pointed out in *Bingham* that the right to continued flow of traffic is not to be confused with the property rights of ingress and egress for which compensation may be awarded. *Ark. State Hwy. Comm.* v. *Bowers,* 248 Ark. 388, 451 S.W.2d 728 (1970).

The appellant contends that appellees' expert's testimony should have been stricken because in arriving at total just compensation she had considered an impermissible element—diminution in value due to diversion of traffic. The appellees contend that the court did not err in denying the motion to strike because the overall testimony of the witness indicates that she was referring to a reduction in value for commercial use due to change in the character of the land and because of damage to its access. From our examination of testimony we think it is clear that the witness attributed diminution in value to access difficulty, severance from the city by the raised level of the highway, and the reduction in size and width of the tract. She also considered and attributed some of the loss to the relocation of traffic. We cannot conclude that the answers on which the appellant's argument is based were taken out of context.

The issue raised by the appellees on cross-appeal should be addressed because of the likelihood that it will arise on retrial. An objection was sustained to the testimony of appellees' expert with regard to a comparable sale of property within 500 feet of an interchange where it was shown that the sale was consummated seven months after the condemnation proceedings on this property were undertaken. Based upon the proffer of that testimony we cannot conclude that it was objectionable. It is not the fact that a transaction occurs after the condemnation which makes some sales inadmissible. The question to determine is whether knowledge of location of the public improvement caused an inflated price to be given for the property. *Ark.*

State Hwy. Comm. v. *Griffin,* 241 Ark. 1033, 411 S.W.2d 495 (1967); *Ark. State Hwy. Comm.* v. *Littlefield,* 247 Ark. 686, 447 S.W.2d 146 (1969). In both of those cases the court rejected testimony of purported comparable sales because they found that the evidence clearly established that the price of the property "sky-rocketed" when the proposed location of the Interstate became known. Those cases hold that the highway department should not be required to pay an enhanced value for property which was brought about solely by its own proposed improvement. It is only the enhancement in value which is brought about in anticipation or by reason of the proposed improvement which is to be excluded. If it can be shown that the enhancement in value of a particular piece of property was brought about by economic factors other than the proposed improvement, the fact that it was consummated close in point of time to the erection of the improvement is not conclusive.

The proffered testimony pertinent to this issue was based almost entirely on hearsay statements repeated by the witness. The objection made and sustained was not on grounds of hearsay. The witness testified that the property had been listed with her in 1974 at a price of $40,000 which was subsequently reduced to $32,000 and sold in April 1975. She testified that the purchaser had told her that the location of the interstate had no impact on the sale because he had been negotiating for the purchase of the property at that sale price for several years prior to the actual issuance of the deed. It was also shown that the price paid by this buyer did not exceed the figure which the witness had previously testified was the fair market value of other comparables.

If on retrial it is shown by competent testimony that the price paid by that buyer was not enhanced by knowledge of the location of the interstate, testimony with regard to that sale should be admitted.

Reversed and remanded.

CORBIN and GLAZE, JJ., agree.

Allen R. LEE *v.* Glenna R. LEE

CA 83-388 674 S.W.2d 505

Court of Appeals of Arkansas
Division II
Opinion delivered August 29, 1984

Young, Patton & Folsom, by: *Nicholas H. Patton,* for appellant.

Lincoln & Orsini, P.A., by: *Charles J. Lincoln* for appellee.

GEORGE K. CRACRAFT, Chief Judge. Allen R. Lee and Glenna R. Lee were divorced by a decree which made provision for custody, support and alimony and disposed of their personal property. By stipulation of the parties the court postponed the division of the balance of their property until a later date as authorized in *Forrest* v. *Forrest,* 279 Ark. 115, 649 S.W.2d 173 (1983). Several years elapsed before the matter of property settlement was determined by the court.

The parties had been separated for over a year before the divorce decree was entered. While separated, but before the decree was entered, Allen purchased a home in which he resided until after the divorce had been granted. No marital funds were used in the purchase of that property which he bought entirely with borrowed funds. Nearly a year after the divorce Allen Lee sold the home for a net profit of $9,000.

In the order now appealed from the chancellor entered judgment for the wife for one-half of the profit derived from the sale of the residence and allowed her attorney's fee and costs. The appellant brings this appeal contending that the trial court erred in granting the judgment because the property had been acquired by the husband while separated from the wife and should therefore be treated as his separate property. We do not agree.

Both parties argue that the law applicable to the issue is Ark. Stat. Ann. § 34-1214(B)(3) (Supp. 1979) which provides in pertinent part as follows:

> For the purpose of this statute "marital property" means all property acquired by either spouse subsequent to the marriage except . . . (3) property acquired by a spouse after a decree of legal separation.

Appellant argues that although the parties had not obtained a decree of separate maintenance at the time the property was acquired they had been separated for a time and "a narrow application of the statute to the facts would be inequitable." The clear wording of the section exempts

from marital property status only that property acquired by a spouse after a decree of legal separation. Had the legislature intended to also exclude property acquired after separation by mutual consent it might easily have said so. The property in question was marital property.

Section 34-1214(B) merely defines the term "marital property." Its disposition is governed by sub-section (A)(1) which provides that all such property shall be divided equally unless the court finds such a division to be inequitable after giving consideration to nine specified factors. Had the chancellor found an equal division of that property inequitable he could have divided it differently.

From our review of the record we find nothing which would compel the chancellor to make a division other than an equal one. The appellant is a cardiologist and since the divorce he has prospered. According to the tax returns contained in the record he had gross income of over $200,000 in 1982 and had substantial investments in other properties and tax shelters. The appellee, on the other hand, had take-home pay of $465 per month. The record is not clear as to the income of the appellant at the time of the divorce but the record does disclose that he was then practicing medicine and that his prospects for future acquisition far exceeded those of the appellee. We cannot conclude that the chancellor abused his discretion in making an equal division of marital property.

Appellant next contends that the court erred in awarding judgment against the appellant for costs and for the attorney's fees. It is well established that the allowance of fees is within the sound discretion of the trial court and will not be disturbed on appeal in the absence of a showing of clear abuse. *Ford* v. *Ford,* 270 Ark. 349, 605 S.W.2d 756 (1980). There are many factors the court can consider in determining whether to grant attorney's fees and in what amount. As stated previously the appellant's income form his practice of medicine alone was in six figures. The wife's net income other than alimony and child support was less than $6,000 a year. There was evidence that in order to maintain herself and her children in their accustomed

station in life she was required to expend all of the alimony, support and her own income in maintaining the family. We cannot conclude that there was any abuse of discretion by the chancellor in making this award.

Affirmed.

GLAZE AND CORBIN, JJ., agree.

ARKANSAS REAL ESTATE COMMISSION
v. Ralph HALE and Ronald OWENS

CA 83-374 674 S.W.2d 507

Court of Appeals of Arkansas
Division I
Opinion delivered August 29, 1984

Steve Clark, Atty. Gen., by: *Thomas S. Gay,* Asst. Atty. Gen., for appellant.

Wright, Lindsey & Jennings, for appellee.

JAMES R. COOPER, Judge. This appeal results from the trial court's reversal of the appellant's order suspending the broker licenses of the appellees. The appellant Arkansas Real Estate Commission, after a hearing pursuant to the Administrative Procedures Act, Ark. Stat. Ann. § 5-701 et seq. (Repl. 1976), found that appellee Owens had engaged in conduct which constituted improper or dishonest dealings with purchasers of land which the appellees purported to own. The appellee Hale's conduct in this transaction was found to be improper. The appellant suspended appellee Owens' license for a one-year period and suspended appellee Hale's license for a 45-day period. The circuit court reversed the Commission's decision, finding that it was not supported by substantial evidence. We disagree with the trial court, and therefore we reverse the circuit court and reinstate the decision of the appellant.

An advertisement appeared in the classified section of a Memphis newspaper in May, 1979 advertising 41 acres of land in the St. Francis River Bottoms for sale. Upon seeing this, James Edgar, a Mississippi resident, contacted the appellees whose company name, Hale Realty Company, appeared in the ad. The ad stated that Arkansas Game & Fish had a patent to manage fish and game on the land and that the owner would provide a special warranty deed. Mr. Edgar and the appellees went to view the land which was flooded at the time, and Mr. Edgar, upon inquiry, was advised

that the patent referred to in the ad gave the Game & Fish Commission only the right to manage wildlife, and that the purchaser would have all other rights incident to fee ownership, except the mineral rights. Subsequently, Mr. Edgar and his wife executed an offer and acceptance which acknowledged the existence of the Game & Fish patent. After closing, the Edgars were informed that the Game and Fish Commission was claiming full ownership of the lands in question and also discovered that they could not secure title insurance on the property. The Edgars filed a complaint with the Real Estate Commission over this transaction, and the hearing in which the appellant suspended the appellees' licenses followed.

For reversal, the appellant argues first that the court erred in finding that the appellees made full disclosure of the patent and therefore were not required to disclose to the purchasers prior to closing the fact the Arkansas Game & Fish Commission claimed to own the property. We agree. At the hearing before the appellant Commission, it was brought out that the appellees had attempted to sell the land in question, Lot 5 of the St. Francis River Bottoms, to the Game & Fish Commission at the same time they sold other lands in this area to the Game and Fish Commission. The Game and Fish Commission refused to purchase this particular lot for the reason that it believed the patent it had received from the federal government gave it fee ownership of the land, subject only to the reverter in the patent which would be triggered if Game and Fish failed to manage the lands as set out in the patent. Thus, the appellees were aware of the Game and Fish Commission's claim of full ownership, failed to disclose this to the Edgars, and represented to them that the patent meant only that the Game and Fish Commission would manage the wildlife on the property. Upon inquiry by Mr. Edgar, the appellees further advised him that he could remove timber off the land, and could exercise other rights which would obviously conflict with the claim of the Game and Fish Commission. The Real Estate Commission's finding that the appellees failed to make full disclosure of the patent is supported by substantial evidence.

The appellant's second point for reversal is that the administrative decision that the appellees failed to disclose the Game and Fish Commission's claim of ownership is supported by substantial evidence. At the risk of being repetitive we feel that it is clear from the findings recited above, and the evidence presented at the hearing before the appellant, that the appellees failed to disclose to the Edgars that Game and Fish were claiming more than the right to simply have an easement for wildlife management purposes. The representations made by the appellees that the Edgars would have all rights incident to full ownership were obviously made with knowledge that the Game and Fish Commission at the very least disagreed with this position, and had a U.S. Government patent which specifically referred to Lot 5 to back up its claim. With this in mind, we feel the appellant's finding that the appellees should, at the very minimum, have at least informed the Edgars of this claim, was supported by the evidence presented at the hearing.

The appellees contend that because the appellees were not employed by the Edgars, they were under no duty to deal fairly with all parties to the transaction. However, in *Black* v. *Arkansas Real Estate Commission,* 275 Ark. 55, 626 S.W.2d 954 (1982), the Arkansas Supreme Court held that where a broker sells his own land but conducts the transaction in his real estate office where his license is prominently displayed, the Commission has the authority to discipline him although he is performing acts which do not require a license. Here, the appellees took out the advertisement under the name of their real estate company and executed the offer and acceptance in their office, where, by law, they must display their licenses. It is clear from the Edgars' testimony, they were relying upon the appellees knowledge as real estate brokers in purchasing the land without consulting an attorney or another person knowledgeable in such matters.

In reviewing the actions of an administrative board or agency, the circuit court's review of the evidence is limited to a determination of whether there was substantial evidence to support the action taken. On appeal to this court, our review

is similarly limited to a determination of whether the action of the board or agency is supported by substantial evidence. *Arkansas Real Estate Commission* v. *Harrison,* 266 Ark. 339, 585 S.W.2d 34 (1979). Substantial evidence has been defined as valid, legal and persuasive evidence that a reasonable mind might accept as adequate to support a conclusion, and force the mind to pass beyond conjecture, *Pickens-Bond Const. Co.* v. *Case,* 266 Ark. 323, 584 S.W.2d 21 (1979). Considering the evidence as a whole, we cannot say that the decision of the appellant was not supported by substantial evidence. On the contrary, we find that there was abundant evidence from which a reasonable mind could conclude that the actions of the appellees in failing to fully disclose the claim of the Arkansas Game and Fish Commission to the Edgars was improper, and in the case of appellee Owens, dishonest. Therefore, the decision of the circuit court is reversed and the case is remanded to the circuit court with directions to reinstate the order of the Arkansas Real Estate Commission.

Reversed and remanded.

MAYFIELD and CLONINGER, JJ., agree.

Madelyn ASHMAN *v.* R. A. PICKENS

CA 83-392 674 S.W.2d 4

Court of Appeals of Arkansas
Division I
Opinion delivered August 19, 1984
[Rehearing denied September 26, 1984.]

Julius D. Kearney, for appellant.

Williamson, Ball & Bird, by: *William K. Ball,* for appellee.

LAWSON CLONINGER, Judge. This is an appeal from a decree of the chancellor which granted the petition of appellee, R. A. Pickens, acting individually and as trustee of the B. C. Pickens trust, who sought to remove the appellant, Madelyn Ashman, as a co-trustee of the above-named trust. The trust was created by the last will and testament of the appellee's father and has been in existence since 1932. Appellee has been a trustee since 1936, and appellant, who is appellee's daughter, has been a trustee since 1961. The trust is involved in farming operations in Desha County where the appellee resides. The trust owns a 43% interest in R. A. Pickens and Son Company which runs a farm shop, a cotton gin and a commissary. It also handles seed, fertilizer and chemicals and the harvesting and marketing of crops. Gross sales of the company have averaged over $3.3 million for each of the last four years. The trust also owns a one-fourth interest in the partnership of R. A. Pickens & Son which owns approximately 9,713 acres of farm land.

The provision in the will providing for the appointment of trustees states in pertinent part:

> When my son R. A. Pickens shall attain the age of 21 years, it is my wish and I hereby provide that he shall then become the fourth member of said Trustees of the Trust created by this Will, having equal voice and authority with each of the remaining three Trustees; and said Trustees shall continue to be four in number until a vacancy shall occur by death, resignation, or incapacity of one of the Trustees, after which there shall be three Trustees, INCLUDING my son R. A. Pickens so long as he may live; and after his death the third Trustee selected and appointed by the surviving Trustees shall be a son of said R. A. Pickens if he shall have a son surviving him who has attained his majority; and so on in the same manner during the existence of this Trust, the sound, adult male heirs of my body who have reached their majority, so long as they are available, shall be selected to fill vacancies occurring among said Trustees, so that at least one of said Trustees shall be of my own blood.

Appellant argues three points for reversal which can be reduced to one major point; namely whether the trial court erred in granting appellee's petition to remove appellant as trustee. Appellant initially argues that the chancellor erred in considering a point not covered in the pleadings. Specifically, appellant argues that it was error for the trial judge to find that the evidence tended to establish the existence of hostility and an impasse between appellant and appellee. Rule 15(b) of the Rules of Civil Procedure states in pertinent part:

> When issues not raised by the pleadings are tried by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

Arkansas appellate courts have recognized the power of the chancellor to treat the pleadings as amended to conform

with the proof. *Sorrells* v. *Bailey Cattle Co.,* 268 Ark. 800, 595 S.W.2d 950 (Ark. App. 1980).

The only issue to be determined is whether the chancellor abused his discretion in removing appellant as trustee of the trust. The removal of a trustee lies in the sound discretion of the trial court and its decision will not be overturned unless there has been an abuse of discretion. *Festinger* v. *Kantor,* 272 Ark. 411, 616 S.W.2d 455 (1981).

In the instant case, the chancellor specifically found that appellant was a long-time resident of New York City and the probability was that she would remain there. The court further found that the business of the trust was large-scale farming and that appellant was not qualified to make farming decisions. In fact, appellant had not participated in any of the trust activities other than occasionally signing papers. Lastly, the chancellor found that there was "a clear and unmistakeable enmity" existing between the parties resulting in an impasse as to the selection of a third trustee required by the trust terms. The evidence at trial indicated that when appellee's son, Andrew, resigned as trustee, appellant refused to cooperate with appellee in the selection of the third trustee. Additional evidence was consistent with the chancellor's findings. Appellant testified that she did not have any experience in the farming industry other than occasional gardening. Further, she stated that she had not participated in the decisions of the farming operations.

In *Blumenstiel* v. *Morris, Executor,* 207 Ark. 244, 180 S.W.2d 107 (1944), the Arkansas Supreme Court stated that removal of the trustee on the ground of non-residence or absence from the jurisdiction is proper only when the absence is of a prolonged character precluding proper attention to the trust or where, in addition to his absence, there is also a neglect of duty. Also in *Blumenstiel, supra,* the court adopted the rule that mutual hostility between the beneficiaries and the trustee is a sufficient ground for the court to remove the trustee if (1) the provisions of the instrument creating the trust require mutual interchange of ideas, and (2) if the hostility tends to defeat the purpose of the trust.

Applying the above rules to the facts in this case, there was evidence in the record to support a finding by the chancellor that appellant's absence from the jurisdiction of the trust precluded proper attention to the trust. Appellant herself testified that she did not participate in the major decisions of the trust but only signed papers and documents when sent to her. Appellee indicated an interest in appointing a trustee who was knowledgeable and experienced in farming operations because he was in poor health and would not be able to make all the decisions much longer.

Further, there was evidence to support a finding that hostility between appellant and appellee tended to defeat one of the purposes of the trust; namely, the appointment of an additional trustee. Evidence indicated that appellant refused to cooperate with appellee in the appointment of another trustee. The trust required a mutual interchange of ideas in the appointment of the other trustee and thus met the requirements for removal stated in *Blumenstiel* v. *Morris*.

We hold that the chancellor's decision in removing appellant as trustee was not an abuse of discretion.

Affirmed.

MAYFIELD and COOPER, JJ., agree.

Betty SAYRE *v.* STATE of Arkansas
SECOND INJURY FUND

CA 84-109 674 S.W.2d 941

Court of Appeals of Arkansas
Division I
Opinion delivered August 29, 1984
[Rehearing denied September 26, 1984.]

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

Steve Clark, Atty. Gen., by: *David S. Mitchell,* Asst. Atty. Gen., for appellee.

MELVIN MAYFIELD, Judge. Appellant has appealed a Workers' Compensation Commission decision holding that a joint petition settlement, approved by the Commission, eliminates the Commission's jurisdiction over any additional claim for the same injury or any results arising from that injury.

Appellant sustained a broken hip in a compensable accident that occurred on November 30, 1981. In 1972, while working for a different employer, she lost several fingers in another work-related accident and was given a 100% impairment rating to her hand. After she filed a claim for her hip injury against the employer, the carrier, and the Second Injury Fund, a joint petition agreement with the employer and carrier was filed and granted by an administrative law judge. A hearing was then held to determine whether

claimant was entitled to additional benefits from the Second Injury Fund. The law judge held that he had jurisdiction to hear the claim but that there was no Second Injury Fund liability because the second injury was independently disabling. On appeal the Commission reversed the law judge and held that it had no further jurisdiction over the claim because of the allowance of the joint petition.

Even though claimant's joint petition specifically stated that she did not waive any rights against the Second Injury Fund and even though such a provision was also included in the administrative law judge's opinion approving the joint petition, the Commission held that Ark. Stat. Ann. § 81-1319(*l*) (Repl. 1976) effectively eliminated any further jurisdiction of the Commission. That statute provides:

> (1) Joint petition. Upon petition filed by the employer or carrier and the injured employee, requesting that a final settlement be had between the parties, the Commission shall hear the petition and take such testimony and make such investigations as may be necessary to determine whether a final settlement should be had. If the Commission decides it is for the best interests of the claimant that a final award be made, it may order such an award that shall be final as to the rights of all parties to said petition, *and thereafter the Commission shall not have jurisdiction over any claim for the same injury or any results arising from same.* [Emphasis added.]

The unanimous opinion of the Commission states: "We strongly feel that Ark. Stat. Ann. § 81-1319(*l*) is controlling and that the clear and unambiguous language of said statute prohibits the claimant in this case from now proceeding against the Second Injury Fund." Appellant argues that the statutory language means that the joint petition is final only as to the parties who participated in it, and that the Commission's interpretation violates the purpose of the law. We do not agree. The statute is clear and unambiguous in stating that a joint petition eliminates the Commission's jurisdiction over the claim. Any other

interpretation would have to ignore the plain meaning of the words used by the legislature. We think the Commission's interpretation was correct.

Affirmed.

COOPER and CLONINGER, JJ., agree.

Mary Sue SNOW *v.*
TRAVELERS INSURANCE COMPANY

CA 83-372 674 S.W.2d 943

Court of Appeals of Arkansas
Division II
Opinion delivered August 29, 1984

Kirby Riffel, for appellant.

Robert H. Crank, for appellee.

TOM GLAZE, Judge. Appellant urges one major issue in this appeal: whether her employees' group health insurance policy covers an eye injury sustained by her twenty-two-year-old son, Michael. The trial court decided against appellant on this issue, and, from our review, we agree.

The essential facts are undisputed. As a result of appellant's employment with TRW, Inc., appellant was eligible for group health insurance under which she could elect either individual employee coverage only or, for an additional premium, add her dependents to the policy. In 1974, appellant applied for individual coverage, but in 1979, she requested dependent coverage, completing an enrollment card, on which she named her husband. Appellee subsequently approved the husband's coverage. Appellant contends that she failed to designate her son, Michael, as a dependent because she was unaware he was eligible. Appellee concedes Michael may have been eligible as a dependent under the terms of the group policy, but denies coverage for his injury because appellant failed to enroll or name him as a dependent. Undisputedly, appellant possessed a 1974 and 1977 Certificate of Insurance which defined dependents in the same manner as did the 1979 policy when she applied for the additional dependent coverage. Appellant admits she possessed an insurance booklet which also defines eligible dependents.[1] The booklet further provides, "Each of your eligible Dependents will be covered on the date you become insured or the date he becomes a Dependent, whichever is later, *provided* you have enrolled for benefits for your Dependents."

Appellant, as the insured or beneficiary of an insurance

[1]Appellant's stipulated testimony was that she discovered this booklet among her papers and that it was evidently mailed to her at some unknown date.

policy, has the burden of proving coverage. *Peoples Protective Life Insurance Co.* v. *Smith,* 257 Ark. 76, 514 S.W.2d 400 (1974). As previously mentioned, appellant possessed two certificates of insurance, and a booklet which defined "eligible dependents" (as did the insurance policy). She was aware that she must enroll and complete a certificate of insurability for dependents added to her policy, and she did so for her husband. Appellant simply failed to do it for her son.

Appellant argues that appellee had an affirmative duty to explain policy benefits to her, especially those pertaining to eligible dependents. In support of this argument, she cites the Employment Retirement Income Security Act of 1974 — an Act which is simply not applicable here. We are unaware of any legal authority that supports appellant's argument, and she cites none.

Our Arkansas Supreme Court, quoting with approval from 18 *Couch on Insurance* §§ 71:30, 71:40 (2d ed. 1967) stated,

> "[C]onditions going to the coverage or scope of the policy, as distinguished from those furnishing a ground for forfeiture, may not be waived by implication from conduct or action, without an express agreement to that effect supported by a new consideration."

See Peoples Protective Life Insurance v. *Smith, supra,* at 85 and 86. In *Smith,* the Court held the doctrine of waiver or estoppel cannot be given the effect of enlarging or extending the coverage as defined in the contract of insurance. Accordingly, the Court ruled that Smith was ineligible under a group insurance policy even though the insurance company had paid his medical benefits under the policy.

Here, appellee did nothing which would cause appellant's policy benefits to be extended to her son nor was appellee under any duty to inform appellant that she could or should designate him as a beneficiary. Appellant failed to

enroll Michael as a dependent, and the Court is powerless under the facts of this case to reform the group policy to cover him. Because the appellant did not meet her burden of proving coverage, we affirm the trial court's decision.

Affirmed.

CRACRAFT, C.J., and CORBIN, J., agree.

Bob ROBERTSON *v.* STATE OF ARKANSAS

CA CR 84-22 674 S.W.2d 947

Court of Appeals of Arkansas
Division II
Opinion delivered September 5, 1984

Felver A. Rowell, Jr., for appellant.

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

DONALD L. CORBIN, Judge. Appellant, Bob Robertson, appeals a Perry County jury verdict of driving a motor vehicle while intoxicated. The jury recommended that appellant receive a sentence of 24 hours imprisonment in the

county jail; pay a fine of $500.00 and suspend appellant's driving privileges for a period of six months. We affirm.

The sole contention for reversal asserted by appellant on appeal is that the trial court erred in admitting the breathalyzer test unaccompanied by a written "waiver of rights" form. In this regard, appellant relies upon Ark. Stat. Ann. § 75-1045(c)(3) (Supp. 1983). He asserts that a written waiver of rights form is a mandatory prerequisite of the foundation needed to be laid prior to introduction of any test results.

Ark. Stat. Ann. § 75-1045 provides in part:

(a) Any person who operates a motor vehicle in this State shall be deemed to have given consent, subject to the provisions of subsection (c) of this Section, to a chemical test or tests of his or her blood, breath or urine for the purpose of determining the alcohol or controlled substance content of his or her blood if:

. . .

(b) Any person who is dead, unconscious or who is otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent provided by paragraph (a) of this section and the tests may be administered subject to the provisions of subsection (c) of this section.

. . .

(c) (3) 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 test administered at the direction of a law enforcement 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.

Officers Johnston and Shackelford testified that appellant signed a waiver of rights form. Although the State was unable to produce or introduce such a consent form and waiver of rights, both officers testified that appellant was advised of his rights and signed the consent form.

It is clear that the above statute requires that a person be advised of his or her right to a second test, but it does not dictate that a written waiver be obtained, which appellant suggests is essential to laying a proper foundation. The record does not reflect that appellant undertook to avail himself of a second test. Deputy Sheriff Shackelford specifically noted that appellant was advised that he could, at his own expense, have a blood or urine test and assistance in obtaining such a test. Officer Shackelford noted that he explained it twice and that each time appellant stated that he knew what he was doing and knew his rights. The officers also testified that there was no doubt in their minds that appellant "knew what he was doing." In addition, the officers testified that a rights form was signed by appellant and, during cross-examination, Trooper Johnston stated that the signed form was presented in municipal court. The record reflects that Trooper Johnston had testified earlier, without objection, as to the results of the breathalyzer test.

Clearly there is no error properly demonstrated in the facts of the instant case. Accordingly, we hold that the trial court properly admitted the results of appellant's breathalyzer test.

Affirmed.

CLONINGER and MAYFIELD, JJ., agree.

CRAIN BURTON FORD CO. *v.* Jimmy Dale ROGERS

CA 83-353 674 S.W.2d 944

Court of Appeals of Arkansas
Division I
Opinion delivered September 5, 1984

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

The McMath Law Firm, by: *Art Anderson,* for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Workers' Compensation Commission holding that the appellee's impotence was a result of a compensable back injury and that the surgical procedure for a prosthetic penile implantation was necessary medical treatment.

Appellee injured his back while working for appellant and underwent surgery in 1973. He subsequently developed bladder and bowel incontinence and impotence. It was determined that he was suffering from a demyelinating disease, thought to be either multiple sclerosis, primary lateral sclerosis, or amyotrophic lateral sclerosis. In a previous hearing the Commission had found that the disease had been either precipitated or aggravated by the back injury and that it was compensable. That decision was affirmed by the Arkansas Supreme Court in an unpublished opinion dated October 18, 1976.

As a result of that decision, appellee received treatment for his bladder and bowel condition. When these were stabilized to the greatest extent possible, treatment was begun for the impotence. After a series of tests, it was decided that the treatment of choice was a penile implant.

In this appeal the appellant's first argument is that there is no medical evidence in the record establishing a causal relationship between appellee's injury and his impotence. Appellee's doctors testified that the state of the art in testing is not yet sophisticated enough to determine with certainty that claimant's impotence is related to his back injury. However, appellee testified that he was 32 years old at the time of the accident, married, and had no problems of this nature prior to his injury. He said the impotence developed immediately after the injury and concurrently with numbness in his legs, the incontinence, and partial paralysis. While one doctor reported that he could not be "certain" that appellee's impotence was related to his injury, another doctor stated it was his opinion that the condition was secondary to appellee's preexisting disease and cited *McDaniel* v. *Hilyard Drilling Co.*, 233 Ark. 142, 343 S. W. 2d 416 (1961), for the proposition that disability

from such an aggravation is compensable. Moreover, it is not essential that the causal relationship between the accident and the disability be established by medical evidence, *Harris Cattle Co.* v. *Parker,* 256 Ark. 166, 506 S.W.2d 118 (1974), or that the evidence be medically certain, *Colonial Nursing Home* v. *Harvey,* 9 Ark. App. 197, 657 S.W.2d 211 (1983). We think there is substantial evidence to support the finding that there was a causal relationship between appellee's injury and impotence.

Appellant argues secondly that the medical procedure requested is not reasonable or necessary. Appellant says that since appellee has one child and there is no evidence that he desires any more, since he has been impotent for ten years and there is no evidence of any marital discord related to his condition, and since there is no evidence that appellee has suffered any psychological damage because of his impotency, the procedure is not medically necessary. Ark. Stat. Ann. § 81-1311 (Repl. 1960), in effect at the time of appellee's injury, provided in pertinent part:

> The employer shall promptly provide for an injured employee such medical, surgical, hospital and nursing service, and medicine, crutches, artificial limbs and other apparatus *as may be necessary* during the period of six [6] months after the injury, or for such time in excess thereof as the Commission, in its discretion, may require. [Emphasis added.]

There seem to be three schools of thought in regard to the issue before us. One line of cases allows medical treatment that will help restore the claimant's earning power. An example of such a case is *Los Angeles County* v. *Industrial Accident Commission of California,* 261 P. 295 (Ca. 1927), in which cosmetic surgery to repair disfigurement to claimant's eye and cheek was ordered to improve his appearance and increase his earning power. *See also Ranson* v. *Orleans Parish School Board,* 365 So.2d 937 (La. Ct. App. 1979) (wig allowed schoolteacher). *Cf. Eckert* v. *Yellow Freight Systems, Inc.,* 351 N.E.2d 924 (Ind. Ct. App. 1976) (cosmetic surgery refused for facial scars). Some workers' compensation statutes limit compensation for disfigure-

ment to the face and head. *See* Ark. Stat. Ann. § 81-1313 (g) (Repl. 1976). Under such a statute, *Whitaker* v. *Church's Fried Chicken, Inc.,* 373 So.2d 1371 (La. Ct. App. 1979), held it was error to award damages for disfigurement in an area other than the face and head.

A second line of cases requires the carrier to continue to pay for custodial care required as a result of the compensable injury even if no further improvement in the claimant's condition is expected. In *Hamilton* v. *Boise Cascade Corp.,* 370 P.2d 191 (Idaho 1962), a 72-year-old employee fell and broke his hip. It was replaced but complications set in and the hip prosthesis eventually had to be removed. Drugs, ambulance, prosthesis, doctor bills, and continuing nursing home care were all allowed as "reasonably required." *See also S & S LP Gas Co.* v. *Ramsey,* 272 N.W.2d 47 (Neb. 1978), in which it was held that the employer continues to be responsible for domiciliary custodial care of an injured employee even when no cure or rehabilitation is possible; and *Nallan* v. *Motion Picture Studio Mechanics Union, Local* #52, 375 N.Y.S.2d 164 (N.Y. App. Div. 1975), in which claimant, a paraplegic, was awarded $150 a week for nursing services performed by his wife, but was not entitled to an automobile to travel back and forth to work because it was not a medical apparatus or device.

A third line of cases allows compensation for measures that are merely palliative. In *Clark* v. *Fedders-Quigan Corp.,* 131 N.Y.S.2d 575 (N.Y. App. Div. 1954), the claimant was disabled by emphysema, an occupational disease. His doctor recommended a period of residence in a warm, dry climate to relieve his symptoms and make him feel better. The expense of his travel to Florida was allowed but not his living expenses while there. *Accord In re Levenson's Case,* 194 N.E.2d 103 (Mass. 1963). *See also Cook* v. *Georgia Grocery, Inc.,* 125 So.2d 837 (Fla. 1961), where there was evidence that a hemiplegic claimant would be happier at home and he was awarded compensation for the medical care, nursing services and appliances necessary to allow him to remain there even though it exceeded the cost of nursing home care. And under a workers' compensation statute almost identical to ours, the Oklahoma Supreme Court in *Akers Auto Salvage* v. *Waddle,*

394 P.2d 452 (Okla. 1964), determined that purely cosmetic surgery on a claimant's ears was reasonable and necessary even though he suffered no loss of hearing and the prognosis for the repair was poor. The claimant had suffered almost total avulsion of his right ear. His doctor stated that the disfigurement could be improved by plastic surgery reconstruction which would require setting back the normal ear to give an appearance similar to the reconstructed ear. The appellate court held that the matter of necessity and reasonableness of the recommended surgical procedure was a question of fact for determination by the industrial court.

The provisions of our workers' compensation act are to be construed liberally in favor of the claimant whenever "obscurity of expression or inept phraseology appears." *International Paper Co.* v. *Tidwell,* 250 Ark. 623, 466 S.W.2d 488 (1971). *See also Johnson* v. *Valmac Industries,* 269 Ark. 626, 599 S.W.2d 440 (Ark. App. 1980). Under the provisions of the act involved in this case the appellee was entitled to such medical and surgical services as "may be necessary." The administrative law judge found that the surgical procedure in question was "necessary" to restore claimant, as far as practicable, to the physical condition he enjoyed immediately preceding this injury. That finding was adopted by the Commission. Applying a liberal construction in claimant's favor, we cannot say the finding was wrong. We hold that the decision appealed from is supported by substantial evidence and within the proper exercise of the Commission's discretion.

Affirmed.

CRACRAFT, C.J., and GLAZE, J., agree.

Reola DANIELS *v.* STATE of Arkansas

CA CR 84-64 674 S.W.2d 949

Court of Appeals of Arkansas
Division II
Opinion delivered September 12, 1984

William R. Simpson, Public Defender, by: *Jacquelyn C. Gregan,* Deputy Public Defender, for appellant.

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

LAWSON CLONINGER, Judge. Appellant was charged with theft by deception of an amount in excess of $2,500, a class B felony, in violation of Ark. Stat. Ann. § 41-2203 (Repl. 1977). Specifically, appellant was accused by Arkansas Social Services of receiving welfare benefits in an amount in excess of $8,000 by fraud. At her trial, in which she waived a jury, a witness called by the State was asked by the prosecutor to testify to the amount of welfare benefits paid to appellant. The trial court sustained appellant's objection to the competency of the witness to testify on the matter, and following a discussion with the parties, the court granted a continuance of the case for three weeks so that the State might call the proper witness. Appellant's objection to the continuance was overruled. The trial resumed and appellant was found guilty and sentenced to twenty years in prison. Imposition of sentence was suspended conditioned upon restitution to Arkansas Social Services.

The sole issue on this appeal is whether the trial court erred in granting the continuance. We find no error, and we affirm.

The granting or denial of a continuance is within the sound discretion of the trial court "and will not be reversed absent a clear abuse of that discretion amounting to a denial of justice." *Walls* v. *State,* 280 Ark. 291, 658 S.W.2d 362 (1983). The appellant bears the burden of demonstrating that the trial court erred in its ruling on a motion for a continuance and one asserting error must show a clear abuse of discretion. *Branham* v. *State,* 274 Ark. 109, 623 S.W.2d 1 (1981). A ruling on a motion for a continuance does not constitute grounds for reversal unless prejudice to the complaining party can be proved. *Christian* v. *State,* 6 Ark. App. 138, 639 S.W.2d 78 (1982).

The trial judge stated that he believed that a failure in communication between the prosecutor and appellant's counsel rendered a continuance necessary. Appellant's only allegation of prejudice was that her welfare benefits had

been discontinued pending her trial for welfare fraud and that she would be in dire straits financially and was "hoping this matter would be cleared up today." The substance of appellant's allegation of prejudice appears to be that she would suffer financially if an acquittal were delayed. That possibility of prejudice was one of the factors weighed by the trial court before granting the State's motion, and the action of the trial court was a proper exercise of discretion.

Appellant's argument that the granting of a continuance subjected her to double jeopardy is without merit. She cites as authority *Downum* v. *United States,* 372 U.S. 734 (1963), which held that a trial court had abused its discretion and subjected the defendant to double jeopardy in discharging one jury and impaneling a second two days later because of the absence of a prosecution witness. *Downum* is inapplicable to the present case. Here, the proceedings were merely continued and then resumed, not terminated and then begun anew. Ark. Stat. Ann. § 41-106 (Repl. 1977) provides, in pertinent part, that a former prosecution is a affirmative defense to a subsequent prosecution for the same offense if the former offense was terminated without the consent of the defendant. However, a continuance is not a termination, and § 41-106 would not be applicable in this instance.

We find no evidence of discretionary abuse or prejudice.

Affirmed.

MAYFIELD and CORBIN, JJ., agree.

Maryann SIMMS *v.* STATE of Arkansas

CA CR 84-89 675 S.W.2d 643

Court of Appeals of Arkansas
Division II
Opinion delivered September 19, 1984

F. James Jefferson, for appellant.

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

LAWSON CLONINGER, Judge. Appellant was convicted of Interference with Custody, a Class D felony, Ark. Stat. Ann. § 41-2411 (Repl. 1977), and was given a three year suspended

sentence. On appeal, she argues a single point for reversal, contending that the evidence was insufficient to support a conviction because she lacked the necessary culpable mental state. We do not agree, and we affirm the trial court's decision.

Ark. Stat. Ann. § 41-2411 (Repl. 1977) provides:

> (1) A person commits the offense of interference with custody if, knowing that he has no lawful right to do so, he takes, entices, or keeps any person entrusted by court decree to the custody of another person or to an institution from the lawful custody of that person or institution.
>
> (2) Interference with custody is a class D felony if such person is taken, enticed, or kept without the state of Arkansas. Otherwise, it is a class A misdemeanor.

The instant case was submitted to the circuit court on a stipulation of facts signed by appellant and the deputy prosecutor. The parties stipulated that, following the separation of appellant and her husband, a decree was entered awarding joint custody of their minor child for alternating three month periods. At the beginning of the first three month period, during which the husband had custody of the child, appellant moved back into her husband's residence, and the couple resumed cohabitation. Later in the same month, while her husband was at work, appellant removed the child from the house and moved to the state of Arizona. She was charged with Interference with Custody and was extradited to Arkansas. The Arizona authorities returned the child to the custody of her father.

The trial court found appellant guilty on the basis of the stipulated facts. In a letter to both parties, the judge explained his finding:

> Defendant now contends that because she resumed cohabitation with Marlin Sims . . . the custody order entered in the divorce proceeding was nullified, particularly in view of the fact that no divorce was

> granted. Defendant's position, if honored, would amount to a vacation of a legitimate court order by the conduct of the parties in the case without any reference to the court concerning the best interests of the child. This cannot be permitted for many reasons. If Defendant wanted to change the custody arrangement ordered by the court, she should have made application to the court to do so. Instead, she took action which constitutes contempt of court and cannot be countenanced by this Court.

The court then ordered appellant to appear for sentencing.

In the sentencing phase, appellant testified that when she realized that the renewed relationship between her and her husband was not going to be successful she considered leaving with her daughter. Aware that she might not legally be able to do so, appellant consulted with her attorney. She claimed that her subsequent actions were in accord with her lawyer's advice. Appellant now urges that she lacked the requisite culpable mental state because she had sought the advice of counsel before violating the terms of the court order and believed that her actions were lawful.

Appellant's testimony concerning her conversation with her attorney was given in the sentencing phase of the proceedings against her. It is obvious from the record that the account was offered and accepted as mitigating, rather than exculpating, evidence. In passing sentence the judge said that "*under the circumstances* I will suspend imposition of a sentence of three years, and the reason I'm doing it that way rather than probation is because I really don't see any need for supervision in this case *under the circumstances.*" (Emphasis added.) On the basis of the stipulated facts, the court clearly was within the bounds of its dual function of trier of fact and of law in finding appellant guilty. We find no irregularity in the sentencing phase; to the contrary, it appears that the court properly and, we might add, humanely, exercised its discretion in considering, before passing sentence, the various factors that prompted appellant's violation of the law.

In criminal cases, this Court presumes that an appellant has been given a fair trial and that the judgment of conviction is valid; appellant bears the burden of showing either prejudicial error in the record or such inadequacy in the record that error cannot be shown. *Kendrick* v. *State,* 6 Ark. App. 427, 644 S.W.2d 297 (1982). Appellant was convicted under facts to which she agreed to stipulate; she was given an opportunity to present evidence in mitigation before she was sentenced. Nowhere does she show prejudicial error, and her conviction must stand.

Affirmed.

MAYFIELD and CORBIN, JJ., agree.

Henry CABLETON *v.*
GULF LIFE INSURANCE COMPANY

CA 83-408 674 S.W.2d 951

Court of Appeals of Arkansas
Division II
Opinion delivered September 19, 1984

Eugene Hunt, for appellant.

Bridges, Young, Matthews, Holmes & Drake, by: *Brenda J. Vassaur,* for appellee.

DONALD L. CORBIN, Judge. This case involves a suit

against a life insurance carrier for benefits under a $1,000 policy of life insurance on the life of Paul Cableton. The court ruled that the policy of life insurance was issued contrary to the laws of the State of Arkansas in that Paul Cableton did not consent in writing to the issuance of the life insurance policy insuring his life as required by Ark. Stat. Ann. § 66-3206 (Repl. 1980). We affirm.

The Court had some difficulty following the discourse of the parties' briefs; however, we believe that the evidence introduced into the record reflects the following basic facts. The soliciting agent for appellee, Gulf Life Insurance Company, up to the time he took the witness stand at trial, had contended to appellee as well as to appellant that he had destroyed the application signed by a family member of appellant, for life insurance on Paul Cableton's life and procured the signature of Paul Cableton on a second application. During the trial it became apparent that the agent had never obtained Paul Cableton's consent or signature. There was no evidence in the record indicating that appellee had any pre-existing knowledge of this deception by their agent until the agent took the witness stand. Too, other than a clearly hearsay statement, there was no evidence that Paul Cableton had any knowledge of the life insurance policy.

Ark. Stat. Ann. § 66-3206 states as follows:

> No life or disability insurance contract upon an individual, . . . shall be made or effectuated unless at the time of the making of the contract the individual insured, being of competent legal capacity to contract, applies therefor or has consented thereto in writing . . . [Acts 1959, No. 148, § 273, p. 418.]

Case law prior to 1959 sets forth the same policy that the legislature codified in Ark. Stat. Ann. § 66-3206 above. The case of *Callicott* v. *Dixie Life & Accident Insurance Company,* 198 Ark. 69, 127 S.W.2d 620 (1939), closely parallels the facts of the instant case. In *Callicott, supra,* the Court made the following statement:

> It is contended, however, by the appellee, that the policy was void because the consent of the insured was not obtained; that the policy was taken without his knowledge or consent. The evidence conclusively shows this to be true, and this would make the policy voidable. One who takes out a policy of insurance on the life of his brother without the knowledge or consent of the latter, cannot maintain an action against the company on the policy. 14 R. C. L. 889.
>
> It is against public policy to allow one person to have insurance on the life of another without the knowledge of the latter. It is not only the general rule that the consent of the insured must be had, but that is the rule in this jurisdiction, and this case is ruled by the case of *Amer. Benefit Life Ins. Ass'n* v. *Armstrong,* 183 Ark. 47, 34 S.W.2d 1082.

The passage of Ark. Stat. Ann. § 66-3206 codifies this policy and cannot be circumvented. The adherence to the policy of non-waiver of statutory law is best stated in *Southern Burial Insurance Company* v. *Baker,* 199 Ark. 468, 134 S.W.2d 1 (1939), wherein the Court stated:

> If there is any point to § 14 of said Act 139 of the Acts of 1925, we must follow the plain letter of the law and give due effect to this provision, or declare it unconstitutional and void. There is no room for construction, nor question of validity raised on this appeal. Truly, if we might say that the parties by their conduct could waive these provisions and their effect in this class of insurance, then there is no reason why the Legislature should have troubled about the enactment of this bit of legislation.

Case law since the passage of Ark. Stat. Ann. § 66-3206 has upheld the written consent provision. See *Constitution Life Ins.* v. *Thompson & Son,* 251 Ark. 784, 475 S.W.2d 165 (1972).

Affirmed.

CLONINGER and MAYFIELD, JJ., agree.

Jon D. WARREN *v.* Sue WARREN

CA 83-412 675 S.W.2d 371

Court of Appeals of Arkansas
Division I
Opinion delivered September 19, 1984

W. Q. Hall, for appellant.

Everett & Whitlock, by: *John C. Everett,* for appellee.

TOM GLAZE, Judge. This appeal is from the property

settlement provisions of a divorce decree entered May 2, 1983. The appellant contends the chancellor erred in awarding the appellee an undivided one-half interest of appellant's one-third interest in a partnership. Appellant also contends the chancellor erred in the distribution of the parties' debts, particularly partnership debts, contracted during the marriage. We agree with appellant that the chancellor erred in awarding the appellee an undivided one-sixth interest in the partnership. However, the chancellor was correct in determining that the partnership was marital property subject to being divided equally between the parties. Therefore, we modify his decision to reflect the proper manner of determining the amount to which appellee is entitled, and we remand for that determination to be made.

The appellant is in business with his father and his brother. Each owns an undivided one-third interest in J-W Foods, a retail grocery store in Huntsville. The chancellor found that the grocery business was marital property to be divided equally between the appellant and the appellee. As a part of his order, the Chancellor found:

> Sue Warren [appellee] becomes the owner of an undivided one-sixth interest in such partnership and partnership assets. . . . [T]he interest of . . . Sue Warren in such partnership is subject to the liabilities of such partnership existing on the date of this order.

The appellant contends the chancellor should have awarded the appellee a sum in cash equal to one-half of appellant's net interest in the partnership. We agree. Under the Uniform Partnership Act, a partner's rights in specific partnership assets are those of a tenant in partnership. Ark. Stat. Ann. § 65-125 (Repl. 1980). In determining at divorce the rights of a husband or wife to a spouse's partnership interest, the court cannot make specific awards of partnership assets. The court must first determine the value of the spouse's interest in the partnership, treating the accounts receivable as assets having a provable fair net present value, and then award the husband or wife a monetary decree equal to one-half that amount, the same to be enforced if necessary

by a charging order on the partnership interest. *Riegler* v. *Riegler,* 243 Ark. 113, 419 S.W.2d 311 (1967). We cannot make that determination ourselves on the record before us. Further proceedings will be necessary on remand to determine appellant's net interest in the partnership.

The appellee contends that *Glover* v. *Glover,* 4 Ark. App. 27, 627 S.W.2d 30 (1982), is factually similar to the case at bar and that it states the controlling law. Relying upon *Glover,* appellee contends the chancellor was correct in awarding her a one-half of appellant's one-third interest in the partnership, giving her a one-sixth interest in the partnership. However, the facts in *Glover* are distinguishable. The wife in *Glover* owned a one-fourth interest in the partnership before the divorce. As part of the property division, the chancellor awarded the husband all of both his and his wife's interests in the partnership. On appeal, we reinstated to the appellant wife the one-fourth interest in the partnership that was hers all along. In the case at bar, the appellee wife was clearly not a partner in the business. However, she did participate in the acquisition of the business during the parties' marriage, and she is entitled to a share of the value of that business.

For his second point, appellant contends the appellee should be required to pay a portion of the parties' marital debts, particularly those involving the partnership. The chancellor specifically ordered the appellee to pay those debts she had incurred personally on the parties' charge accounts from the date of the parties' separation until the decree was rendered. The appellant's argument with respect to partnership debts is rendered moot by our disposition of his first issue.

Therefore, we reverse that part of the chancellor's decree awarding the appellee a one-sixth interest in the partnership and remand for a determination of the value of appellant's interest in the partnership and a monetary award in appellant's favor for one-half of that amount.

Affirmed in part; reversed and remanded in part.

CRACRAFT, C.J., and COOPER, J., agree.

Herman Levert MITCHELL *v.*
STATE of Arkansas

CA CR 84-105 675 S.W.2d 373

Court of Appeals of Arkansas
Division II
Opinion delivered September 26, 1984

Bennie O'Neil, for appellant.

Steve Clark, Att'y Gen., by: *Michael E. Wheeler,* Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Judge. Appellant, Herman Levert Mitchell, was charged with violation of Ark. Stat. Ann. § 41-2203 (Supp. 1983), theft of property by deception. This offense arose out of an investigative audit conducted by the Arkansas Employment Security Division. The audit allegedly established that appellant had illegally received unemployment benefits in excess of $2,000.00. Fraud was assessed and as the amount in question was in excess of $500.00, the matter was turned over to the office of the prosecuting attorney. In addition to the theft charge, the information provided that appellant was subject to sentence enhancement pursuant to Ark. Stat. Ann. § 41-1001 (Supp. 1983), as an habitual offender having at least three prior felonies. Appellant waived a trial by jury whereupon the trial court found appellant guilty of the offense. Sentence was fixed at twelve years in the Arkansas Department of Correction. We affirm.

On appeal, appellant contends for reversal that the policy of the State of Arkansas, Arkansas Employment Security Division, to prosecute only those persons who fraudulently obtain $500.00 or more in unemployment benefits, regardless of the circumstances, is a discriminatory enforcement of Ark. Stat. Ann. § 41-2203 in violation of appellant's right to equal protection of the law, has no rational basis, represents an illegal classification, involves an unequal application of the law, and the effect of which has unlawfully usurped the power of the legislature. The prosecutor's office and the Arkansas Employment Security Division are separate and distinct entities. It should initially be noted that the Arkansas Employment Security Division

does not in fact prosecute individuals. It is merely the victim of fraud under these circumstances and the prosecuting attorney's office prosecutes criminal charges.

The essence of appellant's argument would appear to be that he should escape punishment because others who fraudulently obtain unemployment benefits under $500.00 are not prosecuted. Such laxity is not ordinarily a defense to criminal prosecution. See, *Poe* v. *State,* 251 Ark. 35, 470 S.W.2d 818 (1971); *Taylor* v. *City of Pine Bluff,* 226 Ark. 309, 289 S.W.2d 679, *cert. denied,* 352 U.S. 894 (1956); *Barnett* v. *State,* 183 Ark. 884, 39 S.W.2d 321 (1931). It appears to us that the Arkansas Employment Security Division's administrative policy of recommending prosecution only when there has been a theft in excess of $500.00 of unemployment benefits is representative of a valid administrative decision-making function, does not create a new statute and is not improper. Nothing different in the form of punishment was sought nor was there any showing of a difference in treatment in respect to recommending prosecution for all persons who illegally obtained benefits in excess of $500.00. Furthermore, the record reflects that the Benefit Payment Control Unit of the Arkansas Employment Security Division made the decision to seek prosecution and that the prosecutor's office had no input in its decision. When asked by the trial court why the Employment Security Division used $500.00 as the minimum amount, it responded that the national office of the Department of Labor had recommended that only the most flagrant cases be prosecuted.

Equal protection of the laws necessarily extends to their application. *Taylor* v. *City of Pine Bluff, supra.* However, the conscious exercise of some selectivity in enforcement is not in itself a constitutional violation. See, *e.g., Oyler* v. *Boles,* 368 U.S. 448 (1962); *United States* v. *Ojala,* 544 F.2d 940 (8th Cir. 1976); *United States* v. *Swanson,* 509 F.2d 1205 (8th Cir. 1975); and *Poe* v. *State, supra.*

In *Oyler* v. *Boles, supra,* certiorari was granted in habeas corpus proceedings commenced in the Supreme Court of Appeals of West Virginia seeking relief from

conviction under that state's recidivist statute. The United States Supreme Court observed:

> Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of a denial of equal protection were not alleged. [Cites omitted]

We find no merit to appellant's contention that the policy of the Arkansas Employment Security Division violates his right to equal protection of the law and there is no evidence that the prosecuting attorney's office engaged in selective prosecution. Therefore, we hold that appellant has not met his burden of proof in establishing an equal protection violation nor did he establish an absence of a rational basis. *United States* v. *Swanson, supra.* As stated previously, we believe this administrative policy represents a valid administrative decision-making function.

Affirmed.

CLONINGER and MAYFIELD, JJ., agree.

REYNOLDS METALS CO. *v.* Milton COUCH, David BATES, James DICKEY, Sr., and Dewey STILES, DIRECTOR OF LABOR

E 84-24 675 S.W.2d 838

Court of Appeals of Arkansas
Division II
Opinion delivered September 26, 1984
[Rehearing denied October 24, 1984.]

Wright, Lindsey, & Jennings, for appellant.

Youngdahl & Larrison, P.A., by: *Jay Thomas Youngdahl,* for Couch, Bates, and Dickey.

Alinda Andrews, for appellee Stiles.

MELVIN MAYFIELD, Judge. Prior to January 11, 1982, appellees, Couch, Bates and Dickey, who were employed by appellant, Reynolds Metal Company, had been informed that they were among a group of employees who would be affected by a reduction in force. Pursuant to a

union contract with Reynolds these appellees had the option of "bumping" less senior employees but chose not to exercise that option and, therefore, ceased work on the above date.

On June 29, 1982, the Arkansas Board of Review affirmed the decision of the Appeal Tribunal holding that appellees were entitled to unemployment benefits. That decision was appealed to this court and we remanded the matter to the Board of Review. *Reynolds Metals Co.* v. *Couch,* 8 Ark. App. 37, 648 S.W.2d 497 (1983). It was our holding that whether appellees voluntarily quit work without good cause connected with the work depended upon whether they had failed to accept available, suitable work as defined and explained in Ark. Stat. Ann. § 81-1106 (c) (Repl. 1976). Our opinion concluded:

> In *Terry* v. *Director, supra,* there was no evidence in the record as to whether the offered work was still available after claimant had been given a reasonable length of time to find other work. Here, the record contains evidence that the three positions available to claimants were still available on the date of the Appeal Tribunal hearing, March 18, 1982, approximately 10 weeks after claimants were informed that they would be losing their positions. If the Board of Review finds that the offered work was unsuitable at the time offered, it must then decide whether a reasonable time passed so as to make the work offered claimants in this case suitable. (Citations omitted.)

On remand, the Board of Review held that the work offered appellees when they ceased working on January 11, 1982, was not suitable and was not suitable through the date of the Appeal Tribunal hearing on March 18, 1982. The Board noted that it could make findings only "up until that date."

Reynolds has appealed from the Board's decision and its sole point is that it "is entitled to a consideration of and a determination as to whether offered and available

work was suitable within the contemplation of the statute at times subsequent to 9.5 weeks after the claimants had been on voluntary layoff" and Reynolds contends that the Board "erred in not affording the parties a hearing and an opportunity to present evidence" on this issue. Appellant's brief states that the problem seems to be that there is no specific statutory provision for handling the situation that is involved, but asserts that this court has established a right and can effect a remedy.

The appellee Director of Labor has filed a brief stating that Ark. Stat. Ann. § 81-1106 (c) (Repl. 1976), which disqualifies a claimant who refused to accept "suitable work when offered," is administered by the Employment Security Division and when an employer reports a work offer that is refused, the agency will gather the facts and issue a determination of whether the refusal was "without good cause." The director says he has "no quarrel" with the Board of Review's deciding the suitability of work question through the date of the Appeal Tribunal hearing on March 18, 1982, but contends that the appellant's attempt to have the Board go back over the period of two years and three months since the March of 1982 hearing would "circumvent the statutory scheme" and "cause an administrative nightmare for the Board of Review as well as for ESD." The Director cites the case of *Wacaster* v. *Daniels,* 270 Ark. 190, 603 S.W.2d 907 (Ark. App. 1980), as an example of how the statutory procedure is designed to work and says Reynolds simply did not follow that procedure in this case and is now seeking to be exempt from following the law.

Reynolds points out that under the union contract the unemployed appellees could notify the company of their desire to be recalled and the company would have to return them to work at the first available job to which their seniority entitled them. Reynolds cites *Price* v. *Everett,* 2 Ark. App. 98, 616 S.W.2d 766 (1981), as authority for the duty of claimants to moderate their employment demands as the period of unemployment continues and says at a hearing before the Board of Review it would be shown that the appellees in this case

had sufficient seniority to return to work on multiple occasions after March 18, 1982. The unemployed appellees, however, have filed a brief in which they say this procedure is outside the statutory scheme and they point to our opinion remanding their case where we said we "do not believe that a private agreement between an employee and an employer can affect the eligibility of the employee for unemployment benefits."

We agree with the arguments of the Director of Labor and the unemployed appellees. Our order of remand directed the Board of Review to consider only the suitability of any work offered prior to the hearing of March 18, 1982. The procedure for the period of time after that date is regulated by the statutes enacted by the Arkansas legislature and the Board of Review was correct in holding that at the time of the remand hearing it could make findings only for the period up to March 18, 1982.

Affirmed.

CORBIN and CLONINGER, JJ., agree.

Gary Wayne WHITESIDE *v.*
STATE of Arkansas

CA CR 84-84 675 S.W.2d 645

Court of Appeals of Arkansas
Division I
Opinion delivered September 26, 1984

Brown & Kesl, P. A., by: *Navada C. Brown,* for appellant.

Steve Clark, Att'y Gen., by: *Leslie M. Powell,* Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. Appellant, Gary Whiteside, was convicted by jury of the rape of a seventy-seven-year-old woman and of the burglary of her home. For his crimes, appellant was sentenced to twenty years' imprisonment. Appellant raises one issue on appeal: Must a stipulation to admit into evidence the results of a polygraph examination be in writing?

Three days prior to his trial, appellant requested the prosecutor and the trial court to permit him to take a polygraph examination to prove that he did not commit the rape or the burglary. The agreement, made in the presence of the trial judge, was not on the record and was never placed in writing. Appellant's counsel warned him

of the consequences of taking the test—particularly that the results of the examination would be admissible into evidence. After advice from counsel, appellant insisted on taking the examination, which he subsequently failed. At trial, appellant moved to exclude the results of his polygraph examination because the stipulation to take it was not in writing. Appellant admitted to the trial court during a hearing on his motion to exclude that he had said, "I want to take the lie detector test, and I'll go by whatever it says." He also stated that if the examination had shown he was telling the truth when he denied committing the crimes, he would have placed these results into evidence.

Appellant relies primarily on *State* v. *Bullock,* 262 Ark. 394, 557 S.W.2d 193 (1977), which holds that the defendant and the prosecuting attorney must enter into an adequate stipulation whereby they agree that the results of a defendant's polygraph examination are admissible into evidence. In *Bullock,* the defendant passed a polygraph test and tried to introduce the results into evidence. The trial court refused to admit the test results, and the Supreme Court upheld the decision because the trial record disclosed that there was a misunderstanding concerning the terms of the agreement and, in fact, a dispute existed whether any agreement was reached at all. The Court stated that the misunderstanding arose because the defendant's attorney had failed to fully explain the situation to his client. In discussing the adequacy of such stipulations, the Court cited *State* v. *Valdez,* 91 Ariz. 274, 371 P.2d 894 (1962). That case held that the results of polygraph examination are admissible into evidence in Arizona under certain qualifications, one of which is that the prosecuting attorney, defendant and his counsel all sign a written stipulation providing for the admission into evidence of the polygraph results. Although our Supreme Court in *Bullock* did not expressly hold that stipulations to enter the results of polygraph examinations into evidence must be in writing, the Court did express such a ruling in the subsequent case of *Wilson* v. *State,* 277 Ark. 43, 639 S.W.2d 45 (1982). Specifically, the Court in *Wilson,* citing *Bullock,* stated that the results of

polygraph examinations are not admissible unless both parties enter into a written stipulation agreeing that the results will be admissible.[1]

Even though the Supreme Court in *Wilson* seems to interpret *Bullock* to require a written stipulation before polygraph exams can be introduced, we do not agree that either of those cases precludes the admission into evidence of such an examination under the facts of this case. Here, unlike in *Bullock,* appellant has never questioned the existence of his stipulation or its terms. The record clearly shows that appellant knew his polygraph examination, despite its results, would be admissible into evidence and that he deliberated with counsel before making his decision. Under these circumstances, we uphold the admission of the polygraph examination into evidence despite the lack of a written stipulation to that effect.

One other jurisdiction has confronted this issue. In the case of *State* v. *Streich,* 87 Wis.2d 209, 274 N.W.2d 635 (1979), the Supreme Court of Wisconsin stated that an oral stipulation could not satisfy its case law requirement of a written stipulation for the admission of polygraph results; however, the Court refused to reverse the defendant's conviction because the record showed there that appellant knew the results of the test would be used as evidence at trial. In the instant case, the record clearly shows that the appellant did know that the results of his polygraph examination would be used at his trial and that there was no misunderstanding on this point between the parties. In fact, appellant candidly admitted that if the results of the polygraph examination had been favorable, he would have introduced them into evidence. We have not discovered any case (and appellant cites none) in which a conviction was reversed *solely* because the parties did not follow the proper procedure in having a written stipulation to the admission of polygraph results. We would be

[1]In *Holcombe* v. *State,* 268 Ark. 138, 594 S.W.2d 22 (1980), a case involving a written stipulation, the Court cited *Bullock* for the rule that polygraph test results should be excluded from evidence unless there is a *valid* stipulation for their admission.

placing form over substance if the *only* reason we reversed this case was that the parties failed to reduce their agreement to writing. Accordingly, we affirm.

Affirmed.

CRACRAFT, C.J., and COOPER, J., agree.

SANYO MANUFACTURING CORPORATION and GREAT AMERICAN INSURANCE COMPANY
v. Margaret LEISURE

CA 84-103 675 S.W.2d 841

Court of Appeals of Arkansas
Division I
Opinion delivered October 3, 1984
[Rehearing denied November 21, 1984.]

Daggett, Van Dover, Donovan & Cahoon, by: *Robert J. Donovan,* for appellant.

Whetstone & Whetstone, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Sanyo Manufacturing Corporation appeals from a decision of the Arkansas Workers' Compensation Commission that Margaret Leisure

had developed an occupational disease while in the employ of the appellant and was entitled to temporary total disability from April 2, 1982 to a date yet to be determined. The appellant maintains a plant in Forrest City for the manufacture of television sets. The appellee was first employed there in September 1979 and eventually was assigned to the assembly line where the television sets were fine tuned. In that job she had to lift television sets which weighed fifty pounds and place them on the assembly line. Then she bent over and reached around to the back of each set to hook it up to an antenna. She then was required to fine tune from seven to thirteen channels on each set. In tuning the sets it was necessary that she keep her arm in a bent position and use constant twisting wrist motion. She would repeat this procedure thirty times an hour on 240 television sets per day. On March 6, 1981, after working for several hours on the line she experienced pain in her hand, arm and neck, which she attributed to the heavy lifting and the repetitive work which her job required. She was seen by Dr. Jacobs in Forrest City, was diagnosed as having tenosynovitis, and remained off work for approximately three months for which she received workers' compensation benefits. She was treated by Dr. Richardson during this period.

Her doctor then returned her to work with restrictions and she was assigned duties which would not require heavy lifting or fine tuning, but ultimately she was reassigned to a fine tune assembly line. She testified that she continued to experience pain and swelling in her hand and arm and consulted Dr. William Traylor, who diagnosed her condition as tenosynovitis with carpal tunnel syndrome and referred her to Dr. Edward Kaplan, a neurosurgeon. Dr. Kaplan confirmed the tenosnovitis but he said the carpal tunnel syndrome was only suspected. He subsequently released her to work without heaving lifting and with other restrictions on the use of her hand on August 23, 1982. She was also placed on restrictive layoff which meant that Sanyo had no available job for appellee that could accommodate her work restrictions.

The appellant concedes that appellee suffers from tenosynovitis and that the Commission properly classified it

as an "occupational disease," but contends that the claim should have been denied in its entirety because the appellee did not establish all of the elements required by our statute to make an occupational disease compensable. Appellant argues that:

> (1) appellee failed to prove "a causal connection between the occupation or employment and the occupational disease by clear and convincing evidence" as required by Ark. Stat. Ann. § 81-1314(a)(5)(i);
>
> (2) appellee failed to prove that "the hazards of such disease actually exist and are characteristic thereof and peculiar to the trade, occupation, process or employment and is actually incurred in his employment" as required by Ark. Stat. Ann. § 81-1314(a)(7);
>
> (3) appellee failed to overcome the prohibition in Ark. Stat. Ann. § 81-1314(a)(5)(iii) that "No compensation is payable for any ordinary disease of life to which the general public is exposed."

Appellant first argues that the appellee failed to establish a causal connection between the disease and her occupation by clear and convincing evidence. On appellate review we affirm the findings of the Workers' Compensation Commission if they are supported by substantial evidence and we review the evidence in the light most favorable to the Commission's finding. It is not a prerequisite to a finding of causal connection that is based upon medical testimony. *Treadaway* v. *Riceland Foods,* 268 Ark. 658, 594 S.W.2d 861 (Ark. App. 1980). It is the Commission's duty to translate all of the evidence presented to it into findings of fact utilizing its advantage of expertise and superior knowledge of industrial demands, limitations and requirements.

There was evidence that the onset of appellee's first period of disability in 1981 came about while she was performing a job requiring repetitive twisting motions and heavy lifting. Her condition improved after she was returned to work which required neither lifting nor repetitive twisting. The onset of the second episode occurred after she

had returned to her former job. She attributed her disability to the nature of the work she was required to perform. There was medical testimony that work that is of a continuous, repretitive nature involving bending of the wrist and working with weights in a flexed position does tend to predispose one to the disorder suffered by the appellee. There was evidence that this type of job activity was common in appellant's plant and that appellee's disease was a frequent one in that industrial environment. We cannot conclude that the Commission's finding of a causal connec tion is not supported by substantial evidence or that reasonable minds could not have arrived at the conclusion it reached.

Appellant next contends that Ark. Stat. Ann. § 81-1314(a)(7) (Repl. 1976) requires that an occupational disease be compensable only when it is peculiar to the occupation in which the claimant is engaged and, if it can be contracted by one engaged in any other occupation, benefits are excluded under this section. This argument was rejected by the court in *Brown Shoe Company* v. *Fooks,* 228 Ark. 815, 310 S.W.2d 816 (1958).[1] In that case the employer manufactured shoes. In the performance of her duties the employee sat on an adjustable steel chair at a sewing table for eight-hour work days. She contracted bursitis of the tailbone which caused her great pain and was aggravated by sitting. There was medical testimony that this condition was caused by "constant pressure to the tailbone."

The employer appealed from a Commission award of benefits for the occupational disease arguing that there was no evidence showing that this particular industrial disease was characteristic of or peculiar to the occupation of the shoe industry. The court disposed of that argument in the following language:

> In the first place it is noted that, under the wording of the statute (§ 81-1314(a) (7)) the disease need not be

[1]*Brown Shoe* was decided under the original act which declared that only diseases listed in it were to be considered "occupational" ones. The limitation to scheduled diseases was removed by Act 1227, extended session 1976, but the language relied upon in *Brown Shoe, supra,* was retained.

> peculiar to the *occupation,* but may be peculiar to the *process* or *employment.* These last two emphasized words, we think, have reference in this case, to sitting in one position continuously for long hours and not to manufacturing shoes. . . .The key word which appellant seems to overlook is "hazards" in said subsection 7. The question is not whether the *disease* is characteristic of and peculiar to the kind of work appellee was doing, but whether the *hazard* (of such disease) bore such relation. There can be no doubt here that there was a *hazard* or risk involved in the *character* of work appellee was doing because it actually did cause her ailment. No less was the *hazard peculiar* to a process which entailed continual and repeated pressure on the tailbone for eight hours a day for five days a week, because such abnormal pressure on the affected parts is not incident to many other processes of employment.
>
> If it be conceded, and we do, that the exact meaning and application of the words referred to above are not crystal clear in the context in which they are used, then we think they should be interpreted in the light most favorable to appellee.

This decision and those we have examined from other jurisdictions make clear that an occupational disease is "characteristic" of an occupation, process or employment where there is a recognizable link between the nature of the job performed and an increased risk in contracting the occupational disease in question. We agree with the court's reasoning in *Brown Show Company* and conclude that the words "process" and "equipment" have reference in this case to a job requiring continuous repetitive bending of the wrist and working with weights in a flexed position, and not to the manufacture of television sets.

We find no merit in appellant's argument that because there was evidence that people who do not work in factories suffer from tenosynovitis, this disease should be excluded from coverage under Ark. Stat. Ann. § 81-1314(a)(5)(iii) as an "ordinary disease of life to which the

general public is exposed." We conclude that this places an entirely too narrow interpretation upon the wording of that statute, particularly in view of the purposes for which our workers' compensation laws were enacted. A proper interpretation of this section requires that it be read in conjunction with the Act as a whole and particularly those sections dealing with the same subject matter. Although this section was not referred to in the *Brown Shoe Company* case, the court's decision there foretells the result we must reach. To interpret § 81-1314(a)(5)(iii) as narrowly as appellant suggest conflicts with § 81-1314(a)(7) as construed in *Brown Shoe Company*. In that case there was nothing to indicate that bursitis was a disease peculiar to factory workers or was not suffered by the general public. The court's decision turned on the increased risk of contracting the disease due to the nature of the employment.

As we construe § 81-1314(a)(5)(iii) the fact that the general public may contract the disease is not controlling. The test of compensability is whether the nature of employment exposes the worker to a greater risk of that disease then the risk experienced by the general public or workers in other employments. In *Booker* v. *Duke Medical Center,* 297 N.C. 458, 256 S.E.2d 189 (1979) it was stated:

> For example, it is clear that the Law was not intended to extend to an employee in a shoe factory who contracts pneumonia by standing next to an infected co-worker. In that example, the employee's exposure to the disease would have occurred regardless of the nature of the occupation in which he was employed. To be within the purview of the Law, the disease must be so distinctively associated with the employee's occupation that there is a direct causal connection between the duties of the employment and the disease contracted.

Courts in other jurisdictions have likewise rejected the proposition that a particular illness cannot qualify as an "occupational disease" merely because it is not unique to the injured employee's profession. *Carter* v. *Lakey*

Foundry Corp., 118 Mich. 325, 324 N.W.2d 622 (1982); *Young* v. *City of Huntsville,* 342 So.2d 918 (Ala. Civ. App. 1976), cert. denied, 342 So.2d 924 (Ala. 1977); *Aleutian Homes* v. *Fischer,* 418 P.2d 769 (Alaska 1966); *State ex rel. Ohio Bell Telephone Co.* v. *Krise,* 42 Ohio St. 2d 247, 327 N.E.2d 756 (1975); *Briggs* v. *Hope's Windows,* 284 App. Div. 1077, 136 N.Y.S.2d 41 (1954); *Underwood* v. *National Motor Castings Division,* 329 Mich. 273, 45 N.W.2d 286 (1951).

The appellant finally contends that even if the appellee were entitled to benefits for occupational disease the Commission erred in that there was no substantial evidence to support its finding that she continued to be temporarily and totally disabled after August 23, 1982. This argument was based on Dr. Kaplan's testimony that he had released her to work without heavy lifting on August 23rd and that she was able on that date to perform light work. She did not return to work because there was no work available to her under those limitations at Sanyo. Appellant argues that under Ark. Stat. Ann. § 81-1302(e) "disability" means "incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury" and that as there was no evidence that appellee has sought work elsewhere, her lack of earnings resulted from *unavailability* of work, not from an *incapacity to earn.* We find no merit in this contention. The situation here is the same as in *Arkansas State Hwy. Dept.* v. *Breshears,* 272 Ark. 244, 613 S.W.2d 392 (1981) where that same argument appears to have been made. There the court stated:

> Although Dr. Cash released claimant for light work, there was no testimony pertaining to his ability to earn the same or any part of the wages he was receiving at the time of the injury. The Workers' Compensation Commission is in a better position to evaluate the claimant's ability to earn wages in the same or other employment. And, as in this case, once the Commission has before it firm medical evidence of physical impairment and functional limitations, it has the advantage of its own superior knowledge of

industrial demands, limitations, and requirements. It can apply its knowledge and experience in weighing the medical evidence of functional limitations together with other evidence of the manner in which the functional disability will affect the ability of the injured employee to obtain or hold a job and thereby arrive at a reasonably accurate conclusion as to the extent of the disability.

We cannot conclude that the finding of the Commission is not supported by substantial evidence.

Affirmed.

GLAZE and COOPER, JJ., agree.

LONOKE NURSING HOME, INC. et al
v. WAYNE AND NEILL BENNETT
FAMILY PARTNERSHIP

CA 83-417 676 S.W.2d 461

Court of Appeals of Arkansas
Division I
Opinion delivered October 1, 1984
[Supplemental Opinion Denial of Rehearing November 28, 1984.*]

*GLAZE, J., concurs; CORBIN, J., not participating.

Catlett & Stubblefield, by: *S. Graham Catlett,* for appellants.

Charles A. Walls, Jr. and *Owens, McHaney & Calhoun,* by: *John C. Calhoun, Jr.,* for appellee.

JAMES R. COOPER, Judge. This appeal arises from a dispute between the appellants, who leased two buildings from the appellee for nursing home purposes, and the appellee lessor over the terms of the lease and option to renew. The chancellor declared the option to renew void for lack of definiteness, and enjoined the appellants from moving their nursing home business. From that decision, comes this appeal.

Around 1962, the appellee's predecessor, J.O. Bennett & Sons, a family partnership, built two facilities to serve as nursing homes in Lonoke and Marvell. The homes were leased to Mrs. Mason Pennock, who operated them until 1969 when she and her partner subleased the premises to the appellants. In 1973 and 1978 the appellants leased the premises directly from the Bennetts. The 1973 lease provided for an option to renew for an additional five year term on the same terms as the 1973 lease, except for the rental. The 1978 lease contained the following language:

> The second parties shall have the right and option to renew this lease upon terms and conditions and rentals to be agreed upon by the parties prior to the renewal date, which shall be compatible to similar facilities within the State of Arkansas.

In early 1983, the appellee agreed to sell the properties to a third party, subject to the lease. The appellants, at the same time, were making plans to expand other nursing home facilities which they owned and to transfer their State-allocated bed capacity from the leased homes to one in Cabot which they owned. That plan apparently began in 1980, but was stalled because of a moratorium on nursing home construction. Thus, in order for the expanded Cabot facility to utilize the Lonoke and Marvell bed capacity, those two homes would have to be closed. Neither the Lonoke nor Marvell homes met current construction requirements, but were allowed to operate under waiver. The waiver would be forever lost as to those homes if they ceased to be operated as nursing homes, absent remodeling to bring them into compliance with current standards. The appellee, fearful that the leased homes would be closed by the appellants, instituted this action, seeking to require the appellants to continue to operate the leased premises as nursing homes through the lease term, and to declare the alleged option void for indefiniteness.

For reversal, the appellants first argue that the option is valid, contrary to the chancellor's finding that it was void

because the terms of the renewal were not included in the option. Generally, courts will not supply missing terms in a lease when the parties have not stated in their agreement a definite bases to guide the court's effort to effectuate the parties' agreement. The Arkansas Supreme Court has held that "an option in a written lease to renew upon terms and conditions to be agreed upon is void for uncertainty." *Ferrill* v. *Collins,* 225 Ark. 247, 281 S.W.2d 939 (1955). However, in *Nakdimen* v. *Atkinson Imp. Co.,* 149 Ark. 448, 233 S.W. 694 (1921), the Court upheld an option which did not provide for the amount of the rental, but where the parties had agreed that a board of arbitrators would fix the rental. This method of fixing the rent was upheld because of its objective nature. The appellants argue that the language in the option which provides that the renewal is to be on terms "compatible to similar facitlities" in Arkansas is objective enough to guide the court in fixing the terms. We disagree. This option is fatally defective in that no definite method for determining the rental was established. As this Court has stated:

> Where the annual rental is not agreed upon and the contract does not otherwise provide a manner for its definite determination, the contract does not meet [the test for definiteness].

Phipps v. *Storey,* 269 Ark. 886, 601 S.W.2d 249 (Ark. App. 1980).

Rental rates in Arkansas, according to the testimony, ranged from $55.82 per bed to $88.66 per bed. We cannot say that the chancellor's decision not to select a figure within this range was wrong. Further, and perhaps more important, *no* terms of the renewal period were fixed. The chancellor's decision was neither clearly erroneous, nor against a preponderance of the evidence, and therefore we must affirm. ARCP, Rule 52(a).

The appellants next argue that the chancellor's injunction effectively requires them to forfeit their business, thus,

it is alleged, resulting in a windfall to the appellees of over one million dollars. We disagree. The appellants own their business, and the appellee own its buildings and land free from the lease (which has expired), and the chancellor's order simply protected the interests of both parties. The court found that the appellants should not be allowed to move the nursing home patients out of the leased premises, except in the ordinary course of business, and that decision was correct. The lease required that the appellants use the leased premises for nursing homes, and, because of the "grandfathered" status of the homes, moving the patients out would have caused a serious reduction in the fair market value of the leased premises.

Further, the spirit and purpose of the lease would have clearly been violated had the appellants been allowed to breach the lease, move out of he premises, and thereby destroy the usefulness of the premises as nursing homes.

The landlord-tenant relationship between the parties is over, the premises are free to be sold or leased by the appellee, and the assets of the nursing home business belong to the appellants. Both parties have substantial interests at stake which need protection, and the patients in the two nursing homes must be protected from unnecessary disruption. Therefore, we remand the case to the chancellor so that such orders as are necessary to ensure an orderly transition may be entered.

Affirmed, and remanded for further orders consistent with this opinion.

CRACRAFT, C.J., and GLAZE, J., agree.

Supplemental Opinion on Denial of Rehearing
November 28, 1984

679 S.W.2d 823

APPEAL & ERROR — RECORD NOT FULLY DEVELOPED — CASE REMANDED. — Where the record on an issue was not fully

developed below, that point will be remanded to the chancellor for a decision.

Petition for Rehearing; denied.

JAMES R. COOPER, Judge. By petition for rehearing filed by the appellee, and the appellants' response, both parties seek a clarification of this Court's original opinion dated October 3, 1984.

The appellee argues that clarification is needed to settle the question of whether the bed capacity of the two nursing homes, and the certificate of need, is an "asset" of the nursing home business which belongs to the appellants. The appellants respond, contending that the issue was not fully developed at trial, and that the case should be remanded for further proceedings. We agree with the appellants' position. This present dispute is one of the principal reasons we remanded the case to the chancellor.

The trial and appeal of this case involved two issues: first, whether the chancellor was correct in his ruling regarding the validity of the option to renew. We held that the chancellor correctly found the option to renew void. The second issue involved the chancellor's injunction prohibiting the appellants from taking certain actions. The decree states:

> 3. The lessees under said lease are obligated to operate the leased premises as nursing homes and are not authorized to relocate to other premises the beds allocated to the leased premises.

Further, the decree states that the lease expires June 4, 1983.

Neither the issue concerning the validity of the

option, nor the decision that the lease expired June 4, 1983, is raised by either party on rehearing. Neither this Court, nor the trial court, was asked to determine the respective rights and obligations of the parties *once the lease terminated.* The appellants did not develop the point because they were arguing that they controlled the bed capacity *during the term of the lease.* The appellee argued that the appellants could not, *during the lease,* apply for a new certificate of need and transfer the bed capacity to another nursing home, as such a transfer would violate the terms of the lease.

We originally remanded the case so that the chancellor could, if necessary, enter orders to ensure an orderly transition. If the parties cannot agree on the ownership of assets, or even what those assets are, such orders by the chancellor obviously will be necessary.

We did not intend, nor attempt, in our original opinion, to define what the business assets were, nor, for example, what items were fixtures or personalty. That is a task for the chancellor, if the parties cannot agree. The record is not fully developed and that issue was not tried below.

Because the judges in the division which originally decided this case are not unanimous in this supplemental opinion, it is issued by the Court sitting *en banc.*

The petition for rehearing is denied.

CORBIN, J., not participating.

TOM GLAZE, Judge, concurring. In this Court's original opinion, we upheld the chancellor's decision declaring the parties' option to renew the 1978 lease void for lack of definiteness and enjoining the appellants from moving *their* nursing home businesses. We further concluded that the parties' landlord-tenant relationship is

over so the appellee was free to sell or lease its premises and the appellants were free to take the assets of their nursing home businesses. We merely remanded this cause for the chancellor to ensure that the parties' respective interests would be protected and that an orderly transition would ensue. Both parties now seek clarification of what interests or assets go with which party. This, of course, has been the integral issue in this case all along. If appellants are permitted to remove the entire nursing home business, leaving appellee only its lands and buildings, the value of appellee's facilities is greatly reduced because the facilities are valuable as nursing homes, but not nearly so valuable for other purposes. Because the record clearly reflects these parties' respective interests, I believe we should resolve their doubts now rather than compelling them and the trial judge to go through the frustration of another hearing and, most likely, another appeal.

First, I believe the appellee gave undue emphasis to the term "certificate of need" when attempting to define each party's rights in this case. As appellee earlier pointed out in its brief, the business relationship between the parties actually commenced in 1962, long before certificates of need were authorized in 1975. *See* Ark. Stat. Ann. § 82-2311 (Supp. 1983). The undisputed evidence reflects that Mrs. Pennock — from whom appellants acquired the Lonoke and Cedar Lodge Nursing homes — applied for and was given the license to operate these nursing homes on appellee's premises. Neil Bennett, Sr., representing the appellee, testified:

> I have never held a nursing home license or an administrator's license. My family's sole association with the nursing home business is that we own the land and the buildings in which some nursing homes were operated. We did not give Mrs. Pennock any advice concerning the operation of the nursing home. The only advice we gave anybody was to operate

them so that they would stay in good standing with the State.

In sum, under Ark. Stat. Ann. § 82-346 (Repl. 1976), appellants, through their original owner Mrs. Pennock, were issued nursing home licenses to operate homes on appellee's premises only. Those licenses are not transferable; they cannot be transferred to appellee or others, nor, as the licenses were issued, can appellants operate their nursing homes operations at other than on appellee's premises. *See* § 82-346. Nevertheless [pursuant to Ark. Stat. Ann. § 82-347 (Repl. 1976)], the appellants, as the licensees, may seek the State's approval to construct new facilities. Depending upon what appellants' plans encompass, they could also be subject to § 82-2311, *supra.*

Regardless of what appellants' existing licensure rights may be under the Arkansas law, it appears eminently clear that appellee neither owns nor possesses the licenses in question and their incidental interest in appellants' licenses terminated when the parties' leasehold relationship ended. Appellee admittedly owned only the land and buildings in which appellants operated their licensed nursing home businesses, and all three lease agreements between the parties reflect this fact. These arguments were arms-length business transactions under which appellee merely furnished two facilities, and in turn, appellants paid appellee a monthly rent so they could operate in each a fifty-three patient bed unit and 132-patient bed unit. To decide that appellee has any continuing interest in or control over appellants' licenses after their lease ends would inferentially grant appellee a transferable interest in those licenses, which is clearly contrary to statutory law. *See* § 82-346, *supra.* In addition, because the subject licenses are appellants' indicia of title to operate nursing homes in the State, appellants' business — except for its tangible assets such as kitchen, dining and lounge equipment and nursing supplies — would be rendered totally worthless. On the other hand, appellants' loss would become appellee's gain because their premises

remain valuable for nursing home purposes as a result of appellee's continued, appropriated use of appellants' licenses.

In reaching this conclusion, I am aware that appellee places small emphasis on the fact that appellants were granted the licenses. Instead, appellee argues that the critical issue is who is granted the certificate of need — not the license — because the certificate is the prior authorization from the State to construct the facilities in the first instance and because it specifies the bed capacity the facilities shall have. Although such certificates were not provided by law until 1975 — six years after appellants' licenses were granted — appellee suggests that they (not appellants) were given the "authorization" by the State to build the homes in 1962 with their existing bed capacity and that "authorization" has not changed. As I indicated earlier, I am firmly of the opinion that under Arkansas' statutory law, the *licensed person* (or organization) is the *only person* who may apply with the State to alter or add to its facilities or to request permission to construct new facilities. Any such nursing home licensee who operates under a grandfathered status (as do appellants) is also the one who must obtain a certificate of need from the State before seeking construction of additional patient beds to reach licensed capacity. *See* § 82-2311(i). Here, the appellee. by showing its responsibility for obtaining the State's authorization to build the homes in 1962, cannot thereby subrogate itself to the rights of the appellants, who possess the licenses granted under § 82-346.

I still agree that this cause should be remanded so an orderly transition can be made by the parties. However, the issue on which both parties request clarification should be addressed to avoid further confusion below and other appeals to this Court. To return this cause to the trial court to determine the assets of appellants' nursing home operation is merely to delay ruling on the obvious question sought to be resolved by both parties: Does the appellee have any continuing interest in the licensed nursing home businesses and its bed capacity allocations once the appel-

 [redacted]

lee's and the appellants' lease relationship ended? The parties fully developed the evidence and submitted excellent arguments in an effort to resolve this question. I believe the answer is no. Because this question is one of first impression involving statutory construction, perhaps the Supreme Court would agree to accept this cause on review if we would conclusively decide this issue now.

ARKANSAS DEPARTMENT OF HEALTH *v.*
Dorothy L. HUNTLEY

CA 84-124 675 S.W.2d 845

Court of Appeals of Arkansas
Division II
Opinion delivered October 3, 1984

Jerry G. James, for appellant.

Ed Daniel, for appellee.

DONALD L. CORBIN, Judge. This is a workers' compensation case involving a claim for benefits arising out of an apparent unprovoked attack by an unknown assailant upon appellee, Dorothy L. Huntley, who was on an overnight business trip. The Arkansas Workers' Compensation Commission allowed benefits and appellant, Arkansas Department of Health, appeals that decision. We affirm.

Appellee was employed by appellant as an emergency medical services specialist. Pursuant to the requirements of her employment, appellee left Little Rock on Monday, October 18, 1983, en route to Harrison, Arkansas, to inspect ambulances belonging to the Boone County Hospital. She completed her inspection around 4:30 or 5:00 p.m. and checked into the Holiday Inn in Harrison. Her travel itinerary called for her to be in Yellville, Arkansas, the following day which necessitated her spending the night away from home. Appellee testified that she went to her room, watched television for an hour, and went to sleep for

two or three hours. At approximately 8:30 or 9:00 p.m., appellee left her room and went to the bar located in the Holiday Inn for the purpose of seeing and talking to a friend of hers who previously had run the restaurant and bar. Upon learning that her friend no longer worked there, appellee sat down at the bar and had a drink, played a few games of Pac Man, and then accepted an invitation to have a drink with a couple of traveling salesmen. Appellee testified that she was in the bar for approximately an hour.

After declining an invitation to have dinner with the two traveling salesmen, appellee left the bar to go back to her room at approximately 9:30 p.m., some five hours after she had completed her work for appellant for that day. Appellee testified that while she was en route to her room, a drunk came up behind her and grabbed her and a scuffle ensued during the course of which she fell to the ground and injured her lip and mouth. She stated that she went on to her room, passed out in the bathroom, and when she came to and saw how bad her lip was, went to the emergency room at Boone County Hospital at approximately 2:00 to 2:15 a.m. After receiving treatment at the hospital, she went back to her room, got her things and returned to Little Rock.

A claim was filed with appellant which was controverted. On January 25, 1983, a hearing was held at which appellee contended her injuries arose out of and in the course of her employment in that she claimed to have been on business for appellant at the time she was assaulted leaving the bar. Appellee contended that the assault and her injuries would not have happened but for her employment requiring her to travel to Harrison. Appellants flatly rejected this contention and contended on the other hand that appellee's injury simply did not arise out of and in the course of her employment. Appellant very candidly admits the necessity of overnight accommodation because of the trip, employment, the assault and the injuries but does dispute appellee's contention that "but for" her employment she would not have been assaulted and sustained injuries. On the other hand, appellee candidly admitted that her excursion to the hotel's bar was personal to her and for the purpose of personal recreation and pleasure.

The Administrative Law Judge held that appellee's injuries arose out of her employment and awarded benefits. In a two-to-one decision, the Commission affirmed the ALJ and adopted her decision as the decision of the Commission.

The ALJ found two overlapping bases for recovery consisting of the traveling employee and the positional risk doctrines. In so finding, the ALJ relied upon a prior Commission decision which was not appealed to this Court. This decision apparently adopted the traveling employee doctrine which is found in 1A Larson, *The Law of Workmen's Compensation,* § 25.00 (1982). The ALJ quoted extensively from 1 Larson, *The Law of Workmen's Compensation,* § 10.00 (1984). This section provides that positional risks may also be compensable. In affirming the decision of the ALJ, the Commission stated as follows: "From our *de novo* review of the record on appeal, deferring to the Administrative Law Judge's assessment of the claimant's credibility, we think the decision of the Administrative Law Judge is supported by a preponderance of the evidence, correctly applies the law and should be affirmed." We believe there is substantial evidence to affirm this case on the basis of the traveling employee doctrine without considering the positional risk doctrine.

In his treatise regarding traveling employees in the course of employment, Professor Larson states as follows:

> Employees whose work entails travel away from the employer's premises are held in the majority of jurisdiction to be within the course of their employment continuously during the trip, except when a distinct department [sic] on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.

1A Larson, *The Law of Workmen's Compensation,* § 25.00 (1982). Professor Larson further states that personal acts performed while away from home, including eating meals in restaurants, are generally compensable unless a "personal social motive was the occasion for an excursion which

would otherwise be in the course of employment." *Id.* § 25.21.

Arkansas has adopted the traveling salesman doctrine as evidenced by the following cases: *Wilson* v. *United Auto Workers,* 246 Ark. 1158, 441 S.W.2d 475 (1969); *Fine Nest Trailer Colony* v. *Reep.,* 235 Ark. 411, 360 S.W.2d 189 (1962); *Johnson Auto Co.* v. *Kelley;* 228 Ark. 364, 307 S.W.2d 867 (1957); *Frank Lyon Company* v. *Oates,* 225 Ark. 682, 284 S.W.2d 637 (1955). These cases dealt with the ultimate issue of whether the injury arose out of and in the course of the employment.

We believe the controlling law in determining whether or not appellee's injury arose out of and in the course of her employment is found in *J & G Cabinets* v. *Hennington,* 269 Ark. 789, 600 S.W.2d 916 (Ark. App. 1980). That case involved an injury which occurred during the claimant's lunch hour and the issue on appeal was whether his injury could properly be found to have arisen out of and in the course of the employment. In affirming the Commission's award of benefits, this Court stated as follows:

> Activities of a personal nature, not forbidden but reasonably to be expected, may be a material incident of the employment and injuries suffered in the course of such activities are compensable. The fact that the injury is suffered during a lunch break, when the employee is not required to be on the premises, does not alter this principle. The controlling issue is whether the activity is reasonably expectable so as to be an incident of the employment, and thus in essence a part of it. *Maheaux* v. *Cove-Craft, Inc.,* 103 N.H. 71, 164 A.2d 574 (1960).
>
> A claimant before the Workers' Compensation Commission must prove that the injury sustained was the result of an accident arising out of and in the course of employment. The phrase 'arising out of the employment' refers to the origin or cause of the accident and the phrase 'in the course of the employment' refers to the time, place, and circumstances under which the

> injury occurred. *Bass* v. *Mecklenburg County,* 258 N.C. 226, 128 S.E.2d 570. In order for an injury to arise out of the employment, it must be a natural and probable consequence or incident of the employment and a natural result of one of its risks.

The Court in *J & G Cabinets, supra,* found substantial evidence to support the Commission's finding that the employee's injury arose out of his employment since the injury resulted from a risk to which the employee's employment exposed him. It also determined that the injury occurred in the course of the employee's employment. We believe this case accurately states the law in regard to whether an employee's injury arises out of and in the course of the employment. Recent decisions of this Court relying upon *J & G Cabinets, supra,* include: *Adkins* v. *Teledyne Exploration Co.,* 8 Ark. App. 342, 652 S.W.2d 55 (1983); *Bagwell* v. *Falcon Jet Corp.,* 8 Ark. App. 192, 649 S.W.2d 841 (1983); *Owens* v. *Nat'l Health Laboratories, Inc.,* 8 Ark. App. 92, 648 S.W.2d 829 (1983).

The record reflects that appellee was on a trip for her employer and this business trip required her to secure overnight lodging at a motel. She had performed her work activities during normal working hours and had checked into the motel as a prelude to her continuation of employment activities the following day. We believe appellee's utilization of the facilities offered by the motel to all of its patrons was a natural and probable consequence or incident of her stay in the motel. As noted by the Administrative Law Judge, appellee was assaulted by an unknown person in a passageway during her return to her motel room and she had clearly regained her traveling employee status at this point. Therefore, appellee's activities, when examined within the context of *J & G Cabinets, supra,* were a natural and probable consequence or incident of her employment and we agree with the Commission's determination that her injury arose out of and in the course of her employment.

Affirmed.

CLONINGER, J., agrees.

MAYFIELD, J., concurs.

MELVIN MAYFIELD, Judge, concurring. I concur in the majority's decision because I think this case comes under the traveling employee doctrine and that the specific issue involved is governed by the rule set out in *J & G Cabinets* v. *Hennington,* 269 Ark. 789, 792, 600 S.W.2d 916 (1980), that "Activities of a personal nature, not forbidden but reasonably to be expected, may be a material incident of the employment and injuries suffered in the course of such activities are compensable."

When viewed in the light most favorable to the findings of the Commission, *Clark* v. *Peabody Testing Service,* 265 Ark. 489, 579 S.W.2d 360 (1979), I believe there is substantial evidence from which the Commission could find that appellee's injury resulted from activity reasonably to be expected.

Imogene BLEDSOE *v.*
GEORGIA-PACIFIC CORPORATION

CA 84-130 675 S.W.2d 849

Court of Appeals of Arkansas
Division I
Opinion delivered October 3, 1984
[Rehearing denied October 31, 1984.]

McMillan, Turner & McCorkle, by: *Ed McCorkle,* for appellant.

Arnold, Hamilton & Streetman, for appellee.

DONALD L. CORBIN, Judge. Appellant, Imogene Bledsoe, was employed by Georgia-Pacific as a stacker in its Glenwood lumber mill. She suffered a compensable injury on March 29, 1979. In July she underwent surgery for a herniated disk. When she returned to work in February of 1980, she received temporary partial disability and her medical bills were paid. Her last benefits were paid on March 9, 1982. In September of 1981, appellant ceased work due to back pain. On October 5, 1981, she filed a claim for additional compensation by letter and requested a hearing. The hearing was set and then postponed at appellant's request due to appellant's difficulty in obtaining medical treatment. The Administrative Law Judge notified the parties that the case would be returned to the Commission's general files until another hearing was requested. Appellant requested such a hearing on March 10, 1983. The hearing was held June 29, 1983, and the Administrative Law Judge awarded appellant a 40% permanent partial disability rating, finding that the statute of limitations set out in Ark. Stat. Ann. § 81-1318(b) was tolled when appellant filed her claim October 5, 1981. On appeal the Workers' Compensation Commission reversed and dismissed on the statute of limitations question. From the decision appellant brings this appeal. We reverse and remand.

The Workers' Compensation Commission, relying upon *Petit Jean Air Service* v. *Wilson,* 251 Ark. 871, 475 S.W.2d 531 (1972), determined that appellant's claim for additional benefits filed October 5, 1981, failed to toll the statute. We believe the Commission is in error. *Petit Jean, supra,* is entirely distinguishable upon its facts from the case at bar.

In the *Petit Jean* case the claimant filed original claims for two compensable injuries in 1968. These claims were not controverted. The claimant received his last

compensation payment on September 22, 1969. Thirteen months after this date claimant filed a claim for additional benefits. The claimant maintained that the filing of his original claims tolled Ark. Stat. Ann. § 81-1318(b), much as the filing of a complaint in a court of law tolls statutes of limitation, and that therefore his failure to file for additional benefits within the one year statutory period was not fatal to his claim. The court rejected his argument pointing out that such claims, uncontroverted and original, were not analogous to complaints in lawsuits which by their nature are almost always contested.

In the case at bar, appellant filed her original claim for a compensable injury on July 16, 1979. On October 5, 1981, she filed a claim for additional benefits. On March 9, 1982, appellant received her last benefits payment. Appellant makes no claim that her original claim tolled the statute of limitations as did the claimant in the *Petit Jean* case. Rather, appellant argues that the filing of her claim for additional benefits on October 5, 1981, well within the one year statutory period, tolled the statute. We must agree. Otherwise, the statute has no meaning. If the statute is not tolled when the claimant filed a claim for additional benefits, what could possibly toll the statute? We prefer to think the statute means what its plain language implies. The decision of the Workers' Compensation Commission is therefore reversed and remanded to the Commission for an order in keeping with this decision.

Reversed and remanded.

COOPER and MAYFIELD, JJ., agree.

Alton BOHANNON *v.* Jewell BOHANNON

CA 84-200 675 S.W.2d 850

Court of Appeals of Arkansas
En Banc
Opinion delivered October 3, 1984

Henry C. Morris, for appellant.

Wilson, Walker & Short, P.A., by: *Charles M. Walker,* for appellee.

DONALD L. CORBIN, Judge. Appellant, Alton Bohannon, appeals a decision of the chancellor requiring appellant to pay appellee, Jewell Bohannon, alimony in the sum of $400.00 per month and the award of possession of the marital home to appellee. We affirm the chancellor's decree in both respects.

At the time of the hearing on November 17, 1983, appellee was seventy years of age and the parties had been married for 48 years. The record reflects that appellee was in poor health, unable to work and had a monthly income of $141.00. Appellee's testimony established her monthly expenses at over $500.00, which figure excluded gasoline, car upkeep and insurance expenses. Appellant did not choose to testify, the proof of more than three years separation having been stipulated by the parties and verified by appellee in her testimony. It was also stipulated by the parties that appellant's monthly income amounted to $1,291.00

It is well settled that while chancery cases are tried *de novo* on appeal, the findings of a chancellor will not be reversed unless clearly against a preponderance of the evidence. Since the question of the preponderance of the evidence turns largely on the credibility of the witnesses, we defer to the superior position of the chancellor. *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W.2d 404 (1981); A.R.C.P. Rule 52(a). The award of alimony in a divorce action is not mandatory but is a question which addresses itself to the sound discretion of the chancellor. We do not reverse the chancellor's determination unless we find a clear abuse of that discretion. *Weathers* v. *Weathers,* 9 Ark. App. 300, 658 S.W.2d 427 (1983); *Neal* v. *Neal,* 258 Ark. 338, 524 S.W.2d 460 (1975). Among the factors considered by the courts in fixing the amount of alimony are the financial circumstances of both parties, the financial needs and obligations of their past standard of living, the value of jointly owned property, the

amount and nature of the current and anticipated income of each, the extent and nature of the resources and assets of each that is spendable, the amounts, after entry of the decree, which will be available to each for the payment of living expenses, the earning ability and capacity of both husband and wife, property awarded or given to one of the parties by the court or the other party, the disposition made of the homestead or jointly owned property, the condition of their health and medical needs, the relative fault of the parties and their conduct before and after separation to each other and to the property of one or both, the duration of the marriage and amount of child support. *Boyles* v. *Boyles,* 268 Ark. 120, 594 S.W.2d 17 (1980). In *Russell* v. *Russell,* 275 Ark. 193, 628 S.W.2d 315 (1982), the Arkansas Supreme Court deleted the relative fault of the parties as a factor considered by the courts in fixing the amount of alimony. It has also been stated that the primary consideration is the ability of the husband to pay regardless of what other factors may indicate. *Boyles, supra.* Although appellant in the instant case had the opportunity to present evidence of his financial condition, he elected not to testify. From our *de novo* review of the evidence presented, we cannot say that the chancellor's award of alimony was an abuse of discretion.

Appellant also contends that the court erred in awarding appellee the use and possession of the marital home. The abstract of the record reflects that a decree of separate maintenance was entered on May 20, 1981, wherein appellee was granted separate maintenance. The decree recites that the parties, together with their then respective attorneys, were present and that the parties had agreed in open court upon a settlement of their property rights, among other things. Pursuant to this agreement, appellee was placed in possession of four acres and a residence, title to which was in the name of appellant. The agreement was approved by the court and incorporated in the decree. In his complaint for divorce, appellant alleged that property rights had been adjudicated and settled between the parties. Appellee, in her response to appellant's complaint for divorce, stated that a decree of separate maintenance previously issued by the trial court on May 20, 1981, incorporating a property settlement

agreement should be enforced and continued; and additionally, stated that if the court didn't enforce the agreement, that additional property issues existing between the parties should be settled. On the date set for hearing, appellant's attorney announced that three issues were to be decided. These included the divorce, alimony and attorney's fees. The record reflects that appellant's attorney did not raise the issue of possession of the marital home at this time. This argument was raised for the first time on appeal. We do not consider matters raised in such a manner. *Bull* v. *Brantner,* 10 Ark. App. 229, 662 S.W.2d 476 (1984).

Affirmed.

COOPER and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. With due respect, I do not agree with a portion of the majority's opinion in this case.

The appellant's sole contention is that the trial court's judgment awarding the appellee $400.00 per month alimony and the right to live in the parties' marital home for the rest of her life is contrary to the preponderance of the evidence. I think the evidence supports the alimony award, but the appellant is absolutely right as to the home issue.

A careful reading of the majority's opinion reveals that the only bases upon which it attempts to sustain the award of the home is (1) it was agreed to and (2) the issue is being raised for the first time on appeal.

The problem with the first position is that the appellant designated all of the evidence to be contained in the record on appeal and the record shows that *no such agreement* was introduced into evidence. In fact, the majority opinion very carefully avoids stating otherwise. The record does contain a decree of separate maintenance entered on May 20, 1981, and it recites that for $10,000.00 paid in open court the appellee relinquishes all right,

title, and interest to all properties owned by appellant except that out of 124 acres which the parties have previously conveyed to their two sons and their wives, those grantees *will reconvey* to the *appellant* four acres on which is located a home, and the appellee shall have possession and use of this home as long as she lives or until she permanently moves from it. However, the fact that the parties had settled their property rights by an agreement which had been approved by the court in the separate maintenance suit did not mean that the divorce decree entered eighteen months later should again recite *some* of the terms of the property settlement set out in the separate maintenance decree. To the contrary, it very definitely indicates otherwise. If there has been *no new agreement,* then there is simply no need to again recite any of the terms of the old agreement, and if *there has been* a new agreement, it is wrong for the new judgment to incorporate terms of the old agreement.

The problem is that the court entered judgment based upon the old agreement without *any* evidence that it was still in effect and unchanged. As the appellant's brief asserts "there is simply the unexplained inclusion of the terms of the earlier decree of separation."

The majority opinion seeks to justify the trial court's action by saying the appellant's attorney did not raise the issue of the use and possession of the home in the trial court and is raising it here for the first time. The short answer to that is the case of *Bass* v. *Koller,* 276 Ark. 93, 632 S.W.2d 410 (1982). There, the Supreme Court of Arkansas held that under Civil Procedure Rule 50 (e), it is not necessary, in a non-jury trial, to make a motion in the trial court questioning the sufficiency of the evidence in order to raise that issue on appeal. The instant case was tried non-jury and appellant has the right to question the sufficiency of the evidence for the first time on appeal. Parenthetically, I note that appellant's attorney on appeal was not his attorney at the trial and I do not criticize the new attorney for raising this issue on appeal. Furthermore, the appellant's complaint for divorce alleges that the property rights "have already been determined and

settled between the parties." It was, therefore, the appellee's burden to show otherwise and she has failed to do that.

I would delete the chancellor's reference to the use and possession of the home because it is not supported by the evidence.

COOPER, J., joins in this dissent.

William C. HORNE *v.* STATE of Arkansas

CA CR 84-38 677 S.W.2d 856

Court of Appeals of Arkansas
En Banc
Opinion delivered October 3, 1984

Hale, Lee, Young, Green & Morley, by: *R. Wayne Lee,* for appellant.

Steve Clark, Att'y Gen., by: *Theodore Holder,* Asst. Att'y Gen., for appellee.

TOM GLAZE, Judge. Appellant was convicted of first degree murder. The jury found that appellant, with premeditation and deliberation, as required by Ark. Stat. Ann. § 41-1502 (Repl. 1977), had beaten the deceased, David Michel, to death. Appellant was sentenced to thirty years imprisonment.

In this appeal, appellant raises six points for reversal. Appellant challenges the sufficiency of the evidence to sustain a conviction of first degree murder. He also maintains that the trial court impaired his constitutional right of confrontation and cross-examination. Finally, appellant contends that the trial court erred in allowing the State to charge him with first degree murder after initially charging him with second degree murder, in admitting certain evidence into the State's case in chief against him, in allowing the State's to refer to his commission of another crime, and in failing to give a requested instruction to the jury. Of these six allegations of error, only the points concerning the sufficiency of the evidence, the reference to another crime and the limitation of cross-examination merit detailed discussion.

All witnesses' descriptions of the initial events of appellant's encounter with Michel are consistent. On the evening of November 10, 1982, Michel was drinking in a Little Rock tavern with three friends. John Lock, one of Michel's friends, got into a scuffle with appellant; both Lock and appellant were ejected from the tavern. Michel and one or two of their companions joined Lock outside the establishment, and one of them challenged appellant to meet them on the parking lot of a nearby K-Mart store.

Appellant testified that he pulled his truck onto the lot to see if a nearby Safeway store was open because his girlfriend wanted to buy some cigarettes. Once he was on the parking lot, a car was pulled onto the lot at a high rate of speed and the driver tried to cut him off from an exit. He turned his truck, and the driver of the car tried to cut him off again. According to appellant, when a second car entered the parking lot, he stopped his truck because "I didn't think that there was any way I could get by without them both trying to block me off again." Next, two or three people got out of one of the cars, fanned out and tried to circle his truck. After a bottle struck his truck, appellant got out of his vehicle with his .30-.30 rifle and fired two shots into one of the cars. Appellant stated that he was scared that he and his girlfriend were going to be hurt. He stated he "was not aware of anyone in the car" and fired into it "to scare the people that were

running after me away and hopefully to disable their car where they couldn't follow me." After appellant fired the shots, his antagonists returned to the car and fled. Appellant stated that, during this rapid sequence of events, as he was getting into his truck, he heard the sound of footsteps on metal and saw someone diving toward the back of his vehicle off the top of a nearby tractor-trailer truck. Appellant stated that he did not see the man hit the pavement of the parking lot but that he did hear "bones pop" when the man struck the pavement. He did not move toward the back of his truck to determine what happened but, instead, wanting "to get out of there," he started his truck and left the parking lot. Appellant testified that he did not know who dove off the truck, and he emphatically denied that he struck the deceased with his rifle butt. Appellant's girlfriend's testimony was essentially the same as appellant's.

The companions of the deceased, Lock and Matthew Webre, tell a different story concerning the events that occurred on the K-Mart parking lot. According to them, they saw the appellant's truck and followed it onto the lot. They stated that they pulled up beside appellant's truck and asked him what was wrong. Lock stated that they were not seeking appellant to attack him but to "get calmed down with him." Rather than respond to their question, appellant drove his truck away and turned it around so he was facing their automobile. Then, according to these witnesses, appellant got out of his truck, bent over the back of the truck and fired two rifle shots into their car, both of which struck John Lock, who was sitting on the passenger side of the car in the front seat. After the shooting, Webre drove Lock to a nearby hospital. Earlier, while appellant was turning his truck around, David Michel got out of the car and began running toward a Salvation Army trailer parked on the lot. Lock and Webre stated that they did not leave their car and that they did not see Michel after he got out of Webre's car. Webre stated that no one threw a bottle at appellant's truck.

At trial, in addition to the testimony outlined above, the State introduced the testimony of a passerby, Marcella Shelley, who stated that, on the night in question, she saw a boy standing over another boy who was prostrate on the

parking lot. This witness saw the boy who was standing holding a cane or a shillelagh. The State also introduced testimony of a co-worker of appellant who stated that appellant told her he had hit a man with his rifle butt and had beaten him up. Also, the State introduced numerous exhibits; among them were the shirt that Michel was wearing on the night in question, x-rays of his body, and a transparency of the butt of appellant's rifle. Both appellant and the State introduced the testimonies of medical experts. The State's expert witness, the chief medical examiner of Arkansas, declared that the deceased had been struck with a hard object on the left collarbone, on the back of the shoulder, and on the head with tremendous force. The medical examiner testified that the pattern of the injuries was consistent with the State's theory that appellant struck the deceased with a rifle butt and that the deceased's body showed no indication of having been injured in a fall. During cross-examination, the chief medical examiner stated that "[I]t would be impossible for Michel to suffer these injuries if he jumped from a trailer." One medical expert, testifying on appellant's behalf, stated that Michel could have sustained his injuries by jumping off a tractor-trailer rig and striking the rear of appellant's truck. Another expert, testifying for appellant, said that Michel's injuries were caused by a fall and not by a blow from a hard object.

Of appellant's six allegations of error, one — the limitation of his right of cross-examination — clearly merits reversal and remand. Appellant wished to challenge the credibility of the eye-witness, Marcella Shelley, based on her psychological records. Appellant made a pre-trial discovery motion for these records based on his belief that Shelley had such psychological impairment that she frequently fantasized events that never occurred. The trial court denied the motion. During a pre-trial hearing, appellant's attorney tried to question Shelley's psychologist to determine if her mental condition affected her credibility as a witness. The psychologist evoked the psychotherapist-patient privilege of Arkansas Uniform Rule of Evidence 503 and refused to discuss *any* of Shelley's psychological history. When appellant asked the trial court to order the psychologist to testify, the trial court ruled:

> These records . . . are protected by patient-doctor relationship. The Doctor, if he were to testify, would violate that privilege and confidence. I am not going to order those records to be disclosed, and *he can't testify to anything about that treatment* unless she permits him to. That is the reason the rule is in here. (Emphasis supplied.)

The trial court also ruled that the privilege prevented appellant from calling the psychologist to rebut Shelley's expected testimony about her psychological condition and that Shelley did not have to assert her psychotherapist-patient privilege before the jury. Finally, the trial court refused to order the psychologist to proffer his testimony about Shelley's mental condition into the record. At trial, Shelley admitted that she had received psychological counseling to help her tolerate back pain.

The trial court's refusal to order Shelley's psychologist to testify about his treatment of her was clearly error. *Baker* v. *State,* 276 Ark. 193, 637 S.W.2d 522 (1982), unequivocally holds that the privilege of Rule 503 does not prohibit testimony identifying a patient's medical treatment. The Arkansas Supreme Court in *Baker* rejected a motion that Rule 503, the physician and psychotherapist/patient privilege, protected "any information" exchanged between doctor and patient; instead, the Court construed the privilege narrowly to protect only *confidential communications between doctor and patient.*[1] Here, appellant attempted to elicit information from the psychologist concerning whether his treatment of Shelley involved any impairment on her part to perceive correctly the events to which she would testify in this cause. As earlier stated, appellant sought to show Shelley suffered from a histrionic personality, causing her to fantasize events that never happened. In short, appellant's inquiry to the psychologist was directed toward his diagnosis of Shelley's mental condition and not his confidential communications with

[1]Not all jurisdictions construe the privilege as narrowly as Arkansas. *See generally,* S. Stone and R. Liebman, *Testimonial Privileges* 390-92 (1983); E. Cleary, *McCormick on Evidence* 248-49 (3d ed. 1984).

her. Nonetheless, the trial court's ruling effectively excluded appellant's effort to obtain *any* information from the psychologist. Of course, such a ruling runs contra to the Supreme Court's desire expressed in *Baker* to give full range to the accused's constitutional right to confront and cross-examine witnesses against him.[2] Given the Arkansas Supreme Court's emphasis in *Baker* on the narrow protection afforded by Rule 503, we feel compelled to reverse and remand this case for a new trial.

Because appellant will have a new trial, we will resolve his other allegations of error that could reoccur there. First, appellant contends that the State did not adduce any evidence that he premeditated the murder of David Michel. Appellant's argument is three-fold: (1) appellant was not acquainted with Michel and had no quarrel with him; (2) expert medical witnesses testified that Michel's injuries could have been caused by a fall; (3) the State put forward no evidence showing appellant weighed in his mind the decision to strike the deceased. Appellant's first sub-point seems to be a suggestion that the State failed to prove appellant had a motive for murdering Mr. Michel; however, the State is not bound to prove a motive for the killing. *Ezell* v. *State,* 217 Ark. 94, 229 S.W.2d 32 (1950). Appellant's second and third sub-points were discussed in our recent case of *Jones* v. *State,* 11 Ark. App. 129, 668 S.W.2d 30 (1984). Like the instant case, *Jones* was a first degree murder case in which the evidence of premeditation and deliberation consisted of expert testimony regarding the nature, extent and location of the wounds inflicted on the deceased. As in the instant case, both sides in *Jones* presented conflicting testimony concerning the nature and extent and location of the wounds. In this case and in *Jones,* the jury chose to believe the State's expert, the chief medical examiner, who testified that Michel had suffered a broken collarbone, broken ribs and a fractured skull as a result of three blows

[2]We recognize that *Baker* was not a psychotherapist-patient case — the testimony at issue there was from a nurse concerning her treatment of a prisoner in the Pulaski County jail for venereal disease. However, Rule 503, on its face, applies to confidential communications between a psychotherapist and his patient made to diagnose the patient's mental condition.

from a hard object and that these injuries could not have been sustained in a fall. It is the jury's duty to assess the credibility of expert witnesses. 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,* ___ U.S. ___, 103 S.Ct. 386 (1982). 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). Based on our review of the State's expert testimony and the other facts and circumstances of the case, we find that the State did put forward substantial evidence of appellant's premeditated and deliberated murder of David Michel.

Appellant next contends that the State violated Arkansas Uniform Rule of Evidence 404(b) when it introduced evidence that appellant had shot John Lock twice in the back with his .30-.30 rifle. According to appellant, the evidence had no probative value and was introduced simply to prejudice him by showing that he is a criminal. The State counters that appellant's attack on Lock and his murder of Michel are an indivisible criminal transaction. We agree with the State's characterization of the events on the night in question. The Arkansas Supreme Court has stated repeatedly that all of the acts of a contemporaneous criminal transaction are admissible into evidence. *See Thomas* v. *State,* 273 Ark. 50, 615 S.W.2d 361 (1981).

Appellant also argues that the trial court erred in admitting a shirt that the deceased supposedly wore on the night he was injured because the shirt had not been properly authenticated and because the shirt had been tampered with. David Michel's mother testified that the shirt the State introduced at trial was, in fact, the shirt her son had worn on that night. She testified further that she had washed the shirt because it had a small grass stain on it and that it had no rips or tears in it. We believe this evidence was properly

authenticated under Arkansas Rule of Evidence 901(b)(1), which states that the testimony of a witness with knowledge that an item is what it is claimed to be is proper authentication. The possibility that certain stains on the shirt had been washed away simply goes to the weight the jury was to accord the evidence.

Appellant also contends that the trial court should not have admitted a transparent photograph of appellant's rifle butt and an x-ray of the deceased's rib cage into evidence. The appellant argues that he had not been given the opportunity to examine these exhibits as required by Arkansas Rule of Criminal Procedure 17.1(a)(V), which requires the prosecuting attorney to disclose to the defense counsel, upon timely request, any photographs the prosecuting attorney intends to use at trial. Any prejudice appellant may have suffered from being unaware of this evidence cannot reoccur at his new trial, so we need not decide this point.

Appellant also argues that the trial court erred in allowing the State to charge him with first degree murder after initially charging him with second degree murder. Originally, the State charged appellant with second degree murder; however, the trial court permitted the State to enter a *nolle prosequi* to the second degree murder charge and refile a first degree murder charge. According to appellant, this tactic is a violation of Ark. Stat. Ann. § 43-1024 (Repl. 1977), which states:

> The prosecuting attorney or other attorney representing the State, with leave of the court, may amend an indictment, as to matters of form, or may file a bill of particulars. But no indictment shall be amended, nor a bill of particulars filed, so as to change the nature of the crime charged or the degree of the crime charged. All amendments and bills of particulars shall be noted of record.

However, in the case of *Abernathy* v. *State*, 278 Ark. 250, 644 S.W.2d 590 (1983), the Arkansas Supreme Court upheld just such a procedure. It is true that in *Abernathy* four

months passed between the filing of the new charge and the appellant's trial and that only two weeks passed in the case at bar. However, because appellant denied all along that he struck the deceased, we fail to see how appellant was surprised or otherwise prejudiced in the preparation of his defense. In a related argument, appellant contends the filing of the first degree murder charge was a violation of his constitutional due process rights because the filing of the charge was motivated by prosecutorial vindictiveness when appellant refused to plead guilty to a lesser homicide charge. The trial court held an extensive pre-trial hearing on this point and ruled that there had been no prosecutorial vindictiveness. In his brief, appellant does not point out how the trial court's findings on this issue are erroneous; instead, he simply makes a sweeping assertion that the prosecutor acted vindictively in filing the first degree murder charge. After a careful review of the record of the pre-trial hearing, we are unable to say the trial court was clearly erroneous in making its determination that the prosecutor had not acted vindictively.

Appellant's final point, that the trial court erred in not instructing the jury that appellant had a constitutional right not to testify against himself, is without merit. When the defendant does take the stand to testify in his behalf, as appellant did in this case, the trial court need not instruct the jury that the defendant does not have to testify. *Caldwell* v. *State,* 214 Ark. 287, 215 S.W.2d 518 (1948).

Having addressed and decided each point likely to reoccur on retrial of this cause, we reverse and remand this case for the reasons stated hereinabove.

Reversed and remanded.

CORBIN and MAYFIELD, JJ., concur.

CRACRAFT, C.J., and COOPER, J., dissent.

DONALD L. CORBIN, Judge, concurring. I concur in the majority's decision to reverse and remand this case for a new trial because of the trial court's erroneous application of

Ark. Unif. R. Evid. 503 to the testimony of Dr. Stevens. The dissenting judges argue that we should not have decided this issue. Although the dissent does not expressly say so, it seems to suggest that we ought to apply Supreme Court Rule 9(e)(2) and affirm this case because the appellant's abstract of Dr. Stevens' testimony regarding his treatment of Marcella Shelley is deficient. The dissent overlooks the trial court's refusal to order Dr. Stevens to proffer his testimony into the record. Appellant's counsel asked the trial court to issue such an order, and the trial court refused to do so. Because of this refusal, Dr. Stevens' testimony of his treatment of Marcella Shelley was not in the record to be abstracted by appellant's counsel. The dissent's failure to recognize this fact produces a curious result — appellant is denied a new trial because his counsel could not perform the impossible task of abstracting nonexistent testimony. In their opinion, the dissenting judges cite five cases that set out the requirements of a proper appellate abstract. Of these, only two cases, *Williams* v. *Owen,* 247 Ark. 42, 444 S.W.2d 237 (1969), and *Kitchen* v. *State,* 271 Ark. 1, 607 S.W.2d 345 (1980), seem even remotely close on their facts to the instant case. As I read these two cases, their teaching is simply that counsel for appellants must abstract pertinent testimony in their briefs and cannot merely indicate, by references to page numbers, what pertinent testimony may be found in the record. The purpose of this rule is obvious — to spare appellate judges the burden of passing from office to office the single copy of the often massive trial record. This rule makes sense where there is pertinent testimony in the record. Because the testimony is *in* the record, counsel can abstract it. To insist, as the dissenting judges do, that this rule be applied to a record where the pertinent testimony was never allowed in the record in the first place creates a Catch-22 situation.[1]

As a final point, the dissent strikes off on this tack alone on its own motion. Not even the State, in its brief, bothered to call our attention to the so-called deficiencies in the appellant's abstract that the dissent has seized upon.

[1]"Catch-22: a paradox in a law, regulation, or practice that makes one a victim of its provisions no matter what one does." *Webster's New World Dictionary of the American Language,* at 224 (2d ed. 1984).

Obviously, the State agrees with this Court's majority that no deficiencies exist warranting the application of Rule 9 to this case.

MELVIN MAYFIELD, Judge, concurring. I agree that under the holding of *Baker* v. *State,* 276 Ark. 193, 637 S.W.2d 522 (1982), the physician-patient privilege did not prohibit the psychologist, who treated the witness Marcella Shelley, from testifying as to his diagnosis of her mental or emotional condition so long as he did not testify as to any communications made by her to him for the purpose of this diagnosis or treatment.

Appellant's abstract shows that at an omnibus hearing held four days before the trial began, the psychologist refused to testify as to the mental or emotional condition of Mrs. Shelley because of the physician-patient privilege. In his argument on this point, the appellant's attorney gave page references to the transcript where the trial court said he would not order the psychologist to testify and where the attorney stated that he had information that if the psychologist were required to testify he would say that Mrs. Shelley had a histrionic personality with a strong likelihood of fantasizing. I believe the essence of that testimony was admissible and that the jury should have been allowed to hear it.

I realize that these page references did not constitute an abstract as required by Rule 9, and that it is not practical and we are not required to search the transcript to find out what it says. In this case, I was willing to make the limited search necessary to consider the point argued, but an attorney who fails to properly abstract takes a big risk because we simply do not have the time to read the transcript in every case.

On the narrow grounds above indicated, I concur in the reversal and remand of this case.

GEORGE K. CRACRAFT, Chief Judge, dissenting. I respectfully but strongly dissent from the majority opinion reversing this conviction. I thoroughly agree with the majority that under the ruling in *Baker* v. *State,* 276 Ark.

193, 637 S.W.2d 522 (1982), testimony of a physician with regard to diagnosis and treatment is not within the privilege asserted. If the abstract furnished me had contained evidence that the trial court had excluded unprivileged relevant testimony such as that cited in the majority opinion I might agree with their conclusion. The pretrial hearing referred to in the majority opinion appears in the appellant's abstract in two sentences quoting Dr. Stevens as admitting he had treated the witness in November 1982 and refusing to testify as to her condition based upon the physician-client privilege. Nothing else with regard to Dr. Stevens appears in the abstract of that proceeding and at no place in the entire abstract furnished me was there a proffer of what Dr. Stevens would have said. It is a well settled rule that the exclusion of evidence is not reversible error where there is no proffer of what that evidence would have been. *Simmons* v. *McCollum,* 269 Ark., 811, 601 S.W.2d 232 (Ark. App. 1980).

The substance of the testimony and rulings of the court on which the majority rely appears in appellant's printed argument with only scattered transcript page references in some but not all instances. In reaching its result the majority have, in my opinion, departed from a well established rule not only of our courts but of almost universal application that an appellant must demonstrate error from his abstract of the record. On appeal the *abstract* of the record constitutes the *record,* and the appellate court considers only that which is contained in the abstract. *Williams* v. *Owen,* 247 Ark. 42, 444 S.W.2d 237 (1969); *Corning Bank* v. *Bank of Rector,* 265 Ark. 68, 576 S.W.2d 949 (1979); *Jones* v. *Reed,* 267 Ark. 237, 590 S.W.2d 6 (1979); *Smith* v. *State,* 278 Ark. 462, 648 S.W.2d 792 (1983). It has been often stated that where the appellant's abstract does not contain the testimony on which he bases his argument our practice is to rely on the record only if it shows the trial court's decision should be affirmed on a particular point, but we do not explore the record for prejudicial error if none is shown to us. *Smith* v. *State, supra.* The mere scattering of transcript references throughout appellant's argument is not a substitute for a proper abstract. *Kitchen* v. *State,* 271 Ark. 1, 607 S.W.2d 345 (1980). The reason for such a rule is obvious. It is to permit deletion of those parts of the proceeding which have no

bearing on the issues and to bring to the court's attention only those parts of the proceedings that do. Our court has often pointed out the impossibility of all appellate judges reading a single transcript. I was not able to do so here and for that reason I was wholly unable to follow the arguments of either the appellant in his brief or the presentation of the case in conference.

JAMES R. COOPER, Judge, dissenting. Although I fully agree with Judge Cracraft's dissenting opinion, because of Judge Corbin's concurring opinion I feel compelled to write. First, it is worth emphasizing that Judge Cracraft noted that the abstract supplied did not include "unprivileged *relevant* testimony" (emphasis mine). I agree that it did not, but even more important, nothing was proffered so that the trial court could have determined the relevancy of the testimony it is claimed that Dr. Stevens would have given. Judge Corbin's concurring opinion states that the trial court refused to order Dr. Stevens to proffer his testimony into the record. Any such request of the trial court is not included in the briefs furnished this Court. It is true that the Attorney General's office, in a supplementary abstract, provided us with an abstract of the pretrial motion, and the argument before the trial court concerning Dr. Stevens' records, but that exchange between counsel and the trial court does not include a request that Dr. Stevens be required to proffer the records and his testimony.

Judge Corbin indicates that Judge Cracraft and I would require that counsel do the impossible, i.e., abstract nonexistent testimony. That is an inaccurate reading of the dissenting opinion; the dissenting opinion of Judge Cracraft simply states that, since the Court does not know, *from the abstract,* what Dr. Stevens might have said, we will not search the record to find out. This becomes even more obviously reasonable when the trial court was never asked to require Dr. Stevens to answer in a proffer.

For the reasons stated in Judge Cracraft's dissenting opinion, and for the reasons stated herein, I would affirm. Further, I find no merit to the other points raised by the appellant.

Humberto JIMENEZ *v.* STATE of Arkansas

CA CR 84-87 675 S.W.2d 853

Court of Appeals of Arkansas
Division I
Opinion delivered October 3, 1984

John W. Settle, by: *J. Fred Hart, Jr.,* for appellant.

Steve Clark, Att'y Gen., by: *Patricia G. Cherry,* Asst. Att'y Gen., for appellee.

TOM GLAZE, Judge. On the night of October 10, 1983, appellant broke into the home of Bill Payno in Fort Smith and was arrested shortly after entering the house. At trial, appellant submitted that he purposely entered Mr. Payno's house, looking for a place to sleep. Appellant was convicted in a non-jury trial of burglary, a violation of Ark. Stat. Ann. § 41-2002 (Repl. 1977). The trial court sentenced appellant to five years' imprisonment, with three and one-half years suspended. Appellant presents one issue on appeal: Was there sufficient evidence from which the trial court could find that appellant entered Mr. Payno's house with "the purpose of committing therein any offense punishable by imprisonment," as required by statute?

At trial, the State offered the testimonies of Mr. Payno, the homeowner, and the police officer who arrested appellant, to prove the requisite element of intent. The arresting officer testified that on the evening of October 10, he was called to investigate a possible break-in at the Payno home. Upon his arrival, the officer found a window in the back door of the house that had been broken. After entering the house, the officer found appellant sitting in a corner of what appeared to be the living room. Mr. Payno testified that after hearing of the break-in into his home, he went there to determine if anything was missing. Because he had moved out of the house one week earlier, the house was almost empty. However, Mr. Payno did find that some dishes, glasses and silverware had been wrapped in towels and placed in a large pail. He also discovered that someone had torn some curtains off the living room wall and had used them to wrap up a staple gun and some other items, as if to carry them away. Mr. Payno stated that none of these items were as he had left them in the house that afternoon. Mr. Payno conceded that his sister had been assisting him daily to clean and pick up items in the house; however, he stated that he was aware of everything she did and he did not believe it was possible she might have wrapped up these dishes.

To rebut the State's circumstantial evidence of his intent, appellant testified that, previous to his arrest, he had been living with a friend, Louis Martinez, in Martinez'

apartment. Because appellant never paid rent to Martinez, he evicted appellant late on the evening of October 10. After being turned out into the street by his friend, appellant broke into the Payno home, which was across the street from Martinez' apartment. Appellant stated that he broke into the house only to find a place to sleep that night and that he knew the house was vacant because he had seen Payno move out. About the dishes and the torn curtains, appellant said that he knew nothing. He denied having any intention to steal anything from inside of the Payno home. According to appellant, he was asleep when the police entered the home.

On appeal, we must affirm appellant's conviction if there is substantial evidence to support the trial court's finding of fact. *Holloway* v. *State,* 11 Ark. App. 69, 666 S.W.2d 410 (1984). 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). In evaluating the substantiality of the evidence, we must view it in the light most favorable to the State. *Profit* v. *State,* 6 Ark. App. 51, 637 S.W.2d 620 (1982). Appellant does not argue on appeal that the Payno house was not an occupiable structure or that he lawfully entered the home. His sole contention is that the State did not present substantial evidence that he entered the home with the requisite intent.

Appellant's argument rests primarily upon *Norton* v. *State,* 271 Ark. 451, 609 S.W.2d 1 (1980), and its progeny. In *Norton,* the State proved that the appellant there illegally entered an office building; there was no proof that Norton had taken, or even touched, any property inside the building. In reversing Norton's conviction, the Supreme Court held:

> We hold a specific criminal intent, which is an essential element of the crime of burglary, cannot be presumed from a mere showing of illegal entry of an occupiable structure. The prosecution must prove each and every element of the offense of burglary beyond a reasonable

> doubt and cannot shift to the defendant the burden of explaining his illegal entry by merely establishing it.

Id. at 454, 609 S.W.2d at 3.

We followed *Norton* in the subsequent case of *Wortham* v. *State,* 5 Ark. App. 161, 634 S.W.2d 141 (1982). In this case, the State proved that appellant entered a house and confronted two teen-aged girls with whom he was acquainted and that he fled after one of the girls saw him. There was no proof that appellant was armed, that he made an improper approach toward the girls, or that any property was missing from the home or had even been touched by Wortham. In that decision, we reversed Wortham's conviction because the State did not produce any evidence to show appellant's purpose for being in the home. Without such proof, the jury in that case was forced to guess regarding Wortham's intent in entering the house.

Both *Norton* and *Wortham* are distinguishable from the case at bar. In both of these cases, the State proved only that appellant was "merely present;" in this case, the State proved "presence" plus other facts and circumstances from which the trial court could infer that appellant had the requisite intent. These facts and circumstances are, of course, the items that had been gathered up, as if to be carried off, and the homeowner's testimony that neither he nor his sister had moved these things. The fact that the State's evidence bearing on appellant's intent is circumstantial does not render it insubstantial, as the law makes no distinction between direct evidence of a fact and circumstances from which it may be inferred. *Johnson* v. *State,* 7 Ark. App. 172, 646 S.W.2d 22 (1983).

Affirmed.

CRACRAFT, C.J., and COOPER, J., agree.

Randy PHILLIPS *v.* STATE of Arkansas

CA CR 84-80 676 S.W.2d 753

Court of Appeals of Arkansas.
Division II
Opinion delivered October 10, 1984

Stripling & Morgan, by: *Dan Stripling,* for appellant.

Steve Clark, Att'y Gen., by: *Leslie M. Powell,* Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was charged with third degree battery, tried by a jury, convicted and sentenced to 90 days in jail and a $100.00 fine. In his sole point for reversal, the appellant argues that in his closing statement, the deputy prosecuting attorney commented on the defendant's failure to testify, and the trial court erred in refusing to grant the appellant's motion for a mistrial based on the comment.

On December 23, 1982, the appellant attended a dance at the Folk Center in Mountain View. Richard Sanchez, who was a musician at the dance, went outside while on break at around 11:30. Immediately upon leaving the building where he was playing, Mr. Sanchez was either shoved or tripped and fell down a hill. Upon coming to rest, Mr. Sanchez testified that he looked up and saw the appellant. He stated that the appellant spoke to Mr. Sanchez in a threatening tone, asking if he "wanted some of this." Mr. Sanchez testified that he replied that he needed someone to carry him to the hospital because he thought his leg was broken. It is further alleged that at this time, the appellant kicked Mr. Sanchez and broke his collarbone, thus giving rise to the battery charge. The defense elicited testimony which indicated that Sanchez had told a different story at the hospital.

In his summation to the jury, the deputy prosecutor stated:

> You haven't heard one person that was there tell you that Randy Phillips didn't do this. The only people that were there all told you that Randy Phillips . . .

At this point defense counsel objected and requested that the trial court grant a mistrial based on this comment, alleging that it called attention to the fact that the appellant had failed to take the stand and testify. According to the appellant, the statement is improper because it mentions the appellant's name in the same sentence as it is mentioned that

everyone who was at the scene testified that the appellant had committed the crime, thus calling attention to the fact that although the appellant was present, he failed to take the stand and deny his guilt.

The appellee argues that the prosecutor's statement was simply directed to the fact that the nurses who had testified for the defense in order to impeach Sanchez' statement were not eyewitnesses to the alleged battery and thus the testimony of the victim and another was more credible.

A statement by the prosecuting attorney which is a comment on an accused's silence violates the self-incrimination clause of the Fifth Amendment to the United States Constitution made applicable to the states by the Fourteenth Amendment. Since *Griffin* v. *California,* 380 U.S. 609 (1965), which held that a prosecutor could not make any direct reference to the failure of the accused to take the stand, most prosecutorial comments on the failure of an accused to testify have been subtle and ambiguous. *See,* Hall, *The Bounds of Prosecutorial Summation in Arkansas,* 28 Ark. Law Rev. 55 (1975). While the United States Supreme Court has stated in the recent case of *United States* v. *Hasting,* ___ U.S. ___, 103 S.Ct. 1974 (1983), that *Griffin* error is not prejudicial *per se,* and that the reviewing court has a duty to determine if, absent the prosecutor's statement, it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty, the Supreme Court of Arkansas has declined to adopt such a rule. In the recent case of *Pruett* v. *State,* 282 Ark. 304, 669 S.W.2d 186 (1984), the court stated:

> When a comment about an accused's silence is made before a jury by the prosecution a mistrial is proper. Prejudice is presumed in such cases. *Adams* v. *State,* 263 Ark. 536, 566 S.W.2d 387 (1978).

See also *Evans and Foust* v. *State,* 221 Ark. 793, 255 S.W.2d 967 (1953).

Certain statements by the prosecution in summation referring to the nature of the State's case have been upheld as not violative of the accused's right to refuse to testify. In

Harris v. *State,* 260 Ark. 646, 543 S.W.2d 459 (1976), the prosecutor stated:

> Possession? You heard the three agents get on the stand and say that the hundred pounds of substance was taken from these two defendants out there on Cato Springs Road on April 29th, 1974. *There has been absolutely no testimony to contradict that.* I don't think that is even an issue at this point. They possessed it; a hundred pounds — Approximately one hundred pounds — .

The court held that this statement did not constitute a comment on the appellant's failure to testify. In *Moore, Frazier & Davidson* v. *State,* 244 Ark. 1197, 429 S.W.2d 122 (1968), the statements that the case was "uncontradicted and undenied"; "I will leave that because the record is bare"; "There is nothing else in here except the testimony and proof of the sheriff"; "There has been no proof as to who [certain equipment] belonged to, the testimony was that nobody would claim it, nobody has acquired it, nobody has come here today to acquire it"; and "If I was picked up with [the equipment introduced into evidence], there would be some explanation of what it was doing in my car and what I was doing with it," all were held to be expressions attributable to the weight to be given to the evidence, rather than attempts to call the jury's attention to the fact that the appellants failed to testify. For a review of other statements held not to be improper, see Chief Justice Harris' dissent in *Adams* v. *State, supra.*

Other statements by the prosecution in summation, however, have been held to violate the accused's right to remain silent. In *McCroskey* v. *State,* 266 Ark. 806, 586 S.W.2d 1 (1979), the prosecuting attorney stated:

> And what evidence do you have concerning this statement? You've got two officers who have sworn under oath as to the circumstances of taking the statement. There's been no evidence submitted in any way to challege anything other than that was a perfectly free and voluntary statement given by Mr. Braden (sic). That's the only testimony.

The court reversed and remanded for a new trial, holding that this statement focused attention on the fact that the appellant failed to take the stand and in any way challenge the statement of the co-defendant which was introduced in evidence.

In *Adams* v. *State,* the prosecutor stated in closing argument to the jury:

> . . . . .To convict him (the defendant) you don't have to disbelieve any part of their case, *because what did the defense, how many witnesses did the defense put on for your consideration?*

The court, in reversing the trial court, stated:

> It is apparent that in light of the prosecuting attorney's comment the jury could have surmised appellant's failure to tesify was an admission of guilt. Thus, the exercise of a constitutional right could have been damaging evidence against the appellant.

In *Evans and Foust* v. *State, supra,* the court reversed the appellants' conviction and remanded the case for a new trial based on the following statement by the prosecutor:

> . . . and you had been called in here to testify, and placed under bond, you would begin to search your mind and to place in your mind indelibly where you were on that occasion, and what you were doing. These boys are hauling timber all the time. Where were you on the 16th, gentlemen, if you were not where this little boy says you were?

In reversing, the court stated:

> Our law wisely provides that the failure of a defendant to testify shall not create any presumption against him. The prosecuting attorney should carefully refrain from using any words or gestures which would be calculated to call to the jury's attention the fact that a defendant has not testified.

In the case at bar, the prosecutor, in his statement, essentially was arguing that the evidence of the appellant's guilt to the battery charge was uncontradicted.

It is easy to state that the prosecuting attorney should not comment on a defendant's failure to testify. Identifying such statements, and separating them from the prosecutor's comments concerning the uncontradicted testimony of the State's witnesses, is difficult. The prosecutor must be able to argue the weight of the evidence, including the fact that the witness' testimony was consistent and uncontradicted. Also, as the Arkansas Supreme Court stated in *Pruett* v. *State, supra:*

> The court is in a position to note the manner of delivery of such statements and the inflections or emphasis used and is therefore in the better position to understand how the jury perceived it. *Perry* v. *State,* 277 Ark. 357, 642 S.W.2d 865 (1982)

In the case at bar, we hold that the trial court did not err in failing to grant a mistrial.

Affirmed.

CORBIN, J., dissents.

DONALD L. CORBIN, Judge, dissenting. I must respectfully dissent. I find very little difference between the comments made by the prosecutor in *Adams* v. *State,* 263 Ark. 536, 566 S.W.2d 387 (1978), and those made by the deputy prosecutor in the instant case. The remark by the prosecutor here clearly called the jury's attention to the fact that appellant Phillips had failed to take the stand and testify. The majority has reached the wrong result under existing case law in Arkansas and I would reverse and remand.

I believe the better rule to be that of *United States* v. *Hasting,* 103 S.Ct. 1974 (1983), where in referring to the holding of *Griffin* v. *California,* 380 U.S. 609 (1965), it was held that *Griffin* error is not prejudicial *per se* and that the

reviewing court has a duty to determine if, absent the prosecutor's statement, it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty.

The majority believes the Arkansas Supreme Court has declined to follow the rule of *Hasting, supra.* I believe we should adopt it as it provides adequate protection against self-incrimination. To do so would accomplish the same result in the instant case as the majority has reached.

MAGIC MART, INC. and THE HOME INSURANCE COMPANY *v.* Lewis LITTLE

CA 84-253 676 S.W.2d 756

Court of Appeals of Arkansas
Division II
Opinion delivered October 10, 1984
[Rehearing denied October 31, 1984.]

Tom Forest Lovett, P.A. by: *Mel Sayes,* for appellants.

Henry N. Means, III, for appellee.

DONALD L. CORBIN, Judge. This is an appeal from a decision of the Workers' Compensation Commission finding a compelling reason for a change of physicians by appellee, Lewis Little, and directing that future medical expenses from September 9, 1983, would be the responsibility of appellants, Magic Mart, Inc., and The Home Insurance Company. We affirm.

Appellee sustained a compensable injury on October 26, 1981. He was first treated by a company doctor and returned to work on October 29, 1981. Appellee requested a change of physicians from the company doctor to his family doctor, Dr. Peter Thomas. The change was mutually agreed upon by the parties and Dr. Thomas subsequently referred appellee to Dr. William F. Blankenship for treatment. On January 21, 1982, Dr. Blankenship performed surgery upon appellee to repair the rotator cuff tear and a partial acromionectomy of the right shoulder. Dr. Blankenship awarded appellee a permanent partial impairment of 15% to the right upper extremity and released appellee on July 16, 1982. After appellee was released from medical treatment, he returned to work for

appellant Magic Mart. He worked for approximately two months and was laid off. Thereafter, appellee applied for and received unemployment compensation benefits and worked part time for Kroger polishing floors.

A hearing before the Administrative Law Judge was held on August 16, 1982, to deal with appellee's request for a change of physicians from Dr. Blankenship. An independent evaluation by Dr. John L. Wilson was ordered which confirmed Dr. Blankenship's rating of 15% and noted that Dr. Blankenship's treatment of appellee was adequate. No formal opinion was entered and it was determined that appellee was not entitled to a change of physicians.

Another hearing before the Administrative Law Judge was held on June 2, 1983, to determine whether appellee was entitled to a change of physicians from Dr. Blankenship to Dr. Michael J. Weber. Because of appellee's dissatisfaction with Dr. Blankenship's treatment and his continuing pain and discomfort, he began seeing Dr. Weber on December 9, 1982. Appellee began treatment with Dr. Weber without consent of appellants and without the authorization of the Commission. Appellants refused to pay medical benefits in connection with Dr. Weber's treatment. The ALJ again ordered an independent evaluation of appellee by Dr. Wilson. In his report dated August 18, 1983, Dr. Wilson stated that appellee's healing period had ended and found his impairment to be 15% to the upper extremity as previously stated. On January 20, 1983, Dr. Weber diagnosed a probable anterior superior impingement syndrome. After an examination of appellee on June 28, 1983, Dr. Weber recommended hospitalization for a complete evaluation of appellee's shoulder problem including an arthrogram and possible shoulder manipulation for adhesive capsulitis. Dr. Blankenship's report of June 6, 1983, to the ALJ stated his belief that appellee was not in need of any further treatment. The ALJ again determined that appellee had failed to prove by a preponderance of the evidence that there was a compelling reason or circumstance to justify a change of physicians. Appellee's request was denied and the decision was appealed to the Full Commission.

The Commission determined that the treatment of appellee by Dr. Weber prior to September 9, 1983, was unauthorized and not the responsibility of appellants as appellee had not followed the statutorily prescribed procedure for effecting a change of physicians. The Commission, however, found a compelling reason or circumstance justifying a change of physicians after September 9, 1983, based upon the deterioration of the physician-patient relationship between appellee and Dr. Blankenship, appellee's continuing pain and discomfort and Dr. Blankenship's report of June 6, 1983, stating his belief that appellee was not in need of any further treatment.

Ark. Stat. Ann. § 81-1311, as amended by Act 290 of 1981 (Supp. 1983), provides in pertinent part:

> If the employee selects a physician, the Commission shall not authorize a change of physician unless the employee first establishes to the satisfaction of the Commission that there is a compelling reason or circumstance justifying a change. If the employer selects a physician, the claimant may petition the Commission one time only for a change of physician, and if the Commission approves the change, with or without a hearing, the Commission shall determine the second physician and shall not be bound by recommendations of the claimant or respondent;

The above statute governs the method of requesting and granting a change of physicians depending upon whether the employee is seeking a change from a physician of his choice or from one of the employer's choice. Appellants argue that the Commission's opinion has misinterpreted the application of the above statute and that its opinion should be reversed. Based upon their interpretation of the above statute, appellants contend that appellee was only entitled to one change of physicians and that appellee has already had his one statutory change. They base this argument upon the supposition that this is a situation where the employer has selected the physician and that the mutually agreed upon change from the

company doctor to appellee's family doctor, Dr. Thomas, who subsequently referred appellee to Dr. Blankenship, constituted appellee's one change of physician. While appellants concede that the Commission correctly determined that past medical services provided by Dr. Weber were unauthorized, appellants contend that they should not be held responsible for medical services provided by Dr. Weber after September 9, 1983. We do not agree. This appeal involves appellee's first petition to the Commission for a change of physicians. We do not view the mutually agreed upon change of physicians from the company physician to one of appellee's choosing as his first and only change. While we do agree with appellants that the "compelling reasons or circumstances" burden is not applicable where the employer has initially selected the physician, the record reflects that there is substantial evidence to support the Commission's finding that appellee was entitled to a change of physicians. Appellee has clearly met his burden of proof under either provision of Ark. Stat. Ann. § 81-1311.

Using the rule that we must view the evidence in the light most favorable to the action of the Commission, *Clark* v. *Peabody Testing Service,* 265 Ark. 489, 579 S.W.2d 360 (1979), we think appellee's testimony that he suffered continuing pain, Dr. Blankenship's report stating that he had nothing further to offer appellee by way of treatment, the deterioration of Dr. Blankenship and appellee's relationship and Dr. Weber's opinion that appellee was in fact in need of further treatment are sufficient to support the Commission's decision in this case.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

Dwight LOMAX *v.*
STATE of Arkansas

CA CR 84-103 676 S.W.2d 464

Court of Appeals of Arkansas
Division I
Opinion delivered October 10, 1984

[redacted]

Leon F. Pesek, Jr., for appellant.

Steve Clark, Att'y Gen., by: *Theodore Holder,* Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. The appellant, Dwight Lomax, was found guilty by a jury of the sale of a controlled

substance in violation of Ark. Stat. Ann. § 82-2617 (Repl. 1976), and was sentenced to ten years imprisonment. On appeal, he relies upon seven points for reversal. His attorney here was not the attorney at the trial.

First, the appellant argues that the trial court erred in proceeding without two of his subpoened witnesses' being present. The appellee points out, however, that the appellant did not ask for a continuance or object to proceeding without the witnesses. The failure to ask for a continuance, *Weaver* v. *State,* 185 Ark. 147, 46 S.W.2d 37 (1932), or to make an appropriate objection, *Wicks* v. *State,* 270 Ark. 781, 606 S.W.2d 366 (1980), precludes the consideration of this issue on appeal.

Appellant next contends that the trial court erred in proceeding without requiring the state to produce its confidential informant. Normally, the state is required to disclose the identity of an informant when he is present and participates in the alleged illegal transaction but not when the informant merely supplies a lead. *Bennett* v. *State,* 252 Ark. 128, 477 S.W.2d 497 (1972). This distinction is not always conclusive, however. *West* v. *State,* 255 Ark. 668, 501 S.W.2d 771 (1973). In the instant case, the informant was present during the transaction involved so the state may have been obligated to disclose his identity, but the appellant's testimony reveals that on the day of the trial he knew the informant's identity. Furthermore, according to statements in the record made by appellant's attorney at the hearing of a motion for new trial, he was also aware of the informant's identity.

Appellant argues further that the state should have produced the informant as a witness although no authority is cited for this contention. Even more prejudicial to appellant's argument, however, is the absence of any motion for disclosure or for "production" of the informant. In addition, there was no motion for continuance or any other objection to keep the trial court from proceeding as it did. Again, without any such motion or objection, this court cannot find that the trial court erred.

The appellant's third contention is that the state failed to establish the chain of custody of the controlled substance allegedly sold (marijuana), and thus the substance should not have been admitted into evidence. There was testimony that on the day of the sale Investigator Jimmy Morris (the "buyer") placed the marijuana in an envelope and labeled and sealed it. He then put his initials on the seal and put tape over it. He kept the envelope in his locked brief case until he turned it over to the state crime lab five days later. (Appellant argues that the evidence could have been tampered with in those five days.) A chemist in the crime lab testified that he received the labeled and sealed envelope and ran tests on the contents which were positive for marijuana. At that point, the state moved for introduction of the marijuana into evidence and the appellant did not object.

Again we note that an argument for reversal will not be considered in the absence of an appropriate objection in the trial court, but even if the objection had been made, we think the chain of custody established was sufficient. This court has said:

> In establishing a chain of custody prior to introduction of evidence, it is not necessary to eliminate every conceivable possibility that the evidence has been tampered with; it is only necessary that the trial judge be satisfied that the evidence is genuine and, with reasonable probability, that it has not been tampered with.

Ethridge v. *State,* 9 Ark. App. 111, 119, 654 S.W.2d 595 (1983).

Appellant's fourth argument is that the trial court erred in not allowing him to reserve his opening statement until after the state rested. The record establishes that after the state's opening statement the appellant's attorney moved to reserve the right to make an opening statement after the close of the state's case. At the close of the state's case, there was an in-chambers hearing at which the trial judge stated that at the original conference on appellant's motion, he had expressed serious reservations about the right to reserve opening statement but appellant's attorney had assured him

that he had case law to support the motion. The case presented by appellant's attorney was *McDaniels* v. *State,* 63 S.W.2d 335 (1933), which is listed as not reported in 187 Ark. at 1163. The trial court found that case did not support appellant's position. Therefore, the court denied appellant's request to reserve opening statement and stated that appellant had been put on notice that this might be the decision if appellant's attorney did not provide the court with case law to back his position. Thus, appellant did not make an opening statement and he now argues that there was a denial of one of his fundamental rights.

The main case relied upon by appellant is *Jackson* v. *State,* 249 Ark. 653, 460 S.W.2d 319 (1970). In *Jackson,* the defendant requested to reserve his opening statement until after the close of the state's case. At that time the state did not object and the trial judge assented, but when the state rested, the judge then refused to allow the defendant to make his opening statement, ruling that he had waived his right when he did not make the statement immediately after the prosecution's opening statement. The Arkansas Supreme Court stated the general rule that the defendant's opening statement should be made immediately following the opening statement of the prosecuting attorney, and that refusal to make his statement at that time would constitute a waiver. However, the court found "the failure of the State to object when defendant's request was made was at least a silent acquiescence in the procedure proposed. The failure to permit the defendant to make his belated opening statement deprived him of a fair trial and constituted prejudicial error." 249 Ark. at 656.

We think the instant case is distinguishable from *Jackson.* The record here shows that the appellant assured the trial court that he could supply authority to the court for allowing him to reserve his statement. The trial judge did not at that time give blanket consent but gave consent contingent on appellant's showing him authority for his proposed procedure. Under these facts, the appellant had notice that he would be allowed to make the belated statement only if he could show the court authority for his position. Because of this notice, the court could properly

find that appellant knowingly waived his right to make an opening statement and was not denied a fair trial as a result.

The appellant next argues that the state should not have been permitted to (1) introduce evidence of "other undercover drug operations," or (2) make reference to the fact that appellant was drinking at the time of his arrest. Appellant argues that both issues are irrelevant and, even if relevant, that their probative value is outweighed by their prejudicial effect.

First, it should be pointed out that relevancy is to be determined by the trial court, *Caldwell* v. *State,* 267 Ark. 1053, 594 S.W.2d 24 (Ark. App. 1980), and we cannot reverse absent a showing of abuse of discretion, *Fisher* v. *State,* 7 Ark. App. 1, 643 S.W.2d 571 (1982). *Fisher* also holds that whether probative value outweighs prejudicial effect is a matter within the trial court's discretion and absent a showing of abuse of that discretion, the case will not be reversed.

Investigator Morris testified that he was in Texarkana "as a part of a major undercover operation for the purchase of drugs." Appellee correctly points out that this evidence is relevant as it informed the jury why Morris was in Texarkana and that appellant's arrest was part of a major operation. We find no abuse of discretion in allowing this testimony and it is difficult to believe this background evidence had any prejudicial effect on appellant's case.

Second, one of appellant's witnesses testified that she had known appellant since he was a child, that she had never known him to use drugs and had never seen him in possession of alcohol or drinking alcohol. On cross-examination, appellee attempted to establish that she did not know the appellant as well as she had testified. She was asked if it would surprise her to know that appellant was drinking when he was arrested. We do not believe the trial court abused its discretion in finding this evidence relevant and in finding that its prejudicial effect did not outweigh its probative value. In *Caldwell* v. *State, supra,* the court stated: "It is logical to allow the cross-examiner to explore the basis

of the witnesses' [sic] opinion, i.e., whether the witness had heard all the facts about the defendant on which to base his opinion." 267 Ark. at 1056.

The appellant's final contention is that there was insufficient evidence to support his conviction because of the many inconsistencies in the testimony and the state's failure to produce the informant to clear up these inconsistencies. In criminal cases we view the evidence in the light most favorable to the appellee and affirm if there is substantial evidence to support the conviction. *Pickens* v. *State,* 6 Ark. App. 58, 638 S.W.2d 682 (1982). Here, Investigator Morris testified that appellant sold him two bags of green vegetable material for $60.00. Other evidence established that the material in the bags was tested in the state crime lab and was positively identified as marijuana. This evidence was clearly sufficient to support the finding that appellant sold a controlled substance in violation of Ark. Stat. Ann. § 82-2617 (Repl. 1976).

Affirmed.

COOPER and CORBIN, JJ., agree.

Henry SHEMLEY and Louise SHEMLEY *v.*
Jim MONTEZUMA and Lynn STEVENS

CA 83-437 676 S.W.2d 759

Court of Appeals of Arkansas
Division I
Opinion delivered October 10, 1984

Mickey Buchanan, for appellant.

Hawkins & Metzger, by: *Claude S. Hawkins, Jr.,* for appellee.

MELVIN MAYFIELD, Judge. Appellants appeal from a probate court's denial of their petition to adopt their granddaughter. Jim Montezuma, the girl's natural father, cross-appeals from a chancery court's refusal to give him custody of the child. Both matters were heard by the same judge who consolidated the chancery and probate cases for hearing and entered the same order in both cases. This procedure was followed in *McKee* v. *Bates,* 10 Ark. App. 51, 661 S.W.2d 415 (1983) and *Lindsey* v. *Ketchum,* 10 Ark. App. 128, 661 S.W.2d 453 (1983), and avoids any jurisdictional problem. *Cf. Poe* v. *Case,* 263 Ark. 488, 565 S.W.2d 612 (1978) (probate court held without jurisdiction to award visitation rights in an adoption proceeding.)

Appellants are the maternal grandparents of Mandy, age 3, whose mother and father, Lisa and Jim Montezuma, were separated. Jim was 20 years old at the time of the hearing. He had left his teenage wife when Mandy was about a year and a half old. While hitchhiking to California, he got into some trouble and was serving three months in an Arizona jail when appellants first obtained custody of Mandy. At that time Lisa was living a carefree existence which exposed Mandy to an unsavory side of life involving drugs, sexual promiscuity, and venereal disease.

When released from jail, Jim went on to California, finished his high school education, and is now employed there. It was undisputed that he has never paid any child support. He testified, however, that he called the appellants' home one time and got the impression that he would not be allowed to see Mandy. Lisa filed a written consent to the adoption but Jim opposed it alleging he is now in a position to support Mandy and wants custody of her. The appellants' petition for adoption was denied, but they were allowed to retain custody. Jim was ordered to pay child support and he and his mother were granted visitation rights.

Appellants argue on appeal that the court erred in denying their petition for adoption. The Revised Uniform Adoption Act, Ark. Stat. Ann. § 56-207 (Supp. 1983), provides:

> (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.

While the court in this case did find that the father had failed to see the child or support her for over one year, it also found that he was under no court order to support her and that he had unsuccessfully attempted to contact her. Of course, a parent has the obligation to support a minor child independent of order. *Dangelo* v. *Neil,* 10 Ark. App. 119, 661 S.W.2d 448 (1983). See also, Ark. Stat. Ann. § 57-633 (Repl. 1971). The fact that the father's consent is unnecessary, however, does not require that the adoption be granted. The court must find that the adoption is in the best interest of the child. *McKee* v. *Bates, supra.* A probate court's decision regarding a petition for adoption will not be reversed unless it is clearly erroneous (clearly against the preponderance of the evidence) and we must defer to the judge's superior opportunity to assess the credibility of the witnesses. ARCP Rule 52(a); *Henson* v. *Money,* 1 Ark. App. 97, 613 S.W.2d 123 (1981). In the instant case the court must have found that it was not at this time in the child's best interest to grant the adoption. We cannot hold that he was clearly wrong.

On cross-appeal, Jim argues that the chancellor erred in denying him custody of his minor daughter. He acknowledges that the standard for the court to apply is and must be the welfare and best interest of the child. *Digby* v. *Digby,* 263 Ark. 813, 567 S.W.2d 290 (1978). He maintains, however, that when the contest is between the natural parent and the grandparents the law prefers the parent unless incompetent or unfit. *Baker* v. *Durham,* 95 Ark. 355, 129 S.W. 789 (1910), is cited as authority for that

view. That case was more recently cited with approval in *Perkins & Diggs* v. *Perkins,* 266 Ark. 957, 589 S.W.2d 588 (1979).

We are not persuaded that the trial judge should be reversed on the custody issue. It is well settled that the chancellor, in awarding custody of an infant child, must keep in view primarily the welfare of the child, and should confide its custody to the party most suitable therefor. *Kirby* v. *Kirby,* 189 Ark. 937, 75 S.W.2d 817 (1934). We have said that in child custody cases a heavy 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; that we have no such opportunity; and that we know of no case in which the superior position, ability and opportunity of the chancellor to observe the parties carries as great weight as one involving minor children. *Calhoun* v. *Calhoun,* 3 Ark. App. 270, 625 S.W.2d 545 (1981).

Affirmed.

CORBIN and COOPER, JJ., agree.

Sidney Carroll BECK *v.*
STATE of Arkansas

CA CR 84-156 676 S.W.2d 740

Court of Appeals of Arkansas
Divison II
Opinion delivered October 10, 1984

Hawkins & Metzger, by: *Claude S. Hawkins, Jr.,* for appellant.

Steve Clark, Att'y Gen., by: *Jack Gillean,* Asst. Att'y Gen., for appellee.

TOM GLAZE, Judge. This appeal is from appellant's conviction of possession with intent to deliver a controlled substance and criminal use of a prohibited weapon, for

which he was sentenced to twenty years and five years respectively, to run concurrently. Appellant raises nine points for reversal.

The facts leading to appellant's arrest are undisputed. On April 25, 1982, the appellant was a passenger in a car stopped by Ashdown police officer, Greg Fox, and Sevier County deputy, John Sullivan, who was visiting Fox and was riding patrol with him. Sullivan was not in uniform, but he was armed. Fox stopped the car after he observed it weaving within its lane. While Fox was running a check on the license of Jimmy Doss, the driver, Sullivan asked Doss if he could look in the trunk. Doss gave him permission to open the trunk, and Sullivan found and removed an ice chest of beer. Fox testified that when the beer was found, he decided to take all four occupants of the car to the station for a breathalyzer test. Fox saw and removed a Crown Royal sack from the floor of the car and found inside it three boxes of bullets. When he questioned the appellant about the gun that went with the bullets, appellant told Fox it was under a jacket on the backseat. While Fox was retrieving that gun, Sullivan shouted to alert Fox that appellant had a pistol in his hand. When appellant failed to drop the gun after Fox's second or third command to do so, Sullivan grabbed the gun from his hand. The officers then removed guns from the handbags of the two female passengers and transported all four people to the Ashdown jail.

While Sullivan was locking Doss's car before leaving it on the roadside, he saw and opened a leather pistol case and found inside a white powdery substance that was later identified as methamphetamine. The car was taken to the City Barn where a search was conducted and various other items found, including hypodermic needles, two weight scales, and two sifters.

The appellant filed pretrial motions to suppress items seized and a motion in limine requesting that the State not be allowed to question appellant at trial about prior drug-related convictions. Items removed from the car when it was searched at the Car Barn were suppressed, but the trial court denied the motion dealing with the methamphetamine. In

addition, the court ruled that cross-examination on appellant's prior convictions would be permitted.

We will discuss the appellant's nine points for reversal in the order he presented them. Appellant first contends that the trial court erred in ruling on his motion in limine that evidence of his prior drug-related convictions would be permitted on cross-examination for impeachment purposes. Appellant contends that the potential prejudice greatly outweighed any probative value. The appellant further contends that the court's ruling forced him to give up his right to testify. This same argument was made by defendants in two cases that this Court decided on the same day, *Bell* v. *State,* 6 Ark. App. 388, 644 S.W.2d 601 (1982), and *Williams* v. *State,* 6 Ark. App. 410, 644 S.W.2d 608 (1982). In both cases, we found that the trial courts had not abused their discretion in ruling that the State would be permitted to impeach the defendant's testimonies under Rule 609 of the Arkansas Uniform Rules of Evidence. In both, we relied upon *Smith* v. *State,* 277 Ark. 64, 639 S.W.2d 348 (1982), in which the Supreme Court upheld denial of the defendant's motion in limine and the introduction of evidence of prior convictions under Rule 609. In *Smith,* the Supreme Court noted that the question of admissibility under Rule 609 must be decided on a case-by-case basis. *Id.* at 69, 639 S.W.2d 350; *see also Washington* v. *State,* 6 Ark. App. 85, 638 S.W.2d 690 (1982). As in *Bell* and *Williams,* in the instant case, we do not find that the trial court abused its discretion in denying appellant's motion in limine or that the court's ruling deprived him of his right to testify.

Appellant's second point for reversal is that the court erred in not suppressing any evidence that resulted from Deputy Sullivan's participation in the search and arrest. The incidents occurred in Ashdown, which is in Little River County. Sullivan is a deputy in Sevier County and was riding with Officer Fox only because the two are friends and former coworkers. Because Sullivan was outside his jurisdiction as a deputy, according to appellant, he had no authority to search the vehicle to find the chest of beer in the trunk. It was finding the beer that led Fox to arrest appellant and the others, according to Fox's testimony. Appellant

claims the original search was void and that all evidence seized as a result of that search should have been suppressed. A similar objection was urged in *Logan* v. *State,* 264 Ark. 920, 576 S.W.2d 203 (1979). Logan was arrested in St. Francis County by a Crittenden County deputy sheriff, J.M. Davis, who was accompanied by a St. Francis County deputy sheriff, Sam Hughes. Logan argued on appeal that the arrest made by Davis was illegal and, as a consequence, all items seized and his confession were inadmissible as fruits of the illegal arreest. The Supreme Court found the arrest to be legal because Davis was accompanied by Hughes who "was also present in his capacity as a deputy sheriff and participated in making the arrest." *Id.* at 923, 576 S.W.2d at 205. We find the facts in the instant case even stronger than the facts in *Logan,* because here, Fox undisputedly initiated the stop and made the arrest in his own county. Sullivan merely assisted him.

Appellant's third point for reversal is that the trial court erred in not suppressing evidence seized as a result of an illegal arrest. In our examination of the abstract, we fail to find any objection to evidence based upon an illegal arrest. It is well settled that we do not consider issues or objections raised for the first time on appeal. *Brown* v. *State,* 5 Ark. App. 181, 636 S.W.2d 286 (1982).

Appellant's fourth point for reversal is that the trial court erred in not suppressing appellant's statement because he was under the influence of alcohol and drugs to the extent that his statement was not voluntarily and knowingly made. The car in which appellant was a passenger was stopped at about 11:30 P.M., and he was questioned and a statement taken about twelve hours later. Officer Fox testified that he could not smell alcohol on appellant, but that appellant "was rocking from heel to toe under the influence" when the car was stopped. Fox said that his speech was slurred. Deputy James Crouse, who was on duty at the sheriff's office the night Beck was brought in, testified that on that night, the appellant "just stood there," but that the next day appellant was upset and was beating on a door in the sheriff's office. Crouse said, "He appeared to be something . . . people had told me . . . that they thought he was coming down off some type of high or something.

At the pretrial suppression hearing, the appellant claimed that he had not slept for a week, that he had consumed a quart-and-a-half of whiskey each day of that week and that he had ingested over a half a gram of crystal amphetamine when he was arrested. He claimed not to have been aware of what was happening for eight days after his arrest. Federal Agent Larry Carver, one of the officers who took appellant's statement, testified that appellant told him he had been up for several days and had taken some drugs, but Carver said that appellant could understand what Carver was saying, could respond in an understandable fashion to what was said, and in Carver's opinion "understood what was going on."

Our appellate courts have repeatedly held that when testimony conflicts on the issue of voluntariness, it is for the trial court to weigh the evidence and resolve the credibility of the witnesses. *Lockett* v. *State,* 275 Ark. 338, 629 S.W.2d 302 (1982); *Marbley* v. *State,* 9 Ark. App. 190, 656 S.W.2d 717 (1983); and *Profit* v. *State,* 6 Ark. App. 51, 637 S.W.2d 620 (1982). We have also held that the defendant's testimony regarding his interrogation is not entitled to more weight than that of the officers. *Id.*

The appellant compares his circumstances to those of the defendant in *Townsend* v. *Sain,* 372 U.S. 293 (1963), in which the Court set out standards for determining when a confession is inadmissible as a result of coercion. *Townsend* is clearly not applicable to the facts at bar because Townsend confessed to three murders after a police doctor allegedly gave him an injection of scopolamine, a "truth serum." The appellant in the instant case does not allege that he was coerced into making a statement nor that he was drugged by the participating officers.

Appellant's fifth point for reversal is that the trial court erred in allowing testimonies of Laura Dickinson and Doyne Branch or, in the alternative, in failing to grant appellant a continuance. Appellant based his objection to these witnesses' testimony upon the State's failure to disclose the names of the witnesses until the day before trial. We note that appellant filed his motion for discovery only two days

before trial, so we are unable to see how the appellant was prejudiced or how the prosecution could have complied any sooner. In Laura Dickinson's case, because she was a co-defendant of appellant, she would not have been a potential witness for the State until two days before trial, when a motion for severance (which appellant joined in filing) was granted. In Doyne Branch's case, appellant's argument is based upon a hearing that occurred in chambers immediately before the trial began. Counsel for appellant objected to Branch's testifying that he had test fired the weapon. The prosecutor responded that Branch would not testify that he test fired the weapon, but only that "This is a machine gun." Nevertheless, Branch did testify that he test fired it, but his test resulted in the gun firing only one time, rather than several times, automatically. We fail to see how this testimony prejudiced the appellant at all. In fact, the testimony was more favorable to the appellant than to the State.

On the question of a continuance, a trial court has broad discretion in determining whether to grant a continuance. *Christian* v. *State,* 6 Ark. App. 138, 639 S.W.2d 78 (1982). The trial court's refusal to grant a continuance will not be reversed absent a clear abuse of discretion amounting to a denial of justice, and appellant has the burden to demonstrate such abuse. *Id.* It is also settled law that in the absence of a showing of prejudice, we cannot say the refusal of a continuance is error. *Id.* The appellant has not demonstrated that the trial court abused its discretion or that he was prejudiced by the denial of a continuance.

The appellant's sixth point for reversal is that the court erred in admitting into evidence the weapons removed from the purses of Laura Dickinson and Sonya Orlovic. The appellant alleged that the weapons were not relevant to any charge filed against him and that the prejudice greatly outweighed the probative value. However, the State, citing *Harshaw* v. *State,* 275 Ark. 481, 631 S.W.2d 300 (1982), contends that the weapons were properly admissible as part of the overall circumstances of the crime. In *Harshaw,* a defendant objected to the admission of testimony of acts that had been committed by three others. The Supreme

Court found the testimony admissible because it linked the defendant to the crime and was therefore relevant to him. The Court quoted the following from *Russell* v. *State,* 262 Ark. 447, 559 S.W.2d 7 (1977):

> [W]hen acts are intermingled and contemporaneous with one another, evidence of any or all of them is admissible to show the circumstances surrounding the whole criminal episode.

Harshaw at 485, 631 S.W.2d at 303. We believe the rule in *Harshaw* controls here and, therefore, agree that the trial court correctly admitted the weapons seized from Dickinson and Orlovic.

Appellant's seventh point for reversal is that the trial court erred in admitting documents pertaining to chain of custody of the methamphetamine, because the documents had not been disclosed to appellant in discovery. Although we find in the abstract of record that appellant objected to admission of the documents, his objection was not based on these grounds. It is well settled that appellant cannot change his grounds for objection on appeal. *Wilson* v. *State,* 9 Ark. App. 213, 657 S.W.2d 558 (1983).

Appellant's eighth point for reversal is that the trial court erred in allowing Doyne Branch to give opinion evidence without being qualified properly as an expert witness. Branch is an agent with the United States Treasury Department's Bureau of Alcohol, Tobacco and Firearms. He testified that the weapon removed from under appellant's coat in the back seat of the car was an automatic weapon. Appellant based his objection on the fact that Branch's familiarity with firing the weapon did not qualify him to testify about design characteristics and functions of automatic weapons. Rule 702 of the Arkansas Uniform Rules of Evidence provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or

> education, may testify thereto in the form of an opinion or otherwise.

Mr. Branch testified that he had worked for the Bureau for thirteen years. He testified that he had attended Automatic Weapons School, was qualified to use an automatic weapon, and had fired between twenty and twenty-five different automatic weapons. Whether a witness qualifies as an expert is a matter to be decided by the trial court, and in the absence of abuse of that discretion, we will not reverse the trial court's decision. *Parker* v. *State,* 268 Ark. 441, 597 S.W.2d 586 (1980); *Harper* v. *State,* 7 Ark. App. 28, 643 S.W.2d 585 (1982). We are unable to see that the trial court abused its discretion in finding Branch an expert or in permitting him to testify that the weapon in question was an automatic weapon.

Appellant's last point for reversal is that the trial court erred in denying appellant's motion for a directed verdict because the State failed to show that the weapon that was the basis of one of the charges against appellant was actually an automatic weapon. The statute under which appellant was charged provides:

> "Machine Gun" applies to and includes a weapon of any description by whatever name known, loaded or unloaded, from which more than five [5] shots or bullets may be rapidly, or automatically, or semi-automatically discharged from a magazine, by a single function of the firing device.

Ark. Stat. Ann. § 41-3157 (Repl. 1977).

Two people, Sgt. Buck Bailey and Branch, both test fired the weapon, according to Branch's testimony. The gun would only fire one time. It would not eject a round or fire automatically. Once the spent shell was manually ejected, the gun would fire again. However, Branch explained that the gun was loaded with "a 30-caliber luger which is a different size than the 30 mouser. The bullets would fit in the chamber. . .and would fire but it would not work automatically." Branch obtained the right caliber of

ammunition from headquarters in Washington, D.C., but the gun would still fire only one time. He explained that stale ammunition was a likely explanation for the failure of the gun to operate automatically. He said the ammunition was some that had been confiscated and was probably too old to work. He opined that with proper ammunition, he had "no doubt that it would fire fully automatic."

We believe the trial court properly denied a directed verdict under these facts. In addition to his explanation that stale ammunition would account for the gun's not operating properly, Branch also testified that he could find no other, obvious reason for the gun's not working properly. Having qualified as an expert, Branch's testimony and opinion established at least a fact question for the jury concerning whether the seized weapon was a machine gun. Appellant offered no evidence to rebut Branch's opinion, and the jury clearly resolved that fact question against the appellant.

Affirmed.

CRACRAFT, C.J., and CLONINGER, J., agree.

Supplemental Opinion on Denial of Rehearing
November 7, 1984

680 S.W.2d 110

1. APPEAL & ERROR — REHEARING — FULL CONSIDERATION ON APPEAL. — The appellate court denies appellant's petition for rehearing on one point because that point was fully considered on appeal.
2. CRIMINAL PROCEDURE — DISCOVERY — FAILURE OF PROSECUTOR TO MAKE PROPER DISCOVERY ANSWERS. — A prosecuting attorney's failure to make proper discovery answers, although serious, is not reversible error absent a showing of prejudice to the defendant.
3. CRIMINAL PROCEDURE — DISCOVERY — TRIAL COURT'S DISCRETION. — Under Ark. R. Crim. P. 19.7 the trial court has the discretion to exclude or to admit material not disclosed through discovery based upon the likelihood that prejudice will result.

Petition for Rehearing; denied.

TOM GLAZE, Judge. Appellant's petition for rehearing is denied. Points two and three are without merit, but we will elaborate on points one and four.

Appellant's first point for rehearing is that appellant properly raised objections to the lack of probable cause which made the stop and arrest illegal. On appeal, appellant's third point for reversal was that the trial court erred in failing to suppress evidence seized as a result of an illegal arrest. Our review of the abstract indicates that both counsel for appellant and counsel for Doss argued at length below whether probable cause existed. However, most of their arguments involved probable cause to stop the car, to conduct a search and to seize items from the car, not probable cause to arrest. The clearest reference to the legality of the arrest was the trial court's specific finding that "this was a search incident to a valid stop and a valid arrest." However, even assuming that appellant properly raised the issue of the legality of the arrest, we believe that we fully covered this issue under appellant's second point on appeal, which we phrased as an allegation of error based upon the trial court's failure to admit evidence resulting from Sullivan's participation in the search and *arrest*. We cited *Logan* v. *State*, 264 Ark. 920, 576 S.W.2d 203 (1979), which involved the legality of an arrest. Because we fully considered the arrest issue that appellant now urges us to review, we deny the petition on this point.

Appellant's fourth point for rehearing is that he objected to the admission of documents at trial for the same reason that he argued on appeal: that the State failed to furnish them through discovery. The documents, State's Exhibits 14-18, pertained to the chain of custody of evidence seized in the search. The appellant objected below "for hearsay reasons and also discovery reasons." The appellant failed to point out, to the trial court or on appeal, how he was prejudiced by the introduction of the documents. We have held that while an assertion that the prosecuting attorney failed to make proper discovery answers might be serious, it is required that prejudice be shown. *Fisk* v. *State*, 5 Ark. App. 5, 631 S.W.2d 626 (1982). Under Rule 19.7 of the Arkansas Rules of Criminal Procedure (Repl. 1977), the trial

court has the discretion to exclude or to admit material not disclosed through discovery, *Lear* v. *State,* 278 Ark. 70, 643 S.W.2d 550 (1982), based upon the likelihood that prejudice will result. *Fisk* v. *State, supra.* Appellant did not demonstrate, nor did we find, that prejudice resulted from the trial court's decision.

Petition for rehearing denied.

Dorothy BRADLEY *v.* Lindell HOUSTON

CA 83-420 676 S.W.2d 746

Court of Appeals of Arkansas
Division II
Opinion delivered October 10, 1984

Mark Woodville, for appellant.

Kinney, Easley & Kinney, by: *B. Michael Easley,* for appellee.

H. WILLIAM ALLEN, Special Judge. This appeal arises from a paternity action that appellant filed against appellee in 1979. The County Court of St. Francis County found the appellee, Lindell Houston, to be the father of Keenan Bradley. Houston appealed that judgment to the circuit court. Following a motion by appellant, Dorothy Bradley, to require a blood test, on February 10, 1982, the circuit court ordered the appellant, Bradley, the appellee, Houston, and Keenan Bradley to undergo blood tests pursuant to statute. Ark. Stat. Ann. § 34-705.1 (Supp. 1983). A jury trial was held in St. Francis County on May 11, 1983; the jury found Houston not to be the father of Keenan Bradley. In appealing that verdict, appellant alleges the trial court committed two reversible errors below. She contends the court erred (1) in limiting appellant's examination of Dr. Jerry L. Morrisey, the expert witness who performed the blood test analysis, and (2) in permitting appellee's expert witness, Steve Murray, to testify. For the reasons set out herein, we affirm the jury's verdict.

A brief recitation of what occurred procedurally prior to and during trial is necessary to an understanding of this appeal. In 1979, after appellant had filed her paternity action, each party filed answers to the other's interrogatories, which included questions requesting the names of all witnesses to be called at trial, including expert witnesses. Neither party listed the names of the two experts who actually testified.

On the day of the trial, counsel for the appellee

objected in chambers to the appellant's calling Dr. Morrisey, a chemist, to testify about results of the court-ordered blood tests. Appellee's attorney contended that appellant was in violation of Rule 26(e) of the Arkansas Rules of Civil Procedure because she had not identified Dr. Morrisey as an expert witness in her answers to appellee's interrogatories filed nearly four years before. Appellee's counsel stated that he was given a copy of the blood test results on May 6, 1983, only five days before trial, but acknowledged that appellant's counsel had informed him by telephone of those results on April 25, 1983.

The trial court ruled that the test results were admissible and that Dr. Morrisey would be permitted to testify but that his testimony would be restricted to the contents of the test results which had been provided to appellee's counsel. The court ruled further that it would permit appellant to elicit testimony concerning Dr. Morrisey's educational background and qualifications. Counsel for appellant objected to the trial court's limiting the scope of Dr. Morrisey's testimony at all and stated, "If allowed to testify, our expert would proffer testimony as to how the test was developed, its acceptability in the scientific community and the reliability of the test."

Dr. Morrisey testified, subject to some limitations upon appellee's objections. His testimony included his finding that the probability of appellee's being the father of Keenan Bradley was 95.83%, a "reasonable scientific certainty." On cross-examination, appellee's counsel attempted to pose the following hypothetical to Dr. Morrisey:

> Doctor, for the purpose of this question I want you to assume that there are 6,000 black males of fertile age in St. Francis County. Now, I want you, please, sir, to take the difference between 100% and 95.83%, which is your paternity index in this case. That would be . . . 4.17% . . . . Would you take 4.17% of 6,000 and tell the jury what that figure is?

Counsel for appellant objected to the hypothetical

because no proof had been introduced to support the number of black males in St. Francis County. The trial court ruled that no foundation existed for the hypothetical. Later that day, and over appellant's objection, appellee called Steve Murray, Director of Admissions and Registrar at East Arkansas Community College, to provide the figure of adult black male population in St. Francis County. Murray testified to the 1970 census figure. The basis of appellant's objection to Murray's testimony was that Murray's name had not been listed as an expert witness in appellee's answers to appellant's interrogatories in compliance with Rule of Civil Procedure 26(e).

Thus, both of appellant's points for reversal are based upon Rule 26(e). Rule 26(e) provides, in pertinent part;

> Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:
>
> (1) A party is under duty seasonably to supplement his response with respect to any question directly addressed to. . .(B) the identity and location of each person expected to be called as a witness at trial, and in the case of expert witnesses, the subject matter on which he is expected to testify, and the substance of his testimony.

Ark. R. Civ. P. 26(e) (Repl. 1979).

We do not believe this rule is applicable to this situation because (1) Dr. Morrisey's report and the likelihood that he would appear as a witness were not a surprise to appellee's counsel, who, in any event, had sufficient time before trial to seek a continuance on the basis of surprise, and (2) Dr. Morrisey was technically the court's witness, pursuant to Ark. Stat. Ann. § 34-705.1, and could not reasonably be expected to be on a listing of appellant's witnesses. Ark. Stat. Ann. § 34-705.1 (Supp. 1983) provides in pertinent part as follows:

> Whenever it shall be relevant to the prosecution or the defense in an illegitimacy action, the trial court may direct that the defendant, complainant and child submit to one (1) or more blood tests or other scientific examinations or tests, to determine whether or not the defendant can be excluded as being the father of the child, and to establish the probability of paternity if the test does not exclude the father (defendant). *The results of the tests shall be receivable in evidence.* The tests shall be made by a duly qualified person, or persons, not to exceed three (3), to be appointed by the court . . . . *Such experts shall be subject to cross-examination by both parties after the court has caused them to disclose their findings.* (Emphasis supplied).

Thus, the trial court properly permitted Dr. Morrisey to testify. The more difficult question is whether prejudicial error occurred by the trial court's limitation of the scope of appellant's examination of Dr. Morrisey. Given the language previously quoted, it appears that a wide latitude of examination by all parties was intended by the statute. Further, we are not unmindful of our rule that error is presumed to be prejudicial unless it is demonstrated to be otherwise or is manifestly not prejudicial. *Chappell Chevrolet, Inc.* v. *Strickland,* 4 Ark. App. 108, 628 S.W.2d 25 (1982). However, we have concluded that in this instance any error by the trial court in restricting Dr. Morrisey's testimony was not prejudicial for the following reasons: (1) the latitude of the examination that did occur, and (2) the fact that there was no challenge by the appellee at trial to the authenticity of the test, its acceptability in the scientific community or its reliability.

(1) *The testimony presented gave substantial validity to the test results.*

Appellant was able to elicit the following from Dr. Morrisey: He has a Ph.D in chemistry and has done postdoctorate work in genetic defects in children. His training in performing medical laboratory tests was at a school of medicine. He has been employed for three years at Roche

Bio-Medical Reference Laboratories in Gibsonville, North Carolina, which performs laboratory medical tests for paternity evaluation. He has previously testified in ten or eleven other cases as an expert in interpreting paternity evaluations. Over the past two years, he has attended lectures and seminars and has read the scientific literature concerning paternity evaluation.

Dr. Morrisey also testified in detail regarding how the two separate tests on the paternity evaluation report were conducted and on the basis for his conclusion that he was 95.83% certain that the appellee was the father of appellant's son. He testified that one of the testing procedures utilized "has been used extensively in paternity evaluations over the past few years in different parts of the country." The report itself, admitted into evidence as an exhibit, prominently reflects, "Probability of Paternity—95.83%" as to appellee, and the report is an affidavit form signed not only by Dr. Morrisey as Assistant Director but also by James W. Geyer, Ph.D., Director, Department of Paternity Evaluation, Bio-Medical Reference Laboratories, Inc.

(2) *The reliability of the test results was not contested by appellee.*

Appellee's defense to the paternity claim did not challenge Dr. Morrisey's finding or conclusions but, instead, focused on the margin of error recognized by the test results. Appellee asserted that because the test was not 100% certain, the true father could have fallen within the 4.17% margin of error.

Accordingly, in the circumstances of this case, where extensive testimony concerning the qualifications of the witness, the methodology of the testing and some evidence regarding its acceptability nationwide were presented, plus the fact that the credibility of the test results was not put to the issue, we cannot find prejudice to the appellant by the trial court's ruling. In the absence of prejudice, there was no reversible error. *King* v. *Cardin,* 229 Ark. 929, 319 S.W.2d 214 (1959).

Appellant's second point is that the trial court erred in permitting Steve Murray, the college registrar, to give the black male population statistics in St. Francis County based upon the 1970 United States Census because appellee failed to supplement his witness list in compliance with Rule 26(e). Since no issue of relevancy was raised, there was no error in allowing the testimony which amounted to no more than the extraction of public census information. Even without the presence of a witness, the court could have taken judicial notice of this information under Unif. R. Evid. 201, or admitted it as the contents of a public record, Unif. R. Evid. 1005. The court did not abuse its discretion in permitting introduction of this readily accessible information, even though no advance notice of this "expert" witness through which the information was submitted was provided to appellant.

Although we agree with appellant that the trial court erred in limiting Dr. Morrisey's testimony based upon Rule 26(e), we cannot say that appellant demonstrated that prejudice occurred because of that error. We also find no abuse of discretion in the court's admitting testimony limited to 1970 census statistics through a witness not provided in advance under Rule 26(e). This holding is based upon the unusual factual and procedural circumstances in this case and is not intended to serve as a basis for relaxing the requirements of Rule 26(e).

Affirmed.

CRACRAFT, C.J., and CLONINGER, J., agree.

WRIGHT CONTRACTING CO., Employer and INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier *v.* Louis RANDALL, Employee

CA 84-149 676 S.W.2d 750

Court of Appeals of Arkansas
Division II
Opinion delivered October 10, 1984

Walter A. Murray, for appellant.

No response by appellee.

H. WILLIAM ALLEN, Special Judge. This is an appeal of a decision of the Workers' Compensation Commission ordering a change of physicians for the appellee pursuant to Ark. Stat. Ann. § 81-1311 (Supp. 1983). The appellant employer contends on appeal that the Commission's opinion is not supported by substantial evidence and that the award is contrary to Arkansas law. We affirm the Commission's decision.

The pertinent facts are undisputed. The appellee, Louis Randall, suffered a compensable injury to his right eye on April 11, 1983, while he was operating a cleaning machine for appellant Wright Contracting Company. The appellee's foreman took him to Doctor's Hospital where Dr. A. Henry Thomas, an ophthalmologist, performed surgery to remove a small piece of metal from appellee's eye. As a result of his injury, appellee was paid temporary total disability from April 12 through April 26, 1983, totalling $285.73 and medical expenses totalling $2,128.29. On April 27, 1983, Dr. Thomas released the appellee to return to work and to resume normal work activities. In a report dated May 18, 1983, Dr. Thomas noted that appellee had 20/20 vision in his right eye.

A hearing was conducted before an administrative law judge on August 2, 1983, to consider the appellee's request for a change of physicians. The appellant contended that because the appellee had been released by his doctor to return to work, and had, in fact, returned to work, he was no longer within his healing period and was therefore not entitled to a change of physicians. The appellee testified that he was treated for his injury in the emergency room where his foreman took him after his injury, that the treating physician called in Dr. Thomas, and that appellee was never questioned about his preference of physicians.

The appellee said that after the treatment he continued to experience sensitivity to light and that he could not see in bright lights. In addition, he testified:

> And of the mornings. . .for the first four (4) or five (5) hours I'd have a lot of trouble seeing. My eye would run constantly. And my pupil. . .when I'd turn my head my left eye would focus on something and my right eye would try to tag along behind it.
>
> . . . .
>
> That's what problem I have. I still have trouble with the light hurting my eye and it runs all the time. And my eye is not going as fast as the other one when I focus, when I try to focus on something.

The appellee testified that his problem with light sensitivity occurred in sunlight or when he watched television. He said that even the white of a newspaper caused his eye to water when he attempted to read. He stated that he had never experienced eye problems of any nature until after his injury.

On cross-examination, the appellee testified that he did return to work after Dr. Thomas released him, and that appellant had dismissed him the day he returned to work. He was working for another construction company at the time of the hearing, and had missed no work because of his eye.

Between the time of the hearing and the time the administrative law judge rendered an opinion, the appellee moved to Wichita, Kansas, and he requested that he be examined by a physician there. The administrative law judge filed his opinion on November 14, 1983, ruling that appellee was entitled to an independent evaluation by an ophthalmologist in Wichita, Kansas. The law judge also stated in his decision that if the choice of physicians became a point of controversy, he would appoint a specific doctor. The Commission affirmed the decision of the law judge.

Appellant's first point for reversal is that the Commission's decision is contrary to the facts of the case and is not supported by substantial evidence. Appellant contends that appellee was "provided with adequate medical care" to satisfy the "reasonably necessary" prescription of the Workers' Compensation Law. Ark. Stat. Ann. § 81-1311 (Supp. 1983). Appellant also contends that the medical reports, coupled with the fact that claimant has missed no work because of his eye injury, contradicts his testimony that he needs further medical evaluation. Appellant contends the medical reports show that appellee had "normal vision," and that the only contradictory evidence is the "uncorroborated and interested testimony of the [a]ppellee himself."

This Court's review of workers' compensation cases is well established. We must affirm if we find substantial evidence to support the Commission's ruling. *Jones* v. *Scheduled Skyways, Inc.,* 1 Ark. App. 44, 612 S.W.2d 333 (1981). We must view and interpret the evidence, and all reasonable inferences deducible therefrom, in the light most favorable to the findings of the Commission and give the testimony its strongest probative force in favor of the action of the Commission, whether if favored the claimant or the employer. *Id.* The issue of credibility is one for the commission; we are not at liberty to weigh the credibility of witnesses. *Id.* It is the duty of the Commission to weigh medical evidence as it does any other evidence. *Id.*

In the instant case, the Commission apparently believed the appellee's testimony about his difficulties with his right eye after the injury, despite a medical report that he has 20/20 vision in his right eye. Although appellant argues that it has provided all "reasonable and necessary" medical treatment the law requires, Ark. Stat. Ann. § 81-1311 (Supp. 1983), the Commission determined otherwise in ordering an examination by another ophthalmologist. What constitutes reasonable and necessary treatment under the statute is a fact question for the Commission. *See, e.g., Meadors Lumber Co.* v. *Wysong,* 262 Ark. 425, 557 S.W.2d 395 (1977); *Pine Bluff Parks and Recreation* v. *Porter,* 6 Ark. App. 154, 639 S.W.2d 363

(1982). We believe substantial evidence supports the Commission's determination.

Appellant's second point for reversal is that the Commission's award is contrary to Arkansas law because appellee's healing period has ended. Under the present law and the facts of this case, appellee's healing period is of no significance. The pertinent section of the Workers' Compensation Law provides:

> If the employee selects a physician, the Commission shall not authorize a change of physician unless the employee first establishes to the satisfaction of the Commission that there is a compelling reason or circumstance justifying a change. If the employer selects a physician, the claimant may petition the Commission one time only for a change of physician, and if the Commission approves the change, with or without a hearing, the Commission shall determine the second physician, and shall not be bound by recommendations of claimant or respondent. . . .Treatment or services furnished or prescribed by any physician other than the ones selected according to the foregoing. . .shall be at the claimant's expense.

Ark. Stat. Ann. § 81-1311 (Supp. 1983).

Appellant does not dispute that appellee had no initial choice of physicians at the time of the injury. The emergency room physician called in Dr. Thomas, whom appellee had never met, and Dr. Thomas performed surgery that same day. The statutory provision set out above provides for a "one time only" petition for a change of physician when the employer has initially selected the physician. The statute also provides for a change even when an employee has selected the physician, provided the Commission finds a compelling reason or circumstance to justify a change. The Commission has authority to approve a change under either of those circumstances. Problems have arisen when claimants have changed physicians and then attempted to secure the Commission's approval after the fact. Recent changes in the law have

resulted in a limitation on the Commission's discretion to *retroactively* approve a change of physicians. *See American Transportation Co.* v. *Payne,* 10 Ark. App. 56, 661 S.W.2d 418 (1983); *Continental Grain Co.* v. *Miller,* 9 Ark. App. 317, 659 S.W.2d 517 (1983). The cases upon which appellant relies are simply not applicable to the instant case. Most of them were decided under prior law, when a claimant's healing period *was* a determining factor in approving a change of physician. *See* Ark. Stat. Ann. § 81-1311 (Repl. 1976). Appellant has cited the following for the proposition that even under the law presently in effect, a claimant's healing period is or ought to be a valid consideration in deciding a change of physician issue: *Continental Grain Co.* v. *Miller, supra; Union Medical Center* v. *Brumley,* 4 Ark. App. 370, 631 S.W.2d 618 (1982); *Mad Butcher, Inc.* v. *Parker,* 4 Ark. App. 124, 628 S.W.2d 582 (1982); and *Bradford* v. *Timex Corp.,* 270 Ark. 184, 604 S.W.2d 472 (Ark. App. 1980). However, all of those cases were decided under our prior law, even though some of the decisions were handed down by this Court after the effective date of the current law. Appellant also cited *Popeye's Famous Fried Chicken* v. *Willis,* 7 Ark. App. 167, 646 S.W.2d 17 (1983), but it has no bearing on the instant case because it involved the issue whether Act 290 of 1981, which amended § 81-1311 to its present form, had retroactive application. Of course, no question exists here over what law applied. *Willis* did involve a claimant who applied to the Commission for a change of physician in advance of actually consulting another doctor, as did the appellee in the instant case, and in *Willis* we affirmed the Commission's approval of that change. In *American Transportation Co.* v. *Payne, supra,* the current law was applied, but the facts are distinguishable from the facts at bar. The *Payne* case involved a claimant who applied to the Commission for approval after she already had been treated by a physician of her choice. We noted that under the present law, the Commission no longer has the broad discretion it once had to *retroactively* approve change of physicians, and that, absent compliance with § 81-1311, the employer is not liable for a new physician's services.

In the instant case, the appellee clearly complied with

the dictates of § 81-1311 in applying for a change of physician in advance of actually being treated by a doctor of his choice. The Commission acted within its discretion in approving that request. Therefore, we affirm.

Affirmed.

CRACRAFT, C.J., and CLONINGER, J., agree.

Franklin H. JONES, Jr. et al *v.*
INNKEEPERS, INCORPORATED, et al

CA 83-325 676 S.W.2d 761

Court of Appeals of Arkansas
Division II
Opinion delivered October 17, 1984

Cearley, Mitchell & Roachell, by: *Robert M. Cearley, Jr.,* for appellants.

Wilson, Engstrom & Vowell, by: *Stephen Engstrom,* for apellees.

GEORGE K. CRACRAFT, Chief Judge. Rachel B. McMillen brought an action in the circuit court of Pulaski County against J. Dan Baker and Innkeepers, Inc. (referred to collectively as "Baker") for unpaid rent under a five year lease. Baker cross-complained against Franklin Jones, Jr. and Hotel Venture, a Louisiana partnership, (referred to collectively as "Jones") alleging that Jones was liable as assignee of the lease. The trial court sitting without a jury found Baker liable for the rent and granted Baker's cross-complaint against Jones for the rent which amounts to $40,500. Baker does not appeal.

Jones brings this appeal contending that the trial court erred in holding him liable because the assignment of the lease did not meet the requirements of the Statute of Frauds and also was void for lack of mutuality. We find no merit in these arguments but do agree that the trial court erred in not considering the issue of Baker's duty to mitigate the damages.

The testimony on behalf of McMillen established that Baker was the owner and operator of the Sheraton Hotel in Little Rock. In April 1979 Baker leased from McMillen a vacant lot adjacent to the hotel for a term of five years at a monthly rental of $1,125. The lease also granted Baker an option to purchase the lot for $135,000 at the expiration of the lease. Baker obtained this lease and option for the purpose of development or sale of the property. However, the property was not used for any purpose and has remained vacant from the date of the exeution of the lease through the date of the judgment.

In the latter part of 1979 Baker and Jones negotiated a sale of the Sheraton Hotel. According to Baker these negotiations were for the sale of the hotel and all of its assets, including the lease in issue. Baker and his attorney testified that although the contract of sale did not specifically describe the leasehold property as was intended, the contract did refer to a leasehold interest with option to purchase. They testified that all parties contemplated that the McMillen lease would be transferred to Jones as a part of the whole transaction. They testified that at closing they had presented a document for Jones' signature in which Jones would assume all obligations under the lease with McMillen, but Jones' attorney argued that they had agreed only to an assignment and the lesser obligations it would impose. After some discussion it was agreed that Jones would only be required to accept an assignment of that lease. They testified that Jones' attorney then prepared a written assignment which Baker signed and returned to Jones' attorney who recorded it and delivered it to Jones. Baker's witnesses testified that in April 1980 one payment in the amount of $1,125 was received by McMillen from Jones and that he failed to

make any further payments and explained that Jones had decided that he did not want the property.

Baker testified that after Jones defaulted he wished to preserve the rights under the option by making the required monthly payments of rent but was advised by his attorney that unless the lease containing the option was reassigned to him he would have no rights in the option. On October 10, 1980 Baker's attorney sent a reassignment deed to Jones with a request that he execute and return it. Jones refused.

Jones and his associates testified that throughout the negotiations there were no discussions of the assignment of the lease in question and that the first he heard of it was at the meeting at which the sale was consummated. Jones testified that he first refused to sign the assumption agreement but after discussing it with his associates he had determined that he wanted to look at the property to determine whether he would assume the lease. He stated that at the time the separate assignment was prepared it was his belief that he was to look at the property to see if he wanted to accept the assignment. He stated that one rent payment had been made on his behalf but he did not know why, and that upon learning of it he told his employees to make no more payments. He further testified that when McMillen's agent called him about it he told her that he had decided he did not want the property. He testified that he had made no use of the property and had never taken possession of it. He did recall the letter from Baker's attorney requesting that he reassign the lease agreement and stated at trial that he was willing to reassign at that time.

Jones' attorney also stated that he had no knowledge of the transfer of the McMillen lease prior to the date of closing and had found nothing in the contract of sale referring to it. It was his testimony that he did prepare and record the assignment but there was a collateral agreement that Jones would have a period of time in which to determine whether he would assume the obligation, and if he did not want it he would return it to Baker. It was his

understanding that Jones and his associates would look at the leased property and make a feasibility study, but there would be no further obligation if they decided not to take it.

The trial court found that the agreement for the purchase and sale of the hotel provided for the transfer of the leasehold and the omission of the description of it in the purchase agreement was a clerical error. He further found that the leasehold was an asset and its transfer was contemplated by all parties as part of the sale of the hotel. The court further found that Jones was bound by the acceptance of the assignment to the leasehold and obligated him to pay the monthly installments provided in the lease for its entire term. The court specifically found that the assignment did not violate the Statute of Frauds and that there were no "side agreements" which would relieve Jones from its obligation upon acceptance of the lease assignment. The court concluded that by acceptance of the assignment and performance under it Jones became liable to Baker for all accrued installments of rent.

Appellant first contends that the trial court erred in finding that the transaction was not violative of Ark. Stat. Ann. § 38-101 (Repl. 1962) which provides that no action may be brought to charge any person upon a lease of lands unless the agreement, promise or contract upon which the action is brought is in writing and signed by the party to be charged. He argues that the assignment was signed only by Baker and is unenforcible under the Statute of Frauds and that there was insufficient evidence of part performance on his part to remove the assignment from the Statute of Frauds, citing *Norton* v. *Hindsley,* 245 Ark. 966, 435 S.W.2d 788 (1969).

We do not view the matter as one involving the Statute of Frauds. The lease was in writing signed by the lessor and lessee, in all respects complied with Ark. Stat. Ann. § 38-101, and was an enforcible contract between those parties. The leasehold interest of Baker was assigned to Jones in a written assignment deed which clearly

identified the subject of the assignment by specific reference and met all of the requirements of Ark. Stat. Ann. § 38-105 (Repl. 1962) on the assignment of leases which requires only that the assignment be by deed or in writing and *signed by the party assigning.* The assignment of a lease signed only by the assignor is not violative of that section of the Statute of Frauds requiring that a promise to answer for the debt of another be in writing. The acceptance of an assignment of a lease places the assignee in privity of estate with the lessor and he becomes liable for those covenants which run with the land, one of which is the obligation to pay future rents while that privity exists. It is not a collateral agreement to answer for the debt of another but an original undertaking based on valid consideration. 1 *Friedman on Leases,* 2d Ed., § 7.501(c) (2) (1983). Such undertakings are not prohibited by the Statute of Frauds. *Barnett* v. *Hughey Auto Parts, Inc.,* 5 Ark. App. 1, 631 S.W.2d 623 (1982).

The issue is simply whether a preponderance of the evidence supports the finding that there was sufficient delivery and acceptance by Jones to make the assignment a binding one and to impose on him the duties of assignee under our law of landlord and tenant. Findings of fact of a circuit court sitting as a jury will not be reversed on appeal unless clearly against a preponderance of the evidence and in making that determination we give due regard to the superior opportunity of the trial court to judge the credibility of the witnesses and the weight to be given to their testimony. ARCP Rule 52(a).

In *Baston* v. *Davis,* 229 Ark. 666, 318 S.W.2d 837 (1958), Baston accepted a written assignment of a lease and went into possession under it. The Statute of Frauds was pled in that case and was rejected as being inapplicable. There the court said:

> The rule appears to be that where a person *accepts* an assignment of a lease he enters into a privity of estate with the original lessor, and becomes personally liable for the rents, (32 Am.Jur. 320 § 374) and that liability continues despite the fact the assignee

> abandons the premises, as Baston did here. Baston's *acceptance* of the written assignment and performance under it, we hold, was sufficient to make him liable for the rents *without regard to the statute of frauds,* and that his abandonment of the property did not relieve him from a liability for the remainder of the term. [Emphasis supplied]

The only discussion in *Baston* of the Statute of Frauds was contained in a recitation of the headnotes to *Chicago Attachment Co.* v. *Davis Sewing Machine Co.,* 25 N.E. 669 (Ill. 1890) which did involve an oral assignment of a lease. There the Illinois court utilized the doctrine of part performance to validate an otherwise invalid oral assignment.

Nor can we agree that the extent of the possession and performance of an assignee is a critical issue; it is his acceptance of the assignment which places him in privity of estate with the landlord. In 49 Am. Jur.2d, *Landlord and Tenant* § 460 (1970) the rule is stated as follows:

> The liability of an assignee for rent is determined by his *right to possession* and not his actual possession, and he is therefore held liable although he may not have entered into possession, if he has *accepted* the assignment, and, a fortiori, he cannot escape liability by merely abandoning the possession. The entry into possession is said to be material only as an aid in determining whether the assignment made was bona fide or only colorable. [Emphasis supplied]

See also 1 *Friedman on Leases,* 2d Ed., § 7.501(c).

In *Little* v. *Hudgins,* 117 Ark. 272, 174 S.W. 520 (1915) our court declared that the law does not contemplate that a landlord "shall hunt up his tenant and ask him to go into possession of the premises before he can claim the rent which the tenant has agreed to pay." It is the duty of the tenant to take possession unless possession is withheld from him and if he does not do so he would be liable for the rent from the beginning of the lease term.

This same rule was applied to an assignee in *Baston* v. *Davis, supra.* Although in *Baston* the assignee under a written assignment took actual possession for eighteen months and paid rent during that period, it is clear from the opinion of the court that it was the fact of acceptance of the assignment and not the extent and duration of possession and compliance that was the basis for the decision. There the court, quoting from *Chicago Attachment Co.* v. *Davis Sewing Machine Co., supra,* stated:

> The lessee is liable to the lessor by virtue of privity of estate and privity of contract. We understand that the liability of the assignee to the lessor or reversioner is by reason of the privity of estate, which, by the assignment, has been transferred from the lessee to the assignee. The fact of actual possession is frequently of vital importance, as affording a link which, in connection with the further fact such possession is derived from the lessee, will raise the presumption that there is privity of estate between the party in possession and the lessor, or even estop such party from denying such privity, but, after all, it is the privity of estate which imposes the liability. . . . *So long as it* (assignee) *continued to be the owner of the lease estate, and retained the legal title thereto, and was entitled to immediate and actual possession, such legal title drew to it the constructive possession, and it was still assignee of the term, and responsible as such.* [Emphasis supplied]

As with all other conveyances, delivery and acceptance are essential to the validity of a deed of assignment but there is no requirement that there be a formal delivery or acceptance. These questions are largely ones of intent and may be found from the acts and conduct of the parties. *Graham* v. *Suddeth,* 97 Ark. 283, 133 S.W. 1033 (1911). The evidence clearly discloses that there was an actual manual delivery of the assignment at the time of closing which was accepted by Jones and his attorney. It was recorded and returned to Jones who retained it in his possession thereafter and refused a request for reassignment of the lease to Baker. There was evidence that the lease had been delivered to Jones

before the first rent payment was due and paid on his behalf. Jones thereafter took no action to relieve himself of the obligations imposed by the assignment. When all of the evidence is considered and giving due regard to the superior position of the trial judge to judge the credibility of the witnesses and the weight of their testimony, we cannot say that his findings that the assignment of the lease had been delivered, accepted and acted upon, are clearly erroneous. ARCP Rule 52(a).

Here the trial court found that Jones did accept the assignment and he expressly rejected Jones' assertion that it was conditioned on subsequent acceptance. Having accepted the assignment he was entitled to immediate possession of the property and the fact that he did not take the possession is not decisive.

Nor do we find merit in the contention that the assignment was void for lack of mutuality. The duties and obligations existing between lessee and his assignor are not contractual ones but those which arise between those in privity of estate. When that privity is established the rights and obligations of the parties are those which the law imposes.

We have concluded, however, that the trial judge erred in refusing to address the issue of McMillen's duty to use all reasonable efforts to minimize the damage she sustained. *Baston* v. *Davis, supra.* For this error the judgment must be reversed and the cause remanded.

Affirmed in part; reversed and remanded in part.

COOPER and CLONINGER, JJ., agree.

Fread J. LOANE *v.* STATE of Arkansas

CA CR 84-42 677 S.W.2d 864

Court of Appeals of Arkansas
En Banc
Opinion delivered October 17, 1984

Hewett & Hewett, by: *Carol Hewett,* for appellant.

Steve Clark, Att'y Gen., by: *Patricia G. Cherry,* Asst. Att'y Gen., for appellee.

LAWSON CLONINGER, Judge. Appellant, Fread J. Loane, was convicted of the offense of delivery of a controlled substance. He received a sentence of six years and a fine of $5,000.

Appellant was serving a sentence on a related charge in Oklahoma at the time the information was filed in Arkansas

and was brought to this state pursuant to the Interstate Agreement on Detainers, which is codified as Ark. Stat. Ann. § 43-3201 (Repl. 1977).

He initially argues that the trial court erred in refusing to dismiss the charges against him for failure to bring him to trial within the time period set out in the Interstate Agreement on Detainers. We agree. Article IV(c) of § 43-3201, *supra,* provides:

> In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty (120) days of the arrival of the prisoner in the receiving state, but for a good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

The trial judge held in a hearing on this matter that the defendant was initially brought back to Arkansas pursuant to the provisions under the Interstate Agreement on Detainers on March 29, 1983, but was subsequently paroled by the authorities in Oklahoma and was released on bond in this jurisdiction. Once he was free on bond, it was the trial judge's ruling that Rule 28 of the Arkansas Rules of Criminal Procedure applied from that point on. Rule 28.1 of the Arkansas Rules of Criminal Procedure provides that a defendant shall be brought to trial within eighteen months after being charged with an offense excluding only such periods of necessary delay as are authorized in Rule 28.3. Appellant's trial was conducted on August 6, 1983. The trial judge specifically stated the reasons for not bringing appellant to trial within the eighteen month period and appellant does not dispute his findings in that respect. His only argument is that Rule 28 does not apply and the speedy trial rule provided in the Interstate Agreement on Detainers does. Rule 28(g) provides specifically that this rule would have no effect on those cases governed by the Interstate Agreement on Detainers Act.

In *Blackmon* v. *Weber,* 277 Ark. 393, 642 S.W.2d 294 (1982), the appellant sought a writ of prohibition to prohibit

Pulaski County Circuit Court from proceeding to trial on a charge of first degree battery against him. The incident giving rise to the charge occurred on August 24, 1980, while the appellant was an inmate in the Pulaski County Jail as a federal detainee. The following day he was transferred to federal prison in El Reno, Oklahoma. Subsequently he was charged with battery by the State of Arkansas and the prosecuting attorney placed a detainer against him. On December 18, 1981, appellant completed his federal sentence and was transferred to the Pulaski County Jail. A bail bond was filed on January 5 and trial date was set for June 25, 1982. In holding that Rule 28.1 of the Arkansas Rules of Criminal Procedure did not apply, the Arkansas Supreme Court stated that because a detainer was placed against appellant under the Interstate Agreement on Detainers Act, the speedy trial rules provided for in that Act applied to the appellant.

In this case, the trial judge refused to apply the speedy trial rules of the Interstate Agreement on Detainers Act because appellant was out on bond. However, the petitioner in *Blackmon, supra,* was also out on bond, and the Arkansas Supreme Court held that the speedy trial rules of the Act still applied. Hence, we hold that the trial judge was in error.

The State argues that we nevertheless can affirm the Interstate Agreement on Detainers was satisfied. However, Article IV(c) of the Act is clear in that it states that the defendant shall be brought to trial within 120 days, "but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance." No continuances were requested or granted in this case. Furthermore, no actions taken by appellant caused a delay in the trial of the case and nothing in the record indicates that any trial date was set prior to August 6, 1983.

Appellant further contends on this appeal that the Arkansas prosecution is barred by the prior Oklahoma conviction for a crime arising out of the same cause of criminal conduct as the Arkansas prosecution. In view of

our decision on the first issue argued by appellant, we do not reach the second.

Reversed and dismissed.

MAYFIELD and COOPER, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. I respectfully dissent from the majority decision in this case, which holds that the charges against the appellant must be dismissed for failure to bring him to trial within 180 days of his delivery from Oklahoma. First, the majority opinion neglects to point out that the appellant was out of jail on bond from Carroll County when he was imprisoned in Oklahoma. Next, the majority opinion says that the appellant was brought back pursuant to the Interstate Agreement on Detainers. The fact is, he was *paroled* from Oklahoma to the Arkansas detainer. The purposes of the Interstate Agreement on Detainers is to require a speedy trial so as not to interfere with the rehabilitative efforts of the state in which the detainee is incarcerated. *See Camp* v. *United States,* 587 F.2d 397 (8th Cir. 1978). Since, in the case at bar, Oklahoma had released the appellant on parole, a delay in his trial would have had no effect on that state's rehabilitative efforts. I simply do not think that the Act applied to the appellant, and I think that the trial court was correct in determining that Rule 28 applied. I would affirm on this point.

Judge Mayfield joins in this dissenting opinion.

Robert Lee JACKSON *v.*
STATE of Arkansas

CA CR 84-91 677 S.W.2d 866

Court of Appeals of Arkansas
En Banc
Opinion delivered October 17, 1984

William C. McArthur, for appellant.

Steve Clark, Att'y Gen., by: *Theodore Holder,* Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Judge. This case was submitted to the trial court on a charge of criminal conspiracy to possess a controlled substance. The trial court found appellant, Robert Lee Jackson, guilty but reduced the charge to a misdemeanor. He was sentenced to ninety days in the Pulaski County Jail. A prior suspended sentence was revoked and appellant was sentenced to one year in the Arkansas Department of Correction, with both sentences to run concurrently. We affirm.

Appellant's first assignment of error involves the question of whether the trial court erred in allowing taped and transcribed telephone conversations into evidence when

positive identification of the party could not be made. Appellant relies principally upon the fact that undercover Officer Houser stated candidly that he could not positively identify appellant Jackson as the person who called him. The evidence reveals that Officer Houser received several telephone calls from a person who "sounded like Jackson", concerning a deal in which Officer Houser was to sell ten pounds of marijuana for $5,000.00. The evidence clearly established that appellant Jackson showed up at the time and place in furtherance of the proposed purchase pursuant to the prearranged telephone instructions. Appellant contends that Rule 803 of the Uniform Rules of Evidence prohibits the admission of the telephone conversations without proper and positive identification of the speakers. A similar issue was addressed in *United States* v. *Biondo,* 483 F.2d 635 (8th Cir. 1973), *cert. denied,* 415 U.S. 947 (1974). In a prosecution for conspiracy to extort money, the victim, Wozniak, on direct examination, testified about two phone calls allegedly received from Biondo, in which Biondo threatened him and arranged for a meeting for a payoff. The defendants claimed that no sufficient foundation was laid for the introduction of the evidence. The Court noted that Biondo's presence on May 20 at the meeting place and at the time arranged by the caller would certainly constitute circumstantial evidence as to the identity of the caller. Since neither party in the case at bar has provided us with any Arkansas law to the contrary and our research has not revealed any, we adopt as precedent the holding of *Biondo, supra.* It is well settled that a telephone conversation is admissible provided the identity of the speaker is satisfactorily established. *New York Life Ins. Co.* v. *Silverstein,* 53 F.2d 986 (8th Cir. 1931). Voice identification is an issue of fact which may be established by both direct and circumstantial evidence. *United States* v. *Turner,* 528 F.2d 143 (9th Cir. 1975). We belive an application of these rules to the facts of this case requires us to affirm on this point as there was both direct and circumstantial evidence presented which created an issue of fact for the trier of fact to resolve. Accordingly, we cannot say that the trial judge's ruling on the issue of the admissibility of the tapes and transcriptions was an abuse of discretion.

Appellant's second point for reversal is that the trial court erred in admitting evidence of a prior conviction in the State's case in chief when appellee's stated purpose of offering the judgment of conviction was to prove appellant's predisposition in response to the asserted defense of entrapment. It should be noted that the record reveals that appellee offered this evidence for the stated purpose of absence of mistake, knowledge and intent.

This issue arose out of a prolonged discussion between the trial court and counsel at the end of the State's case. Defense counsel had previously moved to suppress evidence concerning the search and seizure of a suitcase of marijuana and the discussion of this motion occurred following cross-examination of Officer Wayne Chaney. Appellant's counsel then interjected a motion for a directed verdict on the basis of entrapment. At this point the prosecutor proffered evidence of a prior conviction stating that it had not planned to introduce it at that time but in view of appellant's raising of the entrapment defense, it was necessary to do so. The trial court allowed the admission of the evidence.

In *Spears* v. *State,* 264 Ark. 83, 568 S.W.2d 492 (1978), appellant contended that the trial court erred in permitting the State to present the testimony of Jess Baker, Jr., to the effect that he had purchased controlled substances from appellant on three different occasions. This testimony was offered as a part of the State's case in chief. The Court found no evidence of entrapment in the State's evidence and found that under the entrapment statute, this testimony was not proper at that stage of the proceedings. The Court went on to state that the testimony would have been proper in rebuttal to appellant's testimony relating to entrapment, as it would be relevant to the question of whether the conduct of the undercover officer, and more particularly, his informant, did more than afford appellant an opportunity to make a sale of controlled substances.

Rule 404(b), Uniform Rules of Evidence, provides that evidence of other acts or crimes is not admissible to prove the character of a person or that he is a bad man. They may be admissible, however, to prove motive, opportunity, intent,

preparation, plan, knowledge, identity or acts absent of mistake or accident. *Harper* v. *State,* 7 Ark. App. 28, 643 S.W.2d 585 (1982). Furthermore, such evidence is usually admissible in rebuttal to the defense of entrapment. When reviewing the facts of the instant case, it is clear that defense counsel had laid the groundwork for his defense of entrapment through his cross-examination of the State's witnesses. By his trial tactic of moving for a directed verdict on the basis of entrapment, appellant's counsel invited the State to proffer the evidence of the prior conviction as evidence of absence of mistake, knowledge and intent on appellant Jackson's part in this occurrence. In other words, appellant placed it in issue through his motion for a directed verdict. The implication in *Spears, supra,* is that if evidence of entrapment is produced in the State's evidence, then evidence of a prior bad act can be properly introduced in rebuttal, regardless of whether the State has rested. We find no error in this ruling of the court.

Appellant's third point for reversal alleges that the trial court erred in not suppressing evidence based upon an illegal search. The record reflects that following the purchase of marijuana from Officer Houser, appellant Jackson placed the marijuana in a suitcase he had brought with him. He went to his automobile and put the suitcase in the backseat. Before he could sit down in the driver's seat, he was arrested. The suitcase was removed from the automobile and opened on the spot. Appellant argues that the officers should have first obtained a search warrant before searching the suitcase. We believe this contention is answered by *New York* v. *Belton,* 453 U.S. 454 (1981); *Chimel* v. *California,* 395 U.S. 752 (1969); *United States* v. *Singer,* 687 F.2d 1135 (8th Cir. 1982).

In *Belton, supra,* an automobile in which appellee Belton was one of the occupants was stopped by a New York State policeman for traveling at an excessive rate of speed. In the process of discovering that none of the occupants owned the car or was related to the owner, the policeman smelled burnt marijuana and saw on the floor of the car an envelope suspected of containing marijuana. He then directed the occupants to get out of the car and arrested them for

unlawful possession of marijuana. After searching each of the occupants, he searched the passenger compartment of the car, found a jacket belonging to appellee Belton, unzipped one of the pockets, and discovered cocaine. Appellee Belton was subsequently indicted for criminal possession of a controlled substance.

The substance of the Court's holding was that the search of appellee Belton's jacket was a search incident to a lawful custodial arrest, and hence did not violate the Fourth and Fourteenth Amendments. The jacket, being located inside the passenger compartment of the car, was within the arrestee's immediate control within the meaning of *Chimel, supra,* wherein it was held that a lawful custodial arrest creates a situation justifying the contemporaneous warrantless search of the arrestee and of the immediately surrounding area. The United States Supreme Court held that not only may the police search the passenger compartment of the car in such circumstances, but they may also examine the contents of any containers found in the passenger compartment. Such a container may be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have. Clearly, *Belton* is controlling when the facts of this case are considered and we find no merit to this contention.

Finally, appellant argues that the trial court erred in refusing to acquit appellant on grounds of entrapment. The record reflects that at some point in time, Wayne McDonald, a confidential informant working with Officer Houser, informed appellant that Officer Houser, identified by his undercover identity of Ronnie, was selling large quantities of marijuana and would sell appellant some of it. Officer Houser then received two telephone calls from appellant through the telephone used by the narcotics section for undercover operations. The subject brought up by appellant and discussed in each telephone conversation was the purchase of marijuana.

Officer Houser followed those telephone calls with two

others he made to appellant concerning the purchase. Officer Houser arrived on time at the agreed rendezvous, a motel room, with some marijuana to "sell" appellant. Appellant arrived with a suitcase and triple beam scale with which to weigh the marijuana. He weighed the marijuana, paid Officer Houser for it, left the room and placed the suitcase in his automobile.

Appellant testified that he would never have participated in these activities but for the urging of Wayne McDonald, the confidential informant working with Officer Houser. Appellant stated that McDonald persuaded him that he, ". . .could get the marijuana and he (McDonald) would get rid of it for me." During the taped conversations between appellant and Officer Houser, appellant negotiated for a reduced price for the ten pounds of marijuana. Appellant also inquired of Officer Houser if the marijuana was "good brown." Appellant said further, "Hey man, its exactly how I make my living and I'm always looking for a good connect man. See, you'll be a good connect Ron" (Officer Houser). Officer Houser testified that after the purchase in the motel room , appellant asked if he could get in touch if he needed more marijuana.

Entrapment is an affirmative defense which must be proved by the defendant by a preponderance of the evidence. *Spears, supra.* Entrapment occurs when a law enforcement officer or any person acting in cooperation with him, induces the commission of an offense by using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Furthermore, conduct merely affording someone an opportunity to commit an offense does not constitute entrapment. Ark. Stat. Ann. § 41-209 (Repl. 1977). Entrapment does not occur when government agents merely afford one the opportunity to do that which he already has a predisposition to do. See, *Sherman* v. *United States,* 356 U.S. 369 (1958); *Harper, supra; Rhoades and Emmerling* v. *State,* 270 Ark. 962, 607 S.W.2d 76 (Ark. App. 1980), *cert. denied,* 452 U.S. 915 (1981).

Accordingly, we hold that the trial court's determination that appellant had failed to meet his burden of proof in

establishing entrapment by a preponderance of the evidence was not in error.

Affirmed.

COOPER and MAYFIELD, JJ., concur.

JAMES R. COOPER, Judge, concurring. I concur in the result reached by the majority, and I also concur in Judge Mayfield's concurring opinion on the issue of entrapment. My agreement on the search and seizure issue is based, however, on the fact that Rule 12.1(d) (Repl. 1977) of the Arkansas Rules of Criminal Procedure decides this issue. Rule 12.1(d) states:

> An officer who is making a lawful arrest may, without a search warrant, conduct a search of the person or property of the accused for the following purposes only:
>
> * * *
>
> (d) to obtain evidence of the commission of the offense for which the accused has been arrested or to seize contraband, the fruits of crime, or other things criminally possessed or used in conjunction with the offense.

I do not believe that *New York* v. *Belton,* 453 U.S. 454 (1981) or *Chimel* v. *California,* 395 U.S. 752 (1969) have anything to do with this case. Both those cases deal with the search of the immediate area surrounding the person who is being arrested, either to protect the officer or to prevent the destruction of evidence. Further, neither case involved a search "to obtain evidence of the commission of the offense for which the accused has been arrested. . ." as is contemplated in Rule 12.1(d) of the Arkansas Rules of Criminal Procedure. The majority court reaches the right result on the search and seizure issue, but by an unnecessary, and, in my view, erroneous route.

Judge Mayfield joins in this concurring opinion.

MELVIN MAYFIELD, Judge, concurring. I am in agreement with the majority opinion but concur in an attempt to enforce the point that evidence to refute the defense of entrapment can be properly introduced "regardless of whether the state has rested."

In *People* v. *Mann,* 31 N.Y.2d 253, 288 N.E.2d 595, 61 A.L.R.3d 286 (1972), the court said, "The better view, it seems to us, would be to admit competent proof of criminal disposition and prior convictions as part of the People's direct case when it is 'clear that the defense of entrapment will be invoked.' " There the defense was raised by pretrial pleading and by defense counsel's opening statement and his cross-examination of the prosecution's witnesses. For other cases to the same effect, see Annot., *Admissibility of Evidence of Other Offenses in Rebuttal of Defense Entrapment,* 61 A.L.R.3d 293 (1975).

COOPER, J., joins in this concurrence.

John Roland FLYNN *v.*
GREENE COUNTY, ARKANSAS

CA 84-24 676 S.W.2d 766

Court of Appeals of Arkansas
Division II
Opinion delivered October 17, 1984

Curtis L. Huckaby, for appellant.

Steve Clark, Att'y Gen., by: Theodore Holder, Asst. Att'y Gen., for appellee.

TOM GLAZE, Judge. Appellant sued appellee, Greene County, to recover $7,500 bail he had posted for himself in 1977. The circuit court granted the appellee's motion for summary judgment in the suit, and appellant appeals the decision. We affirm.

In July of 1977, appellant paid a $7,500 bail to appellee to guarantee a court appearance the following December. Appellant did not appear in court when summoned in December of 1977. On March 1, 1979, the Sheriff of Greene County received notice from federal prison officials that appellant was in their custody in Texarkana, Texas. In May of 1979, the circuit judge signed an order directing that appellant's bail be forfeited and issued a summons for appellant to appear and show cause why the bond should not be forfeited. This summons was filed *non est* with the circuit clerk's office on December 3, 1979. In February of 1980, appellee dropped its criminal charges against appellant.

Appellant admits that he forfeited his bail by failing to appear in December of 1977; he seeks to retrieve the money by the operation of Ark. Stat. Ann. § 43-733 (Repl. 1977). This statute prohibits the forfeiture of bail money if the principal of the bailment is incarcerated. Appellant argues on appeal that he was unable to make this statutory argument in the show cause hearing ordered in May of 1979 because appellee failed to notify him of the hearing, as required by Ark. Stat. Ann. § 43-727 (Repl. 1977), which states:

> No pleadings are required on the part of the State but the clerk shall issue a summons against the bail requiring them to appear within 20 days, to show cause why judgment could not be rendered against them for the sum specified in the bail-bond, on account of the forfeiture thereof; which summons shall be executed as in civil actions and the action proceed as an ordinary civil action.

Appellant argues that this notice was impliedly part of the bail bond contract he entered into with the appellee and that the appellee breached the contract when it failed to notify him of the show cause hearing when it could easily have done so because it knew he was in federal prison in Texarkana, Texas. According to the appellant, the failure of the appellee to notify him of the show cause hearing, combined with his probability of success in

retrieving the bail money in the hearing are genuine issues of material fact such that appellee's motion for summary judgment should not have been granted below.

We disagree with appellant's contentions. He has failed to prove two crucial facts: (1) that he actually was incarcerated in December of 1977, and (2) that he is within the category of persons protected by the notice provisions of § 43-727.

Although appellant claimed to have been in federal prison in December of 1977, when he was scheduled to appear in Greene County Circuit Court, he put forward no proof below that he was in federal prison at that time. A document entitled *Agreement on Detainers* submitted into evidence by appellant reveals that he began serving a federal prison sentence in November of 1978, almost one year after he failed to appear in Greene County Circuit Court. Appellant put on no proof of his whereabouts during the period from when he posted bail in July, 1977, until he entered federal prison in November, 1978. Other documents from the federal prison in Texarkana prove that appellant was there as of March 1, 1979; however, even these documents are not in the form of a "sworn affidavit," as required by § 43-733. Only if appellant could prove he was in federal prison in December of 1977 could he avail himself of the provisions of § 43-733 because, by operation of Ark. Stat. Ann. § 43-723 (Repl. 1977), the appellant forfeited his bail in December of 1977 by failing to appear in appellee's circuit court. This statutory forfeiture is not abrogated by any subsequent show cause orders. *Craig* v. *State,* 257 Ark. 112, 514 S.W.2d 383 (1974). Given the appellant's admission that he forfeited his bail and his failure to provide any proof that his bail should not have been forfeited because he was in prison at the time of the forfeiture, we agree with the circuit judge below that there are no genuine issues of material fact in this case and that appellee is entitled to a judgment as a matter of law.

As for the second point, we note that § 43-727, *supra,* on its face, appears to provide notice of show cause

hearings to professional bail bondsmen or others who post bail for defendants and not to defendants, like appellant, who post their own bail. Examination of related statutes, such as Ark. Stat. Ann. § 43-716 (Repl. 1977) shows that "bail" as it is used in § 43-727 refers to someone other than the defendant. The summons required by § 43-727 is intended to inform those who post bail for others that unless they produce the defendant within twenty days (who has, of course, already forfeited his bail by his own nonappearance), they will be liable for the defendant's bail.

Appellant's interpretation of the requirement of notice of a show cause hearing would produce results unintended by the Arkansas General Assembly. According to appellant, the purpose of the statute is to require the State to notify defendants who posted their own bail but did appear in court that they must return to court to show cause why judgment should not be rendered against them for the bail. Such defendants are of two types: (1) those who never intend to make it to the court on time—that is, those who "jump" bail, and (2) those who truly intend to appear in court but cannot for some reason. The first group, those who forego their day in court, forfeit their bail when they fail to appear and by operation of § 43-723 judgment is automatically entered against them. Obviously, § 43-727 is not intended to protect them. The second group, those defendants who in good faith intend to make their court appearances, will undoubtedly explain their absences to the court without a reminder from the State that they need to do so.

Affirmed.

CRACRAFT, C.J., and CLONINGER, J., agree.

Carl M. FIVEASH *v.*
STATE of Arkansas

CA CR 83-138 676 S.W.2d 769

Court of Appeals of Arkansas
Opinion delivered October 17, 1984

F. James Jefferson, for appellant.

No Response from the State.

PER CURIAM. On February 1, 1984, we affirmed the trial court's judgment in the above styled case. On October 4, 1984, appellant's court-appointed attorney filed a motion for attorney's fee.

In *Cristee* v. *State,* 4 Ark. App. 33, 627 S.W.2d 34 (1982), we said that motions for attorney's fees in these cases should be filed in this court in time for them to be considered at the time the case is considered on its merits. Two years later, in *Stefanovich* v. *State,* 10 Ark. App. 233, 662 S.W.2d 476 (1984), we called attention to *Cristee* and pointed out that failure to file the motion in time for it to be considered at the time the case is considered on its merits could prevent the allowance of an attorney's fee.

We allowed a fee in both of those cases, but the motions were filed within three months of the case decision and in the same fiscal year. Here, eight months have elapsed and on July 1, 1984, a new fiscal year intervened.

Our power to allow the fee at this late date is suspect; moreover, we do not think one should be allowed under the circumstances.

Motion denied.

WILD TURKEY RANCH, INC. *v.*
WILHELM NURSING HOME, INC.

CA CR 84-181 677 S.W.2d 871

Court of Appeals of Arkansas
Division I
Opinion delivered October 24, 1984

H. David Blair, for appellant.

Burris & Berry, for appellee.

JAMES R. COOPER, Judge. The appellee, a Florida corporation, sold certain lands in Arkansas to the appellant, an Arkansas corporation, in April of 1980. In connection with this sale, the appellant executed a promissory note which was secured by a mortgage on the land. At the time of

this transaction, the appellee was qualified to do business in Arkansas as a foreign corporation, but later its authorization to conduct business in Arkansas was revoked based on its failure to pay its franchise taxes. This foreclosure action was commenced in July of 1983 by the appellee. The appellant sought dismissal of the action, alleging that the appellee had no capacity to sue in Arkansas to enforce its contracts by virtue of the fact that its authority to do business in this state had been revoked. This motion was denied, judgment was entered against the appellant for the debt, and foreclosure of the mortgage was also ordered. From that decision, comes this appeal.

For reversal, the appellant argues that the trial court was in error in denying its motion to dismiss based on the appellee's lacking the capacity to sue to enforce its contracts in this state. This argument seems to be based on the "Wingo Act," Ark. Stat. Ann. § 64-1201 (Repl. 1980), although this statute is not cited by the appellant in its brief. The appellant cites two cases in support of its argument that the appellee ceased "to have a jural existence" when its authority to do business in Arkansas was revoked. See *Sulphur Springs Recreational Park, Inc.* v. *City of Camden,* 247 Ark. 713, 447 S.W.2d 884 (1969); *Moore* v. *Rommel,* 233 Ark. 989, 350 S.W.2d 190 (1961). In both of these cases cited by the appellant, the corporations involved were Arkansas corporations whose domestic corporate charters were revoked and they unquestionably ceased to exist as corporations in this state or any other. However, in the case at bar, the corporation involved is a Florida corporation which was, at the time the note and mortgage was executed, qualified to do business in Arkansas. Subsequently, the corporation no longer was actively involved in its Arkansas operations and therefore allowed its authority to expire. However, we cannot hold, nor can we find any authority to support the proposition that the appellee cannot enforce the valid obligation of the appellant on the note and mortgage simply because the appellee no longer is a registered foreign corporation doing business in Arkansas.

Affirmed.

CORBIN and MAYFIELD, JJ., agree.

Ronnie Dale BAILEY *v.* Debra Ann BAILEY

CA CR 84-7 677 S.W.2d 874

Court of Appeals of Arkansas
Division II
Opinion delivered October 24, 1984

Hurst Law Offices, by: *Richard McMillan,* for appellant.

Janice Williams Wheeler, for appellee.

TOM GLAZE, Judge. This appeal is from a chancellor's denial of appellant's petition to change custody of the parties' minor children. Appellant's only point for reversal is that the chancellor abused his discretion in denying the petition. Appellant contends that because the appellee mother has herpes genitalis, a change of circumstances has occurred virtually mandating a change in custody. We disagree and affirm the chancellor's decision.

Appellant Ronnie Bailey and appellee Debra Ann

Bailey were divorced in July of 1979, and custody of the parties' two children was awarded to the appellee mother, with reasonable visitation rights awarded the appellant father. In his petition to change custody, the appellant alleged that appellee had remarried, that her actions indicated emotional instability and that because she had been ill, she "may well be unable to care for the children, both from a physical and emotional perspective."

At the hearing, Debra Bailey (now Nichols) testified that her doctor discovered that she had herpes in May of 1983, when she went into the hospital for another reason and a culture was run that was positive for herpes. Debra testified that she did not know how, when or where she contracted herpes but that doctors told her it could be dormant for as long as fifteen years without being active. She stated that as far as she knows, she could have contracted it from appellant.

Appellee's doctor, Hayes G. Jackson, testified by deposition that in May of 1983, he was treating appellee for acute cervicitis, a bacterial infection, when he got a positive culture for herpes. Dr. Jackson testified that herpes is a viral infection, transmitted practically altogether by sexual intercourse, and that it would be "practically unheard of" to transmit it to other people without sexual activity. He said it was possible, but highly unlikely, to get herpes from bedding or an open lesion. He stated that he knew of "no medical reason why a reasonably careful person could not have children in . . . [his or her] home if they had herpes." He said that he does not describe herpes as a highly contagious disease.

Appellant contends in his brief that appellee is infected with a contagious, viral infection which could be transmitted to the parties' children, and that the chancellor's decision to leave custody with the mother was an abuse of discretion. Appellant contends "it is common knowledge that a mother, in caring for her children, is necessarily intimate with them physically to some extent," and that "the one person who should not have a contagious viral infection is the primary care provider for minor children."

The welfare of the child is the polestar in every child custody case. *Hickey* v. *Hickey,* 9 Ark. App. 281, 658 S.W. 2d 411 (1983). The same standard applies to a change in custody. *Sweat* v. *Sweat,* 9 Ark. App. 326, 659 S.W.2d 516 (1983). A decree with respect to the custody of a child is subject to modification in light of circumstances that have changed since rendition of the original decree. *Van Winkle* v. *Van Winkle,* 7 Ark. App. 53, 644 S.W.2d 311 (1982). The party seeking a change in custody has the burden of showing such changed conditions as would justify a modification. *Id.*

In the instant case, the chancellor found that the mere fact of a possible infection primarily transmitted by sexual activities did not have that much significance as far as the children are concerned, and we agree. Based upon the testimony of the parties and the medical testimony of appellee's doctor, we cannot see that he was clearly erroneous in denying appellant's petition for a change of custody under these circumstances.

Affirmed.

CRACRAFT, C.J., and CLONINGER, J., agree.

Shelley COIT *v.* Dewey STILES, Director of Labor, KELLY SERVICES, and PUBLISHER'S BOOKSHOP

E 84-45 678 S.W.2d 373

Court of Appeals of Arkansas
Division I
Opinion delivered October 31, 1984
[Rehearing denied November 28, 1984.]

Gale Stewart, for appellant.

Allan Pruitt, for appellees.

JAMES R. COOPER, Judge. In this unemployment compensation case, the Agency, Appeal Tribunal and the Board of Review all found that the appellant was disqualified from receiving benefits because she quit her last work without good cause connected with the work. The main issue presented in this appeal is whether the appellant's last employer in a chronological sense, Kelly Services, is her last employer for purposes of the administration of the unemployment compensation act, since that employer was a part-time employer, or whether her last full-time employer, Publisher's Bookshop, is her last employer for the purposes of the act.

The appellant had worked for Publisher's for about ten years, and in March, 1983, she was laid off. She applied for, and began receiving unemployment benefits. She sought other employment, and when she was unable to find full-time work, she accepted a job with Kelly Services. She testified that an employee of the Employment Security Division told her that accepting such part-time work would not affect her unemployment benefits from Publisher's. The appellant later quit her work with Kelly in order to accompany her spouse to Arizona, and also because she was dissatisfied with the part-time employment.

In the recent case of *Hopkins* v. *Stiles, Director,* 10 Ark. App. 77, 662 S.W.2d 177 (1983), we held that a claimant should not be disqualified from receiving unemployment benefits as a result of her accepting part-time employment when no suitable full-time employment is available. In *Hopkins,* this court analyzed the purposes behind the act, the competing policies involved and the decisions in other jurisdictions which have addressed this issue in reaching the holding that we feel is the better policy. There we noted that the statutory provision governing the amount of weekly benefits awarded during partial employment, Section 3(c) of the Arkansas Employment Security Law [Ark. Stat. Ann. § 81-1104 (c) (Supp. 1983)], provides for a reduction in the weekly benefits received as a result of the prior employment by the amount received from the part-time employment

which is in excess of 40% of the weekly benefits being received. Thus the appellant could earn up to 40% of her weekly benefits being received based on her employment with Publisher's, from Kelly, and suffer no reduction in the amount she was receiving in unemployment compensation. The holding in *Hopkins* adopted a public policy designed to encourage persons receiving benefits under the act to accept part-time employment if no full-time employment was available without suffering a reduction in their overall income. We therefore reaffirm this holding in reversing and remanding this case for a determination of benefits based on the appellant's last employment with the appellee, Publisher's[1].

As a result of our holding above, we do not reach the issue concerning the appellant's asserted quitting her last employment without good cause. Likewise, we do not reach the estoppel argument raised by the appellant based on the alleged assurances from the Agency employee regarding the appellant's suffering a loss in unemployment compensation as a result of her accepting the part-time employment. The appellant is entitled to benefits regardless of the fact that she left part-time work voluntarily, without good cause. Her further unemployment benefits are subject to reduction only to the extent that her part-time wages compel that result.

Reversed and remanded.

CRACRAFT, C.J., and GLAZE, J., agree.

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[1]Although the Arkansas Supreme Court reversed our decision, *Stiles, Director* v. *Hopkins,* 282 Ark. 207, 666 S.W.2d 703 (1984), the reversal was based on the fact that the Supreme Court found that the issue we decided was not properly before us. The court did not reach the merits of our decision.

INTERNATIONAL PAPER COMPANY *v.* Ezekiel McBRIDE

CA 84-188 678 S.W.2d 375

Court of Appeals of Arkansas
Division I
Opinion delivered October 31, 1984

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

Baim, Gunti, Mouser, Bryant & DeSimone, for appellee.

DONALD L. CORBIN, Judge. Appellee, Ezekiel McBride, was adjudicated permanently and totally disabled as a result of an injury to his lower back while employed by the appellant, International Paper Company. Now the matter is back before us because appellant is controverting the lump sum award of attorney's fees to appellee's attorney.

Appellant's first argument that we must address concerns the question raised by his counsel as to whether Ark. Stat. Ann. § 81-1332.1 (Supp. 1983) of the Arkansas Workers' Compensation Act, providing for lump sum award of attorneys' fees is inconsistent with Ark. Stat. Ann. § 81-1332 (Supp. 1983), and therefore void.

The emergency clause found in Act 215 of 1979, codified at Ark. Stat. Ann. § 81-1332.1, makes it clear that the legislature was aware of the provisions of § 81-1332 in regard to attorneys' fees. With this knowledge the legislature passed Act 215 to address what it saw as a gap left by § 81-1332. Section 5 of Act 215 reads in pertinent part:

> [T]hat the scope of the Commission's authority

> to award attorney's fees on a lump sum basis is unclear and must be immediately clarified. Therefore an emergency is hereby declared to exist. . . .

Obviously, the legislature intended the two sections, § 81-1332 and § 81-1332.1, to be read in conjunction with one another and saw no conflict between the two statutes. The legislature felt strongly that the Commission should be able to award lump sum attorneys' fees. Had the legislature perceived any conflict between the statute they enacted to accomplish this and the old statute, they would have undoubtedly repealed § 81-1332.

We have spoken to this issue previously in *Aluminum Company of America* v. *Neal,* 4 Ark. App. 11, 626 S.W.2d 620 (1982). Judge Tom Glaze writing for a majority of the Court stated:

> Prior to the enactment of Act 215, many instances existed where the claimant's attorney received his or her compensation installments on the same schedule benefits were paid the claimant. Since an individual claimant or beneficiary might die or remarry prior to the projected time set forth in the tables, attorneys in these instances would fail to receive full payment for their services. The language in the emergency clause of Act 215, i.e., Section 3 *supra,* clearly reflects that the Arkansas General Assembly enacted Act 215 to remedy this problem.

Appellant argues that § 81-1332.1 is unconstitutional in that it violates the equal protection and due process clauses of the Fourteenth and Fifth Amendments to the United States Constitution.

The equal protection clause of the Fourteenth Amendment has been interpreted to mean that similar individuals in similar circumstances will be dealt with in a similar manner. There is nothing in the language of § 81-1332.1 to indicate that any individual or group of individuals is to be singled out for different treatment under similar circumstances. Section 81-1332.1 is a facially

neutral statute and in no way violates the equal protection clause of the Fourteenth Amendment. Appellants present several hypothetical situations in which they allege § 81-1332.1 could be discriminatorily applied; however, the record is totally devoid of any evidence to support an argument that the statute has been applied discriminatorily. Absent such evidence, we cannot address this issue.

Appellant argues that § 81-1332.1 violates the due process clause of the Fifth Amendment because the Commission's discretion in awarding lump sum attorneys' fees can never be challenged due to the statute's lack of guidelines. We believe appellant misunderstands the nature of the protection provided by the Fifth Amendment.

The due process clause of the Fifth Amendment, applicable to the states by the Fourteenth Amendment, provides in part that no one shall be deprived of property without due process of law. Appellants below were afforded a hearing before the Commission to determine whether a lump sum attorney's fee would be awarded. This hearing provided appellant due process of law in regard to the award of a lump sum attorney's fee.

Appellants argue that the statute fails to set forth guidelines for awarding lump sum attorney's fees. We must disagree. The plain language of the statute authorizes the Commission to award lump sum attorney's fees. No limitations are set forth because none were apparently intended. We must assume that the legislature intended to authorize the Commission to award such fees in any or all cases. Thus the statute's guidelines are discernible; lump sum attorneys' fees can be awarded in any or all cases. Any complaint that the Commission has exercised their authority to award lump sum attorneys' fees discriminatorily must be raised under the equal protection clause and supported by the record.

The Workers' Compensation Commission declined to rule on the constitutionality of § 81-1332.1 when the issue was raised before them. As we have said before in

Hamilton v. *Jeffrey Stone Co.*, 6 Ark. App. 333, 641 S.W.2d 723 (1982), and in *Swafford* v. *Tyson Foods, Inc.*, 2 Ark. App. 343, 621 S.W.2d 862 (1981), the constitutionality of a statute must be raised at the Commission level; however, the ultimate decision upon a statute's constitutionality can only be decided by a court of law. Arkansas Constitution, Article VII, § 1. The constitutionality of the statute was properly raised below and we find the statute to be constitutional.

Affirmed.

COOPER, J., agrees.

MAYFIELD, J., concurs.

Virginia TODD *v.* Michael PELOSO, Jr. and Roger LOGAN, Circuit Judge, on Exchange, of the Circuit Court of Baxter County, Arkansas

CA 84-370 680 S.W.2d 712

Court of Appeals of Arkansas
En Banc
Opinion delivered October 31, 1984

William David Duke and *Judith Strother,* for petitioner.

Poynter, Huckaba & Gearhart, by: *Van A. Gearhart,* for respondents.

PER CURIAM. Petitioner, Virginia Todd, has caused to be filed in this Court a Petition for Writ of Certiorari and Application for Stay of the Trial Court's Grant of Habeas Corpus Relief pending a decision on the merits in this Court.

Petitioner makes no allegations which, even if supported by the record, would compel a finding by this Court that the trial judge's refusal to stay its Writ of Habeas Corpus was in error.

The record presented to this Court by Petitioner demonstrates that the trial judge was in a better position to determine the best interests of the child than this Court.

Petition denied.

CRACRAFT, C.J., and COOPER, J., concur.

GLAZE, J., would grant the stay.

GEORGE K. CRACRAFT, Chief Judge, concurring. The majority of this court take the view that the issues of whether the Vermont court's determination that it had subject matter jurisdiction was incorrect, and whether the court had improperly interpreted the law of Vermont regarding the rights of putative fathers or there was an error in our own court rulings are not before us on the merits. These issues should not be addressed until the record is lodged here and the matter submitted on briefs and arguments. We addressed only the issue presented by the appellant's motion, i.e., whether the trial court abused its discretion in denying appellant's motion to stay the order returning custody of the minor to appellee during the pendency of the appeal. The trial court has the authority to fix the custody of minors during the pendency of an appeal and there is no absolute right to a supersedeas in child custody cases. Appellate courts do not interfere unless it appears that the trial court has manifestly abused its discretion. *Goodin* v. *Goodin,* 240 Ark. 541, 400 S.W.2d 665 (1966).

The courts in both Vermont and Arkansas have found that it would be in the best interest of the child that he be returned to the custody of his father. The Arkansas court has further held that it would be in his best interest to remain in his father's custody pending appeal. I see no abuse of discretion in that finding. Regardless of where the initial fault in this litigation lies, this child has resided with his father for at least the past three years. His initial contact with the State of Arkansas was four months prior to the entry of the trial court's order, when his mother absconded with him to Arkansas while her prayer for relief was pending in the Vermont court. The child's accustomed surroundings are in Vermont and his father is his accustomed custodian. There is no allegation that the father was not properly caring for the child or fostering his interest.

My opinion that the majority are correct is strengthened considerably by the data supplied us with appellee's response to the motion, which indicates that the motion presented us was filed on appellant's behalf *in absentia,* while appellant was secreting herself and the child in defiance of the court. Pursuant to Rule 3, Arkansas Rules of the Supreme Court and Court of Appeals, appellee attached to his response to the motion affidavits of a deputy sheriff of Baxter County and the principal of a Mountin Home elementary school. The deputy averred that when he attempted to execute the trial court's order he discovered that appellant had packed her belongings and left her home with the child upon learning of the court's order, and that he had been unable to discover their whereabouts. He further averred that an information charging her with the felony of interference with court-awarded custody had been filed but he had been unable to serve it on her for the same reason. A certified copy of the information was also attached to the motion. The school principal averred that the child had been absent from school for unexplained reasons since October 3, two weeks prior to the trial court's order. No counter affidavits have been filed in support of appellant's motion.

Absent some indication that the child's welfare is endangered by remaining with his father pending the

appeal, the motion, in my opinion, borders on the ludicrous. We have no assurances that appellant will abide by our mandate; on the contrary, we have a clear indication that she has no intention of doing so unless our opinion is favorable to her.

JAMES R. COOPER, Judge, concurring. Today, this Court has denied petitioner's request for a stay of the Baxter County Circuit Court's order granting Mr. Peloso's petition for habeas corpus. In so doing, we have affirmed the decision of the circuit judge not to stay his own order. After hearing the habeas corpus petition, and after being asked to stay this order granting that petition, the trial court specifically found that it would be in the best interest of the minor child that custody be immediately placed in Mr. Peloso. I can find nothing which indicates that the trial court erred in refusing to stay his own order, nor could the other members of this Court's majority. Apparently, my dissenting colleague cannot find anything which shows error on the part of the trial judge, since there is nothing in the dissenting opinion to so indicate. This opinion is written to clarify the factual and procedural history of this case, and to spell out my specific reasons for voting to deny the petitioner's request for a stay.

First, I must strongly disagree with Judge Glaze that the majority decision will "serve only to encourage kidnapping children." I do not understand, nor does the dissenting opinion explain, the basis for such an assertion. Actually, I think that granting the relief sought by the petitioner would more likely serve to encourage violation of lawful court orders.

Next, I must also take issue with the statement that the majority has acted precipitously without benefit of a complete record. True, we do not have a complete record in this case. We do not need a complete record to decide whether or not we should stay the trial court's order pending a decision on the merits of this case, nor should we be presently concerned with the merits of the case. We do have excellent briefs in this case prepared by both sides to this litigation, and the members of the Court stayed the trial judge's order to provide time to study those briefs.

The background of this case is somewhat complex. Seth, who is now eight years old, was born in Vermont to the petitioner, who was living with Mr. Peloso without benefit of matrimony. Two years later, petitioner moved to Missouri. Mr. Peloso soon followed, and during the next two to three years, the petitioner and Mr. Peloso cooperated with each other with regard to Seth, with Mr. Peloso providing child support and the petitioner providing Mr. Peloso with adequate visitation. In 1981, Mr. Peloso took Seth to Vermont, and shortly thereafter, he initiated a petition for custody of Seth. Mr. Peloso was successful, but, on June 8, 1984, the Vermont Supreme Court overturned the lower court decision awarding Mr. Peloso custody of Seth. The Court found that, at the time Mr. Peloso filed his custody petition, Vermont could not exercise jurisdiciton because

> Vermont was not the child's home state at the time of the commencement of the proceeding nor within six months prior thereto, see § 1-31(5), and no parent or person acting as a parent continued to live in Vermont after the defendant and the child left the state in 1978. Neither the child nor the plaintiff had a significant connection with Vermont, since both had been absent from the state, other than for periodic, temporary visits, for three years.

Peloso v. *Botkin*, ___ Vt. ___, 479 A.2d 156 (1984).

Three days after the Vermont Supreme Court decision, Ms. Todd filed a petition seeking custody of Seth in Baxter Chancery Court, and she received an *ex parte* order granting her custody of Seth. That order was presented to the courts in Vermont, and, on June 12, 1984, Ms. Todd applied to the Vermont courts for a writ of habeas corpus. On June 15, 1984, Ms. Todd appeared before the Vermont court, and she was awarded visitation with her son. She signed the margin of the order acknowledging that she had received a copy of it. The order clearly prohibits removal of the child from the state of Vermont. On that same day the petitioner made arrangements to remove Seth from Vermont, an act which was completed on the next day in an airplane chartered by

the petitioner. On June 19, 1984, Mr. Peloso filed a petition in Vermont seeking custody of Seth. Ms. Todd also initiated an action in Baxter County Court, but that action was commenced after she had initiated her habeas corpus action in Vermont, and after Mr. Peloso initiated his custody action in Vermont. The Baxter County Chancery Court action was dismissed for want of subject matter jurisdiction on July 29, 1984.

The Baxter County Circuit Court, mindful of all these legal maneuvers, found that the Baxter County Court order, which was entered July 20, 1984, was not enforceable on the record before the Circuit Court, first because Mr. Peloso was not given proper notice of the pendency of that action, and second, because other custody actions were pending in Vermont. The trial court specifically found that the petitioner's habeas corpus petition was pending in Vermont before the Baxter County court action, and that the Vermont action was proceeding with notice and personal appearance of all parties, and that action was proceeding in substantial conformity with the Arkansas Uniform Child Custody Act. Further, the trial court found that Mr. Peloso's custody action in Vermont commenced July 19, 1984, was proceeding in conformity with the Arkansas Uniform Child Custody Act.

Having attempted to summarize the proceedings thus far, the situation is now this: the petitioner removed Seth from school on October 3, 1984, and is now apparently concealing him; she is a fugitive from justice, since felony interference with custody charges are pending against her in Baxter County (Judge Glaze states that this is an erroneous statement, but I am at a loss to understand that statement, since a certified copy of the felony information and bench warrant has been provided to all members of this Court, and, also attached is an affidavit from a Baxter County Criminal Investigator stating that he had tried to serve the custody order and warrant on the petitioner, but that his information was that she was in hiding); she has possession of Seth in violation of court order issued in Vermont and in Arkansas, and she had notice of those orders; two actions are pending in Vermont, one initiated by the petitioner herself,

and the other initiated by Mr. Peloso; and the Arkansas trial court has granted a habeas corpus petition which effectively returns jurisdiction of the matter to the Vermont courts. In the face of the factual history of this case, it seems to me that to grant any relief to the petitioner, in the form of a stay pending a hearing before this Court on the merits, would obviously reward her flagrant disregard of the orders of courts of competent jurisdiction in this State and in Vermont. Since there is not one scintilla of evidence, nor even a convincing argument, present before us that supports the argument that Seth's best interest requires a stay, this Court should not grant one.

Judge Glaze also makes much of the fact that Mr. Peloso took Seth to Vermont from Missouri, even to the extent of characterizing it as "stealing" him away. However, even if I were to agree that such action was improper, Mr. Peloso violated no court order, and his misconduct, if such it was, pales in comparison to the flagrant, deliberate, and continued disregard of court orders which, at least in part, are the result of litigation initiated by the petitioner.

The discussion of paternity in the dissenting opinion is interesting, but I fail to see what it really has to do with the question of whether we should stay the circuit judge's order pending a decision on the merits of this case. Neither the two Vermont trial courts which have had this matter before them, nor, apparently, the Vermont Supreme Court, and certainly not the Baxter County Circuit Court, have found the paternity issue to be a stumbling block to finding what is in Seth's best interest, and I do not find it to be a stumbling block. Petitioner makes reference to Mr. Peloso's lack of standing to seek custody, but I submit the proper forum for that issue is Vermont, where petitioner instituted her habeas corpus action, and where Mr. Peloso's action for custody is pending. Lest there be any question about it, no one alleges that Mr. Peloso is not Seth's natural father, though it apparently is true that legal proceedings to establish that fact have not taken place.

TOM GLAZE, Judge, dissenting. I would grant the petitioner's stay and request for certiorari. Apparently, I struck a nerve in writing this dissent since Judges Cooper

and Cracraft have belatedly and subsequently decided to write concurrences. I need only say, in response, that both my colleagues simply avoid the primary point of my dissent — that this Court ruled in this appeal without a complete record. As a consequence, the parties' petition, response and accompanying briefs are replete with affidavits and other hearsay attachments in order to make a record. In sum, both concurrences are based upon rank hearsay affidavits when a full record could have been had before deciding this case. I submit that this Court's taking such precipitous action gives rise to erroneous statements like that which appears in Judge Cooper's concurring opinion (and with which Judge Cracraft apparently agrees), *i.e.*, "she [petitioner] is a fugitive from justice, since felony interference with custody charges are pending against her in Baxter County." Not only is such statement not based on the record, it also serves to find the petitioner guilty of an allegation before she has had any opportunity to be heard. There is nothing in the incomplete record before us — including the deputy sheriff's hearsay-on-hearsay affidavit upon which Judges Cooper's and Cracraft's conclusion is based — that shows the petitioner possessed any knowledge that a criminal charge was pending against her. To impute such knowledge to the petitioner is sheer speculation and to conclude the petitioner is a fugitive is indulging in loose, legal thinking and clearly wrong. While I disagree with other assertions set forth in the concurring opinions, I note only that such differences can easily arise between members of the Court when the Court fails to require a complete record before ruling on issues presented to it on review.

This Court's action serves only to encourage kidnapping children, not to diminish it. In essence, it encourages putative fathers to steal children and forces the mothers — like petitioner — to go wherever the absconding putative father lights in order to regain custody of her child. In most cases, these mothers are persons who can least afford to pursue the litigation necessary to recover their children. Petitioner's son, Seth, is now *eight years old, but the* respondent *putative father has never taken any action to legitimate him.* Nonetheless, this Court's ruling, made without a complete record submitted by the parties, permits

the respondent to take physical custody of the child and to return him to Vermont. Over three years ago, the respondent stole Seth from the petitioner when she and her son lived in Missouri. Petitioner has spent the past three years in Vermont's courts trying to regain the custody of her son. The Vermont Supreme Court only recently declared that the State had no jurisdiction to grant the respondent custody of Seth under their U.C.C.J.A. *Peloso* v. *Botkin,* ___ Vt. ___, 479 A.2d 156 (1984). Not discouraged, respondent filed a new action in Vermont, thus forcing petitioner to continue her attempts to regain custody of Seth in Vermont even though that State's highest court held jurisdiction did not lie there.

Obviously, the respondent is depending upon his and Seth's three year presence in Vermont awaiting a final court decision as being sufficient contacts to give Vermont jurisdiction. In other words, respondent whisked Seth from his mother in Missouri, went to Vermont, obtained a court order granting him legal custody of Seth which was ultimately set aside by Vermont's Supreme Court, and this Court now says she must continue a legal fight for Seth's custody in Vermont — *even though it was respondent's misconduct that started the proceedings in that State in the first place.*

This Court's ruling, I submit, is countenanced solely on the fact that the petitioner violated a Vermont court's order — which was entered in respondent's new action filed after the Vermont Supreme Court's decision holding that State had no jurisdiction. Our Court ignores respondent's earlier misconduct of stealing Seth away to Vermont and his present attempt to use the past three years to bootstrap himself into the jurisdiction of Vermont.

If respondent had ever made an effort to legitimate Seth, my view of this unfortunate — almost tragic — situation might be different. I might also add that the respondent has not attempted to adopt Seth. Any legal obligation respondent owes Seth is tenuous even if the Vermont court grants him legal custody.

What has taken place so far has simply not been consistent with my understanding of the law. For example,

it is well established that the mother's right to custody of an illegitimate child is superior, and the father's right, if any exists, is secondary. *See* Annot., 98 A.L.R.2d 417, 427, 431 (1964), and Annot., 45 A.L.R.3d 216 (1972). This rule was adopted by the courts in both Arkansas and Vermont in the early 1900s. *See Waldron* v. *Childers,* 104 Ark. 206, 148 S.W. 1030 (1912); *Lipsey* v. *Battle,* 80 Ark. 287, 97 S.W. 49 (1906); and *Ex parte Byron,* 83 Vt. 108, 74 A. 488 (1909). In Arkansas, a putative father has virtually no defined statutory rights regarding his minor child unless that father takes some action to legitimate his child. *See* Ark. Stat. Ann. §§ 56-206(a)(2) (Supp. 1983), and 34-715 to -718 (Supp. 1983). In addition, I can find no cases either in Arkansas or Vermont in which a *putative* father gained legal custody of a child under the Uniform Child Custody Jurisdiction Act before he established his parentage with the child. From my quick review of the countless numbers of cases from other states, I am aware of one jurisdiction where a state permitted a putative father to obtain custody of his putative child under the Uniform Custody Act. I must admit that my independent research may be somewhat lacking since limited briefs have been submitted and the Court has chosen to decide this matter on short notice. Nevertheless, I believe the State has a rational basis upon which it can treat putative fathers differently than those fathers who have separated from or divorced the mothers and who no longer live with their children. *Lehr* v. *Robertson,* 103 S.Ct. 2985 (1983). Clearly, Arkansas law provides that a putative father may request custody of his child *provided* he has established paternity in a court of competent jurisdiction. Ark. Stat. Ann. § 34-718 (Supp. 1983). Even if Vermont's laws should allow respondent to proceed under its Uniform Custody Act, Arkansas, as a matter of public policy, need not defer to that court's jurisdiction or law in light of our own.[1]

[1]Vermont recently passed legislation effective May 14, 1984, that among other things, would permit the respondent to establish his parentage to Seth; that law provides it is the policy of Vermont that the legal rights, privileges, duties and obligations of parents be established for the benefit of all children, regardless of whether the child is born during marriage or out of wedlock. *See* Vt. Stat. Ann. T. 15 § 301 *et seq* (1984). From the record before us, respondent has not made any effort to proceed under Vermont's new parentage law. Instead, he merely seeks custody without any effort to establish those legal rights to which Seth would be entitled under that new law.

In sum, I believe this Court should have, at the minimum, afforded the petitioner and respondent the opportunity, after a complete and correct record was made, to fully brief and argue this cause before simply deferring to Vermont's jurisdiction — especially since respondent through his own misconduct and surreptitious acts has caused this matter to be lodged in Vermont's courts for *over three years.* I in no way condone petitioner's act in violating Vermont's court order by bringing Seth to Arkansas. There are legal penalties she may incur if she is found in contempt of that court's order; *but she should not be punished by taking away her son.* Such punishment is administered this mother by this Court's decision, and it is in no way ameliorated, by attempting to justify this Court's action on hearsay affidavits when the Court could have, at the very least, waited to decide this case when a full record was lodged.

Although I strenuously disagree with the majority, I have every confidence that the Vermont courts will be guided by the paramount issue concerning the best welfare and interest of Seth. On this point, Seth was in his mother's sole custody until respondent took him to Vermont three years ago. As noted earlier, Seth is now eight years old. It seems to me that if respondent had any genuine interest in Seth's welfare, he would have acted before now to have made him legitimate — a requirement Arkansas' law imposes before a putative father can request custody.

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