[redacted]

[redacted]

Jack CAUDILL *v.*
Kenneth SNOW and Jessie O. MERRYMAN

CA 83-455 679 S.W.2d 210

Court of Appeals of Arkansas
En Banc
Opinion delivered November 7, 1984

[redacted]

Kendall & Schrantz, by: *Steven Lee Wood,* for appellant.

Everett & Whitlock, by: *John C. Everett,* for appellee Merryman.

The Niblock Law Firm, by: *Curtis E. Hogue,* for appellee Snow.

GEORGE K. CRACRAFT, Chief Judge. Appellant appeals from the trial court's refusal to grant his post trial motions to conform the pleadings to the proof and to reform the jury verdict. We find no error.

Jessie O. Merryman owned approximately 90 acres of woodland which he wished to put into pasture. He orally contracted with Kenneth Snow to clear the land. Under an oral agreement with Snow, Jack Caudill participated in the bulldozing operations. After the work was completed a dispute arose between the parties. Appellant Caudill brought an action against Snow as the general contractor and Merryman as owner of the land based upon two alleged oral contracts — one with Snow to clear the north half of the property at an hourly rate for which he claimed the sum of $800 to be due, and one with Merryman for clearing the south half for a contract price of $3,050 for which he claimed a mechanics lien.

Merryman denied any contract with Caudill and asserted that he had made a contract only with Snow. Merryman counterclaimed against Caudill for damages to his real estate and cross-claimed against Snow for damages for breach of contract. Snow admitted the two oral contracts to clear Merryman's land but denied causing any damage to the property or breaking the contract in any way. Snow

cross-complained against Merryman for $2100 which he alleged he still owed him on the contract.

At the trial there was testimony offered by the parties in support of their respective positions. Caudill testified that he had an independent contract with Merryman for clearing the land and that there was due him the sum of $3,050 on the contract price. He further testified that he had an agreement to do work for Snow at an hourly wage for which he was entitled to $800. Merryman testified that he had no contract with Caudill and that his only contract was with Snow, even though he knew that Caudill was working under some arrangement with Snow. He offered testimony with regard to his damages which was contradicted. Snow stated that he had an arrangement with Merryman to clear the entire tract and had subcontracted one-half of it to Caudill on agreement that he would give him one-half of the contract price. He stated that there was due him under the contract the sum of $4200, half of which he felt he owed to Caudill, and admitted that he was indebted to Caudill for $800 for additional clearing done by him.

The court directed a verdict in favor of Caudill against Snow for the sum of $800. All other issues were submitted to the jury. The jury returned verdicts for Caudill on Merryman's claim against him for damages, in favor of Snow as to Merryman's cross-complaint against him for breach of contract, and for Merryman in Caudill's claim against him on the independent contract for clearing. On the cross-claim of Snow against Merryman the jury returned a verdict for Snow in the amount of $4200. The jury, however, added in longhand on the verdict form submitted to them the following words: "With stipulation that Kenneth Snow will pay Jack Caudill the amount of $2100." At that time the court instructed the jury that they were not permitted to put a condition on a verdict and sent them back to the jury room with instructions to reconsider their verdicts and to return them in court without stipulations or conditions.

After reconsideration the jury deleted the stipulation with regard to the $2100 in their verdict on the cross-claim of

Snow against Merryman and made no changes in any other verdicts. These verdicts were received and recorded by the court.

The appellant thereafter filed a motion with the trial court in which he asserted that even though the right of Caudill to recover $2100 from Merryman was not raised in his pleading, the issue was tried with the implied consent of the parties and the court ought to now amend the pleadings to conform to the proof. Appellant also asserted that the jury, by their initial conditional verdict, expressed an intention that Caudill recover $2100 from Merryman and therefore the verdict ought to be amended to conform to the true intention of the jury. The trial court denied both motions and entered judgment in accordance with the verdicts after ordering a remittitur of $2100 as the jury verdict was in excess of the amount Snow sued for. Snow does not appeal from the order of remittitur.

Caudill contends on appeal that the trial court erred in denying his post trial motions to amend the pleadings to conform to the proof and to conform the verdict to the clear intent of the jury. We first address appellant's contention that the verdict should be reformed to reflect the jury's intention.

Under the circumstances which arose there were several options open to the court. The trial court does have power to determine what the jury's intention is when the verdict may be fairly interpreted or where it is obvious and manifest although incorrectly expressed under a mistake of law. When the jury's intention can be ascertained the trial court is accorded the power to modify the verdict to conform to the jury's intent. *Traylor* v. *Huntsman & Allis-Chalmers,* 253 Ark. 704, 488 S.W.2d 30 (1972). Where the jury's intent is not manifest or the verdicts are inconsistent with each other the trial court has authority to poll the jury to determine their intention or to resubmit the issue on proper instruction, as was done in this case. *Mattingly* v. *Griffin,* 235 Ark. 1028, 363 S.W.2d 919 (1963).

Appellant did not request that the jury be polled or that

on resubmission it be instructed on, or furnished a verdict form which would have permitted recovery on, appellant's amended claim. The case was resubmitted to the jury on the original verdict forms without objection. The jury then returned an entirely new verdict which made no reference to Caudill. The second verdict then became the jury's verdict. We conclude that the proper rule to apply is stated in 89 C.J.S. *Trial* § 512 (1955) as follows:

> *Effect of Reconsideration or Change of Verdict.* Where the jury have been sent back to correct a verdict which has not become final and the jury, on reconsidering, are unable to agree on a verdict, and are, therefore, discharged, the original defective verdict cannot be accepted and treated as the verdict of the jury; and after the court has permitted the jury to retire and return a changed verdict it is error for the court to reject this verdict and enter judgment on the verdict first returned since the verdict subsequently returned may properly be accepted and used as the basis for judicial action, unless the second verdict is in some manner defective.

Cited as authority for the rule is *Bino* v. *Veenhuizen,* 141 Wash. 18, 250 P. 450, 49 A.L.R. 1297 (1926) which states:

> In *Grant* v. *State,* [33 Fla. 291, 14 So. 757 (1894)] this same question was urged upon the court. The court there said: 'The judge refused to receive the verdict when given by the jury, and they were instructed to retire, and present a verdict in proper form. Thereupon they retired, and brought in another and different verdict. The first verdict was never recorded, nor does it appear from the record before us that it had ever been affirmed as the unanimous finding of the jury. The jury having retired and brought in a different verdict, which was recorded, it cannot be held that the first is the verdict of the jury, or that it has any validity whatever. The case was still in the hands of the jury upon their second retirement, and, not being bound by their former action, they were at liberty to review the case, and bring in an entirely new verdict.'

> We think the trial court committed no error in refusing to record this defective verdict, and enter judgment thereon.

See also *Whitehead* v. *City of Tulsa,* 624 P.2d 65 (Okla. 1980); *Roth* v. *Meeker,* 27 Ill. Dec. 840, 389 N.E.2d 1248 (1979); *Sears, Roebuck & Co.* v. *Chandler,* 152 Ga. App. 427, 263 S.E.2d 171 (1979); *Sweeney* v. *Wiggins,* 350 So.2d 536 (Fla. App. 1977).

We conclude that while the trial court had several alternatives there was no error in opting, without objection, to refer the matter to the jury for its reconsideration and correction, and when this was done the jury had a right to return an entirely different verdict, which then became its *only* verdict, the one on which the judgment should be entered.

In view of our conclusion on this point we do not address the issue of the power of the court to amend the pleadings to conform to the proof at this stage of the proceedings or its power in any event to reform the verdict after the jury has been discharged.

Affirmed.

MAYFIELD, J., concurs.

MELVIN MAYFIELD, Judge, concurring. I want to add a word of explanation as to the basis of my agreement with the majority opinion.

As I understand it, the appellant is not now arguing that he is entitled to a personal judgment against Merryman. He now contends that he is entitled to a judgment in rem for $2100 against Merryman's land and to foreclose a mechanic's and materialman's lien, under Ark. Stat. Ann. §§ 51-601, 51-604—51-626 (Repl. 1971), for the work he says he did on the land as a subcontractor for Snow. Thus, he argues that in keeping with the decisions in *Thompson* v. *Brown,* 5 Ark. App. 111, 633 S.W.2d 382 (1982) and *Traylor* v. *Huntsman,* 253 Ark. 704, 488 S.W.2d 30 (1972), his

complaint should be amended to conform to the evidence introduced and the jury verdict reformed to express the jury's intent to reach the result above stated.

In the first place, the complaint did not need to be amended as the lien theory was pled as an alternative ground for recovery. In the second place, as the majority opinion points out, when the case was resubmitted to the jury, an entirely new verdict was returned which made no reference to appellant. While *Traylor* allows the court to amend a verdict, even after the jury has been discharged, that case holds that this authority should be exercised only when the jury's intention is incorrectly expressed under a mistake of law and not of fact, and only when its intention can be ascertained with certainty.

In this case, the appellant did not request an instruction or verdict form in keeping with the contention he now makes on appeal. Moreover, he did not request that the trial court make any attempt to ascertain the jury's intention upon the return of either verdict. Under all the circumstances, I am unable to conclude that the trial court erred in denying appellant's post-trial motions.

Wayne BENTON and Lillian BENTON *v.*
GENERAL MOBILE HOMES, INC.

CA 83-462 678 S.W.2d 774

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

Murphy, Post, Thompson & Arnold, for appellant.

Highsmith, Gregg, Hart, Farris & Rutledge, by: *Linda Boone,* for appellee.

LAWSON CLONINGER, Judge. The sole issue on this appeal is the commercial reasonableness of the sale of a repossessed mobile home. We find that the trial court erred in finding that appellee disposed of the mobile home in a commercially reasonable manner in accordance with the Uniform Commercial Code, Ark. Stat. Ann. § 85-9-504 (Supp. 1983). We reverse and remand.

Appellants entered into a conditional sales contract with appellee on May 8, 1976 for the purchase of a mobile home. Appellants agreed to pay $11,561.25 for the trailer; they later defaulted, owing appellee a balance of $4,341.85. Appellee repossessed the mobile home and on May 19, 1982 gave notice to appellants by certified letter that it would sell the property at "public auction" on June 1, 1982. On that date, at appellee's offices, appellee's manager purchased the mobile home for appellee for $2,500. Appellee sold the trailer in October 1982 to a third party for $7,032 after investing $991.95 for renovation. Appellee then filed a complaint for a deficiency judgment against appellants, and appellee was awarded a deficiency judgment in the sum of $2,608.05.

The Uniform Commercial Code provides that a secured party may, after default, dispose of repossessed collateral and apply the proceeds to the reasonable expenses of retaking and selling the property and to the satisfaction of the secured indebtedness. The secured party is accountable to the debtor for any surplus, while the debtor is liable for any deficiency. Ark. Stat. Ann. § 85-9-504 (1) and (2) (Supp. 1983). Subsection (3) further provides:

> Disposition of the collateral may be by public or private proceedings, and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms, but every aspect of the disposition including the method, manner, time, place, and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reason-

> able notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods, no other notification need be sent. In other cases, notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations, he may buy at private sale.

Appellants argue that appellee held a private rather than a public sale, thereby violating the Code requirements regarding proper notice and the secured parties' ability to purchase the collateral. The practical consequence of the different proceedings is indicated in § 85-9-504(3), *supra,* where limitations not present in a public sale are placed upon the secured party in a private sale; in the latter, the secured party may buy the collateral if it "is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations." In *Carter* v. *Ryburn Ford Sales, Inc.,* 248 Ark. 236, 451 S.W.2d 199 (1970), the Arkansas Supreme Court held that a secured party was not in compliance with the provisions of § 85-9-504(3) when it purchased a repossessed truck at its own private sale, because a used automobile is not considered "a type customarily sold on a recognized market." See also *Norton* v. *National Bank of Commerce,* 240 Ark. 143, 398 S.W.2d 538 (1966).

We are of the opinion that the disposition of a mobile home is, for the purposes of the Uniform Commercial Code, analogous to that of a car or truck, and that if the secured party is to become the purchaser a public sale is necessary to satisfy the requirements of the Code.

In this case, although appellee notified appellants that a public sale of the repossessed property would be held, there was in fact no public sale at all. The Code does not define either "public sale" or "private sale", but in *Union and Mercantile Trust Co.* v. *Harnwell,* 158 Ark. 295, 250 S.W.2d 321 (1923), the Arkansas Supreme Court adopted the definition of a public sale as one made at auction to the highest bidder. In *Harnwell,* the court went on to say:

> The parties could not have meant that, if the appellant elected to sell at public sale, no notice of the sale would have to be given to the public. Such a construction of the contract of pledge would render the same contradictory within itself, because a public sale could not be conducted unless the public were invited to participate therein. Such construction of the contract would render the same wholly meaningless.

In the instant case, the sale was held at appellee's offices with only appellee's manager, the bookkeeper, and a salesman present. No one else was notified of the sale or invited to participate in it. Appellee's manager simply announced that the mobile home would be auctioned, and he bid $2,500 and sold himself the secured property. The absence of advertisement to the public, the conduct of the sale at appellee's offices, and the presence of only appellee's employees, all strongly suggest a private sale, in spite of the label attached by appellee in its letter of notice to appellants. The purchase of the collateral by appellee at its own sale was improper, and the sale failed to meet the standard of § 85-9-504(3), *supra.*

In *Norton* v. *National Bank of Commerce, supra,* an action was brought to recover a deficiency judgment, as was done in the instant case. In *Norton,* it was held that since the creditor had failed to comply with the notice requirements of the Uniform Commercial Code, it would be presumed "the collateral was worth at least the amount of the debt, thereby shifting to the creditor the burden of proving the amount that should reasonably have been obtained through a sale conducted according to law." In *Mayhew* v. *Loveless,* 1 Ark. App. 69, 613 S.W.2d 118 (1981),

this court held that unless this proof is made, the presumption will result in the failure to obtain a deficiency judgment. In *Mayhew,* we stated:

> If this proof is made, judgment can be rendered for any deficiency that exists after the debt is credited with the amount that reasonably should have been obtained through a sale conducted according to law, *Universal C.I.T.* v. *Rone,* 248 Ark. 665, 453 S.W.2d 37 (1970).

Appellee's manager testified that in his opinion, $2500 was a fair value for the mobile home. The burden was upon appellee in this case to prove the amount that should reasonably have been obtained through a properly conducted public sale. Unless appellee makes that proof, it will be unable to obtain a deficiency judgment against appellants.

The judgment of the trial court is reversed and the cause is remanded for proceedings not inconsistent with this opinion.

CRACRAFT, C.J., and GLAZE, J., agree.

McILROY BANK & TRUST CO. *v.*
LaVonne COMSTOCK

CA 84-101 678 S.W.2d 782

Court of Appeals of Arkansas
En Banc
Opinion delivered November 7, 1984

Ball, Mourton, & Adams, by: *Stephen E. Adams,* for appellant.

Davis & Bracey, P.A., by: *Charles E. Davis*, for appellees.

MELVIN MAYFIELD, Judge. Eva Denny purchased three certificates of deposit from appellant bank payable to herself or Mrs. LaVonne Comstock or Eva Jo Browne, her daughters. Shortly after Denny's death, Browne went to the bank and asked that they not cash the certificates without notifying her. Authorities of the bank agreed although the bank was not given a written notice of an adverse claim. Subsequently, Mrs. Comstock presented the certificates to the bank for payment. The bank agreed to pay only if Mrs. Comstock would sign an indemnity agreement. She executed such an agreement and was paid $4,559.34, the face value of the certificates plus interest. Thirteen months later Mrs. Browne demanded payment from the bank of "her share" of the certificates and was paid $2,468.37. When Mrs. Comstock refused to reimburse the bank for that amount under the indemnity agreement, this action was brought. At the close of the bank's case, the trial court granted Mrs. Comstock's motion to dismiss. The bank has appealed.

Ark. Stat. Ann. § 67-552 (Repl. 1980), which is Act 78 of 1965, provides:

> Checking accounts and savings accounts may be opened and certificates of deposit may be issued by any banking institution with the names of two [2] or more persons, either minor or adult, or a combination of minor and adult, and such checking accounts, savings accounts and certificates of deposits may be held:
>
> . . . .
>
> (d) If an account is opened or a certificate of deposit is purchased in the name of two (2) or more persons, whether as joint tenants, tenants by the entirety, tenants in common, or otherwise, a banking institution shall pay withdrawal requests, accept pledges of the same, and otherwise deal in any

> manner with the account or certificate of deposit upon the direction of any one (1) of the persons named therein, whether the other persons named in said account or certificate of deposit be living or not; unless one (1) of such persons named therein shall by written instructions delivered to the banking institution designate that the signature of more than one (1) person shall be required to deal with such account or certificate of depost [deposit].

Ark. Stat. Ann. § 67-521 (Repl. 1980), which is Act 444 of 1965, provides:

> When a deposit shall have been made in the names of two [2] or more persons and in form to be paid to any of the persons so named, such deposit . . . shall become the property of such persons as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named, and may be paid to any of said persons. Such payment and the receipt or acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge of said bank for all payments made on account of such deposit prior to the receipt by said bank of notice in writing signed by any one of said joint tenants not to pay such deposit in accordance with the terms thereof.

The Supreme Court of Arkansas considered both § 67 552 and § 67-521 in *Cook* v. *Bevill,* 246 Ark. 805, 440 S.W.2d 570 (1969). The Court pointed out that the two acts should be construed together and that the legislative intent was clearly *not* to modify the first act by enacting the second. And in *Boling* v. *Gibson,* 266 Ark. 310, 584 S.W.2d 14 (1979), the court held that where there are alternative payees for certificates of deposit, the sums represented by the certificates are payable by the issuing bank to any one of the designated payees.

Appellant contends that by orally agreeing with Mrs.

Browne to refuse payment on the certificates without her authorization, it became obligated to her and when appellee induced the bank to pay her the face amount of the certificates plus interest by signing the indemnity agreement, she became liable to the bank when it later paid Mrs. Browne under the oral agreement. On the other hand, the appellee maintains that the statutes quoted above relieved the bank of any liability to make payment to Mrs. Browne because Mrs. Comstock had the certificates in her possession, was named as one of the three owners on the face of the certificates, and when she received the proceeds of the certificates the bank was discharged from any further liability on them. Thus, appellee says that the payment made to Mrs. Browne was merely a voluntary act by the bank.

Appellant also argues that it suffered a loss within the scope of the indemnity agreement which Mrs. Comstock signed. However, the appellee contends that the indemnity agreement was void for lack of consideration since the bank was already legally obligated to make payment to her if she presented the certificates to the bank for payment.

We agree with the appellee's position. When one pays money on a demand that is not legally enforceable, the payment is deemed voluntary. Absent fraud, duress, mistake of fact, coercion, or extortion, voluntary payments cannot be recovered. *Gautrau* v. *Jan's Realty,* 271 Ark. 394, 609 S.W.2d 107 (1980); *Boswell* v. *Gillett,* 226 Ark. 935, 295 S.W.2d 758 (1956); *Ritchie* v. *Bluff City Lumber Co.,* 86 Ark. 175, 110 S.W. 591 (1908). We think the payments to Mrs. Browne were voluntarily made.

Also, it is necessary that there be consideration in order to have a valid, enforceable contract. *Minyard* v. *Daking Mill, Inc.,* 269 Ark. 266, 599 S.W.2d 742 (1980). It has been said that consideration is any benefit conferred or agreed to be conferred upon a promisor to which he is not lawfully entitled, or any prejudice suffered or agreed to be suffered by a promisor other than such as he is lawfully bound to suffer. 17 Am. Jur. 2d *Contracts* § 96 at 439

(1964). We find no consideration for the indemnity executed by the appellee.

Affirmed.

Greg SHRADER *v.* STATE of Arkansas

CA CR 84-48 678 S.W.2d 777

Court of Apeals of Arkansas
Division II
Opinion delivered November 7, 1984
[Rehearing denied December 5, 1984.]

[redacted]

[redacted]

[redacted]

[redacted]

Matthew T. Horan, for appellant.

Steve Clark, Att'y Gen., by: *Velda West Vanderbilt,* Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. Appellant was arrested for conspiracy to commit capital murder. The state alleged appellant had attempted to hire Bill Smith to kill Dan Stewart and had committed the overt acts of obtaining a pistol and a silencer for Smith to use. Smith, however, reported the incident to Stewart and then disappeared for several weeks. When Smith returned, he cooperated with authorities by wearing a "body pack" to appellant's home several times, thereby recording conversations in which they discussed the killing. The last such visit by Smith was on Saturday, October 30, 1982. On Tuesday,

November 2, well after dark, officers went to appellant's home without a warrant and about midnight they arrested him. Appellant was taken to the sheriff's office and, after he was read his Miranda rights, he was questioned for about three hours.

Prior to trial, appellant filed a motion to suppress the in-custody statement, the statements recorded by means of the body pack worn by informant Bill Smith, and certain other physical evidence. In the alternative, appellant moved for all references to other crimes contained in the statements to be excluded from the hearing of the jury as being irrelevant to the crime charged. The motion was denied. After a five-day trial, appellant was convicted and sentenced to 20 years.

Appellant's first point for reversal is that the motion to suppress his three-hour midnight statement should have been granted since it was preceded by a warrantless arrest of appellant in his home despite the fact that there were no exigent circumstances and a warrant could have been obtained. In *Payton* v. *New York,* 445 U.S. 573 (1980), the United States Supreme Court held that the Fourth Amendment, made applicable to the states by the Fourteenth, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest. Pointing out that "the simple language of the Amendment applies equally to seizures of persons and to seizures of property," the Court said:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home — a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from

> unreasonable governmental intrusion." . . . Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Id. at 589-90.

Payton involved two appellants. The other appellant, Obie Riddick, was arrested at his home without a warrant. When the police knocked on the door, Riddick's young son opened it and they saw Riddick sitting in bed covered with a sheet. They entered the house and placed him under arrest. Before permitting him to dress, they opened a chest of drawers two feet from the bed in search of weapons and found narcotics and drug paraphernalia. Riddick was subsequently convicted on narcotics charges and the Supreme Court of the United States reversed the trial court's refusal to suppress the evidence found in the chest of drawers. In *United States* v. *Johnson,* 457 U.S. 537 (1982), the Court relied upon *Payton* to affirm a United States Circuit Court of Appeals' decision that held a defendant's written statement should be suppressed as fruit of an unlawful arrest where the statement was obtained after a warrantless arrest of defendant while he stood in the doorway of his home, after having opened the door in response to false identification by government agents.

The Arkansas Supreme Court, in *Jackson* v. *State,* 271 Ark. 71, 607 S.W.2d 371 (1980), applied *Payton* to remand the case for the trial court to determine if exigent circumstances existed to allow the warrantless arrest of the defendant at his home. The court said *Payton* held that:

> [T]he threshold of one's home cannot reasonably be crossed without a warrant in the absence of exigent circumstances. Although the defendant must nonetheless stand trial the exclusionary rule prohibits introduction of any evidence seized pursuant to such an arrest . . . .

In the instant case, the trial court found that the appellant was arrested without a warrant and without

exigent circumstances. But the court held, and it is argued on appeal, that because the officers knocked on appellant's door, asked him to step outside, and arrested him on the front porch, the arrest was not unlawful as there was no actual entry into the home. We think *Scroggins* v. *State,* 276 Ark. 177, 182, 633 S.W.2d 33 (1982), indicates otherwise. There the court said:

> The State offers a parenthetical argument that Scroggins consented to leave the room and was actually arrested outside the room and, therefore, no *Payton* issue exists. The facts demonstrate why this argument is meritless. The officers held a gun on Scroggins and asked him to come out of the room; obviously there could be no free choice on the part of Scroggins in such a situation.

Here, the record shows that the officers had sufficient evidence by October 31, 1982, to constitute probable cause to believe that appellant was involved in a conspiracy to commit murder. However, they made no effort to obtain a warrant even though they had two working days to do so. We find appellant's arrest on the night of November 2, 1982, to be unlawful in light of *Payton,* and that the statement taken from him in the sheriff's office immediately after that arrest should have been suppressed. We therefore reverse and remand.

In view of the remand, we discuss those points which might arise in a new trial. Appellant contends that the trial court erred in refusing to suppress the body-pack tapes in their entirety, or at least those parts of the statements which contained references to a matter for which appellant had already been charged and had retained counsel. He relies on *Massiah* v. *United States,* 377 U.S. 201 (1964), which held that it was error for government agents to obtain and testify to incriminating statements made to an informer by a defendant who was represented by counsel, had been indicted, and had entered a plea of not guilty. In the instant case, however, appellant had not yet been charged with or arrested for the conspiracy to commit murder when he made the statements

which Smith recorded. An additional distinction is that Massiah had already retained an attorney to represent him on the charge he was questioned about. Here, although appellant had hired an attorney, it was to represent him on a charge of possession of a prohibited weapon — not conspiracy to commit murder.

The principle of law in this case is similar to that in *Kerr & Pinnell* v. *State,* 256 Ark. 738, 512 S.W.2d 13 (1974), where a convicted defendant became an informer and taped voluntary conversations with an unindicted accomplice. *See also Smithey* v. *State,* 269 Ark. 538, 602 S.W.2d 676 (1980). Those cases demonstrate that there was no constitutional right, federal or state, violated in the taping of the conversations in the instant case and that the trial court did not err in refusing to suppress the body-pack tapes.

Appellant's argument that certain portions of the tapes should be suppressed is directed toward references to an incident in which a pickup truck was searched after it crashed into a concrete embankment and was abandoned. In looking for the registration, an officer discovered a gun adapted for use with a silencer and a book on how to make a silencer. The officer testified that the vehicle was found to be registered in the name of appellant's brother, but also testified that he had seen the appellant drive the vehicle quite often and that appellant lived within 200 feet of where the accident occurred. Moreover, appellant's brother testified that, although the vehicle was registered in his name, the appellant really owned it and usually drove it.

The appellant was charged with possession of a prohibited weapon, and the possession of the weapon and the book was subsequently alleged as evidence of an overt act in furtherance of the conspiracy. However, Ark. Stat. Ann. § 41-105(1) (Repl. 1977) provides:

> When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.

See also King v. *State,* 262 Ark. 342, 557 S.W.2d 386 (1977). We do not think it was error for the court to admit these tapes into evidence in their entirety.

Appellant next argues, in regard to the testimony of Bill Smith and Junior Brown, that the trial court should have instructed the jury that the testimony of an accomplice must be corroborated. The appellant's abstract contains an objection to the court's failure to give such requested instructions but the instructions are not abstracted and there is no reference to where they may be found in the transcript. For that reason we could not decide this point on its merits. *Pitcock* v. *State,* 279 Ark. 174, 178, 649 S.W.2d 393 (1983); *Green* v. *State,* 7 Ark. App. 175, 646 S.W.2d 20 (1983). However, because of the remand for new trial we think it necessary to discuss the issue to some extent.

In *Cate* v. *State,* 270 Ark. 972, 606 S.W.2d 764 (1980), the appellant was found guilty of conspiracy to commit criminal mischief. The charges stemmed from the destruction of a helicopter owned by a company in which Cate was the majority stockholder. Edd Conn, a codefendant and employee of the company, testified that he was approached by Cate about destroying the helicopter to collect the insurance on it. Conn enlisted the aid of Ken Doles and they set fire to the helicopter. The trial court instructed the jury that Conn and Doles were accomplices as a matter of law and that Cate could not be convicted upon the uncorroborated testimony of an accomplice. The court refused, however, to tell the jury that Conn's common-law wife was an accomplice as a matter of law, even though she tried to find some gasoline for Conn and Doles to use in burning the helicopter. The court submitted her status to the jury and this was affirmed on appeal because she testified that Conn had assured her that he would have nothing to do with the actual destruction of the helicopter. The Arkansas Supreme Court said:

> We hold, in the circumstances, that she was not an accomplice as a matter of law. Her complicity was a

> fact issue. The jury could reasonably infer that her unsuccessful effort to find a gas can, with the knowledge of its intended use, was not made with the true purpose of aiding in the accomplishment of the criminal endeavor.

We think that *Cate* stands for the following points of law that are also involved in the instant case.

1. A conspiracy is a crime in and of itself, and it exists as *Cate* says "when one, for 'the purpose of promoting or facilitating the commission' of a criminal offense, agrees with another person or persons that he will engage or aid in committing the offense coupled with an overt act pursuant to the conspiracy." *See also* Ark. Stat. Ann. § 41-707 (Repl. 1977) and its Commentary.

2. A coconspirator may also be an accomplice. *Accord Spears, Cassell & Bumgarner* v. *State,* 280 Ark. 577, 660 S.W.2d 913 (1983), and *State* v. *Carey,* 285 N.C. 497, 206 S.E.2d 213 (1974).

3. A conviction cannot be had in any case of felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof. *Cate* v. *State,* 270 Ark. at 975 [quoting from Ark. Stat. Ann. § 43-2116 (Repl. 1977)].

4. Whether a witness is an accomplice is usually a mixed question of fact and law, and the finding of a jury as to whether a witness is an accomplice is binding unless the evidence shows conclusively that the witness was an accomplice. *Cate* v. *State,* 270 Ark. at 976 (citing *Wilson & Dancy* v. *State,* 261 Ark. 820, 552 S.W.2d 223 (1977)).

Applying the above points of law to the case at bar, we think under the evidence in the record now before us it would be proper to use AMCI 403 to submit to the jury the question of whether Junior Brown, who made the silencer for the gun which he was told was to be used to kill Dan

Stewart, was an accomplice. *See Robinson* v. *State,* 11 Ark. App. 18, 665 S.W.2d 890 (1984). But we think that the record before us presents a different situation as to Bill Smith.

Ark. Stat. Ann. § 41-305 (Repl. 1977) affords an affirmative defense to an accomplice who terminates his complicity (in accordance with the provisions of the statute) prior to the commission of the offense. Also, Ark. Stat. Ann. § 41-710 (Repl. 1977) affords an affirmative defense to prosecution for conspiracy to commit an offense to one who (in accordance with the provisions of the statute) terminates his participation in the conspiracy. We do not believe, however, that these sections eliminate the necessity for the corroboration of Smith's testimony. Smith had already committed the offense of criminal conspiracy by planning the commission of an offense and committing the overt act of helping to procure a silencer for the gun to be used in the planned offense. He may have a defense to liability for the crime of conspiracy and to being an accomplice, but his testimony against a member of the conspiracy must be corroborated.

We distinguish, in this regard, cases such as *Roleson* v. *State,* 272 Ark. 346, 614 S.W.2d 656 (1981) and *Breed* v. *State,* 198 Ark. 1004, 132 S.W.2d 386 (1939). In *Roleson* it is indicated that the accomplice status of a witness could be vitiated by duress imposed through a threat to her son. This simply means that because of duress one may not be an actual or real participant in the crime. The same principle applies to *Breed* where the court said the jury elected to take the view that a witness "was not a participant in the crime, but was acting under the direction and instruction of a peace officer of the state."

In *People* v. *Comstock,* 305 P. 2d 228, 234 (Cal. Dist. Ct. App. 1956) the court said: "The statutory requirement of corroboration is based primarily upon the fact that experience has shown that the evidence of an accomplice should be viewed with care, caution and suspicion because it comes from a tainted source and is often given in the hope or expectation of leniency or immunity." In 30 Am.

Jur. 2d *Evidence* § 1148 at 323 (1967), it is said that "a long history of human frailty and governmental overreaching for conviction has justified distrust in accomplice testimony." We hold that Ark. Stat. Ann. § 43-2116 (Repl. 1977), requiring that the testimony of an accomplice be corroborated, applies to the testimony of Bill Smith as a matter of law under the circumstances of the record now before us. We point out, however, that we cannot predict the state of the record on retrial.

The appellant's last point has been addressed by what we have already said. Conspiracy is a separate crime. One may be charged with conspiracy to commit capital murder and with capital murder also. *Smith* v. *State,* 6 Ark. App. 228, 640 S.W.2d 805 (1982) (see the dissenting opinion). One could also be charged as an accomplice in the same case. *Cate* v. *State, supra.* There is no merit in appellant's argument that he was found guilty of a "conspiracy to conspire." *See Smithey* v. *State,* 269 Ark. 538, 602 S.W.2d 676 (1980).

Reversed and remanded for a new trial.

CLONINGER and CORBIN, JJ., agree.

J. A. HUGHES, William A. HUGHES and
J. A. HUGHES, Jr. *v.* James McCANN,
NORTHWESTERN MUTUAL LIFE INSURANCE CO.,
Charles GRIFFIN, Henry CHAMBERS, and
LONOKE PRODUCTION CREDIT ASSOC.

CA 84-38 678 S.W.2d 784

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

Gene O'Daniel, for appellants.

John C. Calhoun, Jr., and *Charles A. Walls, Jr.,* for appellee Lonoke Production Credit Assoc.

Timothy Davis Fox and *W. Russell Meeks, III,* for appellee Griffin.

Plegge & Church, by: *John Plegge,* for appellee Northwest Mutual Life Ins. Co.

Howell, Price & Trice, by: *Ron Hope,* for appellee Chambers.

Lessenberry & Carpenter, by: *Jack Lessenberry,* for appellee McCann.

TOM GLAZE, Judge. Appellants brought suit against appellees alleging fraud. The trial court dismissed the action as to all the appellees because appellants failed, in their complaint, to state a cause of action and because their suit was barred by the statute of limitations. Here, on appeal, appellants argue that the trial court erred in dismissing their suit.

In their complaint, appellants stated that in 1968 they farmed three hundred fifty-five acres of land near Keo in Lonoke County. At that time, appellees James McCann, Charles Griffin and Henry Chambers offered to finance appellants' business if they would farm an additional tract near Hope. Their agreement called for Northwestern Mutual Life Insurance Company (NMLIC), McCann's principal, and Lonoke Production Credit Association (LPCA), the principal of Griffin and Chambers, to lend appellants enough money to operate both farms in return for land, crop and equipment mortgages on the two farms. In their complaint, appellants stated that appellee Griffin

promised them that they would have five years to make their operations profitable. Appellants claim this promise was false and made with fraudulent intent. From 1968 to 1971, appellants further expanded their farming operations and continued to take ever greater loans from NMLIC and LPCA. Appellants claimed in their complaint that these two institutions made the loans to them to render them financially dependent. In 1971, appellee LPCA stopped lending money to the appellants. They claim LPCA did so to drive them into default on their loans, which would enable both LPCA and NMLIC to foreclose on the mortgages they held on appellants' land, equipment and crops. Appellants assert in their complaint that LPCA and NMLIC forced them to sell the Keo and Hope parcels by threatening to foreclose on the mortgages if they did not sell. Appellants sold the Hope tract to a Mr. Carroll Ferguson, a buyer obtained by LPCA and NMLIC. According to appellants' complaint, the assumption of their debt by Ferguson was part of LPCA's and NMLIC's scheme to defraud them in that: (1) Ferguson was inexperienced as a farmer and not otherwise qualified to assume their sizeable loan; (2) LPCA made loans to Ferguson, who was not within the jurisdiction of limits of LPCA to make loans; (3) LPCA made crop loans to Ferguson for five years when he failed to plant any crops in any of those years and continued to loan Ferguson money even after the loans were not repaid; (4) NMLIC lent money to Ferguson after he failed to repay earlier loans; and (5) LPCA and NMLIC had not permitted appellants to miss even one year's worth of loan repayments. Appellants also note in their complaint that they were falsely promised that they could retain their Keo farm if they sold the Hope property — in fact, in the summer of 1971, LPCA and NMLIC forced appellants to sell the Keo tract. Appellants further alleged that they discovered the fraudulent scheme in 1980 by searching through public records in Hempstead County. In these records, appellants found (1) that Ferguson never repaid his loans to LPCA or NMLIC and that neither ever brought any legal action to force Ferguson, after he defaulted, to sell the property; (2) that LPCA made improper loans to Ferguson; and (3) farming operations

were never conducted on any of the property. Appellants' claim $9 million in actual and punitive damages as a result of appellees' fraudulent scheme.

Appellees maintain that the trial court was correct in dismissing the appellants' suit because their pleadings failed to state a cause of action and because the pertinent statute of limitations had run. While we may not agree with the trial court's finding that appellants' pleading failed to state a cause of action, we do agree that appellants' action is barred by Ark. Stat. Ann. § 37-206 (Repl. 1962), which provides a three-year statute of limitations for actions sounding in fraud. As a consequence, we need only address and discuss the statute of limitations issue.

According to appellants' complaint, the appellees, fraudulent activity began *at the latest* in January, 1971, when appellees refused to lend them any more money. Appellants commenced this action in November of 1981. Clearly, the appellants' cause of action is barred by § 37-206 unless the running of the statute of limitations was tolled. Appellants argue that the statute was tolled because appellees committed subsequent fraudulent acts to cover up the existence of their cause of action based on appellees' representations concerning financing. Affirmative action on the part of the person charged with fraud to conceal a plaintiff's cause of action will toll the running of the statute of limitations. *Walters* v. *Lewis,* 276 Ark. 286, 634 S.W.2d 129 (1982).

Appellants contend that they discovered appellees' cover-up in late 1979 or early 1980 by searching public records in Hempstead County. In that search, the appellants found mortgages on the property near Hope that had been recorded to Mr. Ferguson from 1971 until 1976. From these records, appellants argue they learned that the appellees had Ferguson purchase appellants' land near Hope and then used him to cover up appellees' original scheme to defraud the appellants. Just how this cover-up operated is not made clear in appellants' argument.

Because the Ferguson mortgages were recorded, ap-

pellants were on constructive notice of such mortgages as far back as 1971 and no later than 1976 — five years prior to their filing this action. *See* Ark. Stat. Ann. § 16-114 (Repl. 1979). In *Teall* v. *Schroder,* 158 U.S. 172 (1895), the United States Supreme Court held that in fraud actions, for purposes of determining when the statute of limitations begins to run, parties alleging fraud are charged with knowledge of any pertinent real estate conveyances from the time such conveyances are placed in public records. Appellees urge that filing for public record and concealment are mutually exclusive. We agree.

Appellants do not argue that appellees committed any affirmative acts that kept them from examining these public records in Hempstead County before 1980. Had appellants examined those records, they could have made themselves aware as early as 1971 of appellees' alleged cover-up of their original fraudulent action. Fraud does suspend the running of the statute of limitations, and the suspension remains in effect until the party having the cause of action discovers the fraud or should have discovered it by the exercise of reasonable diligence. *City National Bank* v. *Sternberg,* 195 Ark. 503, 114 S.W.2d 39 (1938). Appellants' failure to examine such records in Hempstead County must be attributed to their own lack of reasonable diligence. Because appellants have not shown that appellees committed any affirmative acts to conceal their cause of action from them, the three-year statute of limitations of Ark. Stat. Ann. § 37-206 was not tolled, and appellants' action is thereby barred.

Affirmed.

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

Richard ABSHIRE and I. E. MOORE, Trustee for I. E. Moore Trust No. 1 *v.* Lewis W. HYDE, Jr., Kandy K. HYDE, and James B. McDOUGAL

CA 84-155 679 S.W.2d 214

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

Dewey Moore, for appellants.

McHenry & Skipper, by: *Robert McHenry,* for appellees.

TOM GLAZE, Judge. This case involves two parcels of land located in western Little Rock. These parcels were the objects of several purchase agreements: (1) In February, 1975, and March, 1976, appellee James B. McDougal sold them to appellant Richard Abshire, (2) on July 11, 1980, Abshire contracted to sell the parcels to appellee Kandy Hyde, and (3) on May 21, 1981, McDougal agreed to convey title to the parcels to Kandy Hyde if Abshire defaulted on his earlier agreements with McDougal. In September, 1982, Kandy Hyde and her husband filed a quiet title action alleging, among other things, that Abshire had defaulted on his agreements with McDougal, that McDougal subsequently had conveyed the subject parcels to the Hydes and that Abshire's purchase agreement with McDougal constituted a cloud on the Hydes' title and such cloud should be removed by the court. Abshire answered and counterclaimed, setting forth certain defenses and claims against the Hydes and also filed a third-party complaint against McDougal, requesting the court to set aside McDougal's conveyance to the Hydes. Finally, appellant I. E. Moore, Trustee, intervened claiming a security interest in the subject lands by virtue of an assignment agreement he had with Abshire. After the parties denied each others' claim and all issues were joined and tried, the trial judge entered judgment in favor of the Hydes. Both Abshire and Moore bring this appeal, urging that the trial court erred in not voiding McDougal's agreement with the Hydes and in failing to recognize and enforce their interests in the parcels. We find the court was correct and therefore affirm.

Before discussing further details surrounding those transactions outlined above, we note that appellants' argument is largely premised on their belief that the May 21, 1981, agreement between McDougal and Kandy Hyde was improper and contrary to Arkansas law. On this point, we must disagree. Appellants rely on the rule anounced in *Lewis* v. *Boskins,* 27 Ark. 61 (1871), wherein the Court held:

> A person in possession, under an executory contract of purchase, buying in a better title than his vendor's, can derive no advantage from it against the vendor, and the same will inure to the benefit of the vendor under whom he entered, and all that he can conscientiously demand is the sum he paid for the better title, with interest.

Applying the foregoing rule, appellants argue that Kandy Hyde was in possession of the parcels by virtue of her purchaser's agreement with Abshire and that the Hydes could not later disregard her obligation to Abshire by buying title to these same properties from McDougal, Abshire's vendor. First, we note the *Lewis,* case was a bond for title case, which is significantly different than what we have before us. Here, we are confronted with executory contracts containing forfeiture clauses. *See White* v. *Page,* 216 Ark. 632, 226 S.W.2d 973 (1950). McDougal sold the parcels to Abshire under two purchase agreements dated February 8, 1975, and March 15, 1976, for a total of $48,000. In July, 1980, Abshire by purchase agreement sold these lands to Kandy Hyde for $95,000. In both the sales from McDougal to Abshire and from Abshire to Kandy Hyde, the agreements made time of the essence and, in addition, provided in pertinent part as follows:

> [I]f BUYER defaults in the payment of any installment of principal and interest for a period of 60 days, or fails to pay any taxes, assessments or insurance premiums when due, SELLER, at its option, may either declare the entire debt with interest due and payable, or rescind this AGREEMENT, and in the event of rescission all moneys paid by BUYER shall be taken and retained by SELLER, not as a penalty, but as rent of the property and of the relation of the parties thereafter shall be that of landlord and tenant . . . and thereupon SELLER, after notice, may demand possession of the property, and BUYER agrees to surrender immediately peaceable possession. No delay in the exercise of any of the options herein shall be construed as a waiver of such right, but same may be exercised at any subsequent time.

Our appellate courts have upheld the type agreements employed by the parties here, recognizing that a purchaser's rights under an executory contract affecting real estate may be forfeited pursuant to the contract and without proceedings in law or equity. *See, e.g., White* v. *Page, supra; Triplett* v. *Davis,* 238 Ark. 870, 385 S.W.2d 33 (1964).

The trial court found in the instant case that on November 1, 1981, Abshire defaulted on his payment to McDougal, who, more than sixty days after the default, revoked his agreement with Abshire under the terms of their prior purchase agreements. If McDougal had sold the properties to Abshire under a bond for title — rather than an executory contract with a forfeiture clause — McDougal would have been required to foreclose Abshire's equity of redemption. *See Fairbairn* v. *Pofahl,* 144 Ark. 313, 222 S.W. 16 (1920). Because the McDougal/Abshire sale agreements included forfeiture clauses, no foreclosure action was required when Abshire defaulted. *See White* v. *Page* at 637, 226 S.W.2d at 975. Accordingly, when McDougal elected to revoke their agreements, Abshire had no title, equitable or legal, under which Kandy Hyde held possession to the lands in question.

A closer question presented in this appeal is whether McDougal by his actions waived both Abshire's contract breach and as a consequence, the forfeiture clause contained in the contracts. This issue requires a more detailed review of the facts. Abshire's agreement with Kandy Hyde called for her to pay a $25,000 payment on November 1, 1980, with her monthly payments to commence on the same date. After this agreement was made, Abshire and McDougal modified their earlier agreements, making Abshire's two payments, *i.e.,* $7,500 and $28,500 respectively, due on November 1, 1980 —the same date Kandy Hyde was to pay $25,000 — and on November 1, 1981. Abshire also assigned McDougal a security interest in Kandy Hyde's note in the amount of $36,000. On November 1, 1980, both Kandy Hyde and Abshire defaulted on their payments, but neither McDougal nor Abshire took any legal action at that time. On January 2, 1981, Abshire assigned his remaining interest in the Kandy Hyde note to appellant Moore for a loan of $20,000, but

Abshire used none of this loan to pay McDougal. This assignment to Moore was made without notice to McDougal and Kandy Hyde. The record reflects that Kandy Hyde paid Abshire the $25,000 on or before July, 1981, but that sometime earlier, Kandy Hyde's attorney had voiced concern to Abshire about whether Abshire had the ability to pay McDougal his $36,000. Because of this concern, Kandy Hyde entered into the May 21, 1981, agreement with McDougal wherein he promised to convey title to the parcels to Kandy Hyde *in the event* Abshire defaulted in his payments to McDougal. As consideration for this agreement, Kandy Hyde paid McDougal the $7,500 partial payment Abshire had failed to pay on November 1, 1980. Kandy Hyde's attorney suggested this transaction because Kandy had possession of the properties only by virtue of her purchaser's agreement with Abshire; if Abshire defaulted, Kandy was fearful she could not receive title to the lands. Her fear was realized — Abshire again defaulted on his November 1, 1981, payment to McDougal.

Although it is undisputed that Abshire was in default, Moore and Abshire contend that they never received any notice that McDougal intended to revoke the McDougal/Abshire agreements and that the sixty-day grace period under their agreements should be extended because of the actions after Abshire's default of the Hydes and, particularly, of McDougal. Appellant cites *Berry* v. *Crawford,* 237 Ark. 380, 373 S.W.2d 129 (1963), in support of this proposition, but it is inapposite. In *Berry,* the contract provided that the seller had to make a demand on the buyer after the due date — here, no such notice was required. In fact, in his promissory note executed at the time of his September 11, 1980, modification agreement with McDougal, Abshire waived presentment for and notice of payment. Nonetheless, we believe the record sufficiently reflects Abshire was fully aware that McDougal intended to revoke their prior agreements if Abshire defaulted. Appellants' contentions are contrary to the trial court's findings, and from our review of the record, we are unable to conclude the court was clearly erroneous.

The court found that McDougal gave notice of revocation of his agreement with Abshire and after sixty days,

revoked the agreement. McDougal signed a revocation agreement on January 7, 1982, the same date that he deeded the parcels to the Hydes. Kandy Hyde's attorney testified that he had advised Abshire of his default, and he believed he had told Abshire that he had a sixty-day grace period. Hyde's counsel said that Abshire responded, "he could make the payment." Abshire was not heard from after January 1, 1982. However, Moore's attorney did contact McDougal and Kandy Hyde's attorney, indicating Moore's interest in protecting Abshire's position. When these contacts were made is unclear. In a conversation with Moore's attorney, McDougal expressed his uncertainty about his legal position if Moore chose to pay Abshire's debt, especially in view of McDougal's May 21, 1981, contract with Kandy Hyde. Moore's attorney later discussed the matter with Kandy Hyde's attorney, but Hyde's attorney testified he did not recall the mention of Moore's name; nor did he recall any offer by Moore to buy Abshire's interest.

Although there is conflict in the testimonies regarding dates and what was said between the parties during November and December, 1981, the sixty-day grace period, it is clear that Moore never tendered the monies due on Abshire's obligation to McDougal until after February 1, 1982. From our study of the record, we are unable to conclude that Abshire was not properly notified of McDougal's election to revoke their prior agreements; nor can we find McDougal (or the Hydes) waived or somehow extended the sixty-day grace period which was a part of the Abshire/McDougal agreements. Because we find the trial court's findings and conclusions are supported by the preponderance of the evidence, we affirm.

Affirmed.

CRACRAFT, C.J., and CLONINGER, J., agree.

WALDRON METAL RECYCLING COMPANY, INC. and C. A. STRICKLAND *v.* James H. MEUSER and Elizabeth BOLL

CA 84-21 679 S.W.2d 217

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

Jones, Gilbreath & Jones, for appellant.

Davis & Bracey, P.A., by: *Charles E. Davis,* for appellee.

LAWSON CLONINGER, Judge. This case arises from a business dispute between appellant Strickland and appellees Meuser and Boll. Appellant Strickland provided approximately $75,000 in capital and appellee Meuser provided the assets of a radiator shop he formerly owned to finance a radiator shop and salvage yard known as Square S Company. Appellant Strickland employed appellee Meuser as manager. A dispute arose concerning whether appellee Meuser's salary consisted of wages or a draw against 40% of the profits. Another dispute arose concerning whether the initial agreement entitled appellee Meuser to receive 40% of the business or merely 40% of the profits.

The business ended in March, 1982, following an unsuccessful attempt to resolve conflicts, when appellees took all the assets of Square S Company and moved them to appellee Boll's property, where they opened their own radiator shop and salvage yard. Appellee Meuser brought suit against appellants to recover $350,000 for appellant Strickland's breach of promise to invest $250,000 into the partnership, and for 40% of the Square S partnership assets and 40% of the assets of appellant Waldron Metal Recycling Company. Appellants filed a counterclaim against appellees in which they sought to replevy the assets taken by appellees. At a replevin hearing, the court directed the sheriff to take certain specified property from appellees. When the matter came to trial, the jury returned a verdict in favor of appellee Boll in the amount of $8,200, and a verdict in favor of appellee Meuser which stated:

> We, the jury, find in favor of the Plaintiff, James H. Meuser, and against the Defendants, Waldron Metal Recycling Company, Inc. and C. A. Strickland and award James H. Meuser damages in the amount of $20,300.00.
>
> . . .
>
> With the stipulation that all equipment and/or materials be returned to C. A. Strickland.

The trial court incorporated the condition in its judgment. Appellants filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial on the ground that the jury had rendered an improper verdict. The motion was denied by the trial court, and this appeal resulted.

We agree with appellants that the trial court erred in refusing to set aside the jury's verdict, and we reverse and remand for a new trial. The trial court, in adopting the jury's stipulation, entered a conditional judgment. Little discussion of conditional judgments appears in the case law of Arkansas. However, in *Brotherhood of Locomotive Firemen and Enginemen* v. *Simmons,* 190 Ark. 480, 79 S.W.2d 419

(1935), the Arkansas Supreme Court stated:

> Judgments must be certain. Their validity and binding force must rest upon facts existing at the time of rendition. Judgments take their validity from the action of the court based on existing facts, and not from what may happen in the future after the court has rendered its judgment.

The Arkansas Supreme Court has flatly held conditional judgments void. *Brown* v. *Maryland Casualty Co.,* 246 Ark. 1074, 442 S.W.2d 187 (1969). In *Brown,* the trial court entered judgment for a sub-contractor against the prime contractor, and for the prime contractor against its surety; then the court granted judgment in favor of the surety against the property owners and the architects for anything the surety might be required to pay the prime contractor. The Arkansas Supreme Court, in reversing and remanding, stated:

> Inasmuch as the judgments in favor of Maryland and against Brown, Laird and the housing authority were made dependent upon the amount which was paid by Maryland on the judgment in favor of Con-Ark, those judgments must be reversed also, in spite of the fact that we could dismiss the appeal of the housing authority or affirm the judgment against it because of its failure to file a brief on cross-appeal. See Rule 10; *Dunham* v. *Phillips,* 154 Ark. 87, 241 S.W. 361; *Day* v. *Langley,* 202 Ark. 775, 152 S.W.2d 308. These judgments were void as conditional judgments in any event. *Bank of Commerce* v. *Goolsby,* 129 Ark. 416, 196 S.W. 803; See also *Brotherhood of Locomotive Firemen and Engineers* v. *Simmons,* 190 Ark. 480, 79 S.W.2d 419.

Appellants also argue that the court erred in refusing to direct a verdict on the issues of breach of contract with appellee Meuser and breach of contract with appellee Boll. The circumstances recited by both sides in the dispute were riddled with factual inconsistencies. A question was therefore properly formulated for a jury's consideration. In *Brotherhood of Locomotive Firemen and Enginemen* v.

Simmons, supra, the Supreme Court modified the decree of the trial court so as to eliminate the conditional element. That is not possible in this case thus, the cause must be reversed and remanded for a new trial.

CRACRAFT, C.J., and GLAZE, J., agree.

Faye CARRICK *v.* Olan CARRICK

CA 84-48 679 S.W.2d 800

Court of Appeals of Arkansas
Division I
Opinion delivered November 21, 1984

[redacted]

Ball & Lindsay, for appellant.

Gresham & Kirkpatrick, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Faye Carrick appeals from a decree of divorce which awarded Olan Carrick judgment against her for the cost of improvements made by him to her non-marital property and which found that other personal items were marital property and not her separate property by way of gift. We find no error in those findings but we do find merit in her contention that the chancellor erred in holding that a promissory note and a certificate of deposit were not held as an estate by the entirety and were either solely the appellee's property or were subject to unequal division as marital property.

The appellant testified that a Chrysler automobile, stove, refrigerator and other furniture in the former home of the parties, except for specific properties set forth in the decree, were her separate property by way of gift on birthdays and Christmas. The appellee testified that the Chrysler was his own property and replaced a vehicle he brought into the marriage and traded in on the purchase of the Chrysler. All of the payments on it had been made out of his own non-marital funds. He denied that the stove, refrigerator and other items listed in the decree were gifts but said they had been purchased for the parties' mutual use.

On this conflicting evidence the chancellor found that the listed appliances were not gifts but marital property and ordered them sold and the proceeds equally divided unless the parties could divide them in kind by agreement. He further found that the Chrysler automobile was marital

property and awarded it to appellee after considering the length of the marriage, the age, health and station in life of the parties and the amount and sources of their income, their occupations and the estates of each. The record showed that the marriage was a short one, both parties were gainfully employed and that the appellant owned seperate real and personal property of substantial value.

Under Ark. Stat. Ann. § 34-1214(A)(1) (Supp. 1983) the chancellor is permitted to make an unequal division of property when he finds such division to be equitable, having taken into consideration those factors stated by him in the decree. The findings of a chancellor will not be reversed unless clearly against the preponderance of the evidence and since the question of a preponderance of the evidence turns largely on the credibility of the witnesses we defer to the superior position of the chancellor in this regard. *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W.2d 404 (1981); ARCP Rule 52(a). From our review of the record we cannot conclude that these findings of the chancellor were clearly erroneous.

The issues of the proper distribution of the so called "Lilley Note" and its related bank account and the $20,000 certificate of deposit were submitted to the chancellor on stipulated facts. It was agreed that the parties had been married twice, first in 1979, at which time the appellee brought into the marriage 130 acres of property located in Boone County and the appellant brought in real property with improvements located in Carroll County. Subsequent to the first marriage the parties by appropriate conveyances created an estate by the entirety in both tracts. Seven months later the parties were divorced and thereafter exchanged deeds which restored both tracts to their original separate status of ownership. On May 8, 1980, a week after these individual deeds were executed, the parties remarried and appellee conveyed his Boone County property to Pam Cogburn, his daughter by a former marriage. It was further stipulated that on August 27, 1980 Pam Cogburn conveyed the property in Boone County, formerly owned by appellee, to Olan Carrick and Faye Carrick, husband and wife.

On September 25, 1980 a portion of the Boone County

property, then held by the entireties, was sold to Marvin Lilley and Joyce Lilley who executed a mortgage to secure a $28,850 balance due on the purchase price. The mortgage referred to "Olan L. Carrick and Faye Walker Carrick, husband and wife," as mortgagees and the promissory note named "Olan L. Carrick and Faye Walker Carrick, his wife," as payees. The monthly installments due under the note were paid into an escrow account at Green Forest Bank which at the time of the second divorce held the sum of $23,500.

In August of 1980 appellee and appellant contracted with Meredith Miller and Ginger E. Miller for the sale of an additional portion of the Boone County property then held as an estate by the entirety. According to the appellee, his wife signed the contract with him for the sale of the property for the sum of $35,000. The deed to the Millers referred to "Olan Carrick and Faye Carrick, husband and wife," as grantors. The check was made payable to appellee only, who purchased a $20,000 certificate of deposit with a portion of the proceeds. That certificate of deposit was initially in the names of Olan Carrick and Faye Carrick, as husband and wife, but was subsequently withdrawn by appellee and reinvested in a $20,000 certificate of deposit in Olan Carrick and the name of his son by a former marriage.

The chancellor found that the Lilley note and the related bank account were in the names of both parties without indication of survivorship and were therefore not held as an estate by the entirety. He declared that as the property had been acquired in exchange for property brought into the marriage by appellee, it should be retained by him as his separate property as provided in Ark. Stat. Ann. § 34-1214(B)(2) (Supp. 1983). He further ruled that although it might be argued that the property was marital property within the meaning of § 34-1214 it should in equity be awarded to the appellee taking into consideration the length of the marriage, the age, health, and station in life of the parties and the amount and sources of their income, their occupations and the estates of each. He also held that the $20,000 certificate of deposit from the Miller transaction was traceable to the property brought into the marriage by

appellee and should be his separate property for those same reasons. We do not agree.

Pam Cogburn conveyed the property to Olan Carrick and Faye Carrick, husband and wife. Without question that language creates an estate by the entirety. *Shinn* v. *Shinn,* 274 Ark. 237, 623 S.W.2d 523 (1981); *Foster* v. *Schmiedeskamp, Adm'x,* 260 Ark. 898, 545 S.W.2d 624 (1977). The note executed by the Lilleys was payable to them as husband and wife. It is now well settled that an estate by the entirety may exist with regard to personal property and where the note is made payable to a husband and wife a tenancy by the entirety in the personalty is created. *Ramsey* v. *Ramsey,* 259 Ark. 16, 531 S.W.2d 28 (1975); *Cooper* v. *Cooper,* 225 Ark. 626, 284 S.W.2d 617 (1955); *Jordon* v. *Jordon,* 217 Ark. 30, 228 S.W.2d 636 (1950). Furthermore, when property held by tenants by the entirety is sold an estate by the entirety exists in the proceeds. *Cooper* v. *Cooper, supra.*

For the same reason we conclude that the trial court erred in holding that the $20,000 certificate of deposit resulting from the Miller transaction was not as an estate by the entirety. The certificate of deposit, however, presents a more complex question. Although we conclude that the appellant is entitled to a one-half interest, this certificate is now in the names of both the appellee and his son, who is not a party to this suit and whose rights cannot be adjudicated in this action. The certificate of deposit is not contained in the record and we cannot determine from the testimony whether the son is a cotenant, joint tenant or payable-on-death payee. As the record is not sufficiently developed on this issue we remand the case for further proceedings to determine the interest of the parties to the action in the certificate of deposit and to make proper division according to that interest.

It is further argued that the trial court erred in awarding appellee a judgment against the appellant for the cost of improvements on her separate real property which were made by him with his separate funds. The testimony was in conflict as to who made payments. Appellee testified that these improvements, a swimming pool and a fence, were

paid for by his non-marital funds which he had acquired prior to the marriage in a 1974 sale of real estate. Appellant testified that only a small portion of the improvements had been paid for before appellee left her and went to California and that she and her daughter had paid for the pool with the proceeds from a life insurance policy payable to her on the death of a prior husband. She testified that appellee had told her that he was installing a swimming pool as a gift. The appellant contends that under our law where a husband advances money to improve his wife's separate property there is a presumption that a gift was intended. In *Spruill* v. *Spruill,* 241 Ark. 808, 410 S.W.2d 606 (1967) the court recognized that the presumption is rebuttable and when strictly applied frequently brings about a result that is harsh and inequitable. *Stephens* v. *Stephens,* 226 Ark. 219, 288 S.W.2d 957 (1956). Especially is this so in situations where the marriage is of short duration and there are other circumstances, such as those disclosed by this record.

The chancellor found that appellee had expended $8,460 of his personal funds for improvements on appellant's property and entered judgment for that amount. Since the testimony was in conflict on this issue we defer to the superior position of the chancellor to determine the weight to be given to the witnesses' testimony. However, as appellant points out, the appellee admitted that $875 expended by him to construct a fence around the swimming pool on her property came from joint funds. On remand an adjustment of the total amount of the judgment must be made with respect to that expenditure.

This cause is reversed and remanded for further proceedings with regard to appellant's interest in the $20,000 certificate of deposit and the entry of a modified decree not inconsistent with this opinion.

MAYFIELD and GLAZE, JJ., agree.

Fidelis KOELZER, et al *v.*
Terry BAGLEY, et al.

CA 83-409 680 S.W.2d 111

Court of Appeals of Arkansas
Division II
Opinion delivered November 21, 1984
[Rehearing denied December 19, 1984.]

Darrell F. Brown and Associates, P.A., by: *Darrell F. Brown,* for appellant.

Orvin W. Foster, for appellee.

MELVIN MAYFIELD, Judge. The parties to this appeal agree that on February 1, 1981, the Chancery Court of Polk County made a decision, entered of record on August 5, 1981, to dissolve the Gillham School District of Polk and Sevier Counties and restore the former Grannis and Ozark School Districts of Polk County to separate districts, leaving the Gillham School District of Sevier County. The transcript filed in this case actually starts with a decree signed and filed on October 25, 1982. This decree recites that as a result of a hearing on February 17, 1982, the court finds that the assets of the former Gillham district shall be divided by giving 58% to Gillham and 42% to Grannis-Ozark.

Several hearings were had and on September 19, 1983, a judgment was entered which held that the assets of the Gillham district at the time of dissolution were of the value of $921,400.00; that the Grannis-Ozark 42% share equaled $386,988.00; and that 42% of the cash on hand, after the obligations for the 1980-81 school year had been paid, amounted to $20,917.12. This amount was added to the $386,988.00 but the resulting $407,905.12 was reduced by setoffs in Gillham's favor amounting to $26, 811.83, leaving a final amount of $381,093.29 for which Grannis-Ozark was given judgment against Gillham and against the assets held by it.

The style of this case comes from the names of parties who were school directors or patrons, but this is really an appeal by the Gillham district against the Grannis-Ozark district, and it raises three points.

Gillham first contends that the amount of the judgment against it is not supported by sufficient admissible evidence.

This contention is based on the argument that the trial court did not use market value in fixing its evaluation of the assets of the former Gillham School District at $921,400.00. This figure came from an exhibit containing a statement of the "actual cash value" of the buildings and their contents belonging to the Gillham School District. This was prepared by an employee of the State Department of Education, with the assistance of the school superintendent, for use in obtaining insurance in the department's self-insurance program for the 1981-82 school year. The employee testified as to his ten years experience fixing property values while in the insurance claims work, and as to his training in making estimates of the value of buildings. He admitted he did not hold himself out as a real estate appraiser, however, his evaluation did not include any estimate as to land value. He did have many years experience in the business of fixing the value of the kind of property involved here and gave a full explanation of how he arrived at the values shown on the exhibit introduced. We think his testimony and the exhibit were relevant under Unif. R. Evid. 401 and admissible as specialized knowledge under Unif. R. Evid. 702.

In addition, a local building contractor, Earl Hooker, testified as to the replacement cost of the buildings. The total amount of this cost was more than the value fixed in the exhibit for insurance purposes. In a letter opinion to the attorneys, the chancellor referred to other witnesses who testified as to the value of the Gillham School District property and noted that Mr. Hooker said he thought the values stated in the exhibit prepared for insurance purposes would be more accurate as to "actual" value. The chancellor said he was accepting those values and pointed out that the parties who are now the appellants here had offered no better evidence. We think it somewhat ironic for appellants to suggest on appeal that the appellees did not present admissible evidence of market value but argue that an audit report of the Legislative Joint Auditing Committee did present admissible evidence of market value. That value, fixed at $491,945.57, was referred to in the chancellor's letter but was not accepted by him. We do not overturn his factual determination unless clearly against the preponderance of

the evidence. ARCP Rule 52(a). *Hegg* v. *Dickens,* 7 Ark. App. 139, 644 S.W.2d 632 (1983).

Appellants argue that Hooker's testimony was not admissible substantial evidence under *Wesoc Corp.* v. *Ark. State Hwy. Commission,* 257 Ark. 72, 514 S.W.2d 212 (1974), which held that a building contractor may not testify as to market value. In the first place, Hooker did not attempt to place a market value on the school buildings and, in the second place, there was no objection to Hooker's testimony. Moreover, the cited case strongly indicates that replacement cost evidence is admissible, although in eminent domain cases at least, that is not the true measure of damage. We believe there was sufficient admisssible evidence to support the trial court's value determination.

Another point raised by the appellant Gillham School District is that the chancellor was in error in holding that certain contracts made with teachers and other employees were Gillham's responsibility and not the responsibility of Grannis-Ozark. The appellees call attention to the fact that these contracts were entered into on April 2, 1981, prior to the entry of the trial court's decree dissolving the Gillham School District of Polk and Sevier Counties; that the contracts were approved by the directors of the Gillham district; and that all the students involved were in school in Gillham throughout the 1981 school year.

Appellants argue that appellees are liable on these contracts under an agency theory and also under the authority of Ark. Stat. Ann. § 80-422 (Repl. 1980) which provides that "any new district which is created, or district to which new territory is annexed shall succeed to the property of the district dissolved, and become liable for its contracts and debts. . . . "

We agree, however, with the appellees who say there is no evidence of any agency relationship. *See Hinson* v. *Culberson-Stowers Chev., Inc.,* 244 Ark. 853, 427 S.W.2d 539 (1968). We also agree that the statute relied upon by appellants would not place any liability for these contracts upon the appellees until the dissolution of the Gillham

district and the creation of the new districts. This was not done until the end of the 1981 school year. Furthermore, ARCP Rule 58 provides that a judgment or decree is effective only when it is entered by filing with the clerk as provided by ARCP Rule 79. In this case that did not occur until August 5, 1981, which was after the end of the 1981 school year.

The third point raised by appellants is that the court erred in not granting appellants' motion for a setoff in the amount of $47,010.00, based upon taxes collected by appellees which should have gone to appellants.

This point is both legally and mathematically complicated. Involved is the fact that school districts are allowed by statute to receive a 40% "pull back" of local taxes before June 30, which is the end of the school year. As explained by witnesses in this case, taxes are paid by the taxpayers from February 15 through October 10. The law allows 40% of this money to be received, or perhaps pledged, by the school districts during the current school year and the other 60% is not received until after June 30, and perhaps not until after October 10th.

We think the evidence in this case clearly shows that the amount collected in 1981 for school taxes by Polk and Sevier Counties was the sum of $122,588.22. During the period of January 1 through June 30 of 1981 the Gillham School District received or was entitled to receive 40% of that amount in pull-back funds for use in the school year that ended on June 30, 1981. After that date the 1981 school tax money collected by those counties should go to the districts according to the new district alignment. Forty percent of $122,588.22 is $49,035.28. The original Gillham district was entitled to that amount. Sixty percent of $122,588.22 is $73,552.93. This amount belonged to the new districts in the ratio of 58% to Gillham and 42% to Grannis-Ozark. Forty-two percent of $73,552.93 is $30,892.23. However, the evidence clearly shows that Grannis-Ozark was paid $44,794.10 from 1981 school tax money put into reserve by the County Courts of Polk and Sevier Counties. Since Grannis-Ozark was entitled to only $30,892.23, the excess of $13,901.87 should have been allowed as a setoff to Gillham.

This would reduce the $381,093.29 judgment of Grannis-Ozark to $367,191.42. On appeal, chancery cases are tried de novo and the appellate court renders a decree upon the record made in the trial court. *Ferguson* v. *Green,* 266 Ark. 556, 587 S.W.2d 18 (1979). Under the law as we view it and based upon facts that are not in dispute, we reduce the appellee's judgment to $367,191.42 and it is affirmed as modified.

CLONINGER and CORBIN, JJ., agree.

Esther Jane CHAPIN and Jake STUCKEY as Trustee under the Will of Sam CHAPIN
v. J. A. TALBOT and Juanita TALBOT

CA 84-60 679 S.W.2d 219

Court of Appeals of Arkansas
Division I
Opinion delivered November 21, 1984

Frierson, Walker, Snellgrove & Laser, by: *G. D. Walker,* for appellants.

L. D. Gibson, for appellees.

TOM GLAZE, Judge. The appellants appeal from the chancellor's decree finding easements for two roads over appellants' property, one prescriptive easement in favor of the general public and one in favor of the appellees. For reversal, appellants contend that the appellees have no record title to the road and that the evidence did not establish a prescriptive easement on either (a) the north-south road or (b) the east-west road. We affirm the chancellor's decision.

The facts presented at the hearing below showed that the appellants and the appellees own adjoining rural property on which the two disputed roads are located. A north-south road runs between appellants' and appellees' property and has existed for over forty years on the site of what was originally a "dummy line" railroad. The road originally provided access to four tenant houses that were removed from appellants' property in the 1960s. Since the houses were removed, both appellants and appellees have continued to use the road for moving farming equipment to and from their fields. Appellants fenced and closed the north-south road in 1982.

An east-west road runs through appellants' property and is the northern boundary of appellees' land. If one begins at the northeast corner of appellees' property heading east, he drives through appellants' property over the road to reach U. S. Highway 63. When tenants lived in the above-mentioned houses, the east-west road was used by school buses and by mailmen serving those families. In 1978, iron bar gates were erected across this road by Judd Chapin, appellant Esther Jane Chapin's grandson. The gates were opened from time to time until 1980, when they were closed and locked.

The appellees brought their action after appellant blocked and denied appellees the use of these two roads. They asked that these obstructions be removed and that damages be awarded. The chancellor found that the north-south road is a private road with an easement acquired by prescription by appellees and their predecessors in title and that the east-west road is a public road with an easement acquired by prescription. He also found the easements to run with the land.

Appellants' first point for reversal is that the appellees have no record title to the north-south road. Although appellees' complaint included an allegation that they had claimed to the center of that road as their eastern boundary since 1957 and were therefore claiming under color of title, the trial court did not make a finding in that regard. The trial court's findings that prescriptive easements were estab-

lished required no finding that appellees had record title to the property in question. Having record title is not a requisite of one's acquiring a prescriptive easement; therefore, we find appellants' first point inapposite.

Appellants' second point is that the evidence did not establish a prescriptive easement over the north-south road. Appellants contend that appellees never asserted a right to use the north-south road, but rather used the road with the permission of appellants and their predecessor in title. Appellants correctly point out the following rule from *Craig* v. *O'Bryan,* 227 Ark. 681, 301 S.W.2d 18 (1957):

> "[W]hile a way may be acquired by use or prescription by one person over the uninclosed land of another, mere use of the way for the required time is not, as a general rule, sufficient to give rise to the presumption of a grant. Hence, generally, some circumstance or act, in addition to, or in connection with, the use of the way, tending to indicate that the use of the way was not merely permissive, is required to establish a right by prescription."

Craig v. *O'Bryan,* at 685, 301 S.W.2d at 21 (quoting *LeCroy* v. *Sigman,* 209 Ark. 469, 191 S.W.2d 461 (1945)).

As we pointed out in *Burdess* v. *Arkansas Power & Light Co.,* 268 Ark. 901, 597 S.W.2d 828 (Ark. App. 1980), before permissive use can ripen into the adverse use necessary to create a prescriptive easement, some overt activity on the part of the user is necessary to make it clear to the owner of the property that an adverse use and claim is being exerted. We pointed out in *Zunamon* v. *Jones,* 271 Ark. 789, 610 S.W.2d 286 (Ark. App. 1981), that if usage of a passageway over land, whether it began by permission or otherwise, continues for seven years after the facts and circumstances of the usage are such that the landowner would be presumed to know the usage was adverse, then the usage ripens into an absolute right. *Id.* at 791, 610 S.W.2d at 287-88 (citing *Fullenwider* v. *Kitchens,* 223 Ark. 442, 266 S.W.2d 281 (1954)).

The testimony below indicated that in addition to the long passage of time—nearly fifty years—that the road has been used by appellees and their predecessors in title, the appellees have also worked to repair and maintain the road. There was testimony that appellees had neither sought permission nor been denied the right to use the north-south road and that their use was well known by appellants. Appellant Esther Chapin testified that she had never been notified that anyone claimed a right to use the road. She also denied knowledge of the extent of the use that appellees asserted. However, other evidence was to the contrary and indicated a use of a duration and extent that ought to have put appellants on notice. We believe the testimony supported the chancellor's finding that a prescriptive easement in favor of the appellees exists over the north-south road.

Appellants' last point is that the evidence did not establish a prescriptive easement in the public to the east-west road. The east-west road undisputedly lies across property owned entirely by the appellants; the road provided access to the tenant houses on appellants' property so long as they were there. In addition, school buses and mail trucks used the road to get to and from the tenants' houses. Testimony also indicated that other members of the public used the east-west road when traveling in the area. Examples of testimony upon which the chancellor could have relied in making his findings included the following:

> *John Turner, Jr.,* testified that he had farmed all of the appellees' property from 1939 to 1957 and that he had used the east-west road without permission and considered it a public road when he lived there. He said that he had seen county road graders working on the road many times.
>
> *Alfred Burgess* testified that he had lived in the area since 1917, and had used the road without permission to travel to town and to his brother's house. He stated that the road was used by the public, both local people and those just traveling through the area.
>
> *Walter Larison* testified that he "figured" the east-west

road was a public road; it was used by the community as a whole. From 1972 to 1982, he worked on appellees' farm and used the road to go to Marked Tree.

Steve Ryan, the Poinsett County Judge, testified that although there was no recorded easement, the county map in his office showed both disputed roads as county roads for maintenance purposes and that the east-west road was graded by the county until iron bars were placed across the road.

J. A. Talbot, appellee, testified that he had used the east-west road without permission from the time he bought his property in 1957 until about three years before trial when the road was blocked off by the appellants.

In view of the testimony presented concerning the long-standing use of the road by members of the community, we believe the evidence supports the chancellor's finding a prescriptive easement in favor of the public on the east-west road. Applying the same rules about overcoming the presumption of permissiveness as we applied above, we fail to find that the chancellor's findings are clearly erroneous or clearly against the preponderance of the evidence. Ark. R. Civ. P. 52(a).

Affirmed.

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

Virginia LESLIE *v.*
SANYO MANUFACTURING CORPORATION, et al

CA 84-189 679 S.W.2d 222

Court of Appeals of Arkansas
Division I
Opinion delivered November 21, 1984

Youngdahl & Larrison, by: *James H. Larrison, Jr.,* for appellant.

Daggett, VanDover, Donovan & Cahoon, by: *Robert J. Donovan,* for appellees.

TOM GLAZE, Judge. In this Workers' Compensation case, the primary issue is whether the appellant is entitled to receive total disability benefits for a period of time following the end of her healing period and during which she was unable to work because the appellee employer could not provide her a job within the restrictions and limitations placed upon her by her physician. We affirm.

Appellant suffered a compensable injury to her neck on October 17, 1977. She received certain temporary total disability benefits afterwards but part of those was disallowed by the Commission on September 20, 1982, and neither party appealed that determination. Before the Commission's first decision was rendered, appellant entered another healing period, which undisputedly commenced after April 15, 1981, and ended on June 8, 1981. Appellee paid appellant temporary total disability benefits for this new period; no one contests these benefits in this appeal.[1]

In this appeal, appellant contends she is entitled to current total disability benefits between June 8, 1981, and January 3, 1983, the period she was unable to work because her physician had restricted her to lifting not more than twenty-five pounds, and because during this period, appellee had no job for appellant. Appellant also asserts that she sought employment elsewhere without success. She argues that under the circumstances of her case and because she made reasonable efforts to seek other employment during this period, she is entitled to total disability benefits from June 8, 1981, through January 3, 1983, after which a job within her restrictions became available with the appellee.

Appellee argues the appellant offered no evidence that she was "incapacitated" after June 8, 1981, from earning wages in some employment or that her loss of earnings resulted from "incapacity" as required by the statutory definition of disability. In other words, appellee contends the proof shows that appellent's lack of earnings resulted from unavailability of work and not from incapacity to earn. We must agree.

[1]Actually, appellee paid these benefits until sometime in August, 1981, after which it terminated payments.

Appellant testified that when her physician released her on June 8, 1981, appellee had nothing for her to do although she contacted appellee several times. She stated that the Employment Security Division could not find her work and when she checked with Wal-Mart, Campbell's Outlet and Air-Therm, those businesses had no jobs and were not accepting applications. In January, 1983, appellant returned to work for appellee, performing work within her twenty-five-pound lifting restriction, but she indicated that she was not sure whether such work was previously available at the appellee's.

Appellant concedes that she does not fall within the odd-lot category. Under the odd-lot doctrine, total disability may be found in the case of workers who, while not altogether incapacitated from work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. In *M. M. Cohn* v. *Haile,* 267 Ark. 734, 589 S.W.2d 600 (Ark. App. 1979), our Court, quoting from Larson, *Workmen's Compensation Law,* stated:

> If the evidence of degree of obvious physical impairment, coupled with other factors such as claimant's mental capacity, education, training, or age, places claimant *prima facie* in the odd-lot category, the burden should be on the employer to show that some kind of suitable work is regularly and continuously available to the claimant. [2 Larson. . . § 57.61, pp. 10-136 and 10-137].

Because appellant undisputedly fails to come within the odd-lot category, the burden remains hers to show that she is incapacitated *because of her injury* to earn, in the same or any other employment, the wages she was receiving at the time of the injury. *See* Ark. Stat. Ann. § 81-1302(e) (Repl. 1976); *Cf. Arkansas State Highway Department* v. *Breshears,* 272 Ark. 244, 613 S.W.2d 392 (1981). The Commission, adopting the administrative law judge's opinion, found that appellant was not incapacitated because of injury from earning wages, but rather she was merely unable to find employment. In fact, appellant's own testimony indicates, according to the contacts she made with other employers,

that those employers would not have hired her even if she had been free from any physical restrictions. Based upon the record before us, we cannot conclude the Commission erred or that its decision was not based upon substantial evidence. Appellant simply failed to show she is entitled to total disability benefits after June 8, 1981.

In conclusion, we add that the appellant is not precluded from seeking permanent partial disability benefits—a fact acknowledged by the appellee. Apparently, the appellee paid the appellant benefits based upon a ten percent anatomical rating given by her physician; but the record reflects that the Commission has not considered nor has appellant sought any additional permanent partial benefits to which she may be entitled. This decision merely affirms the Commission's holding that the evidence fails to show appellant has any entitlement to *total* disability payments after her healing period.

Affirmed.

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

Patrick Joseph LYONS *v.* Lois LYONS

CA 84-4 679 S.W.2d 811

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

Raymond A. Harrill, for appellant.

Virginia (Ginger) Atkinson, for appellee.

LAWSON CLONINGER, Judge. This appeal arises from a suit by appellant, Patrick Joseph Lyons, to set aside a deed from him to his wife, appellee Lois Lyons, on the basis of fraud, overreaching, undue influence, and harassment by the wife. Appellant amended his complaint to pray for divorce on the grounds of three years continuous separation. At trial, a divorce was awarded appellant. The court found that appellant had failed to carry his burden of proof and refused to order the deed set aside. The court held that the couple's property was not marital property capable of division under Ark. Stat. Ann. § 34-1214 (Supp. 1983), and allowed appellee to retain all the property acquired during the course of the marriage.

Appellant argues two points for reversal: (1) The trial court erred in refusing to set aside the deed; (2) and the trial court erred in distributing all of the property of the marriage to appellee. We do not find appellant's arguments persuasive, and we affirm.

For his first point, appellant contends that his mental condition rendered him susceptible to duress, undue influence, and overreaching on the part of appellee. Appellant had, several years earlier, lost his left eye as a result of an industrial accident. He subsequently lost his job because of his inability to meet the physical demands of his employment. Severe depression followed, and appellant left

his Arkansas home for San Francisco, where he underwent psychiatric treatment. While he was living in California, appellee and appellant communicated by telephone and letter concerning the residence of the parties owned by the couple as tenants by the entirety, which appellant eventually agreed to deed to appellee. A quitclaim deed, prepared at appellee's direction, was sent to appellant, who executed and returned it to appellee, who recorded it.

Appellant claims that a confidential relationship existed between him and appellee. We have held that once one spouse has shown that a confidential relationship existed with the other, and that the other was the dominant party in the relationship, it is presumed that a transfer of property from the former to the latter was invalid due to coercion and undue influence. In such a case, the spouse to whom the property was transferred bears the burden of rebutting the presumption by producing evidence showing that the transfers of property were freely and voluntarily executed. *Chrestman* v. *Chrestman,* 4 Ark. App. 281, 630 S.W.2d 60 (1982); *Marshall* v. *Marshall,* 271 Ark. 116, 607 S.W.2d 90 (Ark. App. 1980).

In the instant case, however, appellant has failed to demonstrate the existence of a confidential relationship in which appellee was the dominant party. The divorce granted to appellant was based upon evidence that there had been a three year continuous separation without cohabitation. Beyond that, appellant failed to convince the chancellor that any duress or undue influence was exerted upon him by appellee. There was evidence that appellant was depressed, but there was no allegation or proof of incompetence. Although we review the record in chancery cases *de novo,* we will not reverse the chancellor unless his findings are clearly erroneous or clearly against the preponderance of the evidence, giving due regard to the opportunity of the chancellor to judge the credibility of the witnesses. A.R.C.P. Rule 52(a); *Chrestman* v. *Chrestman, supra; Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W.2d 404 (1981). We cannot say, on the basis of the record before us, that the chancellor's findings were clearly against the preponderance of the evidence or that they were clearly erroneous.

For his second point, appellant urges that the parties' residence was marital property which should have been divided under Ark. Stat. Ann. § 34-1214. We do not agree with this contention. The property was initially an estate by the entirety and thus exempt from the statutory scheme. Appellant testified that he executed the quitclaim deed in order to get some peace and quiet from appellee's demands. The chancellor found that appellant voluntarily executed the deed, and although the court did not specifically find that there was a gift intended, it would have been justified in so doing. There was ample evidence from which the chancellor could have found that there was an actual delivery of the subject matter of the gift with a clear intent to make an immediate, unconditional and final gift accompanied by an intent to release all future dominion and control. *See Ragland* v. *Commercial Bank of Arkansas,* 276 Ark. 418, 635 S.W.2d 258 (1982). A gift acquired by either spouse subsequent to the marriage is excluded from the definition of martial property by the provisions of Ark. Stat. Ann. § 34-1214 (B) (1) (Supp. 1983). If the decision of the trial judge is correct for any reason we will not reverse his decision. *White* v. *Gladden,* 6 Ark. App. 299, 641 S.W.2d 738 (1982).

Appellant also argues that the chancellor erred in failing to recognize appellant's interest in the personal property acquired during the marriage. We believe the trial court acted within the bounds of its discretion. Evidence had been presented which indicated that appellant had voluntarily relinquished his claim on the various articles he left in Arkansas when he moved to California. The chancellor found as follows:

. . . .

> 4. There is no basis to require Defendant to account to Plaintiff for any funds collected by her from the business or as rental income from 1979 when Plaintiff left until the institution of this lawsuit, that the Plaintiff first left defendant in May of 1978 withdrawing one-half of the funds which the parties had on deposit in Worthen Bank, that the

> defendant thereafter deposited her half into a separate account, that plaintiff left again in June of 1979 and with the stated intent never to return to the State of Arkansas; that thereafter, Defendant remodeled the dog kennel into a tenant property and used the proceeds gained from same for her support and maintenance and to pay joint obligations, the Plaintiff having sent a total of $500.00 to defendant from 1979 to date.
>
> 5. That all the remaining personal property accumulated in the marriage was abandoned by the Plaintiff as reflected from his letters to the Defendant introduced into evidence as Exhibits 5 in which Plaintiff indicated he was never coming back to Arkansas; that he had no interest in the disposition of the personal property which he had left behind and that defendant could dispose of it in any manner she desired. . . .

The findings of the court are supported by the evidence, and we will not disturb those findings on appeal.

Affirmed.

COOPER and CORBIN, JJ., agree.

Charles Ray ANDERSON *v.* STATE of Arkansas

CA CR 84-25 679 S.W.2d 806

Court of Appeals of Arkansas
En Banc
Opinion delivered November 28, 1984
[Rehearing denied January 9, 1985.*]

William C. McArthur, for appellant.

Steve Clark, Att'y Gen., by: *Velda West Vanderbilt,* Asst. Att'y Gen., for appellee.

LAWSON CLONINGER, Judge. Appellant raises two

*COOPER and MAYFIELD, JJ., would grant rehearing.

points for reversal on this appeal of his conviction on the misdemeanor charge of possession of marijuana. We reverse on the first point and remand for further proceedings not inconsistent with this opinion.

At about 2:00 a.m. on April 13, 1983, an officer of the Stuttgart Police Department appeared before the circuit judge to obtain a search warrant for appellant's house and vehicle. After hearing oral testimony, which was not recorded, the judge issued a warrant. Police officers entered appellant's residence at about 2:30 a.m. and seized marijuana and various items described as drug paraphernalia.

Appellant admitted that the marijuana was his. He was charged with several crimes but all were subsequently dismissed except for possession of marijuana with intent to deliver. Before the trial, appellant filed a motion to suppress the evidence seized on the basis of a lack of probable cause and a faulty warrant. The State agreed to suppress all evidence seized from appellant's vehicle, but the court denied the motion with respect to items seized from the house. A jury found appellant guilty of possession of marijuana, a misdemeanor, and sentenced him to one year in prison and imposed a one thousand dollar fine.

In his first point for reversal, appellant contends that the trial court erred in denying his motion to suppress the evidence because the warrant was improperly and illegally authorized. The record of the hearing reveals that (1) the testimony of the officer requesting the warrant was not recorded and no affidavit was prepared; (2) although the issuing judge recalled an oath having been administered, the officer himself stated that he had not been sworn.

Rule 13.1(b) of the Arkansas Rules of Criminal Procedure requires that:

> The application for a search warrant shall describe with particularity the persons or places to be searched and the persons or things to be seized, and shall be supported by *one (1) or more affidavits or recorded testimony under oath before a judicial officer* par-

> ticularly setting forth the facts and circumstances tending to show that such persons or things are in the places, or the things are in possession of the person, to be searched. If an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained. [Emphasis added.]

In the present case neither an affidavit nor recorded testimony under oath was taken.

The Arkansas Supreme Court held in *Lunsford* v. *State,* 262 Ark. 1, 552 S.W.2d 646 (1977), that the State bears the burden of establishing that a search warrant relied upon by it was issued in compliance with the law by producing the required written evidence considered by the issuing magistrate to establish probable cause. The court went on to say that it regarded the "failure to record the testimony on which a search warrant is issued to be a substantial violation of proper safeguards in procedures for obtaining a search warrant." Hence, said the court, a motion to suppress the evidence seized should have been granted when the record was silent as to whether the facts recited to a municipal judge by a sheriff concerning the concealment of marijuana in a mobile home were "recorded testimony under oath" as required by Rule 13.1(b).

The facts in the instant case necessitate reversal under the provisions of Rule 13.1(b) and under the *Lunsford* decision. The lack of compliance with the requirement of either an affidavit or recorded testimony under oath is fatal to the sufficiency of the warrant under Rule 13.1(b).

Regarding appellant's second point for reversal, we find no error. Appellant argues that the trial court erred in admitting into evidence items allegedly used as drug paraphernalia. The record reflects, however, that the items in question were relevant to the crime with which appellant was charged and therefore admissible under Rule 402, Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl.

1979). Whether evidence is relevant is a matter addressed to the sound discretion of the trial court, and, absent an abuse of that discretion by the lower court, the Court of Appeals will not disturb its ruling. *Pruitt* v. *State,* 8 Ark. App. 350, 652 S.W.2d 51 (1983). We find no abuse of discretion here. A police officer, who had established his familiarity with the subject matter, explained the use of each article of paraphernalia as it was introduced into evidence. Such testimony concerning the items enabled the trial court to view the paraphernalia as relevant within the terms of URE Rule 401: "[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The judgment is reversed and the cause remanded.

MAYFIELD and COOPER, JJ., dissent.

CRACRAFT, C.J., concurs.

GEORGE K. CRACRAFT, Judge, concurring. I fully agree that the rule announced in *Leon* and *Sheppard* was long past due and that the effect those decisions will have on our law should be determined by the Arkansas Supreme Court. I do not agree that this case is a proper one for that determination. Had I thought so I would have joined in the dissent and urged that this case be decided by the Supreme Court.

The good faith of the police officer serving the warrant in this case was never an issue in the trial court. Although *Leon* and *Sheppard* were handed down after the briefs had been filed in this case we were not asked to consider them by supplemental letter brief or otherwise. The issue was injected into the case *sua sponte* in our conference of the case. Appellate courts do not ordinarily reverse on issues neither raised below nor briefed and argued.

More importantly, I do not agree that *Lunsford* was decided on the basis of federally declared minimum standards which have now been raised. A.R.Cr.P. Rule 13.1(b)

requires that where a search warrant is issued on sworn testimony that testimony must be recorded. Rule 16.2 provides the manner in which the issue of the legality of the warrant may be raised and Rule 16.2(e) provides that the court shall suppress evidence obtained under a defective warrant where the violation is substantial. *Lunsford* held that failure to record the sworn testimony on which the warrant was issued was a substantial violation warranting suppression. Although *Russ* v. *City of Camden,* was cited in the *Lunsford* opinion it was not necessarily the basis for the holding. *Russ* was decided in 1974 under a now superseded statute in the light of then existing federal minimum constitutional standards as required by *Mapp* v. *Ohio,* 367 U.S. 643 (1961). Its holding was codified when our Rules of Criminal Procedure were promulgated two years later.

For that reason I do not think a mere departure from *Lunsford* would be enough. In my opinion our court can only adopt the present relaxed constitutional requirements by amending our own procedural rules to provide an exception for "good faith" on the part of the officer serving a warrant which was issued in substantial violation of our rules. Rule 16.2(e) does not now contain such an exception and calls for suppression when the warrant itself is substantially defective. Furthermore, in my opinion such an amendment should not be made to apply retroactively.

MELVIN MAYFIELD, Judge, dissenting. Under Rule 29(4) (b) of the Rules of the Arkansas Supreme Court and Court of Appeals, we may certify to the Supreme Court any case filed in this court if it involves an issue of significant public interest. I do not agree with the majority decision because it does not acknowledge that this case involves such an issue and should be certified to the Supreme Court for decision.

After the briefs had been filed in this case, the Supreme Court of the United States decided the cases of *United States* v. *Leon,* ___ U.S. ___ , 104 Sup. Ct. 3405, 82 L. Ed. 2d 677 (1984), and *Massachusetts* v. *Sheppard,* ___ U.S. ___ , 104 Sup. Ct. 3424, 82 L. Ed. 2d 737 (1984). *Leon* reversed a 70-year-old rule that excluded from introduction in federal

court evidence obtained in violation of the Fourth Amendment of the Constitution of the United States, *Weeks* v. *United States,* 232 U.S. 383 (1914); and *Sheppard* reversed that same rule which *Mapp* v. *Ohio,* 367 U.S. 643 (1961), through the application of the Fourteenth Amendment, had required in state courts for 23 years. The decisions in *Leon* and *Sheppard* were widely reported by the news media as well as in the literature. In Arkansas, the story was on the front pages of both the *Arkansas Gazette* and the *Arkansas Democrat* on July 6, 1984.

In *Leon* the Court said that "the Fourteenth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands," and that the exclusionary rule was "a judicially created remedy designed to safeguard Fourth Amendment rights through its deterrent effect." The Court noted that "the substantial social costs exacted by the exclusionary rule for the vindication of the Fourth Amendment rights have long been a source of concern," and that "an objectionable consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains." The court concluded that "when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system."

In *Sheppard* the Court applied this "good faith" rule to a case tried in a state court. The trial judge had held that a search warrant failed to conform to the commands of the Fourth Amendment because it did not particularly describe the items to be seized, but he ruled that the items actually seized could be admitted into evidence, notwithstanding the defect in the warrant, since the police had acted in good faith in executing what they reasonably thought was a valid warrant. The United States Supreme Court agreed in these words:

> In sum, the police conduct in this case clearly was objectively reasonable and largely error-free. An error

> of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake. "[T]he exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges." *Illinois* v. *Gates,* 462 U.S. ___, ___ (1983) (WHITE, J., concurring in the judgment). Supressing evidence because the judge failed to make all the necessary clerical corrections despite his assurances that such changes would be made will not serve the deterrent function that the exclusionary rule was designed to achieve. Accordingly, federal law does not require the exclusion of the disputed evidence in this case.

The majority opinion in the instant case has reversed the conviction of a defendant whom the jury has found guilty. The reversal is based upon the Arkansas Supreme Court decision of *Lunsford* v. *State,* 262 Ark. 1, 552 S.W.2d 646 (1977). In that case, as in this case, the testimony of the officer was not recorded.[1] *Lunsford,* however, relied upon *Russ* v. *City of Camden,* 256 Ark. 214, 506 S.W.2d 529 (1974), in holding that the state must produce "the written evidence relied upon by the issuing magistrate as establishing probable cause," and *Russ* relied upon *Mapp* v. *Ohio* as authority for its holding. Since the United States Supreme Court has now reversed the rule it laid down in *Mapp* v. *Ohio,* the Arkansas Supreme Court may well want to reverse the rule it made in *Russ* and *Lunsford.* This is certainly not an unreasonable suggestion because before *Mapp* v. *Ohio* made the same rule applicable to state courts that *Weeks* v. *United States* had made applicable to federal courts, the Arkansas Supreme Court had said:

> It has long been the settled rule that state courts are not bound by the rules of procedure in federal courts on

[1]The majority opinion in this case is somewhat misleading in saying that the officer "stated that he had not been sworn." The truth of the matter is that the officer also said he could not truthfully answer whether he was sworn or not "due to the length in time and all the things that were going on at the time," but that he did recall giving the judge a statement concerning the issuance of the search warrant and that the judge asked him some questions "in regard to sworn testimony."

> the question of the competency or incompetency of evidence. For example, federal courts hold evidence obtained through an illegal search warrant, or without a search warrant, inadmissible, while this court has always held such testimony competent and admissible. We think this announced rule on the admissibility of evidence in search and seizure cases, which has always been followed in this state, should and does apply in the instant case.

State v. *Browning,* 206 Ark. 791, 794, 178 S.W.2d 77 (1944).

Moreover, Rule 16.2(e) of our Rules of Criminal Procedure provides that "a motion to suppress evidence shall be granted only if the court finds that the violation upon which it is based was substantial, or if otherwise required by the Constitution of the United States or of this state." The rule then sets out criteria that the court shall use in determining whether a violation is substantial. One consideration specifically listed is "the extent to which the violation was willful," and collectively the criteria do not appear to conflict in spirit or letter with the decisions of *Leon* and *Sheppard.* It, therefore, seems to me that our Supreme Court should be given the opportunity to decide whether in the light of these recent cases the old exclusionary rule should still be applied in a case where the officer executing the warrant acted in "good faith." Surely that is an issue of significant public interest.

However, before I would certify this matter to the Supreme Court, I would remand it to the trial court for that court to conduct a hearing to determine whether under the criteria set out in our Criminal Procedure Rule 16.2, as viewed in the light of *Leon* and *Sheppard,* the motion to suppress should be granted. There seems to be no constitutional problem with doing this, *see United States* v. *Sager,* 743 F.2d 1261 (8th Cir. 1984), and this is the procedure followed by the Arkansas Supreme Court in *Jackson* v. *State,* 271 Ark. 71, 607 S.W.2d 371 (1980), when the United States Supreme Court decided the case of *Payton* v. *New York,* 445 U.S. 573 (1980), after the briefs had been filed in the *Jackson* appeal. *Payton* had held that absent exigent circumstances,

a warrantless, nonconsensual entry into a defendant's home to make a routine felony arrest was constitutionally invalid and, although the defendant had to stand trial, the exclusionary rule prohibited introduction of any evidence seized pursuant to the invalid arrest. In *Jackson* the Arkansas Supreme Court remanded for an evidentiary hearing to determine if exigent circumstances had existed when the arrest was made in that case.

A remand of the instant case would accomplish three things. First, after conducting an evidentiary hearing to the extent the trial court finds necessary, that court could make a new finding on the motion to suppress as I have already discussed. Second, the attorneys representing the parties could participate in the hearing and, after the trial court's finding is filed in this court, they could file supplemental briefs in this case on appeal. Third, under the recent case of *Bliss* v. *State,* 282 Ark. 315, 668 S.W.2d 936 (1984), decided after the appellant's brief had been filed in the case now before us, the court held that a trial judge must recuse on a hearing where he is required to rule upon the validity of a search warrant which he issued. That case holds this must be done even though no request to disqualify is made, and also holds that no objection to the failure to disqualify is necessary. The merit of a remand to comply with the rule in *Bliss* is clear in this case where the judge needs to be, and in fact was, a witness to the circumstances surrounding the issuance of the warrant.

After the trial court's findings have been made and filed in this court, I would then certify the case to the Arkansas Supreme Court as a case of significant public interest under Rule 29(4) (b).

I do want to address one argument made by the state that is not addressed by the majority opinion. As I understand the point, the state contends that even if the motion to suppress were granted, there would still be sufficient evidence in the record to convict the appellant of the misdemeanor crime of possession of a controlled substance since the crime was committed in Officer Jerry Ridgell's presence when the appellant made a sale of marijuana to Dwight Hood. The

trouble is that Ridgell's testimony to that effect was given in the suppression hearing but not in the trial of the case before the jury.

I am authorized to state that Judge Cooper joins in this dissent.

CATERPILLAR TRACTOR COMPANY
v. Angel P. WATERSON

CA 84-68 679 S.W.2d 814

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

Friday, Eldredge & Clark, by: *James M. Simpson,* for appellant.

Davis, Cox & Wright, by: *Constance E. Clark,* for appellee.

DONALD L. CORBIN, Judge. This suit was instituted by E. A. Martin Machinery Company against appellee, Ancel P. Waterson, to collect the balance due on a promissory note covering the purchase price on a Caterpillar D-5 bulldozer. Appellee filed a counterclaim against E. A. Martin Machinery Company and a third-party complaint against appellant, Caterpillar Tractor Company, alleging breach of express and implied warranties. He sought damages of $50,000.00. At trial, E. A. Martin Machinery Company and appellee dismissed their respective claims against each other and appellee returned the D-5 bulldozer to E. A. Martin Machinery Company. Appellee pursued his third-party action against appellant on the theory of breach of express warranty. Appellant defended, contending that language in its written warranty limited appellee's remedy to repair or to

replacement of defective parts and excluded liability for any other damages.

The jury returned a general verdict for appellee, fixing his damages at $35,000.00. Appellant appeals on the grounds that the trial court erred in instructing the jury on lost profits and on the issue of unconscionability or failure of essential purpose. We affirm.

Appellee ordered the D-5 Caterpillar bulldozer by filling out a customer purchase order given to him by the dealer, E. A. Martin Machinery Company. The original purchase order was a one page document with printing on both the front and back. In general, the purchase order provided that appellant warranted the product sold to be free from defects in material and workmanship for six months after date of delivery and limited appellant's express obligation to the repair or replacement of any defective parts and provided that the warranty was in lieu of all other express or implied warranties and barred liability for incidental, consequential or special damages arising from defects in material and workmanship. Appellee signed the purchase order indicating he had carefully read the instrument and was acquainted with its contents.

Appellee testified that the dozer had an annoying, almost constant vibration from the very day it was delivered, a vibration that nearly "drove you out of your mind." He testified that despite numerous attempts to correct the problem, neither E. A. Martin Machinery Company nor appellant could pinpoint or eliminate the vibration. Leroy McDonald and James Moore, experienced heavy equipment operators employed by appellee, testified that they noticed the dozer's vibration and pointed it out to E. A. Martin Machinery Company and appellant's representatives. Both men stated that the vibration on the dozer was much greater than that normally felt when operating heavy construction equipment.

Loren Niblett, a bulldozer mechanic employed by E. A. Martin Machinery Company, investigated appellee's complaints about the dozer and confirmed that the machine had

an abnormal vibration. It was his opinion that the vibration was a result of a defect in material and workmanship at the Caterpillar factory. Jerry Ford, another witness for appellee, explained that appellee hired him to tear down the dozer in an attempt to discover the cause of its problems. In the process of tearing down the machine, he discovered that the dozer's rear thrust bearings were installed backwards, the side marked "block side" being turned away from the block. Jerry Ford also testified that the vibration in this bulldozer was certainly abnormal and, in his opinion, was a defect in material and workmanship. He stated that the dozer's value with the vibration problem was $35,000.00 or $36,000.00 at the time of its purchase by appellee.

In addition to the vibration problem, the record reflects that appellee experienced other problems with the dozer which required replacement or repair of the following parts: starter, head gasket, hydraulic hoses, flex coupling, yoke, gaskets and seals.

Appellee had the dozer for approximately twenty months and at the date of trial when the dozer was returned to E. A. Martin Machinery Company, it had approximately 1,400 hours of use on it. Appellee estimated that the dozer was down a total of 68 days during this time and stated that the net profit per day amounted to $161.58 for a total loss of profits of $10,987.48. Evidence adduced at trial established that appellee purchased the D-5 bulldozer at a price of $71,264.67 and was credited with $23,264.67 for a trade-in. A balance of $48,000.00 was to be paid by appellee in monthly installments. Appellee testified that upon return of the dozer to E. A. Martin Machinery Company, he had paid $14,613.72 on the balance of the note. Appellee also testified that in his opinion the fair market value for the machine for the condition it was in when he purchased it was $20,000.00.

Appellant argues in its first point for reversal that the trial court erred in instructing the jury on lost profits. In this regard, appellant contends that the language contained in the purchase order effectively limited appellee's recovery to repair or replacement of defective parts and relies upon the holding of the Arkansas Supreme Court in the case of

Gramling v. *Baltz,* 253 Ark. 361, 485 S.W.2d 183 (1972), and a United States Court of Appeals case, *Cryogenic Equipment Inc.* v. *Southern Nitrogen, Inc.,* 490 F. 2d 696 (8th Cir. 1974). In *Gramling, supra,* the Arkansas Supreme Court impliedly recognized that liability for consequential damages can be limited by "clear and unmistakeable language." The Court there held that the trial court erred in refusing to admit plaintiff's testimony concerning consequential damages in the nature of lost profits because such damages were not properly limited or excluded in the manufacturer's warranty. We believe this case is distinguishable in that the question was whether plaintiff had made a *prima facie* case for the jury on the issues of breach of express and implied warranties and the failure of the remedy's essential purpose was not before that Court as it is in the case at bar. Appellant's reliance upon *Cryogenic Equipment, Inc., supra,* is also misplaced. In upholding a disclaimer of liability for loss of profits in that case, the court held that the disclaimer of liability was not unconscionable in view of the expertise of both parties and in view of the absence of any evidence of a disparity of bargaining power between the parties. The issue of failure of the remedy's essential purpose was not addressed by the *Cryogenic* court.

Under the Uniform Commercial Code, a seller of goods may limit his contractual liability in two ways. He may disclaim or limit his warranties, pursuant to Ark. Stat. Ann. § 85-2-316 (Supp. 1983), or he may limit the buyer's remedies for a breach of warranty, pursuant to Ark. Stat. Ann. § 85-2-719 (Add. 1961). These methods are closely related, and in many cases their effect may be substantially identical. White and Summers, *Handbook of the Law Under the Uniform Commercial Code* (Hornbook Series, 1980), § 12-8, p. 462. A disclaimer of warranties limits the seller's liability by reducing the number of circumstances in which the seller will be in breach of the contract; it precludes the existence of a cause of action. A limitation of remedies, on the other hand, restricts the remedies available to the buyer once a breach is established. White and Summers, *supra,* § 12-11, pp. 471, 472.

In the case at bar we believe the language contained in

appellant's purchase order is an attempt to both disclaim warranties and limit the remedies available to the buyer upon breach.

It is clear under Arkansas law that parties to a contract may limit or alter the measure of damages recoverable by limiting the buyer's remedies to repair and replacement of non-conforming goods or parts. Ark. Stat. Ann. § 85-2-719(1)(a); *Kohlenberger* v. *Tyson's Foods,* 256 Ark. 584, 510 S.W.2d 555 (1974). The purpose of an exclusive remedy of replacement or repair of defective parts is to give the seller an opportunity to make the goods conforming while limiting the risks to which he is subject by excluding direct and consequential damages that might otherwise arise. From the point of view of the buyer the purpose of the exclusive remedy is to give him goods that conform to the contract within a reasonable time after a defective part is discovered. When the warrantor fails to correct the defect as promised within a reasonable time he is liable for a breach of that warranty.

In its argument appellant overlooks language in § 85-2-719 which qualifies its rights to limit or alter appellee's remedies. It is clear that limitations on remedies and damages permissible under § 85-2-719 (1)(a) are subject to § 85-2-719(2), which provides:

> Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

The rationale underlying § 85-2-719(2) is adequately stated by the court in *Jones & McKnight Corp.* v. *Birdsboro Corp.,* 320 F. Supp. 39 (N.D.Ill. 1970), as follows:

> This Court would be in an untenable position if it allowed the defendant to shelter itself behind one segment of the warranty when it has allegedly repudiated and ignored its very limited obligations under another segment of the same warranty, which alleged repudiation has caused the very need for relief which the defendant is attempting to avoid.

Soo Line R. Co. v. *Fruehauf Corp.*, 547 F.2d 1365, 1370 (8th Cir. 1977).

Section 85-2-719(2) is to apply whenever an exclusive remedy, which may have appeared fair and reasonable at the inception of the contract, as a result of later circumstances operates to deprive a party of a substantial benefit of the bargain. See Committee Comment 1. Where the seller is given reasonable opportunity to correct the defect or defects, and the machinery nevertheless fails to operate as should new machinery free of defects, the limited remedy fails of its essential purpose. *Soo Line R. Co., supra; Koehring Co.* v. *A.P.I., Inc.*, 369 F.Supp. 882 (E.D.Mich. 1974); *Jones & McKnight Corp., supra; Kohlenberger, supra; Adams* v. *J. I. Case Co.*, 125 Ill.App.2d 388, 261 N.E.2d 1 (1970). It makes no difference that the transaction was between commercial parties. We are not dealing with unconscionability or disparity of bargaining power under the facts of this case, but whether a party was deprived of a substantial benefit of the bargain. Other courts have found a contract to have failed of its essential purpose in commercial settings and applied § 2-719(2). See, *Soo Line R. Co., supra* (sale of 500 covered hopper freight railroad cars); *Beal* v. *General Motors Corp.*, 354 F.Supp. 423 (D.Del. 1973) (extra-heavy tonnage diesel tractor for trucking); *Jones & McKnight Corp., supra* (automated machinery and equipment); *Adams, supra* (crawler tractor for contracting business). Upon failure of the limited remedy's essential purpose, the purchaser is then entitled to any of the buyer's remedies provided by the Code. Among these remedies are consequential damages as provided in Ark. Stat. Ann. §§ 85-2-714 and 85-2-715(2) (Add. 1961). See, *Hartzell* v. *Justus Co., Inc.*, 693 F.2d 770 (8th Cir. 1982); *Riley* v. *Ford Motor Co.*, 442 F.2d 670 (5th Cir. 1971). Section 85-2-714 deals with the remedies available to the buyer for breach in regard to accepted goods. The most commonly applied formula for damages is stated in this section which gives the buyer "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." Ark. Stat. Ann. § 85-2-714(2). Also, "[i]n a proper case any incidental and

consequential damages under the next section may also be recovered." Ark. Stat. Ann. § 85-2-714(3). The next section, Ark. Stat. Ann. § 85-2-715(2), provides in part: "Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise;" The most commonly litigated and sought-after item of consequential damages is lost profits. White and Summers, *supra,* § 10-4, p. 391.

In order to ascertain the propriety of the trial court's instructions in the case at bar, they are set out in full as follows:

No. 10

> The Defendant, Caterpillar Tractor Company, has raised the defense that the remedies of Ancel Waterson are limited to the repair or replacement of such parts as shall appear to have been defective in material or workmanship, and that he is not otherwise entitled to recover damages. The law allows damages to be limited by warranty if done in clear language, was part of the basis of the bargain, and was known or reasonably should have been known to both parties. Further, you are advised that it is of the very essence of a sales contract that at least minimum adequate remedies be available. Parties to a contract must accept the legal consequence that there be at least a fair remedy for breach of the obligation or duties outlined in the contract. Thus, where circumstances cause an exclusive or limited remedy set forth in the contract to fail of its essential purpose, or operates to deprive either party of the substantial value of his bargain, the limitation of remedy is void and of no effect whatsoever.

No. 11

> If you find that the remedy was effectively limited and did not fail of its essential purpose, then your

verdict must be for the defendant, Caterpillar Tractor Company.

No. 12

On the other hand, if you find that Caterpillar Tractor Company is liable for breach of warranty and has not effectively limited Plaintiff Ancel Waterson's remedies, you must then fix the amount of damages to which Ancel Waterson is entitled. You are advised that the measure of damages for breach of warranty in this case is the difference at the time and place of acceptance between the value of the D5 Caterpillar tractor as it was accepted and the value the D5 Caterpillar tractor would have had if it had been as warranted. Further, you may award as damages the profits lost by Ancel Waterson as a foreseeable result of such breach of warranty.

In applying the law to the facts of this case, we believe the question of whether the exclusive remedy provided in appellant's warranty failed of its essential purpose was properly submitted to the jury by Instruction No. 10. Much of the language contained therein came from the official commentary following Ark. Stat. Ann. § 85-2-719. The instructions as a whole are correct under the law and effectively required a finding that appellant's repair and replacement clause failed of its essential purpose before the jury could award damages, including damages for lost profits. Accordingly, we reject appellant's argument that the trial court erroneously instructed the jury on lost profits. Appellee was entitled under Ark. Stat. Ann. § 85-2-719(2), to any of the buyer's remedies provided by the Code upon establishing appellant's repair and replacement clause failed of its essential purpose.

In its second point for reversal, appellant contends the trial court erred in instructing the jury on the issue of unconscionability or failure of essential purpose. We have addressed the issue of failure of essential purpose in our discussion of appellant's first point for reversal and held that it was proper to instruct the jury on failure of essential purpose where the evidence established that appellant was

in breach of warranty. Therefore, our discussion of appellant's second point for reversal will be limited to only the issue of unconscionability. Appellant argues that the following language in Instruction No. 10 attempted to define the doctrine of unconscionability:

> Thus, where circumstances cause an exclusive or limited remedy set forth in the contract to fail of its essential purpose, or operates to deprive either party of the substantial value of his bargain, the limitation of remedy is void and of no effect whatsoever.

Appellant's interpretation of this portion of the instruction is incorrect. The above language, taken in part from the official commentary following Ark. Stat. Ann. § 85-2-719, is clearly concerned with failure of essential purpose and not unconscionability. As stated previously in this opinion, if the buyer is deprived of the substantial value of his bargain, the limitation of remedy is deemed to have failed of its essential purpose. Ark. Stat. Ann. § 85-2-719(3) provides:

> Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

From our reading of the above provision in conjunction with § 85-2-719(2) and the official commentary, it is evident that an otherwise valid limitation of remedy contained in a contract is avoided by the buyer if the limitation fails of its essential purpose or is unconscionable. If either situation is found, the buyer is entitled to any of his remedies provided by the Code.

In *Hartzell, supra,* the buyer of a log home construction kit brought a breach of warranty and negligence action against the manufacturer-seller of the kit to recover for damages for loss in value of the home due to defects and for cost of repairs. In affirming a jury verdict in favor of the buyer in the amount of $39,794.67, the Court of Appeals

held, among other things, that the district court was not required to have made a determination that the limitation of warranties clause was unconscionable before submitting any issue of consequential damages to the jury. There, the evidence established that the repair or replacement clause was a failure and the buyer was entitled to any of the buyer's remedies provided by the Code among which were consequential damages. The Court stated that "A finding of unconscionability is, as a matter of logic, simply unnecessary in cases where § 2-719(2) applies."

In the case at bar, Ark. Stat. Ann. § 85-2-719(2) applied and the trial court properly instructed the jury on the issue of failure of essential purpose. The question of unconscionability pursuant to § 85-2-719(3) was not addressed by the clear language of Instruction No. 10 and we find no merit to this argument.

Affirmed.

COOPER and CLONINGER, JJ., agree.

FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY *v.* CADILLAC INSURANCE COMPANY and Eugene REDDICK

CA 84-175 679 S.W.2d 821

Court of Appeals of Arkansas
Division II
Opinion delivered November 28, 1984
[Rehearing denied January 9, 1985.]

Eichenbaum, Scott, Miller, Crockett, Darr & Hawk, P.A. by: *Leonard L. Scott* and *Frank S. Hamlin,* for appellant.

Matthews & Sanders, P.A. by: *Gail O. Matthews,* for appellees.

DONALD L. CORBIN, Judge. The Gene Reddick family was injured September 27, 1980, in an automobile accident when their car was rear-ended by a vehicle driven by Dean Mainberger. Mainberger, apparently intoxicated, failed to stop at the scene of the accident. In March, 1982, the Reddicks sued Mainberger. Mainberger failed to appear for trial but was defended by counsel hired by appellee, Cadillac Insurance Company, his liability insurer. The Reddicks were awarded $3,979.66 compensatory damages and $17,500.00 punitive damages. Appellee denied liability for the judgment against Mainberger claiming that he had breached the cooperation clause of his liability insurance policy by failing to attend the trial. The Reddicks then brought suit against appellant, Firemen's Insurance Company, their uninsured motorist carrier, and appellee for the judgment. Appellant cross-claimed against appellee. A motion for summary judgment was granted in favor of the Reddicks against appellant for the amount of the judgment. Appellant's cross-complaint against appellee for the amount awarded the Reddicks was heard by the court upon stipulations. The trial court found that Mainberger's failure to appear for trial constituted a material breach of his contract with appellee which substantially prejudiced its rights, justifying denial of coverage. The court further found that appellee had not waived its right nor was it estopped to deny coverage because of its actions at trial. We affirm.

On appeal, the trial court's findings will not be set aside unless they are clearly erroneous. A.R.C.P. Rule 52(a). We examine the evidence in the light most favorable to appellee and sustain the trial court's findings unless they are clearly against the preponderance of the evidence. *Hvasta* v. *McGough,* 276 Ark. 168, 633 S.W.2d 31 (1982). In examining appellant's points for reversal we cannot say that the trial

court's findings were clearly against the preponderance of the evidence.

Appellant first contends that the trial court erred in finding that Mainberger's failure to appear for trial was a material breach of his contract. Appellant relies on *United States Fidelity & Guaranty Co.* v. *Brandon,* 186 Ark. 311, 53 S.W.2d 422 (1932), as authority for the proposition that to constitute a breach of a cooperation clause an insured's failure to appear for trial must be shown to be a material breach. Under this theory, appellee had the burden of proving that Dean Mainberger's absence was deliberate or without good reason. We believe the evidence supports a finding that Mainberger lacked good reason for his absence from trial. A series of letters between Mainberger and appellee were introduced which demonstrated Mainberger's reluctance to appear in Arkansas. Appellee's concern that Mainberger would not cooperate was readily apparent from the correspondence. Appellee subsequently took actions to insure Mainberger's appearance. It was established that appellee provided transportation, accommodations and compensation for time off work in order to insure Mainberger's cooperation and consistently encouraged Mainberger to appear for trial explaining at length the consequences of any failure to do so. Mainberger's attitude throughout his contact with appellee prior to trial was one of reluctant cooperation at best. Examining these circumstances leading up to Mainberger's failure to appear for trial, we believe there was sufficient evidence to support the trial court's finding that Mainberger's absence was a material breach of the non-cooperation clause of the insurance policy.

Appellant contends that the trial court erred in finding that Mainberger's failure to appear substantially prejudiced appellee's efforts to defend Mainberger. Appellee presented evidence that Mainberger's absence from trial prejudiced appellee's efforts to defend him. The amount of the award and, more significantly, its division between compensatory and punitive damages was presented as some indication of the jury's response to Mainberger's absence. In addition, Mainberger's attorney, admittedly an expert in insurance

litigation and trial work, testified in detail and at length concerning the effect he felt Mainberger's absence had upon the jury. In reviewing this testimony, we believe the trial court could agree with his analysis.

Simple logic and common sense would indicate the difficulty one would have in imagining the case in which a defendant's failure to appear for trial would not be prejudicial to his defense. The failure of a defendant to appear surely has an intangible effect upon the jury. Additionally, unexpected developments in the plaintiff's case cannot be rebutted or offset by the defendant's explanations. The defendant's absence leaves him open to unrebuttable innuendos and characterizations by the plaintiff. Inaccurate or exaggerated testimony by the plaintiffs cannot be properly challenged. See *Beam* v. *State Farm Mutual Automobile Ins. Co.,* 269 F.2d 151 (6th Cir. 1959). Mainberger's attorney testified that he found himself faced with several of these situations because Mainberger was not there to assist in his own defense. We cannot believe the jury was not prejudiced against Mainberger as a result of his failure to appear in light of the evidence.

Finally, appellant contends that the trial court erred in finding that appellee had not waived nor was estopped from denying liability by the actions of Mainberger's counsel at trial.

Appellant contends that by admitting Mainberger's liability and failing to withdraw when Mainberger failed to appear, appellee had waived its right to deny liability for non-cooperation or was estopped to do so. The trial court specifically found that appellee had not waived its right to deny liability nor was it estopped to do so. We agree.

The pitfalls of withdrawal are well noted in insurance case law. Take for example, *U.S. Fidelity & Guaranty Co.* v. *Brandon, supra,* where the attorney representing the insured withdrew as counsel upon the defendant's failure to attend trial. The Court held there was no material breach and thereby made the insurer liable for judgment against which it had no opportunity to defend. Thus, we feel the option to

withdraw was not in reality an option at all.

We think it a more logical rule that the insurer need not withdraw in order to preserve its defense of non-cooperation where the insured does not appear at trial. Any other rule would require the insurer to elect at its peril whether to proceed or withdraw, allowing it no recourse should it elect to withdraw and a later determination be made that there was no lack of cooperation. See *DeRosa* v. *Aetna Insurance Co.*, 346 F.2d 245 (7th Cir. 1965), *cert. denied,* 382 U.S. 980 (1966).

In summary we find ample evidence to support the trial court's findings and therefore affirm.

Affirmed.

COOPER and CLONINGER, JJ., agree.

Conrad S. PRESTON *v.* Joe K. BASS, et al

CA 84-80 680 S.W.2d 115

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

Miller & Goldman, by: *David Goldman,* for appellant.

Hoover, Jacobs & Storey, by: *O.H. Storey, III,* and *Lawrence J. Brady,* for appellee.

TOM GLAZE, Judge. Appellant appeals from the chancellor's order that he remove a carport he had constructed on the parking lot of Scully Pointe in Garland County, Arkansas. Appellant's primary arguments are that the chancellor erred (1) in finding that the Board of Administration did not have authority to approve the construction of carports, and (2) in considering whether the designation

of parking spaces at Scully Pointe amounted to a taking of common property. We affirm.

Scully Pointe is a horizontal property regime within the Horizontal Property Act, Ark. Stat. Ann. §§ 50-1001 to -1025 (1971 Repl. and Supp. 1983). Appellant and appellees are owners of apartments and members of the Homeowners' Association of Scully Pointe. Appellees brought this action on June 10, 1982, alleging that appellant's construction of a two-car carport in the common area violated provisions in both the Master Warranty Deed and the Property Owner's By-laws. The chancellor found that the parking area where the carport was built is within the general common elements, that the Board of Administration had no authority to authorize appellant to construct the carport, and that even if the Board were authorized to approve construction, the carport was not in compliance with the Board's requirements. The chancellor found that construction of the carport created an exclusive appropriation of the general common area by appellant without proper approval by the property owners pursuant to the Master Deed and the By-laws.

Both the appellant and the appellees agreed that, according to the Regime's Master Deed, parking areas and carports are general common elements. Unlike appellees, however, appellant, in his first major point, contends that because the Regime's By-laws give the Board exclusive control and management of the Regime, the Board was authorized to approve the construction of the appellant's carport. We cannot agree.

The Regime's Master Deed, as amended, and its By-laws restate most of the provisions contained in Arkansas' Horizontal Property Act. For example, both set forth the manner in which the apartment owners can use common elements, and tracking the same language in Ark. Stat. Ann. § 50-1008 (Repl. 1971), the By-laws provide that each co-owner may use the elements held in common in accordance with the purpose for which they are intended, without hindering or encroaching upon the lawful rights of the

other co-owners.[1] The Regime's By-laws also incorporate in pertinent part Ark. Stat. Ann. § 50-1007 (Repl. 1971) by providing the common elements shall remain undivided and shall not be the object of an action for partition or division of the [co-]ownership.

Here, the Board's action amounted to a division of common property by permitting the appellant to construct a private carport on the common parking area. Such Board action constituted the creation of a limited common element — which is an act that can only be accomplished by the approval of all co-owners. *See* Ark. Stat. Ann. § 50-1002(e) (Repl. 1971).[2] In sum, only the co-owners—not the Board—were empowered to give appellant the permission to construct a private carport.

As a part of his first point for reversal, appellant urges that his construction of the carport did not necessarily appropriate common property to his exclusive use. He contends that testimony reflected that other owners had parked in the carport after its construction and that because he is a Texas resident, appellant is rarely at Scully Pointe. We find no merit in this contention. Appellant testified that he assumed when he paid for the carport that he would have the right to use it when he was there. He further said:

> If I had thought anyone else owning a unit at Scully Pointe would have used the carport that I constructed so that I would not be able to use the carport when I was in Arkansas, I would not have spent $4,000 to build it.

The carport under the facts of this case would be no less a limited common element merely because appellant's exclusive use of the carport is only part-time rather than full-time.

---

[1]The Master Deed provides that no apartment owner shall make any use of the common elements which would interfere with the use and enjoyment of such elements by all other owners or which would interfere with the use for which they are designed and intended.

[2]Ark. Stat. Ann. § 50-1002(e) (Repl. 1971) defines limited common elements to include those common elements which are agreed upon by all the co-owners to be reserved for the use of a certain number of apartments to the exclusion of the other apartments.

Appellant also argues that even if all co-owners were required to approve his carport's construction, the co-owners—at their 1981 membership meeting—evidenced their intention to delegate this issue to the Board. Again, we must disagree. Although the owners discussed the construction of carports at their 1979 and 1981 membership meetings, the owners never voted on this issue. The only action taken by the membership is recited in the minutes of the 1981 meeting, which reflect that a short discussion was had concerning proposed carports and "that those property owners directly concerned should achieve a consensus of need, then come back to the board with a plan." The owners neither approved carports nor authorized the Board to do so.

Finally, the appellant contends the trial court erred in considering whether the mere designation of parking spaces at Scully Pointe amounted to a taking of common property. This issue was not pled by the parties, and in reading the record, we fail to find that either party requested a conclusive ruling on this point. The trial court ruled only that the construction of the carport *in conjunction with* the numbering of parking spaces coinciding with condominium unit numbers creates an exclusive appropriation of the general common area to appellant without proper approval by the property owners. This action, the court concluded, was not in accordance with the Master Deed, By-laws or Arkansas law; therefore, the court ordered the appellant to remove the carport. We in no way construe the trial court's order to deal with the issue of whether the designated parking spaces alone amounted to a taking of common property.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

Gary COY *v.* Dewey STILES, Director of Labor, and EMPLOYMENT SECURITY DIVISION

E 84-42 679 S.W.2d 804

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

Paul E. Hopper, for appellant.

Alinda Andrews, by: *Gary Williams,* for appellee.

TOM GLAZE, Judge. The appellant, Gary Coy, appeals from the decision of the Board of Review, finding that he was overpaid benefits and is liable for repayment. On appeal, appellant contends that his failure to report part-time earnings while he was collecting unemployment benefits was not a misrepresentation or false statement of a material fact making him subject to repayment under Arkansas law.

The appellant was employed at General Electric in Jonesboro in July of 1981, when he contracted with the

V.F.W. Club to tend bar for two hours a day and to do the club's janitorial work for $200 a week. About two months after contracting with the V.F.W., the appellant lost his job at General Electric, and in October of 1981, he began collecting unemployment benefits. For about a year, from October of 1981 to November of 1982, the appellant drew some kind of benefits — unemployment ($3,406), extended ($1,572), or federal supplemental ($1,179).

Appellant testified before the Appeal Tribunal that he hired two other men, Carl Rupard and Gerald Ishmael, to perform the janitorial work for which he had contracted and that he did the bartending each weekday afternoon from one to three and came in on Saturday mornings to "carry out the garbage." The V.F.W. paid him $200 a week by check, which the appellant says he cashed. Out of that $200, he testified that he kept $50 for himself and paid $150 in cash to the men he hired to do the janitorial work. Appellant freely admitted at the hearing that he filled out a claim form for each week that he collected benefits and that he checked "No" to the question, "Did you work any during the above week?" He testified that he did not indicate that he had earnings for fear that "since I had been drawing unemployment a few weeks, that they would hold up my check and some kind of a mix-up in the paperwork. I've seen it done quite often. . . . " Appellant testified that Rupard and Ishmael quit doing the janitorial work at the beginning of 1983 and that since then he was doing all of the work and was collecting $200 a week.

In considering the foregoing evidence, the Board of Review, affirming the Appeal Tribunal, denied benefits to appellant under Ark. Stat. Ann. § 81-1107(f) (1), finding he willfully made a false statement of a material fact in order to receive compensation. Appellant asserts the Board erred and in part relies upon an Arkansas employment security law which provides a claimant can earn up to 40% of his or her weekly benefit amount without penalty while drawing unemployment benefits. Ark. Stat. Ann. § 81-1104(c) (Supp. 1984). He contends that under the statute he could have earned up to $52 a week, 40% of his weekly benefit amount of $131, and that he actually earned only $50 a week, the amount he claims to have kept of the $200 paid to him each

week by the V.F.W. This being so, appellant claims that he would have collected the same benefits even had he reported his part-time income; consequently, he argues that his failure to disclose he worked and earned $50 weekly was not material.

Appellant cites *Fleury* v. *State,* 114 N.H. 528, 323 A.2d 919 (1974), to persuade us to construe his failure to report income as not "material" within the meaning of our statute. In *Fleury,* a claimant failed to report that he had received an offer of work. The New Hampshire Supreme Court, in affirming the lower court, held that his failure to report was not material so as to disqualify him from receiving unemployment benefits. The court said:

> [T]he determination whether an applicant for benefits has "wilfully" made a false statement or "knowingly" failed to disclose a "material fact . . . to obtain . . . any benefit" is necessarily factual in nature, as is the determination of what is "material".

Id. at 531, 322 A.2d at 921.

The New Hampshire Court's reasoning in *Fleury* is sound, but we believe it supports the position of the appellee rather than the claimant. Whether the appellant's failure to report part-time earnings was or was not material within the meaning of the Arkansas statute was a fact question for the Board of Review. In *Fleury,* the Court determined the claimant's act was not material. Here, the Board decided the fact question adversely to the appellant, and we find substantial evidence to support the Board's findings. Even though appellant could have earned up to $52 a week and still have been eligible for benefits, our statutes require that the part-time income be reported. Appellant signed a statement each week saying that he did not work during that week. As the Director pointed out in his brief, knowledge of the appellant's employment status was of significance to the Agency because it had the responsibility of determining any possible effect a part-time job had upon his eligibility. In addition to determining whether he was entitled to full or reduced benefits, the agency had to determine whether he was available for full-time permanent work, as the statute

requires him to be in order to maintain his eligibility. For these reasons, the Board could well determine that his failure to report was indeed "material" within the meaning of the statute.

Appellant also claims the instant case is factually distinguishable from *Eden* v. *Daniels,* 269 Ark. 690, 600 S.W.2d 416 (Ark. App. 1980). Mr. Eden, the claimant, failed to report any earnings from a contract job to paint Mr. Swanson's house. Eden contended that he did not paint the house, but that his brother was the one who actually did the job. Eden claimed that he received only $88 out of the $588.20 Swanson paid on the contract, and that was reimbursement for money his brother had borrowed from him. This Court found, however, that the Board could infer from the events that Eden intentionally misrepresented a material fact when he filed his claim for unemployment benefits. We pointed out that Eden's own testimony established (1) that Eden advertised for the job; (2) that Eden's truck, tools, and equipment were used to paint the house; (3) that Eden participated in the work (he claimed he painted a door only); (4) that Eden went with his brother to be paid; (5) that Swanson wrote a check in Eden's name alone; and (6) that Eden actually received at least a part of the proceeds. We find the facts in *Eden* quite similar to the facts at bar. *Eden* turned—not on whether Mr. Eden had earned more than 40% of his weekly benefit amount—but upon whether the Board's inferences were consistent with the facts of the case.

In the instant case, the appellant admitted that he was the one who signed a written contract with the V.F.W. to tend bar and to provide janitorial services; that he did, in fact, provide services under that contract; that the V.F.W. wrote a $200 check each week to appellant; and that appellant received at least $50 of each check. In addition, there were contradictions in appellant's testimony at the hearing and his statement on an Employment Security Worksheet[1] that provided fact questions and credibility

[1]The appellant did not sign the worksheet statement and at the hearing, he denied having written it. However, an employee at the Employment Security office noted that Coy gave the disputed statement, took it to check against his records, but never returned it to the office. On December 21, 1982, appellant did sign a statement that he would cooperate in any way on his case.

questions for the Board to resolve.

Although we believe the appellant made a good argument on the question of materiality, we also believe that the question of materiality was one of fact for the Board to resolve. We find substantial evidence here; therefore, we affirm.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

Debra JONES *v.* Ross JONES and Glenda JONES

CA 84-259 680 S.W.2d 118

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

[redacted]

East Arkansas Legal Services, Inc., by: *James O'Conner*, for appellant.

Henry & Mooney, by: *John R. Henry*, for appellees.

GEORGE K. CRACRAFT, Chief Judge. Debra Jones appeals from an order of the chancery court awarding custody of her minor son to Ross and Glenda Jones. Appellant was divorced from her husband in 1979 and was awarded custody of the minor by that decree. Appellees are the minor's aunt and uncle in whose custody the minor had subsequently been placed by the juvenile court. While the case was pending in juvenile court appellees filed this action in the chancery court seeking custody of the child. This case was not heard until after the juvenile court proceedings were dismissed. Appellant contends that the chancery court lacked subject matter jurisdiction and that the court erred in removing custody from appellant.

The appellant first contends that the trial court was without subject matter jurisdiction. The complaint of the appellees alleged that the appellant was not a proper person to have custody of the minor and the best interest of the child required that he be placed in appellees' custody. By subsequent amendment appellees alleged that the minor had originally been placed in their custody by an order of the juvenile court which was later abated. They further alleged that the minor had been beaten and abused while in appellant's custody and if returned to her home would be subjected to further abuse, and that the child's condition had improved while in their care and custody and that he should remain there. The appellant contends that these allegations in effect maintain that the minor is a "dependant-neglected

child" within the meaning of Ark. Stat. Ann. § 45-403(4) (Repl. 1977) and that "original and exclusive jurisdiction" of such cases is vested in the juvenile court under § 45-406(a)(Supp. 1983). We find no merit to this contention.

It has long been settled that minors are wards of the chancery court and it is the duty of those courts to make all orders that will properly safeguard their rights, including the awarding of their custody to persons other than natural parents if circumstances warrant. *Richards* v. *Taylor,* 202 Ark. 183, 150 S.W.2d 32 (1941); *Kirk* v. *Jones,* 178 Ark. 583, 12 S.W.2d 879 (1928); *State* v. *Grisby & Wife,* 38 Ark. 406 (1882). The enactment of the Arkansas Juvenile Code of 1975 in no way interferes with that jurisdiction. The purpose of the juvenile code was to empower the State in its public guardianship capacity to act in emergency situations involving the safety and welfare of dependent, neglected and abused minors and to designate the forum in which determinations of the necessity of temporarily placing those minors under the care of the State is to be made. The juvenile court has special jurisdiction to temporarily protect minors in emergency situations.

The chancery courts retain general jurisdiction over the persons and the properties of minors. *Robins* v. *Ark. Social Services,* 273 Ark. 241, 617 S.W.2d 857 (1981); *Ex Parte King,* 141 Ark. 213, 217 S.W. 465 (1919). Both cases carefully point out that the juvenile courts are to exercise special subject matter jurisdiction solely on the basis of the State's public guardianship over minors as a class and that the constitutionally created courts retain all of their traditional jurisdiction over individual minors.

In *Ex Parte King,* the court in discussing the constitutionality of an earlier Juvenile Act vesting jurisdiction in the county court stated:

> In reaching this conclusion, we are not unmindful of the jurisdiction conferred by the Constitution upon courts of chancery, which is the same jurisdiction that courts of equity exercise at the time of the adoption of the Constitution. Art. 7, § 15, Const. Courts of equity at

> the time of the adoption of our Constitution had general jurisdiction over the persons and property of minors. *Bowles* v. *Dixon,* 32 Ark. 92; *Myrick* v. *Jacks,* 33 Ark. 425; *State* v. *Grisby and Wife,* 38 Ark. 406; *Watson* v. *Henderson,* 98 Ark. 63.
>
> In the last case we said: "But it was not intended by the Constitution to take away from the chancery courts their ancient original jurisdiction over the persons and estates of minors so far as such jurisdiction may be necessary for the protection of the infant or to protect his property from waste or spoliation through the carelessness, fraud, mistake or imposition of his parents, guardians, or others. These are distinct grounds of equitable jurisdiction which have existed since the establishment of courts of chancery, and have been recognized in the jurisprudence of our English-speaking people for centuries."
>
> . . .This jurisdiction of chancery courts, as the jurisdiction of probate courts in matters relating to guardians, deals solely with the person and the estate of the *individual* infant and has reference to the interests of the particular individual rather than to a *class.* It deals with matters of private guardianship and not with that public guardianship over infants as a class, such as was contemplated by the framers of the Constitution by the jurisdiction conferred upon county courts, as *parens patriae,* to assume custody and control over infants as wards of the State whenever their condition, or their conduct, makes it necessary that this should be done for the public welfare. [Emphasis supplied]

In *Robins* the court, in discussing the present Juvenile Code, cited *Ex Parte King* with approval and declared:

> Juvenile court has no jurisdiction to hear custody cases between private litigants. Juvenile courts hear cases involving temporary care of infants as wards of the State, while chancery courts hear custody cases between private litigants.

The appellees' complaint in the chancery court did not purport to provide for temporary care of a minor who was neglected or abused in his present whereabouts. That had already been done by the State over a year earlier in the juvenile court which placed the child in appellees' care. This action was brought to obtain legal and parental custody of a minor already in appellees' physical custody on allegation that his natural parent was unfit and that it would be in the minor's best interest that he remain there. It is also noted that when appellees attempted to intervene in the juvenile proceedings and present evidence of appellant's unfitness, appellant moved to dismiss the action "because it involves a dispute between two private parties and is thereby beyond the jurisdiction of juvenile court," citing *Robins.* The juvenile court granted that motion.

The appellant next contends that the chancellor based his determination solely on the superior ability of appellees to attend to the material needs of the child and ignored the rule that as between the parents and strangers the law prefers the former even though the latter may be more affluent. She argues that the evidence would not sustain a finding that she was guilty of immoral conduct or had failed to properly support the child in accordance with her abilities and that her right to custody should have taken preference even though his condition in life was materially improved while in the appellees' care.

We agree that the State should not interfere with a parental right simply to better the temporal welfare of the child as against an unoffending parent. *Woodson* v. *Lee,* 221 Ark. 517, 254 S.W.2d 326 (1953); *French* v. *Graves,* 205 Ark. 409, 168 S.W.2d 1108 (1943). We do not agree, however, that moral fitness and financial ability are the only criteria by which to judge the right of a parent to the control and custody of children. In *Tucker* v. *Tucker,* 207 Ark. 359, 180 S.W.2d 571 (1944) it was declared that the prime concern and controlling factor is the best interest of the child, and the court in its sound discretion will look into the peculiar circumstances of each case and act as the welfare of the child appears to require. Parental rights are not to be enforced to the detriment or destruction of the happiness or well being

of the child. The rights of parents are not proprietary and are subject to their related duty to care for and protect the child and the law secures their preferential rights only so long as they discharge their obligations. *Watkins* v. *Dudgeon,* 270 Ark. 516, 606 S.W.2d 78 (Ark. App. 1980); *Pender* v. *McKee,* 266 Ark. 18, 582 S.W.2d 929 (1979); *Kirk* v. *Jones, supra; State* v. *Grisby, supra.* The unfitness for which this preferential right to custody may be forfeited can result from a parental failure to discharge any of the correlated duties of parenthood. In *Grisby* it was stated that this preference for natural parents is based on a presumption that they will take care of their children, bring them up properly and treat them with kindness and affection, and when that presumption has been dissipated chancery will interfere and place the child where those parental duties will be discharged by another.

A complete recitation of the evidence presented in this voluminous record would serve only to unduly lengthen this opinion. We recite only a portion of that evidence in stating our conclusion that findings by the chancellor that the appellant was an offending parent, had failed to discharge those related duties of a parent stated in *Richards, Grisby,* and *Watkins,* and that the interest of this child would best be served by placing him in the care of the appellees were warranted.

There was evidence that while his parents were still married the child was severely abused and beaten by his father on numerous occasions. On one occasion the child was taken to a doctor who notified SCAN, an organization which involves itself in families where there is suspected child abuse or neglect. SCAN then monitored the family for a period of five years. The appellant stated that prior to her divorce in 1979 the child was abused only by his father. There was evidence, however, that the physical abuse continued after the divorce. In 1981 he was hospitalized by a doctor as the result of a beating which the child initially said had been administered by his mother. He later accused his grandmother as the guilty party. As the result of that incident the child was removed from the mother's home by order of the juvenile court and placed in the custody of SCAN for a period of six months before being returned to his

mother, still under the observation of the organization. Although the physical evidence of bruises about his body and face were observed by the doctor, social worker and other lay persons, the mother denied that she ever saw the evidence of abuse on that occasion and attributed the accusation to fabrication.

In the spring of 1982 the child was again removed from the mother's custody by order of the juvenile court on her own complaint of delinquency resulting from behavior problems which she stated she was unable to handle by herself. The juvenile court placed him in the Paragould Children's Home and subsequently removed him to the appellees' home where he remained for more than a year prior to the hearing in this case.

Social workers, special education teachers and the appellees testified that although the boy had emotional, social and academic problems while in the mother's care, those problems were immediately relieved on both occasions when he was removed from her custody and placed in foster care. The social workers and teachers also stated that upon his return to his mother after release from the first juvenile order he immediately regressed in all areas. His social behavior regressed to such an extent after returning to his mother that even she could not handle him and sought the aid of the juvenile court.

If, in fact, only the father and grandmother had been guilty of physical abuse there was no indication that the appellant interfered to protect him. There was evidence, however, that appellant admitted to both SCAN and the social workers that she saw characteristics of the father in the boy and had taken out her hard feelings on him. There was evidence that there was a vast difference in the manner in which appellant treated her son and the way she treated his sister. Appellant was unduly harsh on the son and would not let him do many of the things being ordinarily done by children his age. On one occasion she punished him by requiring him to stand before his first grade class and suck on a baby bottle. The teacher ordered her to leave and contacted Social Services, who have monitored the child

since that time. They state that as a result of her treatment the child became withdrawn, unhappy and developed his emotional, social and academic problems. The sister, on the other hand, was permitted to do what all other children were permitted to do and was found to be normal and well adjusted in all areas.

The child testified that the happiest time in his life had been when he was living with the appellees and he hated living with his mother because he was beaten in her home. He likes the appellees and his school and the way his life is presently going. He thinks that his grades would improve if he is permitted to stay where he is and has threatened to run away if he is forced to return to his mother's residence.

There were home study reports made available to the court without objection which stated that from conversations with the mother and grandmother it was determined that the minor was unhappy at home, ran away often and would set fires in the house and break valuable things. These incidents were said to have occurred when he felt he was not loved and not receiving attention. It was shown that the grandmother was the authority figure in that home, and appellant took no responsibilities, and permitted her mother to make decisions about her life and those of her children. The appellant shared a two bedroom home with her mother and her brother, and her sole income was from aid to dependent children. There was other evidence including testimony of the family doctor that the mother was emotionally unstable and could not adequately deal with the stresses of life.

The social worker recommended that the child remain with the appellees. The home study reports reflected that appellees' home was much larger, in a more desirable location near his school and parks, and that appellees do not believe in severe discipline of children. Ross Jones was employed at Union Carbide with a monthly take-home pay in excess of $1,000. Glenda Jones had ceased her former employment when the child came into their home in order to spend more time tending to his needs. This report also recommended that the child remain with the appellees until

the appellant proved to be responsible enough to care for him or was willing to remove him from the grandmother's residence. The mother gave no indication that she was willing to do so.

From our review of the entire record and consideration of all of the surrounding circumstances we cannot conclude that the chancellor's findings that the appellant had not discharged her obligations of parenthood to this child and that his welfare and interest would best be served by placing him in the custody of appellees were clearly erroneous.

We affirm.

CORBIN and CLONINGER, JJ., agree.

ARKANSAS STATE BOARD OF PHARMACY
v. Steve ISELY

CA 84-41 680 S.W.2d 718

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

Steve Clark, Att'y Gen., by: *Robert R. Ross,* Deputy Att'y Gen., for appellant.

William C. McArthur, for appellee.

JAMES R. COOPER, Judge. This appeal involves the penalties imposed on the appellee by the appellant for violations of regulations regarding the practice of pharmacy. The Board appeals from the trial court's decision that one of the bases found by the Board to justify suspension of the appellee's license was not supported by substantial evidence, and from the trial court's reduction of the period of suspension.

On February 16, 1982 a hearing was held before the Board, and, as a result of that hearing, the Board imposed a $200 fine and suspended the appellee's license for 30 days. The appellee appealed that decision to the circuit court, which remanded the case to the Board for further development of the factual basis for the Board's findings. On remand, the Board heard additional charges, and, as a result of a hearing held on October 13, 1982, found that the appellee had failed to maintain accurate records, that he was

guilty of unprofessional conduct in refilling altered prescriptions, that he had arbitrarily changed the directions for dosages on certain prescriptions, and that he had dispensed drugs without a prescription. Based on these findings, the Board suspended his license for 90 days and imposed a $500 fine. On the second appeal, the circuit court found substantial evidence to support the Board's finding regarding the inaccuracy of the records, and the court deferred to the Board's expertise on its finding regarding the altered prescription. However, the court held that the finding that the appellee had refilled unauthorized prescriptions was based on conjecture, speculation, or surmise. The court, based on those findings, reduced the period of suspension from 90 days to 10 days, leaving all other penalties intact. From that decision, the Board appeals.

Since no one appeals from the two findings which the trial court found to be supported by substantial evidence, we will not deal with those facts. The evidence regarding the unauthorized refill of a prescription centers around transactions involving the appellee and Dr. T. H. Hickey. A Health Department Auditor, in the course of his investigation, obtained a statement from Dr. Hickey that he had not authorized a prescription for Mr. Ivan Ward for Talwin. Subsequently, the appellee introduced a statement from Dr. Hickey which indicated that he might have authorized the medication for Mr. Ward. Mr. Ward and his wife testified that, when the prescription was presented to the appellee, he called Dr. Hickey to obtain authorization for the refill. The appellee testified that he had obtained authorization from Dr. Hickey for the refill. Further, Mr. Ward's son testified that he had spoken with Dr. Hickey about his father's condition, and that he later went to the pharmacy and observed the appellee discussing the matter with Dr. Hickey over the telephone prior to filling the prescription. The appellee's mother verified her son's version of the events surrounding the refill of Mr. Ward's prescription.

From this evidence, the Board made its findings and assessed the penalties noted above. The trial court affirmed the Board's findings on two of the charges, but, as noted earlier, found that the Board's conclusion that the appellee

had refilled an unauthorized prescription was based on conjecture and speculation rather than on substantial evidence. After reviewing the evidence, we agree with the trial court that the Board's finding regarding the refill of unauthorized prescriptions was not supported by substantial evidence.

On appeal from decisions resulting from actions under the Administrative Procedure Act, Ark. Stat. Ann. § 5-701 *et seq* (Repl. 1976),

> . . .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 mere conjecture. *Pickens-Bond Const. Co.* v. *Case,* 266 Ark. 323, 584 S.W.2d 21 (1979).

Arkansas Real Estate Commission v. *Hale and Owens,* 12 Ark. App. 229, 674 S.W.2d 507 (1984).

We affirm the decision of the trial court that the Board's decision regarding the charge of refilling unauthorized prescriptions was not supported by substantial evidence. The only evidence before the Board which supported such a finding was Dr. Hickey's initial statement in which he indicated that he had not authorized the refill in question. Dr. Hickey later recanted, and stated, under oath, that he might have authorized the questioned prescription. For the Board to accept as truth the initial statement, and to disregard the witness' later statement, and the testimony of all the other witnesses, required speculation and conjecture on the part of the Board.

The Board also argues that the trial court erred in

substituting its judgment for that of the Board in assessing the penalty against the appellee. On this point, we agree with the appellant.

The trial court, in deciding to modify a penalty, suspension or revocation of a pharmacist's license, is limited by the provisions of Ark. Stat. Ann. § 5-713(h) (Supp. 1983), which states:

> (h) The court may affirm the decision of the agency or remand the case for further proceedings. It may reverse or modify the decision if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) in violation of constitutional or statutory provisions;
> (2) in excess of the agency's statutory authority;
> (3) made upon unlawful procedure;
> (4) affected by other error or law;
> (5) not supported by substantial evidence of record; or
> (6) arbitrary, capricious, or characterized by abuse of discretion.

The trial court, or, for that matter, this Court, has the authority to modify a penalty assessed under the Administrative Procedure Act if it is found that such penalty was unduly harsh and unreasonable under all the facts. *Baxter* v. *Arkansas State Board of Dental Examiners,* 269 Ark. 67, 598 S.W.2d 412 (1980); *Arkansas State Board of Pharmacy* v. *Patrick,* 243 Ark. 967, 423 S.W.2d 265 (1968). Although the trial court may have felt that the 90 day suspension was arbitrary in the sense that it was too harsh under all the circumstances of the case, based on the evidence the trial court found to be substantial, we are not in agreement with the trial court's decision to reduce the period of suspension, nor do we feel compelled to assess a penalty on our own, either by reinstating the penalty assessed by the Board, or arriving at some other period of suspension. We have decided, rather, to remand the case to the circuit court,

with instructions to the trial court to remand the matter to the Board. The Board is to assess a penalty which, in the determination of the Board, is commensurate with the violations found to be supported by substantial evidence by the trial court and this Court. Neither we, nor the trial court, could determine the weight the Board placed on the alleged violation concerning the unauthorized refill, but, since both the trial court and this Court have found that charge and finding of guilt to be unsupported by substantial evidence, a penalty should be assessed absent any consideration of that charge. The Board of Pharmacy is composed of five experienced pharmacists, and, "it is more likely to know the effectiveness of penalties than any court." *Patrick, supra,* (dissenting opinion).

Affirmed, and remanded.

CLONINGER and CORBIN, JJ., agree.

NEW HAMPSHIRE INSURANCE COMPANY and AFFILIATED FOOD STORES, INC. *v.* Martin M. LOGAN, Jr.

CA 84-122 680 S.W.2d 720

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

Laser, Sharp & Mayes, for appellant.

Gary D. Corum, for appellee.

MELVIN MAYFIELD, Judge. The New Hampshire Insurance Company has appealed from a decision of the Workers' Compensation Commission. In order to understand the issue involved, it is necessary to know some details of the largely undisputed factual background.

The appellee, Martin Logan, sustained an injury to his right leg on August 15, 1979, while working for Affiliated Food Stores. After being treated symptomatically for a period, a total knee replacement arthroplasty was performed and appellee continued to see the doctor at regular intervals. At the time of this injury, Maryland Casualty Company was the employer's insurance carrier and the injury was accepted as compensable. Maryland paid the medical bills and some

temporary total disability but as of July 12, 1981, had not paid any permanent partial disability.

On July 12, 1981, the appellee sustained another injury while at work. This resulted in surgery on both knees and it is likely that he will need more surgery in the years to come. At the time of this second injury, the employer had changed insurance carriers from Maryland to New Hampshire. The employer notified Maryland that another operation was being considered and asked if that company would still be liable for the medical bills. Maryland replied that it thought appellee's present problems were caused by his new injury and that it would not pay for the medical bills resulting from this new injury.

Upon being advised as to Maryland's position, New Hampshire began to pay the medical bills for appellee's treatment, but notified Maryland it was making demand for reimbursement, and requested a hearing before the Workers' Compensation Commission.

A hearing was had on September 21, 1982. New Hampshire told the administrative law judge it contended that the incident on July 12, 1981, was a recurrence of the earlier injury and that Maryland should be responsible for all expense and disability incurred in connection with that injury, or alternatively that the expenses should be prorated between the two carriers. Maryland said there had been a new injury, not a recurrence, and also took the position that it had no liability because it had paid no compensation for over a year and, under Ark. Stat. Ann. § 81-1318 (b)(Repl. 1976), the statute of limitations had run as to any claim against it.

New Hampshire's attorney then pointed out to the law judge that the appellee was present but not represented by counsel and suggested that it might be proper that appellee be advised about the right to have counsel since New Hampshire was paying the medical expenses under protest and had not paid any temporary total disability, Maryland was contending that limitations had run on any claim for further compensation against it, and appellee would need to

make a claim against the Second Injury Fund if Maryland was successful in its contention. The law judge advised appellee of these matters and when appellee said he would like to retain counsel, the hearing was recessed.

Another hearing was had on January 17, 1983, and the law judge subsequently held that Maryland should pay all disability and medical benefits arising from the August of 1979 injury up to the date of the second injury on July 12, 1981; this was to include payment of 50% permanent partial disability to the right leg. The injury in July of 1981 was held to be either an aggravation or recurrence of the August of 1979 injury and all benefits after July 12, 1981, were to be paid equally by both carriers. It was also held that Maryland should reimburse New Hampshire for all payments made by it that were not made in accordance with the law judge's decision; that Maryland had controverted the permanent partial disability benefits which arose prior to July 12, 1981; and that both carriers had controverted all benefits subsequent to July 12, 1981, and the attorney's fees resulting from that action should be paid equally by both of them.

The Commission affirmed the law judge's decision and the only issue presented to this court is New Hampshire's appeal from the holding that it controverted all benefits subsequent to July 12, 1981.

The appellant first points to the Commission's opinion that states "appellant should be commended" for providing the claimant with needed medical benefits after Maryland refused to do so, and appellant says if by claiming repayment from Maryland it is held to have controverted the appellee's claim, there will be no incentive for a carrier to act in such a commendable manner in the future. Appellant also says that the Commission attempted to justify its action by reasoning that appellant put appellee in the position of having to obtain an attorney, but appellant argues this is not correct because its dispute with Maryland did not threaten appellee's interest. Appellant cites *Aluminum Co. of America* v. *Henning,* 260 Ark. 699, 543 S.W.2d 480 (1976), where the court said the allowance of attorney's fees where claims have been controverted discourages oppressive delay in re-

cognizing liability and deters arbitrary or capricious denial of claims, and appellant says those reasons do not apply to its actions in this case.

On the other hand, the appellee takes exception to appellant's argument that it was not necessary for appellee to obtain an attorney to represent his interest. Appellee says:

> The fatal flaw in this argument is clearly demonstrated by the following hypothetical. Assume that Mr. Logan had not hired an attorney . . . Assume further that Appellant had been successful in its contention that his [appellee's] subsequent injury was a "reccurrence." Assume also that Maryland prevailed in its Statute of Limitations defense.
>
> Where would Mr. Logan be now? New Hampshire would have no responsibility at all and the claim against Maryland would have been barred. Appellant's argument . . . that Mr. Logan's interest was not "threatened" by its position in this case is specious.

We have to agree with appellee's position. It should be remembered that the primary liability for workers' compensation is upon the employer and that insurance coverage does not relieve the employer of that liability. Ark. Stat. Ann. § 81-1305 (Repl. 1976). Whether a claim has been controverted is a question of fact and is not to be determined by a mechanical approach. *Aluminum Co. of America* v. *Henning, supra; Revere Copper & Brass, Inc.* v. *Talley,* 7 Ark. App. 234, 647 S.W.2d 477 (1983). In the *Henning* case, the court said:

> A liberal construction favoring the claimant mandates a holding that the question whether a claim is controverted be one of fact to be determined from the circumstances of the particular case, only one of which is the status of the formal proceedings before the commission, and that, as in other such determinations, the commission's finding should not be reversed if there is substantial evidence to support it, or [unless] it is clear that there has been a gross abuse of discretion.

260 Ark. at 709.

It seems clear to us that the combined actions of the two carriers in this case constitute substantial evidence to support the Commission's decision that the appellant's claim was controverted. However, in view of appellant's argument that an affirmance will lessen a carrier's incentive to supply needed medical benefits that it claims are the responsibility of another carrier, and, in order to clarify the Commission's award, it is noted that we agree that the appellant did not controvert the medical expenses already paid by it on September 21, 1982, the date of the first hearing in this matter. We do not think a contrary finding would be supported by the evidence in this case, or that the statute allowing attorney's fees on controverted claims would be served by such a finding. Assuming such a finding was made, it is hereby eliminated by a modification of the award.

Affirmed as modified and remanded for further proceedings

CLONINGER and CORBIN, JJ., agree.

DELIGHT OAK FLOORING CO., INC. *v.* ARKANSAS LOUISIANA GAS CO.

CA 84-177 680 S.W.2d 117

Court of Appeals of Arkansas
Opinion delivered November 28, 1984

W. Swaine Perkins, and *Larry Dean Kissee,* for appellant.

McKenzie, McRae & Vasser, by: *James H. McKenzie,* for appellee.

PER CURIAM. At the appellant's request this case was set for oral argument on November 28, 1984. On November 26, 1984, the appellant filed a paper designated "Waiver of Oral Argument" to which the appellee filed a response stating it had no objection to the waiver of oral argument.

We have treated the appellant's paper as a motion to waive the oral argument and the motion has been granted. The case is withdrawn from submission and will be resubmitted when it reaches its proper place on the docket.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. At appellant's request the above styled civil case was set for oral argument to be heard on November 28, 1984. Because this court is legally required to give preference to criminal, workers' compensation, and unemployment benefit cases, the general

civil cases have to wait in line to be submitted to us for decision. Currently the preferred cases are being submitted approximately 35 days after the last brief is filed. The general civil cases, however, are having to wait more than six months after the last brief is filed before they are submitted.

Since oral argument is requested in only a small percentage of our cases, a situation has resulted that enables a general civil case, if it is set for oral argument, to go ahead of the other general civil cases and currently it would be submitted almost as early as the preferred cases. The instant case, for example, was set to be submitted 42 days after the last brief was filed.

Two days before the day set for oral argument, the appellant filed a "Waiver of Oral Argument" in this case. The majority of the court has treated this as a motion to waive the argument and has granted it. The majority, of course, recognizes that it would be unfair to allow this case to remain submitted ahead of the other civil cases and has properly withdrawn it from submission and it will have to wait its turn to be resubmitted. I dissent, however, because my concern goes deeper than that.

The reason the appellant filed its waiver of oral arguments is that it wants to file a belated reply brief. That brief, and a motion for permission to file it, was tendered the same day the waiver of oral argument was filed. We have not yet acted on the motion to file, but it seeks permission to reply to the appellee's brief, and it discloses that appellant has had the appellee's brief for more than a month. Furthermore, the belated reply brief deals with a point that, in my view, should have been argued in the original brief and, I feel sure, if we allow appellant's belated brief to be filed, the appellee will ask permission to file a brief in reply.

There have now been eight separate motions filed in this case. All of this takes up the time of this court and of the clerk's office. This will be compounded by the time and effort it will take to resubmit this case. I think we could have avoided some of this by simply requiring the parties to make the oral argument that was set. Everything in the belated

reply brief could have been covered at that time and appellee's attorney would have been ready and able to fully reply during the argument.

By allowing the oral argument to be waived, we have wasted time and effort that we cannot afford to waste. We are our own worst enemy if we allow this sort of thing to continue.

Kenneth Roland WALKER *v.* STATE of Arkansas

CA CR 84-104 680 S.W.2d 915

Court of Appeals of Arkansas
Division II
Opinion delivered December 12, 1984
[Rehearing denied January 16, 1985.]

J. Marvin Holman, for appellant.

Steve Clark, Att'y Gen., by: *Velda P. West,* Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was convicted by a jury of theft by receiving in violation of Ark. Stat. Ann. § 41-2206 (Repl. 1977) and terroristic threatening in violation of Ark. Stat. Ann. § 41-1608 (Repl. 1977). He received sentences of fifteen years and six years, respectively. For reversal, the appellant argues that the trial court made four errors warranting reversal: 1) by not granting his motion for a directed verdict on both counts; 2) by admitting some of the State's evidence; 3) by failing to declare a mistrial after a witness referred to the appellant's prison record; and 4) by admitting certain testimony of the appellant's accomplice. We find no merit in any of these assignments of error and therefore we affirm his convictions.

The State's version of the facts of this case and the appellant's version are in total conflict. According to the State's witnesses, the appellant participated in the theft of a pickup truck in Missouri with an accomplice, Kenneth Reed. At trial, Reed, testifying for the State, stated that the appellant recruited him into the operation. He stated that in August, 1982, the appellant drove him to Springfield, Missouri to steal a pickup truck. According to Reed, the appellant dropped him off at a Kawasaki dealership where he convinced a salesman to permit him to test drive a Toyota truck. Reed stated that he drove the stolen truck back to Arkansas and parked it near the appellant's home. Reed said that he later sold the Toyota truck and delivered half the proceeds to the appellant who accepted the money. Unknown to Reed, the buyers of the Toyota truck were undercover State Police officers. Reed acknowledged that although his negotiations with the buyers of the stolen Toyota occurred within 150 feet of the appellant's home, the appellant was not present at the sale. Reed also testified to the details of two other truck thefts he and the appellant committed jointly, and he testified that the appellant masterminded the entire car theft operation.

To corroborate Reed's testimony pertaining to the theft charge, the State introduced a tape recording, made by the

police officers, of conversation between the officers, the accomplice Reed, and the appellant. The conversation dealt generally with arrangements for future sales of stolen trucks. At one point in the conversation the following exchange occurred with regard to the stolen Toyota truck, which was the basis of the charge in the case at bar:

> HENDERSHOTT: Me and him done some business, and there wasn't no heat behind it and everything went down fine, I made some money on it, and I wouldn't hold that little old unit for 24 hours, and that sone (sic) of a bitch was gone boy
>
> REED: (inaudible)
>
> HENDERSHOTT: And that was a nice little piece of equipment and it went
>
> REED: There is a lot heat floating around Coal Hill about that.
>
> HENDERSHOTT: About what?
>
> REED: About, just around Coal Hill
>
> HENDERSHOTT: About that truck?
>
> WALKER: Yeah, it's gone isn't it?
>
> HENDERSHOTT: Oh, unless that sone (sic) of a bitch can speak Spanish, we haven't got any problems. I doubt if it even looks the same anymore
>
> WALKER: (inaudible) Is that the one I drove
>
> REED: Yeah

It was during this taped conversation that the appellant allegedly threatened to kill the officers by declaring:

> WALKER: I'll tell you what I done partner, you set here and let me tell you something. They charged me in

> Tulsa, Oklahoma and there was a whole bunch of people and I went by my _____ self and the judge, when they started sentencing me, said Mr. Walker, we'll put you on a plane and you'll land in California, your family's there, he said, we want 3 names and I said, I can't give them to you. You ask any _____ _____ that turns me around, _____, I'm an old man, I'm subject to chop his head off. You dig me? You blame me? . . .
>
> WALKER: I'll tell you what and I'm not bull _____ you, I don't care if you are the man, and I go down and do a _____ 5, I'll come out, I'm going to kill you, cause I'm too old to go . . .
>
> WALKER: I'm too old to go, I don't blame you, but if they bust me, I'll tell you what, I every one of my kids fall dead if I look at you and don't kill you, I said I never seen your (inaudible) before in my life.

The officers testified that they felt the threats were real and that they were frightened by the appellant's promises to kill them.

The appellant took the stand and denied having anything to do with the sale or theft of the Toyota truck. He admitted to being present at the conversation taped by the undercover police officers, but denied asking Reed if he had driven the Toyota truck. He admitted that he might have threatened the officers because he was angry with one of them, but said that he did not have any intention of actually killing them.

The appellant first argues that the trial court should have granted his motion for a directed verdict on the theft by receiving charge. Directed verdict motions are challenges to the sufficiency of the evidence. *Glick* v. *State,* 275 Ark. 34, 627 S.W.2d 14 (1982). The appellant bases this argument on Ark. Stat. Ann. § 43-2116 (Repl. 1977) which requires that the testimony of an accomplice be corroborated by other independent evidence which tends to connect the defendant with the crime. It is the appellant's contention that the State adduced no evidence which corroborated the theft by

receiving charge and, therefore, the trial court should have granted his directed verdict motion.

The test for determining the sufficiency of corroborating evidence is whether, if the testimony of the accomplice were totally eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its commission. *Henderson* v. *State,* 279 Ark. 435, 652 S.W.2d 16 (1983). After a careful review of the abstracted testimony, excluding the accomplice Reed's direct testimony, we find that the State's tape recording of the appellant is sufficient corroboration of Reed's direct testimony pertaining to the theft by receiving charge. The appellant's question regarding the Toyota truck, "Is that the one I drove" and Reed's affirmative response, tend to connect the accused with the commission of the crime. This exchange between the appellant and Reed, in the context of the discussion regarding the Toyota truck, independently establishes the crime of theft by receiving. The appellant's remarks independently establish that he had control of the Toyota truck and that he knew it was stolen. Of course, this evidence of itself would not be enough to sustain a conviction, however, it need not be — it need only tend in some degree to connect the accused with the crime, *Klimas* v. *State,* 259 Ark. 301, 534 S.W.2d 202 (1976).

With respect to the appellant's motion for a directed verdict on the terroristic threatening charge, the appellant argues that the State's evidence does not prove that he directly threatened the undercover officers; instead, the appellant contends that the State proved, at most, that he conditionally threatened to kill the officers when he promised to kill them if they arrested or informed on him. The appellant's construction of the statute is that it only criminalizes present, but not future, death threats. This argument was rejected in *Richards* v. *State,* 266 Ark. 733, 585 S.W.2d 375 (1979).

Next, the appellant argues that the trial court erred in admitting into the State's case-in-chief three tapes, two audio and one video, made by undercover police officers, written transcripts of the audio tapes, and photographs of

two pickup trucks. At a pre-trial suppression hearing, the appellant objected to the introduction of the audio tapes and the transcriptions of them because the tapes were generally inaudible and because the parties to the conversation were not identified on the tape. The appellant objected to the introduction of the written transcription because they were prepared by the State. He objected that the video tape was irrelevant as to proof of *his* guilt because the tape showed only Reed, the accomplice, selling the truck to the undercover officers. There were no objections at the pre-trial hearing nor at trial to the introduction of the photographs of the truck.

At the suppression hearing the trial court listened to the audio tapes, read the transcriptions of them and watched the video tape. The court admitted the audio tapes and the video tape into evidence on the basis of their relevancy. The jury was allowed to read the transcripts merely to assist them in understanding the audio tapes, however, the transcripts of the audio tapes were not admitted into evidence and the jury was instructed, in case of a variation between the tapes and the transcripts, to be guided by the tapes and not by the transcripts. The trial court also instructed the jury to disregard any parts of the audio tapes that were inaudible.

The appellant's objection to the State's introduction of the audio tapes is a challenge to their authenticity. At trial, an undercover police officer, who was present when the tapes were recorded, testified as to their accuracy and authenticity. This testimony was sufficient to authenticate the tapes. Ark. Unif. Rule of Evidence 901(b)(1). In determining the authenticity of taped statements, the trial court has some discretion and in the absence of evidence indicating tampering with the evidence we will not reverse the trial court's ruling unless we find an abuse of discretion. *Gardner* v. *State,* 263 Ark. 739, 569 S.W.2d 74 (1978). We find no such abuse in the trial court's decision to admit the audio tape.

The appellant also objected to the admission of the audio tapes because they were inaudible. The trial court listened to the tapes and found that they were sufficiently

audible to be understood. The admissibility of tape recordings containing inaudible portions is a matter within the sound discretion of the trial court, and we will not reverse unless there has been an abuse of that discretion. *U.S.* v. *Bell,* 651 F.2d 1255 (1981). *See,* 57 ALR 3d 749-54. We find no abuse of discretion here.

There were no objections to the introduction of the photographs of the stolen trucks, therefore, we will not consider this point. *Wicks* v. *State,* 270 Ark. 781, 606 S.W.2d 366 (1980). As for the video tape, the appellant argues that it is irrelevant but he does not show how the introduction of the video tape, showing Reed selling the Toyota truck to an undercover police officer, *prejudiced him.* The appellant has the burden of demonstrating error, and that burden is not met by showing the mere possibility of error. *Butler* v. *State,* 264 Ark., 243, 570 S.W.2d 272 (1978). The appellant has demonstrated no prejudice. The transcripts of the audio tapes were not introduced, and were only to be used as an aid to the jury. Therefore, we fail to see how the appellant was prejudiced.

Next, the appellant alleges that the trial court erred in refusing to declare a mistrial when one of the undercover officers stated that the appellant told them he had previously been to the penitentiary. He argues that the officer's answer was not responsive and was so prejudicial that his motion for a mistrial should have been granted. On cross-examination, the appellant's attorney asked one of the undercover officers "how did that (appellant's threat to kill the officers) happen?" The officer's statement that the appellant had been to the penitentiary was responsive to the question because it explained the appellant's motivation behind his threats: he had been in prison once before and he was determined not to go again, or, if he went, he was determined to kill those who were responsible.

Finally, the appellant alleges that the trial court should not have allowed testimony by Reed concerning the theft of other trucks by Reed and the appellant. The trial court ruled that the testimony concerning other crimes committed by the appellant and his accomplice was admissible under Ark.

Unif. Rules of Evidence 404 (b) as evidence of intent and plan. The trial court's ruling was correct. The appellant denied that he had any knowledge of the sale of the Toyota truck. To prove the appellant's guilty knowledge, evidence of other criminal acts under similar circumstances is admissible to show a system, design, or guilty knowledge. *Vernon* v. *State,* 2 Ark. App. 305, 621 S.W.2d 17 (1981).

Affirmed.

CLONINGER and CORBIN, JJ., agree.

Marvin BOYD *v.* STATE of Arkansas

CA CR 84-132 680 S.W.2d 911

Court of Appeals of Arkansas
Division II
Opinion delivered December 12, 1984

Skillman & Durrett, for appellant.

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

JAMES R. COOPER, Judge. In this criminal case, the appellant was charged with possession of a controlled substance, marijuana, with intent to deliver. After a jury trial, the appellant was convicted and sentenced to four and one-half years in the Department of Correction, and a $2,500.00 fine. From that decision, comes this appeal.

The appellant raises three points of error for reversal: 1) the trial court's failure to grant his motion to suppress evidence seized pursuant to an allegedly defective search warrant; 2) the trial court's not sustaining the appellant's objection to the testimony of one of the arresting officers concerning a statement made by the appellant while in police custody; and 3) the trial court's failure to sustain the appellant's objection to the sheriff's opinion testimony as to whether the vegetable material seized in the search of the appellant's home was in fact marijuana. For the reasons below, we find no merit to the appellant's alleged points of error, and therefore, affirm.

The facts leading up to the appellant's arrest and subsequent conviction are as follows. On the afternoon of June 15, 1983, Officer Don Beck of the Poinsett County Sheriff's Department was approached by a confidential informant who disclosed to Officer Beck that he could purchase marijuana from the appellant at the appellant's residence. Officer Beck arranged with this individual to attempt to make a controlled buy in the evening of the next day, June 16. On June 16, 1983, at approximately 10:30 p.m., Officer Beck drove the informant to the appellant's residence. The informant was searched for drugs, and given $125.00 by Officer Beck to purchase the marijuana. The serial numbers on these bills had been recorded by the officer for later verification. Officer Beck observed the informant approach the appellant's residence, and approximately ten minutes later, the informant returned with approximately one ounce of marijuana. Officer Beck took the informant home, and notified Sheriff Bloodworth of the buy.

Officer Beck and Sheriff Bloodworth then met Municipal Judge Steve Inboden, of Trumann for the purpose of obtaining a search warrant for the appellant's residence. The police officers presented the judge with an affidavit to support the warrant.

The judge doubted the affidavit was sufficient to support the issuance of a warrant, so he took a tape recorded, sworn statement from Officer Beck of the evening's events, which the judge then found gave him probable cause to issue the warrant. It is unclear whether Officer Beck executed the affidavit under oath, and the appellant alleges he did not. The judge also authorized the officers to execute the warrant immediately because of the possibility that the contraband and marked bills could be removed if the search were to be delayed. The search of the appellant's home took place at 1:20 a.m. on the morning of June 17, 1983. Among the items seized were the marked bills which Officer Beck gave the informant to purchase the marijuana, and two and one-half pounds of marijuana. Officer Beck executed an inventory of the items seized pursuant to the search, but neglected to give a copy of his inventory to the appellant, as required by Arkansas Rules of Criminal Procedure, Rule 13.3(d), Ark. Stat. Ann., Vol. 4A(Repl. 1977). Also, the officer failed to return the warrant to the issuing magistrate, as required by Rule 13.4, *Id.*

First, we believe that based on the totality of the circumstances, the judge who issued the search warrant was presented with sufficient facts to support the issuance of the warrant. Although the appellant argues that the warrant would not withstand the two-pronged Aguilar-Spinelli test[1] which is incorporated into Rule 13(b) of the Arkansas Rules of Criminal Procedure, he concedes that since *Thompson* v. *State,* 280 Ark. 265, 658 S.W.2d 350 (1983), the test of whether the warrant will pass constitutional muster has changed. As stated in *Wolf* v. *State,* 10 Ark. App. 379, 664 S.W.2d 882 (1984), under the new test,

> the magistrate issuing the warrant must make a

[1]See, *Aguilar* v. *Texas,* 378 U.S. 108 (1964); *Spinelli* v. *United States,* 393 U.S. 410 (1969).

> practical, common sense decision based on all the circumstances set forth in the affidavit. . . .'the duty of the reviewing court is simply to ensure that the magistrate has a substantial basis for concluding that probable cause existed' to issue the warrant.

In the case at bar, the issuing magistrate initially determined that more facts were needed to establish probable cause. Thus, he placed the officer under oath, and questioned him until he was satisfied that the officer had reliable facts upon which to base probable cause to issue the warrant. We believe that this is the type of common sense determination which the new test contemplates. We also note that this procedure is contemplated by Rule 13.1 of the Arkansas Rules of Criminal Procedure.

The appellant argues that the informant who participated in the controlled purchase had not been shown to be reliable, as he had not been used in the past. We believe the trial judge ruled correctly when he stated, in denying the appellant's motion to suppress, that the controlled purchase gave the informant, who disclosed to Officer Beck that he could purchase marijuana from the appellant, sufficient reliability to support his allegations. If the officer had attempted to obtain a warrant on the informant's bare assertion that he could purchase the marijuana, then the appellant's argument might be well taken. However, when the informant backed up this assertion with the controlled purchase, his reliability was then established, and the warrant was properly issued. In *Pridgeon* v. *State,* 262 Ark. 428, 559 S.W.2d 4 (1979), (reversed on other grounds), the court gave much weight to the fact that the informant had purchased contraband from the appellant the day before the search warrant was obtained. This, the court said, "indicated the reliability and credibility of the informant and, therefore, the existence of probable cause for the issuance of the search warrant."

The appellant also challenges the search on the grounds that the search warrant was executed at an unreasonable time. In obtaining the search warrant, the affiant, Officer Beck, stated that he "had intelligence. . .that there is

heavy traffic in and out of that residence at all hours of the night." The appellee argues that his knowledge, coupled with the necessity of recovering the marked bills as quickly as possible in order to preserve the evidence of the controlled buy, gave the officers reason to execute the warrant in the early morning hours. Rule 13.2 (c), Rules of Criminal Procedure, Ark. Stat. Ann., Vol. 4A (Repl. 1977), provides that search warrants shall be executed between the hours of six a.m. and eight p.m. Subdivision i, ii, and iii set out three exceptions to this rule, in which case the warrant may be executed any time day or night. These exceptions arise when, (1) the place to be searched is difficult of speedy access, (2) the items to be seized are in danger of imminent removal, and (3) the warrant can be successfully executed only at irregular and unpredictable intervals.

The affiant to the search warrant in question had witnessed the sale of marijuana from the appellant's residence prior to his securing the warrant, and feared that if he were not allowed to execute the warrant immediately, the contraband could be removed or the marked bills which were evidence of the earlier sale could also be removed. Under these circumstances we feel there existed the type of exigent circumstances contemplated by the second section of Rule 13.2(c). Also, we feel that the officer securing the warrant gave the issuing judge sufficient basis to authorize the nighttime search when he revealed his knowledge of the activities occurring at the appellant's residence throughout the night. Although the appellant alleges that the affiant's statement is conclusory in nature, we believe that in light of *Harris* v. *State,* 262 Ark. 506, 558 S.W.2d 143 (1977), such a statement will suffice.

Next, the appellant argues that the trial court erred in failing to grant his motion to suppress because the officer who executed the warrant failed to provide the appellant with a receipt of those items seized at the time of the search pursuant to Rule 13.3(d). We cannot agree with the appellant that this failure to comply with the strict requirements of this rule caused the appellant to be prejudiced. In *Harris* v. *State,* 264 Ark. 391, 572 S.W.2d 389 (1978), the court held that because the items seized were so

numerous and taken from different houses, it was critical to show which items belonged to the defendant. Here, the possibility of confusion is virtually non-existent. The appellant makes no allegation that the officers produced evidence allegedly seized in the search of his residence which were actually not his. The appellant has not demonstrated prejudicial error which would require reversal.

Also, the appellant argues that the officer's failure to return the search warrant to the court from which it was issued within five days should result in reversal. Again we find no prejudice.

Another point for reversal raised by the appellant is that the trial court erred in refusing to suppress the appellant's statement concerning ownership of the seized marijuana. After Officer Beck read the appellant his Miranda warnings, and after the appellant had indicated that he understood his rights, the appellant asked the officer why his wife was being detained. When he was told that she was also a suspect in the illegal activity, the appellant made a damaging statement which indicated guilt.

First, we note that the appellant never requested a Denno hearing at which time the voluntariness of the statement would have been explored, and the appellant declined such a hearing when the trial court suggested one. The appellant properly argues that the burden of proving voluntariness is upon the appellee. The State proffered the testimony of Officer Beck who stated the appellant made statements after being advised of his rights and declaring that he understood them. We believe this satisfied the State's burden. The appellant failed to show any evidence of involuntariness, and therefore we believe the statement was properly shown to have been voluntary. Also, we feel that the statement could be characterized as spontaneous, as in *Hale* v. *State,* 252 Ark. 1040, 483 S.W.2d 228 (1972).

Finally, the appellant argues that the trial court erred in allowing Sheriff Bloodworth to testify that, in his opinion, the substance obtained from the appellant's residence was marijuana. We disagree. The sheriff testified as to his prior

law enforcement experience, that he had received special training in the visual identification of marijuana, and that he had actually seen marijuana hundreds of times. Such testimony was admissible. See, *Milburn* v. *State,* 262 Ark. 267, 555 S.W.2d 946 (1977); *Euton* v. *State,* 270 Ark. 121, 603 S.W.2d 468 (Ark. App. 1980).

Affirmed.

GLAZE and MAYFIELD, JJ., agree.

Ray ROWLAND *v.*
WORTHEN BANK & TRUST COMPANY, N.A.

CA 84-47 680 S.W.2d 726

Court of Appeals of Arkansas
Division II
Opinion delivered December 12, 1984

Hal Joseph Kemp, P.A., and *Julius Bracy Cross, Jr.*, for appellant.

Allen, Cabe & Lester, P.A., for appellee.

LAWSON CLONINGER, Judge. The crucial issue on this appeal is whether the trial court erred in ruling that, as a matter of law, an attorney may not bind his client by an agreement to settle his client's claim. We believe that the court ruled incorrectly, and we must reverse and remand.

Appellee sued appellant and another defendant, R.G. Parham, Jr., on a promissory note in the principal amount of $25,100. On February 10, 1983, appellant's attorney, Jack Young, wrote a letter to appellee's attorney, James H. Penick III, in which he suggested a settlement of the case involving appellee's payment of a total of $5,000 in monthly installments over a period of thirty-six months in exchange for (1) a full release of appellant or a covenant not to sue, and (2) a full release of appellant by Parham of any right of contribution against appellant. Another element of the proposed settlement, arising from contemporaneous oral conversations between the two attorneys, was a second mortgage on appellant's house.

In a letter dated March 1, 1983, Mr. Penick wrote Mr. Young: "I hope that the agreement which we discussed earlier is in the making, and if it is not, I would appreciate your putting it on a priority of things to do." Mr. Young assumed from the language of the letter that Mr. Penick had appellee's authority to agree to the proposed settlement terms and was merely awaiting the detailing of terms and settlement documents. Mr. Penick, however, had not yet submitted the proposed settlement to appellee and was awaiting further documentation from Mr. Young before doing so.

On March 4, 1983, Mr. Young sent Mr. Penick a draft covenant not to sue and changed the terms from a note to cash payment. Mr. Penick then discussed with Mr. Young some problems concerning the language of the covenant not to sue. On March 10, 1983, Mr. Penick communicated

appellant's offer to appellee, which then rejected the offer. Mr. Penick informed Mr. Young of the rejection orally on March 15.

Appellant thereafter filed an amended answer pleading settlement and accord and satisfaction. Both Mr. Young and Mr. Penick resigned as attorneys in order to testify as witnesses. The case was tried before the circuit judge acting as jury. The court ruled for appellee, awarding it judgment for the full amount of the $25,100 note plus accrued interest, costs, and attorney's fee. The judgment, filed on August 2, 1983, states: "That as a matter of law an attorney may not bind his client by an agreement to settle his client's claim." No finding of fact was made regarding the exchange of proposals between the two attorneys.

Appellant argues that the trial court erred in holding that, as a matter of law, an attorney may not bind his client by an agreement to settle his client's claim. He insists that an examination of the letters and the behavior of Mr. Penick indicates that the attorney had implied authority to bind appellee to the purported agreement. Although we do not in this opinion either endorse or reject appellant's view that Mr. Penick was clothed with authority, we must agree with his contention that the trial court erred in stating that *as a matter of law* an attorney may not bind his client by a settlement agreement.

Appellant relies upon the case of *Laird* v. *Byrd,* 177 Ark. 1114, 9 S.W.2d 800 (1928), as authority for a determination by the reviewing court of the existence and extent of an attorney's authority by inference from his correspondence and statements. As the Supreme Court noted, however, in distinguishing *Laird* in *Ashworth* v. *Hankins,* 248 Ark. 567, 452 S.W.2d 838 (1970), the evidence in the earlier case suggested that the attorney had been "clothed with authority" by his client, whereas no evidence of such authorization by a client was apparent in the latter case. We make no decision with respect to the scope of authority suggested by Mr. Penick's letter, but we commend to the trial court's notice the distinction in *Ashworth.*

According to appellee, the controlling cases on this appeal are *Cullin-McCurdy Const. Co.* v. *Vulcan Iron Works,* 93 Ark. 342, 124 S.W. 1023 (1910), and *McCombs* v. *McCombs,* 227 Ark. 1, 295 S.W.2d 744 (1956). In the former case, the appellant attempted to establish at trial that one of the appellee's trial attorneys had entered into an agreement with the appellant to compromise the appellee's claim. The Arkansas Supreme Court upheld the trial court's exclusion of evidence of the alleged settlement because no testimony had been offered to show that the attorney had any authority to act for the appellee other than to prosecute the action. Speaking of the lawyer, the court said "it was not within the scope of his authority as attorney to compromise with appellant, or to release the latter from liability, or to shift that liability by making a new contract with another to assume it."

In the *McCombs* case, *supra,* the Supreme Court cited *Cullin-Murdy Const. Co., supra,* with approval and stated:

> The law is well settled that an attorney, as here, employed to conduct litigation involving property, has no implied or apparent authority by reason of his employment, to bind his client in regard to the subject matter of the litigation except with respect to matters of procedure. . . . 'It is a general principle that an attorney cannot by virtue of his general authority as attorney, bind his client by any act which amounts to a surrender or waiver in whole or in part of any substantial right of the client. . .'

As recently as *Walker* v. *Stephens,* 3 Ark. App. 205, 626 S.W.2d 200 (1981), we endorsed the holdings in both of the above-cited cases, noting:

> It is well settled that an attorney's contract of employment implies that he is authorized to take those procedural steps deemed by him to be necessary and proper in the conduct of the litigation whether in pursuit or defense of the claim. His actions in those matters, in the absence of fraud, are regarded as the acts of his client who is bound by those actions, but the mere

> fact that counsel is retained does not, in and of itself. carry an implication of authority to compromise his client's claim and to hold otherwise would vest the attorney with far more power than his retainer requires or implies.

The language of these two quoted cases indicates the degree to which an attorney's authority to act outside procedural bounds is circumscribed by the facts in any given case.

It is precisely at this point that the trial court committed reversible error. The judge's choice of words in his statement that "as a matter of law" a lawyer may not bind his client by an agreement to settle his client's claim is simply too broad, for, as the cases above indicate, a client may clothe his attorney with as much or as little authority as he deems appropriate for the satisfactory conduct of his affairs. In arriving at its conclusion of law, the trial court made no finding of fact concerning the character of the relationship between attorney and client. In *Laird* v. *Byrd, supra,* the Arkansas Supreme Court concluded that the trial court had properly submitted the question of the scope of the attorney's authority to the jury. Here, however, the issue was foreclosed by the trial court's failure to determine whether, under the facts of the case, a settlement had in fact been made by an attorney vested with adequate authority.

The Court of Appeals cannot act as a factfinder. *Bagwell* v. *Falcon Jet Corp.*, 8 Ark. App. 192, 649 S.W.2d 841 (1983). We must therefore reverse and remand this matter to the trial court so that a further hearing may be held to determine whether a settlement had been made and whether Mr. Penick was authorized to make a settlement.

CORBIN and COOPER, JJ., agree.

SOUTHWEST PIPE & SUPPLY and INSURANCE COMPANY OF NORTH AMERICA *v.* Lana HOOVER, Widow of David A. HOOVER, deceased, Employee

CA 84-279 680 S.W.2d 723

Court of Appeals of Arkansas
Division I
Opinion delivered December 12, 1984

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

Holloway & Bridewell, for appellee.

LAWSON CLONINGER, Judge. This is an appeal from an award of dependency benefits under the Workers' Compensation Act to appellee Lana Hoover, for herself and her two minor children. Appellee is the widow of David Hoover who was killed in an automobile accident while in the scope and

course of his employment with appellant, Southwest Pipe & Supply. We affirm the holding of the Commission.

The evidence established that on May 25, 1982, David Hoover was eastbound when his automobile collided head-on with a westbound tractor and trailer driven by Harry Thompson. An insurance adjuster and a state trooper investigated the accident, and their testimony indicated that Hoover's automobile was probably across the center line of the highway and that the impact occurred in the westbound lane. Thompson also testified that Hoover was in the wrong lane. However, Lloyd Franklin, the state trooper who worked the accident, testified that one of the contributing circumstances to the collision was that Thompson was driving too fast for the existing conditions.

Hoover's body was taken to a local hospital where, at the request of Trooper Franklin, a blood sample was drawn from Hoover's heart. The medical technician who drew the blood testified that he put the blood sample in a vacutainer tube, labeled it, and put tape over the top with his signature on the tape and the glass combined. Officer James Singleton testified that he took the tube from the medical technician and put it in the refrigerator at the Chicot County Jail. Trooper Franklin testified that he took the tube out of the refrigerator and mailed it to the Arkansas Department of Health. Peter Sammartino, a chemist with the Health Department, testified that he received the tube in the mail and ran a blood alcohol test on its contents. His test results showed that the sample had a .11% blood alcohol content. However, Sammartino also testified that he did not recall seeing any tape over the top of the tube and that "I don't recall specifically, but I'm pretty sure it wasn't there, because we would have saved it."

Ark. Stat. Ann. § 81-1305 (Repl. 1976) provides in pertinent part that "there shall be no liability for compensation under [the Workers' Compensation Act] where the injury or death from injury was substantially occasioned by intoxication of the injured employee. . . ." At the hearing before the Administrative Law Judge, the appellant offered in evidence the results of the blood alcohol test which

purported to establish that at the time of the accident, David Hoover had an alcohol blood level of .11%, which, under the statute in effect at the time of the accident, was .01% over the percentage of alcohol that was presumed to show intoxication. Ark. Stat. Ann. § 75-1031.1(A)(3) (Repl. 1979) (amended 1983). The Administrative Law Judge found that Hoover was intoxicated based on the results of the blood alcohol test, but he awarded benefits because he found that Hoover's intoxication did not "substantially occasion" his death.

The Workers' Compensation Commission agreed with the Administrative Law Judge's award of benefits but disagreed with his finding that Hoover was intoxicated. The Commission stated that the unexplained absence of the sealing tape with the technician's signature raised "serious questions regarding the accuracy, reliability, and authenticity of the blood alcohol test" and so "the results should not have been admitted into evidence or should be accorded little weight." The Commission went on to affirm and adopt the Administrative Law Judge's finding that the appellants failed to prove by a preponderance of the evidence that Hoover's injury and death were substantially occasioned by intoxication.

On appeal, appellant's first argument is that the Commission erred in finding that the blood alcohol test results should not have been admitted into evidence or should be accorded little weight. Appellant cites *St. Paul Insurance Co.* v. *Touzin,* 267 Ark. 539, 592 S.W.2d 447 (1980), where the Arkansas Supreme Court held that the Commission correctly admitted a similar blood test into evidence. In that case, the Arkansas Court of Appeals reversed the Commission, finding that the test was inadmissible because there had been no affirmative showing of strict compliance with Department of Health regulations for taking blood alcohol tests. The Supreme Court, in reversing the Court of Appeals, pointed out that "the Commission is not bound by technical rules of evidence or procedure, but may 'conduct the hearing in a manner as will best ascertain the rights of the parties.' " *Id.* at 449 [citing Ark. Stat. Ann. § 81-1327 (Repl. 1976)]. The court held that

the Commission had superior expertise in weighing the testimony and should be left to determine the probative value of proof that might not be admissible in a court of law. In the case at bar, the appellant argues that the Commission should have allowed the blood test into evidence because of its probative value and because the Commission is not bound by technical rules of evidence.

Although the court allowed the blood test into evidence in the *Touzin* case, it did so on the underlying premise that the Commission has discretion to determine admissibility of evidence in a manner that best ascertains the rights of the parties. In *Touzin,* the Commission allowed the test into evidence but it also received testimony that the claimant had smelled of alcohol and had several empty beer cans with him at the time of his death. In the instant case, the Commission received no other testimony which might lead to the conclusion that Hoover was intoxicated when he had the accident. More importantly, there was evidence that the only item tending to show Hoover's intoxication had been tampered with. There was substantial evidence to support the conclusion of the Commission that the blood test was not reliable evidence.

The Commission has broad discretion with reference to admission of evidence and we will not reverse absent a showing of abuse of that discretion. *Clark* v. *Peabody Testing Service,* 265 Ark. 489, 579 S.W.2d 360 (1979). Here, we find no abuse of the Commission's discretion. We believe that the Commission correctly excluded or limited the value of the blood alcohol test.

Appellant's second argument is that the Commission did not address the issue of whether Hoover's death was substantially occasioned by intoxication except in dictim; therefore, this court should remand for the Commission to consider this issue. We disagree. The Commission stated in its opinion: "[W]e affirm and adopt the Administrative Law Judge's opinion insofar as it holds that respondents have failed to prove by a preponderance of the evidence that claimant's injury was substantially occasioned by intoxication." Clearly, the Commission made a finding that

appellant failed to prove that Hoover's intoxication substantially caused his injury.

Appellant's final argument is that the Commission's finding is not supported by substantial evidence. On appeal, we review the evidence in the light most favorable to the findings of the Commission and we give the testimony its strongest probative value in favor of the order of the Commission. *Davis* v. *C & M Tractor Co.*, 4 Ark. App. 34, 627 S.W.2d 561 (1982). Under this standard, we find that there was substantial evidence to support the Commission's finding that appellant failed to prove Hoover's injury was substantially occasioned by intoxication. We repeat that the only evidence of intoxication was the blood alcohol test which was of questionable reliability. Furthermore, there was testimony that Hoover was probably not intoxicated. Two of his acquaintances testified that Hoover was with them during the afternoon and early evening and that he did not smell of alcohol or appear to be under the influence of alcohol. They both testified that they did not see him drink anything. Appellee testified that she had never seen her husband drunk. There was substantial evidence to support the Commission's conclusion that appellant did not prove that Hoover's intoxication substantially occasioned his death.

Affirmed.

CRACRAFT, C.J. and CORBIN, J., agree.

Robert Earl CLINKSCALE *v.* STATE of Arkansas

CA CR 84-81 680 S.W.2d 728

Court of Appeals of Arkansas
Division I
Opinion delivered December 12, 1984
[Rehearing denied January 9, 1985.]

Wilson, Harp, O'Hara & Myers, by: *John David Myers,* for appellant.

Steve Clark, Att'y Gen., by: *Michael E. Wheeler,* Asst. Att'y Gen., for appellee.

LAWSON CLONINGER, Judge. This appeal from appel-

lant's criminal conviction consists of four points for reversal. We find no error on the trial court's part with respect to any of the points raised, and therefore we affirm.

Appellant was charged with theft by receiving under Ark. Stat. Ann. § 41-2206 (Repl. 1977) following his arrest for the possession of a stolen gold Rolex wrist watch. The prosecutor sought sentence enhancement under the terms provided for habitual offenders at Ark. Stat. Ann. § 41-1001.

At an omnibus hearing held before the trial, the lower court granted appellant's motion to suppress the admission of the watch as evidence on the grounds that it had been seized without a search warrant in violation of the Fourth Amendment. Two days later the trial court reconvened the omnibus hearing after the State had filed a brief requesting reconsideration of the matter. The court heard the testimony of a jeweler who said that appellant had brought the watch to his shop, claimed that it was "hot," and asked to have the serial numbers removed. The police officer who received the watch from the store manager was examined, as well. At the conclusion of the hearing the court reversed its earlier ruling and denied appellant's motion to suppress the watch.

The case was tried to a jury, and appellant was found guilty of theft by receiving. The value of the watch was determined to be in excess of $2,500, rendering the crime a class B felony pursuant to § 41-2206(5)(a). Before the jury went on to consider sentence enhancement under the habitual offender statute, the members were polled at appellant's request. During the polling, one of the defense witnesses, with the verbal encouragement of appellant, asserted that one of the jurors was a prostitute. The court admonished the jury not to allow the outburst to affect their sentencing decision, and two jurors acknowledged that their decision would indeed be affected. Appellant moved for a mistrial. The court allowed the sentencing phase to proceed and postponed consideration of the motion.

Upon its return, the jury stated that it had "agreed unanimously not to fix the sentence and to allow the judge to fix the sentence if possible." Appellant objected that the

court had access to prejudicial information. The court then passed judgment under the provisions of Ark. Stat. Ann. § 43-2306 (Repl. 1977), sentencing appellant to fifteen years in the Arkansas Department of Correction and assessing a $10,000 fine. From that decision this appeal arises.

Appellant argues first that the court erred in denying the defense motion to suppress the introduction into evidence of the gold Rolex watch. He claims that the seizure without a search warrant violated his Fourth Amendment rights. The court's denial of appellant's motion was grounded on two reasons: (1) when appellant, as bailor, gave the property to the jeweler, as bailee, he gave him apparent authority to act with reference to that property under the circumstances; (2) the jeweler made a telephone call to the police officer informing him that the serial numbers might soon be removed, thus justifying a warrantless seizure under exigent circumstances.

It is appellant's view that he retained an expectation of privacy in the gold watch despite any apparent authority vested in the jeweler. He relies on *United States* v. *Butler,* 495 F.Supp. 679 (E.D. Ark. 1980), a case dealing with a third party consent to the warrantless search of a bureau drawer and a locked suitcase discovered in the defendent's room. The federal court held that the defendant had a reasonable expectation of privacy in the drawer and suitcase and that his father had no lawful authority to consent to the search. The court laid particular emphasis on the absence of exigent circumstances.

We believe that the circumstances of the present case distinguish it from *Butler, supra.* Appellant's reasonable expectation of privacy in the gold watch was considerably diminished when he delivered it to a jeweler with instructions to efface the serial number and to add decorative designs. These directions entailed the shipping of the watch to New York for the requested alterations. Jewelers in both Little Rock and New York thus had access to the watch, and, while appellant's expectation of privacy may have continued, the reasonableness of the expectation cannot be said to have been of the same degree as that of the defendant in

Butler. A watch openly delivered to a jeweler in a business open to the public is not the same thing as a closed bureau drawer or a locked suitcase in a private residence.

Third person authority may be based upon the fact that the third person shares with the absent target of a search a common authority over, general access to, or mutual use of the place or object sought to be inspected under circumstances that make it reasonable to believe that the third person has the right to permit the inspection in his own right and that the absent target has assumed the risk that the third party may grant this permission to others. *United States* v. *Matlock,* 415 U.S. 164 (1974); *United States* v. *Butler, supra.* In the instant case, for the purposes of the bailment, appellant and the jeweler shared common authority over and general access to the watch in question. The jeweler, moreover, initiated the contact with the police, not the other way around. As manager of the shop, the jeweler was clothed with ample authority to notify the police of suspicious circumstances surrounding goods brought to his place of business. In fact, if the jeweler had followed the instruction of appellant without notifying the police, the jeweler may well have become a participant in the crime. Appellant had voluntarily surrendered the watch to the jeweler, expecting that he would do whatever would be necessary to comply with his instructions regarding the changes he wished to be made. The fact that appellant told the jeweler the watch was "hot" clearly indicates that he did not regard the issue of privacy as being of the first importance; it further supports our conclusion that appellant extended sufficient authority to the jeweler to consent to the taking of the watch by the police.

Appellant attacks the trial court's finding of exigent circumstances, contending that the time between the police officer's conversation with the jeweler and the seizure of the watch on the following day provided more than enough opportunity for the officer to obtain a warrant. Yet, as the United States Supreme Court observed in *Cardwell* v. *Lewis,* 417 U.S. 583 (1974): "The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's

necessitating prompt police action." A real danger existed in the present case that the watch seized might have been altered beyond recognition if not destroyed. Although *Cardwell, supra,* applied to the seizure of a car, the concept of mobility underlying the case is applicable in the present set of circumstances when a watch about to be defaced is involved.

In his second point for reversal, appellant urges that the trial court erred in admitting the watch into evidence over his objection that an inadequate chain of custody had been established. Specifically, appellant complains that a proper foundation for authentication should have included testimony regarding the handling of the watch in New York. As he puts it, a "gap" appears in the chain of custody from the time part of the watch was mailed to New York to its return to Little Rock.

Appellant's argument would have been more relevant had it addressed a break in the chain after the watch was seized. No objection was made, however, to the handling of the watch once it was in police custody. Only the dial of the watch had been sent to New York; it was mailed in a parcel bearing appellant's name and was returned in the same manner. The owner was able to identify it positively.

We recently dealt with the issue of chain of custody in *Meador* v. *State,* 10 Ark. App. 325, 664 S.W.2d 878 (1984). There, a weapon introduced into evidence was not in the sheriff's possession at all times and no serial number of the receipt was available. We held that the gap in that case affected the weight to be given the evidence rather than its admissibility.

> In establishing a chain of custody prior to the introduction of evidence at the trial, it is not necessary to eliminate every possibility that the evidence has been tampered with . . . The issue is whether the trial court abused its discretion in determining that in reasonable probability the integrity of the evidence was not impaired and that it had not been tampered with.

In *Davis* v. *State,* 275 Ark. 264, 630 S.W.2d 1 (1982),

the Arkansas Supreme Court found that there was little likelihood of tampering and no abuse of discretion when a judge admitted into evidence a fingerprint card that had been handled by some unknown person with the Federal Bureau of Investigation in Washington, D.C. As in the present case, the unknown person in another city was the only broken link in the chain. Here, as in *Davis, supra,* other testimony satisfied the trial court that "in reasonable probability" the evidence was genuine and had not been tampered with. We find no abuse of judicial discretion and consequently no error on this point.

Appellant's third point for reversal is that the trial court erred in refusing to grant his motion for a mistrial when two jurors declared that they would be unable to pass sentence impartially. Both jurors were reacting to the uproar caused in the courtroom by a defense witness's assertion that one of the jurors was a prostitute. It is readily apparent from a review of the record that appellant seconded the witness in her disruptive remarks:

> WITNESS: Listen—
> DEFENDANT: Tell them. Tell them.
> WITNESS, SHERRY JONES: She cannot do that because she [a juror] has worked with me before.
> DEFENDANT: She can't. That's right.
> WITNESS, SHERRY JONES: She is a prostitute, your Honor.
> WITNESS: Your Honor, she is a prostitute.
> DEFENDANT: Sit down over there. Sit down. She's pregnant.
> WITNESS: Your Honor, she is a prostitute.

The significant part appellant played in the disruption that he now claims occasioned prejudicial error cannot be overlooked by this court. His behavior at the time in question is akin to invited error, and it is settled that one who is responsible for error should not be heard to complain of that for which he was responsible. *Berry* v. *State,* 278 Ark. 578, 647 S.W.2d 462 (1983); *Kaestel* v. *State,* 274 Ark. 550, 626 S.W.2d 940 (1982). In *Illinois* v. *Allen,* 397 U.S. 337 (1970), the United States Supreme Court observed that an accused

cannot be permitted by his disruptive conduct to avoid being tried on the charges brought against him.

The trial court is granted a wide latitude of discretion in granting or denying a motion for mistrial. Except for an abuse of that discretion or manifest prejudice to the complaining party we will not reverse on that basis. *Berry* v. *State, supra; Hill* v. *State,* 275 Ark. 71, 628 S.W.2d 285 (1982). A mistrial is an extreme remedy which should be used only as a last resort. *Bateman* v. *State,* 2 Ark. App. 339, 621 S.W.2d 232 (1981). Any possibility of prejudicial error was removed by the jury's action in acknowledging their inability to determine a sentence in requesting the trial court to do so in their stead.

It is this action of the jury that forms the basis for appellant's fourth point for reversal. He argues that the court erred in sentencing him upon being informed by the jury that it had unanimously decided not to pass sentence. Such a decision by the jury is clearly indicative of the jurors' scrupulous avoidance of passing a sentence based upon prejudice. In addition, the trial judge stated that she had not been affected by the disturbance. Finally, the court's action was in compliance with Ark. Stat. Ann. § 41-802 (Repl. 1977) and Ark. Stat. Ann. § 43-2306 (Repl. 1977), which provide for the trial judge's fixing punishment in cases when "the jury fails to agree on the punishment." The trial court therefore acted within the bounds of its statutory authority.

Affirmed.

CRACRAFT, C.J., and CORBIN, J., agree.

FIRST STATE BANK OF CROSSETT, ARKANSAS
v. Barbara PHILLIPS

CA 84-86 681 S.W.2d 408

Court of Appeals of Arkansas
Division I
Opinion delivered December 19, 1984

Griffin, Rainwater & Draper, by: *Paul S. Rainwater,* for appellant.

Arnold, Hamilton & Streetman, for appellee.

DONALD L. CORBIN, Judge. Appellant, First State Bank of Crossett, brought an action against appellee, Barbara Phillips, to foreclose a real estate mortgage upon her home. In answer, appellee raised the affirmative defense of estoppel and counterclaimed, seeking damages for appellant's violation of certain provisions of the Federal Truth in Lending Disclosure Law. The trial court made the following findings: (1) appellant was estopped from foreclosing the mortgage, (2) appellee was entitled to reinstatement of the underlying debt upon the terms stated in the mortgage, and (3) appellee was entitled to judgment in the amount of $1,000.00 plus interest and attorney's fees for appellant's violation of the Federal Truth in Lending Disclosure Law. We affirm.

Appellant made a $35,000.00 home loan to the Brooks, appellee's predecessor in title, in 1977. The Brooks had executed a promissory note for $35,000.00 in favor of appellant, to be paid in 59 monthly installments of

$275.36 and a final installment of $33,520.93. The Brooks had secured the note with a mortgage upon the property which recited a note of $35,000.00 payable in 360 monthly installments of $275.36 each.

In May of 1980, appellee, Barbara Phillips, bought the Brooks' home and assumed their loan with appellant. The "Agreement of Assumption, Release and Modification" entered into by appellee, the Brooks and appellant, referred to the mortgage and note, citing only the monthly payment amount of $275.36 and the interest rate of 8.75 percent per annum. The agreement itself did not state the number of monthly payments for which the mortgage was calculated. The mortgage cited 360 payments of $275.36 each. Appellee did not see or receive a copy of the Brooks' original note.

In July of 1982, appellant notified appellee that pursuant to the balloon feature of Brooks' original note, the balance of the indebtedness was then due. Appellee was unable to make this payment but continued to make monthly payments of $275.36 which appellant accepted. In December of 1982, appellant filed its action for foreclosure.

In her answer to appellant's foreclosure action appellee raised the affirmative defense of estoppel claiming that appellant misrepresented to her that the loan was payable in 360 installments of $275.36 each and violated the Federal Truth in Lending Disclosure Law by failing to disclose the number, amount and timing of payments scheduled to repay the loan obligation.

On appeal, appellant argues that the trial court's finding that appellant was estopped to foreclose the mortgage was against the preponderance of the evidence.

Upon appeal, we review the evidence in the light most favorable to appellee and sustain the trial court's findings unless they are clearly against the preponderance of the evidence. ARCP Rule 52(a).

The doctrine of estoppel is raised to prevent an injustice to one who has in good faith relied upon the actions, representations, or conduct of another to his detriment. *Collier* v. *Brent,* 266 Ark. 1008, 589 S.W.2d 198 (1979). To establish estoppel, one must show that the party being estopped knew the facts and intended that his conduct be acted upon, and that the party seeking estoppel was ignorant of the true facts and relied upon the other's conduct to his injury. *Wells* v. *Everett,* 5 Ark. App. 303, 635 S.W.2d 294 (1982). Substantial evidence was presented indicating that appellant's loan officer knew the terms of the original note when he discussed with appellee her assumption of the loan. Evidence was presented to establish that not only did the officer fail to give appellee a copy of the original note or to inform her of its terms, but he incorrectly informed her that the mortgage was payable in 360 monthly installments of $275.36. Appellee testified that she questioned the loan officer about the terms of the loan and at no time was she ever made aware that the terms of the loan repayment were anything but 360 payments of $275.36 each. Appellee testified that the repayment terms were of extreme importance to her because of her limited income and that she would never had bought the house had she known the terms included a balloon payment. Appellant's witness testified that he did not remember discussing 360 payments with appellee. However, it is the province of the trier of fact to determine the credibility of the witnesses and resolve any conflicting testimony such as existed here. We recognize the superior opportunity of the trial court to judge credibility of witnesses. ARCP Rule 52(a); *Morriss* v. *Wynia,* 270 Ark. 260, 603 S.W.2d 482 (Ark. App. 1980). Deferring to the trial court's superior ability to resolve issues of credibility, we believe there was ample evidence to sustain the trial court's finding that appellant was estopped from foreclosing its mortgage.

Appellant also argues that the trial court erred in awarding appellee damages upon her counterclaim because her claim is barred by the one year limitation on actions under 15 U.S.C. § 1640(e) (1982). Appellant does not dispute that it failed to make the disclosures required under Regulation Z of the Truth in Lending Regulations

codified at 12 C.F.R. § 226.20 (1982), only that appellant's action was barred by the one year limitation under 15 U.S.C. § 1640(e) which states:

> Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law.

Appellant argues that appellee's counterclaim did not fall under the "recoupment or set-off" exception of 15 U.S.C. § 1640(e), but was a separate cause of action for an independent wrong and therefore barred because it was not brought within one year of the violation. We must disagree. The language of § 1640(e) makes it clear that one sued to collect a debt may assert, as recoupment or set-off, any counterclaim for violation of the Federal Truth in Lending Disclosure Law regardless of the one year limitation. Recoupment is the right to keep back rightfully some part owed so as to reduce or dimish the total sum due. See, *United Missouri Bank* v. *Robinson,* 7 Kan. App. 120, 638 P.2d 372 (1981). In this instance, appellant's action and appellee's counterclaim arose from the same loan transaction. Appellee would have been entitled to a recoupment or set-off in the amount awarded to her upon her counterclaim even if appellant had prevailed upon his cause of action. Thus, appellee's counterclaim was one in the nature of a recoupment and the trial court correctly determined that the one year limitation under 15 U.S.C. § 1640(e) was inapplicable.

Affirmed.

CRACRAFT, C.J., and CLONINGER, J., agree.

B. J. McADAMS, INC. *v.* DOGGETT LEASING COMPANY, INC. and Junior DOGGETT

CA 84-102 681 S.W.2d 406

Court of Appeals of Arkansas
Division I
Opinion delivered December 19, 1984
[Rehearing denied January 16, 1985.]

James W. Woods, for appellant.

Henry & Duckett, for appellee.

DONALD L. CORBIN, Judge. Appellant, B.J. McAdams, Inc., is a motor carrier of property in interstate commerce, and enters into vehicle lease agreements with owners of tractors and trailers to maintain a fleet of vehicular equipment to provide transportation services. Appellees, Doggett Leasing Company, Inc., and Junior Doggett, executed five such agreements with appellant, and were to receive a specified percentage of the net revenue from each load transported by appellees' vehicles. Net revenue was defined in the agreements "as gross revenue less amounts paid to other persons." Also, appellees were to reimburse appellant for any claims for cargo damage caused directly or indirectly by appellees or their employees.

On June 23, 1982, appellees filed suit alleging that appellant had breached the terms of the agreements by (1) deducting fees from the compensation owed to appellees,

from October, 1977, through January, 1982, and paying the fees to two wholly-owned subsidiaries of appellant, and (2) deducting a late delivery claim and a cargo damage claim from appellees' compensation, which were not caused by appellees or their employees.

Appellant filed a counterclaim for breach of the agreements alleging that it had paid certain cargo damage claims caused by appellees or their employees, for which it had not been reimbursed by appellees.

On October 31, 1983, in a trial by jury, a verdict was rendered in favor of appellees on their complaint and against appellant on its counterclaim. Appellant filed a motion for new trial which was denied by the trial court, and appellant prosecutes this appeal.

Appellant raises two issues on appeal: (1) The trial court erred in failing to find, as a matter of law, that the contract phrase, "amounts paid to other persons," was unambiguous, and the interpretation of the phrase by the jury was not supported by substantial evidence. (2) The jury verdict against appellant on the complaint and counterclaim involving cargo damage claims was not supported by substantial evidence.

We need not reach either of these arguments because appellant may not now question the sufficiency of the evidence to support the verdict because appellant failed to renew its motion for a directed verdict at the conclusion of all the evidence, nor did appellant file a motion for judgment notwithstanding the verdict. In *McFall Chevrolet Co.* v. *Collins,* 271 Ark. 469, 609 S.W.2d 118 (Ark. App. 1980), this Court stated:

> [I]n order for an appellant to challenge the sufficiency of the evidence in a jury trial, he must either move for a directed verdict at the conclusion of all the evidence, move for a judgment notwithstanding the verdict, or move for a new trial because of insufficiency of the evidence. The failure to do one of these three requirements precludes raising the issue on appeal.

The rule has since been changed by a May, 1983, amendment to delete the mention of a motion for a new trial as being a means to challenge the sufficiency of the evidence of a jury verdict. ARCP Rule 50(e) now states:

> (e) Failure to Question Sufficiency of the Evidence. When there has been a trial by jury, the failure of a party to file a motion for directed verdict at the conclusion of all the evidence, or a motion for judgment notwithstanding the verdict, because of insufficiency of the evidence will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the jury verdict. [Amended by Per Curiam, May 16, 1983.]

The trial of this case was on October 31, 1983, and was clearly subject to the rule change.

Affirmed.

CRACRAFT, C.J., and CLONINGER, J., agree.

INSURED LLOYDS INS. CO. *v.* ARKANSAS TRUCK PARTS, INC.

CA 84-29 681 S.W.2d 403

Court of Appeals of Arkansas
Division I
Opinion delivered December 19, 1984

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

Hoofman & Bingham, P.A., for appellee.

MELVIN MAYFIELD, Judge. Insured Lloyds Insurance Company appeals the trial judge's decision granting appellee judgment on a garage liability policy. The appellee is engaged in the repair and sale of used cars and in the sale of used automotive parts. The policy was

purchased from a local insurance agency and obtained by it from Lloyds' general agent, Arkansas All Risks, Inc. The policy provided "Automobile Hazard 1" coverage as follows:

> (1) the ownership, maintenance or use (including loading or unloading) of any automobile for the purpose of garage operations, and (2) the occasional use for other business purposes and the use for non-business purposes of any automobile owned by or in charge of the named insured and used principally in garage operations, and (3) the ownership, maintenance or use of any automobile owned by the named insured while furnished for the use of any person.

The garage liability master endorsement, expressly made a part of the policy, provides space for the listing of "furnished automobiles" and "service vehicles." No vehicle is listed in the space allotted to either category and at the top of each space the words "no coverage is provided" have been typed. It is undisputed that appellee had no "service vehicles" at the time the policy was issued. The evidence does not establish whether appellee did or did not have any "furnished automobiles" at the time; apparently, this is because the parties were not concerned with the insurance coverage of "furnished automobiles."

Appellee subsequently acquired a 1979 GMC wrecker and, during the period covered by the policy, the wrecker was involved in an accident when appellee's driver was delivering some parts and turned in front of another truck. Lloyds denied that its policy afforded liability coverage for the damages to the other truck. Appellee paid that claim and brought this suit against Lloyds. The judge, sitting without a jury, found the policy ambiguous, resolved the ambiguity against Lloyds, and gave appellee judgment for the amount it paid to settle the claim, plus 12% penalty, and attorneys' fees. It is Lloyds' contention that the policy is unambiguous and that it did not afford liability coverage for the wrecker.

We start with appellee's assertion that a garage

liability policy is unique. The case of *Morrison* v. *Anchor Casualty Co.*, 53 Wash.2d 707, 336 P.2d 869 (1959), is cited. The opinion in that case states:

> An insurance company lawyer, writing in the *Insurance Law Journal* (October, 1954), p. 668, commences an article . . . with the following statement:
>
> "The Automobile Garage Liability Policy is one of the most complex, and perhaps least understood, liability forms in use today. Its complexity is largely attributable to the breadth of coverage, that is, it embraces a multiplicity of hazards which otherwise are written under separate policies."

The court's opinion in *Morrison* also points out that a "very important distinction" between the automobile garage liability policy and standard automobile liability insurance is that the garage policy does not insure a particular automobile. The appellee says this distinction is very important in the instant case.

Turning to the master endorsement, to which we have referred, the appellee points to the fact that the space provided for the listing of "service vehicles" does not provide a column for the listing of the premium charge for such vehicles whereas the space for the listing of "furnished automobiles" does provide a column for the listing of the premium charge for those vehicles. Appellee then asks: "If a category is provided under furnished automobiles for a premium charge on the appellant's form, why is there not a category under the service vehicle portion for a premium charge?" The appellee answers its own question as follows: "The answer is that a premium has already been charged for service vehicles under the advance premium provision of hazard 1 coverage which used a payroll basis to determine the extent of the exposure for which the appellant must charge."

We have to agree with appellee's answer. The Hazard 1 provision says it covers "(1) the ownership, maintenance

or use (including loading or unloading) of any automobile for the purpose of garage operations. . . ." It is undisputed that the wrecker involved in this case was owned by the appellee and was being used in appellee's garage operations at the time it collided with the other vehicle. It is undisputed that an advance premium had already been charged and collected for the policy's Hazard 1 liability coverage. It is undisputed that this advance premium was based on appellee's payroll and that the payroll could be audited.

The appellee next points to the space on the master endorsement where service vehicles could be listed and calls our attention to the fact that printed under that space is the following: "Coverage is automatically extended to newly acquired Service Vehicles during the policy period so long as the Named Insured notifies the Company within 30 days of such acquisition and proper premium is charged therefor." Since the evidence shows that the wrecker was acquired by appellee during the policy period and that appellee's insurance agent promptly notified Lloyds' general agent of that fact, the next question is whether the "proper premium" has been charged.

Appellee has the same answer to that question. The proper premium was charged when the advance premium based on the appellee's payroll was charged. Appellee's insurance agent testified to the same effect. On the other hand, a witness from Lloyd's general agent, Arkansas All Risks, Inc., testified to the contrary. He would not say that a party who has Hazard 1 coverage and adds a service vehicle must, in every case, pay an additional premium, but he did say that *Lloyds* would charge an additional premium in that situation. The next question is: Did Lloyds have the right under its contract to charge this additional premium as a condition for coverage?

Lloyds places great emphasis on the following evidence. After the appellee acquired the wrecker, the local agent wrote Lloyds' general agents stating:

Please add the following vehicle to this policy:

> 1979 GMC Wrecker . . .
>
> . . .
>
> We want liability coverages & Fire, Theft, CAC & Collision - 250 deductible will be sufficient. Let me know if you need other information. I would appreciate a quote.

Lloyds' general agent replied to that letter, according to appellee's agent, with a quote of $1100.00. Appellee's local agent testified that he told Lloyds' general agent that the Hazard 1 coverage already afforded appellee liability insurance and that he was able to get the collision coverage with another company at a cheaper rate. Appellee's agent admitted that he ultimately received a letter from Lloyds' general agent stating that in order to provide liability coverage for the wrecker the appellee would have to buy a commercial automobile policy or add it to his garage policy and pay a premium of $820.00. It is also admitted that this quote was not accepted and that the premium quoted was not paid.

However, as we have said, the question is whether Lloyds had the right to charge this additional premium as a condition for liability coverage of the wrecker while used in the appellee's garage operation. We have to agree with the appellee that the insurance policy is, at least, ambiguous in that regard. We have held that an ambiguity must be construed against the insurance company preparing the contract, and that the policy will be construed so as to provide coverage unless it is patently unreasonable to do so. *MFA Mut. Ins. Co.* v. *State Farm Mut. Auto. Ins.*, 268 Ark. 746, 595 S.W.2d 706 (Ark. App. 1980). Applying that rule, the trial judge found for the appellee. We do not set aside the trial judge's findings of fact unless clearly against the preponderance of the evidence. ARCP 52(a). We think his decision in this case must be affirmed.

Appellant argues, in the alternative, that if liability coverage is found to exist the amount recoverable should

be reduced by the $250.00 deductible referred to on the master endorsement. While it is not clear that this deductible applies to the coverage involved in this case, the short answer is that the issue was not raised in the trial court and cannot be raised here for the first time. *Old American Life Ins. Co.* v. *Williams,* 241 Ark. 250, 407 S.W.2d 110 (1966); *Tompos* v. *City of Fayetteville,* 280 Ark. 435, 658 S.W.2d 404 (1983).

Affirmed.

COOPER and CORBIN, JJ., agree.

Dr. E. G. DOOLEY and WILLIAMS CHEMICAL COMPANY, INC. *v.* CECIL EDWARDS CONSTRUCTION CO., INC. and STEVE'S PLUMBING AND HEATING, INC.

CA 84-95 681 S.W.2d 399

Court of Appeals of Arkansas
Division II
Opinion delivered December 19, 1984

Person & Vanwinkle, by: *Gary D. Person,* for appellants.

Warner & Smith, by: *Joel D. Johnson,* for appellees.

TOM GLAZE, Judge. Appellees sued appellants in circuit court to recover the value of certain construction work they had done for appellants. The jury returned a verdict of $4,360.16 for appellee Cecil Edwards Construction Company (Edwards), and $19,862.48 for appellee Steve's Plumbing and Heating. On appeal, appellants Dr. E. G. Dooley and Williams Chemical Company, Inc., contend the trial court erred: (1) in admitting testimony pertaining to another lawsuit pending between the parties in Oklahoma; (2) in permitting the permissive joinder of the appellees as plaintiffs; and (3) in giving certain instructions to the jury.

Appellee Edwards is a general building contractor. In May of 1980, appellants and Edwards agreed that Edwards would do certain construction work for appellants. Edwards hired appellee Steve Cooksey as a subcontractor to do plumbing. From May, 1980, to July, 1981, appellees worked on five construction projects for appellants in Arkansas and one in Oklahoma. The last project was the construction of a truck stop in Oklahoma. Because they became dissatisfied with the work the appellees had done on the truck stop, appellants terminated their relationship.

Appellee Edwards' officials testified at great length about the nature of the construction work they had done for appellants. They admitted that appellants had paid them all they owed for the work done in Arkansas, except for $4,300 due on a construction job at Sebastian Lakes. Appellee Edwards stated that appellants owed his company approximately $85,000 for the Oklahoma project. Appellee Cooksey testified that even though he was Edwards' subcontractor, he had a separate agreement with appellants whereby he was to directly bill appellants at the conclusion of all of the plumbing he did for appellants and that he did bill appellants, who never paid him for his work on the Arkansas construction projects. Appellee Cooksey admitted that slightly over a year passed between the start of his work for appellants and his presentation of a bill to appellants for the work done on the five Arkansas projects. Appellee Cooksey also stated that he worked on the Arkansas projects

at the same time he worked on the truck stop in Oklahoma. Dr. Dooley testified for the appellants and admitted that both appellees had provided construction services for them at their request, but denied owing either appellee any money beyond what had already been paid to Edwards. He also denied having any direct billing agreement with appellee Cooksey and stated that if Cooksey was not paid, Edwards, Cooksey's general contractor was liable.

Appellants' first argument for reversal is that the trial court erred in admitting evidence pertaining to the construction of the truck stop in Oklahoma, which was the subject of a then-pending lawsuit between the parties in Oklahoma. According to appellants, the testimony describing the circumstances of the truck stop construction work and the existence of a resultant lawsuit was irrelevant and prejudicial and therefore should not have been admitted. Relevant evidence is, of course, evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ark. Unif. R. Evid. 401. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ark. Unif. R. Evid. 403. Before analyzing the relevancy of the testimony pertaining to the lawsuit in Oklahoma, we note that the trial court has discretion in ruling on the relevance of evidence, and we will not reverse in the absence of an abuse of discretion. *Olson* v. *Riddle,* 280 Ark. 535, 659 S.W.2d 759 (1983).

We agree with the trial court below that the testimony complained of is relevant. The testimony does go to the existence of some fact that is of consequence to the determination of this action — in this case, the evidence of the lawsuit in Oklahoma goes to the issue of whether or not appellants owed any money to appellees. This evidence makes the existence of the issue more or less probable because it suggests why appellants would refuse to pay appellees when they did, in fact, owe them. Edwards' officials testified that the Sebastian Lakes project was completed in April of 1981, but that the final bill for the job, the $4,360.16 at issue, was not submitted to appellants until June 30, 1981. By July 1,

1981, appellants had become dissatisfied with appellees' work on the truck stop in Oklahoma and had dismissed them—in fact, Edwards' officials noted that they had been run out of appellees' office in July of 1981. When cross-examined about the Sebastian Lakes bill, appellant Dooley stated:

> I couldn't understand why we were billed, there, in June for a job where the store opened at Christmas time. It appears like all of these billings took place after the truck stop job was—was finished and we had difficulties on that last—problems over there.

From the foregoing evidence, appellants' receipt of Edwards' $4,360.16 bill for the Sebastian Lakes job coincided with the appellants' dismissal of Edwards over Edwards' workmanship on the Oklahoma truck stop job. Obviously, the jury could have concluded from these facts that even if appellants owed Edwards for the Sebastian Lakes job, they had no intention of paying Edwards any more monies after they severed their relationship, at least until they resolved their differences over the Oklahoma job. This evidence may be of slight relevance in this respect; however, as *McCormick on Evidence* notes, it is enough if the item of evidence reasonably shows that a fact is slightly more probable than it would appear without the evidence. *McCormick on Evidence,* at 540-48 (3d ed. 1984).

In addition, appellees testified that they did not complete the construction projects one after the other, but they worked on the Oklahoma job while they were busy with the Arkansas projects. Appellee Edwards' secretary-treasurer stated during cross-examination that appellants' failure to pay for the work Edwards did in Oklahoma "was the reason behind" their decision to sue to collect the debt owed on the Sebastian Lakes project. This testimony about appellees' construction work for appellants in Oklahoma and the resultant lawsuit is background information necessary to enable the jury to fully understand the relationship between the parties. Such background information is relevant. *See McCormick on Evidence,* 541 (3d ed. 1984); and *M. Graham Handbook on Federal Evidence,* 147 (1981).

Even if the evidence at issue is relevant, it may be inadmissible because it is unfairly prejudicial. Ark. Unif. R. Evid. 403. The testimony pertaining to the truck stop construction in Oklahoma is not unfairly prejudicial to appellants. When questioned about the project, representatives of Edwards stated that the lawsuit that arose from the project in Oklahoma was merely *pending*. Appellants argue that the appellees' testimony bearing on the Oklahoma action prejudiced them because such testimony presented appellants to the jury as having not paid *three* claims, rather than only two claims. However, on cross-examination of Edwards' president, appellants developed testimony pertaining to their counterclaims in the Oklahoma suit which suggested to the jury that appellee Edwards did inferior work and tried to defend them by charging for work his company did not do. If any party was prejudiced by the testimony, it was appellees, not appellants. In addition, appellee Cooksey's testimony concerning his billing practices for the Oklahoma project actually *supported* appellants' case in that Cooksey admitted that he did not bill apellants directly for this work, but instead billed appellants through appellee Edwards, his general contractor. Given the earlier testimony that the Arkansas projects and the construction in Oklahoma were all done at approximately the same time, appellee Cooksey's admission lends support to appellants' contention that they had no direct billing agreement with Cooksey.

Appellants next argue that the trial court erred in denying their motion for severance of the appellees, based on their improper permissive joinder. Arkansas Rule of Civil Procedure 20(a), which governs permissive joinder of parties, states, in part:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or rising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action . . .

The facts in this case, summarized above, clearly

demonstrate that the appellees were involved in the same series of transactions—namely, the construction projects that they both worked on for appellants. At trial, the testimony revealed that there were questions of law and fact common to appellees that arose in their actions—for example, both appellees presented a great deal of testimony to explain appellee Cooksey's billing practices and thereby to establish Cooksey's reasons for directly billing appellants. Each appellee needed to establish the fact of Cooksey's agreement with appellants regarding payment for his plumbing services—appellee Edwards to show that his company had received *only* money due to *it,* and appellee Cooksey to show that appellants had, in fact, agreed to pay him, rather than Edwards, his general contractor. The trial court's decision to permit joinder of the appellees in this action was correct and prevented needless waste of scarce space on the court's docket.

Appellant's third allegation of error is that the trial court erred in giving certain instructions to the jury. The instructions appellants complain of were given for both appellees. The instructions provided that if the jury found a contract existed between each appellee and appellants but that the parties had stated no price term in the contract, and if the services were provided by one party and were accepted by the other, and if the party providing the services proved their reasonable value, then the jury should find for the party providing the services. The appellants argue that the trial court gave the jury instructions pertaining to the existence of an implied contract between appellees and appellants. According to appellants, this was error because the existence of such an implied contract was not an issue in the case, and no party presented any evidence that such a contract existed.

This argument is meritless. The instructions appellants complained of are not based on any implied contract theory. Rather, the instructions are based on Arkansas case law, which holds that if a contract makes no statement of the price to be paid for services, the law invokes the standard or reasonableness and fair value, and the fair value of the services is recoverable. *Hawkins* v. *Delta Spindle of Blytheville,* 245 Ark. 830, 434 S.W.2d 825 (1968). The instructions

were justified because appellants admitted that they had a contract with appellee Edwards, that appellee Cooksey was a subcontractor of appellee Edwards, and that both appellees had provided services which appellants had accepted. Appellants disputed only whether they owed appellee Edwards the amount Edwards claimed and whether they owed appellee Cooksey any money at all. Clearly, these facts admitted by appellants justify the trial court's giving the instructions at issue. Indeed, for the trial court to have refused to give these instructions would have been error because a jury should be instructed on all theories of recovery which the evidence warrants. *Daniel* v. *Quick,* 270 Ark. 528, 606 S.W.2d 81 (1980).

Affirmed.

MAYFIELD and COOPER, JJ., agree.

Charles BARTON *v.*
J. A. RIGGS TRACTOR CO., et al

CA 84-281 681 S.W.2d 397

Court of Appeals of Arkansas
Division II
Opinion delivered December 19, 1984

Parker & Parker, by: *Wayland A. Parker, II,* for appellant.

Hardin, Jesson & Dawson, for appellees.

TOM GLAZE, Judge. The appellant, Charles Barton, appeals from the Workers' Compensation Commission's denial of certain expenses he claims to have incurred as a result of a compensable injury he sustained on August 14, 1976. He contends on appeal that substantial evidence does not support the Commission's findings that he was not entitled to certain expenses. We affirm.

After his injury in 1976, the appellant was awarded permanent partial disability benefits of thirty-five per cent to the body as a whole. As a result of the original order in this case, the appellees were to be responsible for all reasonable hospital and medical expenses and mileage arising out of appellant's compensable injury. This appeal arises from a hearing on September 14, 1983, when appellant sought payment of medical and mileage expenses that the appellees had controverted. The administrative law judge set out with specificity the claims that were allowed and those that were disallowed. The law judge ordered the appellees to pay

$5,773.32 in medical expenses and $2,374.02 in mileage expenses. The Commission affirmed the order of the law judge. The appellant appeals from some of his claims that were disallowed.

On appeal, the appellant claims that substantial evidence did not support denying him: (1) mileage expenses for trips to Dr. Eric Nelson and to pharmacies in Fort Smith, (2) reimbursement for medical treatment and medicines prescribed by Dr. Kutait and mileage expenses, and (3) reimbursement for payment of $105 to Dr. Stanton and $204 to Central Baptist Hospital in Little Rock. We find substantial evidence to support the Commission's decision in each instance.

Appellant's claim for mileage expenses to Dr. Nelson, a therapist in Fort Smith, was allowed for thirty-three visits verified by a statement from Dr. Nelson's office showing specific dates the appellant had received treatment. Appellant claimed mileage for an additional forty visits that were not verified, except by a piece of paper on which the claimant had listed forty dates. Appellant's argument on appeal is that appellees did not deny or contradict that claimant made the additional trips to Dr. Nelson, that appellant had "verified" the office visits by his own record, and that the appellees had, in fact, paid all of Dr. Nelson's bills so they ought to pay the present claim for mileage. Whether appellant was entitled to mileage expenses for thirty-three or seventy-three visits was a fact question for resolution by the Commission, which has the responsibility to draw inferences when the testimony is open to more than a single interpretation. *McCollum* v. *Jones Truck Lines,* 244 Ark. 762, 427 S.W.2d 18 (1968). Although appellant argues that his testimony was uncontradicted, testimony of a party is never considered uncontroverted. *Velder* v. *Crown Exploration Co.,* 10 Ark. App. 273, 663 S.W.2d 205 (1984).

We likewise find no error in the Commission's denial of mileage to two pharmacies in Fort Smith. The Commission found that it was not "necessary" or "reasonable" for appellant to drive seventy miles round-trip to buy medicine when he could have used a pharmacy in Greenwood, thirty-

five miles round-trip from his home. What was necessary or reasonable was a fact question for the Commission to resolve; we believe substantial evidence supports its finding.

In denying appellant's claim for payment of medical treatment by and mileage expenses to Dr. Kutait and medication he prescribed, the Commission found that Dr. Kutait was treating appellant for high blood pressure unrelated to his compensable injury. The appellant contended that, by his testimony, Dr. Kutait connected the blood pressure problem with the compensable back injury. Appellant further contended that he was referred to Dr. Kutait by Dr. Stanton so that Kutait's bills were the responsibility of appellees. We agree that Kutait's charges and those related to his treatment would be compensable had appellant been referred to him by Dr. Stanton. However, Stanton's testimony fails to reveal that he referred appellant either to Kutait or to a general practitioner. We believe the testimony supports the Commission's determination that Dr. Kutait's services were not authorized and therefore not compensable. It follows that if Dr. Kutait's treatment was not compensable, neither the medication he prescribed nor the mileage expenses for treatment or for medicine were compensable.

Appellant's last contention is that the Commission erred in not paying $105 to Dr. Stanton and $204 to Central Baptist Hospital. Dr. Stanton's bill was for two medical reports, at $15 each, furnished to appellant's counsel and $75 for a deposition given at the behest of appellant's counsel. The Commission found that these were not compensable items. Appellant has cited us to no authority to the contrary, and we are aware of none.

The last item for which appellant seeks reimbursement is a $204 payment that the Commission found was a duplication of charges included in another Central Baptist Hospital statement which the appellees were ordered to pay. When appellant was admitted to the hospital on August 3, 1981, the Director of Patient Accounts signed a memorandum stating that the hospital would accept Medicare payments less $204 until appellant's workers' compensation

claim was settled or until appellant paid the balance. That memorandum and a past due statement for $204 dated February 8, 1983, were the only evidence appellant presented on this item. Appellant did now show that he had actually paid the $204 deductible amount, nor did he show the amount that Medicare paid. With that figure, the Commission could have determined with certainty whether the itemized hospital bill totaling $2,519.70 did or did not include the $204. The appellant himself was not clear about what, if anything, he or Medicare had paid. Under the circumstances, we believe the evidence was substantial to support the Commission's findings.

We are aware of the multitude of evidence submitted in this case. The law judge made a conscientious effort to sort out all the papers and to ascertain to the penny the amount the appellees were obligated to pay. In adopting the opinion of the law judge, the Commission determined that the final figures of the law judge were accurate. We believe substantial evidence supports the Commission's decision. Therefore, we affirm.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

Jimmie PATE *v.* Troy MARTIN

CA 84-289 681 S.W.2d 410

Court of Appeals of Arkansas
Division I
Opinion delivered January 2, 1985

Hardin, Jesson & Dawson, for appellant.

Lawrence W. Fitting of *Gean, Gean & Gean,* for appellee.

GEORGE K. CRACRAFT, Chief Judge. Jimmie Pate brings this appeal from an order of the circuit court denying his motion to quash a writ of garnishment issued on an award from the Arkansas Workers' Compensation Commission and served upon a person having in his hands assets belonging to him. The sole issue presented by this appeal is whether an award of the Workers' Compensation Commission entered against a partnership in its firm name only and which makes no reference to the individual co-partners may be enforced as a judgment by garnishment or execution against a co-partner. We conclude that it cannot.

In order to bring this narrow issue into focus a recitation of the events leading up to the issuance of the writ is necessary. In April 1978 Troy Martin notified the Arkansas Workers' Compensation Commission by letter that he had been injured within the scope of his employment with "P & P Fabrication." Upon receipt of the letter the Commission prepared and filed a "Dummy A-8" which designated the employer to be "P & P Fabrication." Appellant's counsel filed a controversion of the claim on behalf of "P & P Fabrication." After a hearing the Commission affirmed the findings of the administrative law judge and awarded the appellant all medical expenses and accrued benefits in excess of $7500 against "the respondent." The award and opinion identified the respondent only as "P & P Fabrication." They made no reference as to whether it was a partnership or corporation, or, if a partnership, the identity of the co-partners. The appellee subsequently filed a copy of this award in the circuit court pursuant to Ark. Stat. Ann. § 81-1325(c) (Repl. 1976). There was nothing on the face or contents of the award that would connect or relate to the appellant Jimmie Pate when the writ of garnishment based on it was issued. At the suggestion of appellee's counsel, the clerk placed the name of "Jimmie Pate" on the writ of garnishment as the judgment debtor.

It was undisputed that "P & P Fabrication" was a partnership in which Jimmie Pate and Jimmie Pate, Jr. were equal partners. It was also undisputed that both partners appeared in the hearings before the Workers' Compensation Commission in defense of the claim and admitted that they were equal owners of the firm.

The trial court ruled that because the appellant had notice, appeared and defended before the Commission and was co-owner and partner in P & P Fabrication the circuit court had a right to consider the record before the Commission to determine his legal liability, even though appellant was not named as a party to those proceedings or in the award of the Commission.

In reaching its conclusion the trial court relied on *Ethridge* v. *Brown & Associates,* 258 Ark. 444, 527 S.W.2d 591 (1975). There Ethridge filed his claim against "Alexander Brown and Associates" and the proceedings before the Commission were styled *"Edward Ethridge, Claimant,* v. *Alexander Brown and Associates, Respondents."* Brown appeared and was represented by counsel who contended that the partnership, Alexander Brown and Associates, was not in existence at the time of the injury, and that the claimant was actually employed by Alexander Brown, Inc. There was evidence that the claimant was hired and paid by Mr. Brown and received all of his instructions from him. On conflicting evidence the Commission found that:

> *When the claimant filed his claim against Alexander Brown & Associates, he was, in effect, filing a claim against Alexander Brown individually.*

In the style of the award the respondent was referred to as "Alexander Brown and Associates" and the award was made against the "respondents." On appeal the circuit court ruled that the entity designated as respondent was not a legal one against whom an award might be made and remanded the case for further proceedings. The Arkansas Supreme Court reversed the circuit court stating:

> The circuit court apparently was guided more by the

> style of the claim before the Commission than by the substance of the Commission's findings.
>
> Whether Mr. Brown appeared at the hearing in response to notice served personally or by registered mail makes no difference in this compensation case. It is perfectly clear from the record that Mr. Brown was before the Commission and testified. It is also clear that the Commission's findings were based on substantial evidence. As we read and interpret the Commission's findings, the Commission simply found that *Mr. Brown was doing business as Alexander Brown & Associates at the time of the appellant's injury,* long before the limited partnership by that name was formed, and that Alexander Brown was the appellant's employer and the actual respondent in the case.

In *Ethridge,* although the claim was made against the partnership and the award was so styled, the body of the award shows that on conflicting evidence the Commission found that the actual employer and "respondent" was Alexander Brown individually.

It has long been the rule that in construing a judgment where the identity of a person against whom judgment is rendered is ambiguous or uncertain, resort may be had to the entire judgment or opinion for purposes of identification. In *Ethridge* the body of the award clearly identified the "respondent" against whom that award was being entered. Here, however, the claim was made against "P & P Fabrication" and the award was so styled. The award made no mention of appellant or his son and made no finding that they were the actual employers of the respondent. There was no finding by the Commission that the actual respondent was anyone other than "P & P Fabrication," which was not designated as either a partnership or a corporation. We find it to be error for the circuit court to have made a finding not made by the Commission.

Nor do we find merit in the argument that one may be bound by a judgment even though not a party to the action where he has appeared and actually participated in the

proceedings. While we agree that a court may enter a binding judgment against the individual parties under those circumstances, the Commission did not do so here. Nothing in the award or the opinion indicated an intent to make the appellant personally liable for the award.

Both parties agree that at common law a partnership is not an entity separate from its members and is nothing more than the aggregate of the individuals making it up. The partnership was not recognized as a legal entity separate and apart from the individuals owning it and had no capacity to sue or be sued. It was necessary to bring suit by or against a partnership in the names of the individuals comprising it rather than in the names of the partnership itself. The appellee argues, however, that this rule was abrogated by the Uniform Partnership Act and that a partnerhip may now be sued in the firm name and liability thereby imposed upon the members. We conclude that the enactment of the Uniform Partnership Act set forth in Ark. Stat. Ann. § 65-101 et seq. (Repl. 1980) did not embrace the entity theory as contended for by the appellee, but retained the common law rule that except in certain specific instances a partnership is not an entity separate and apart from its members and remains no more that the aggregate of the individuals forming it.

In *Mazzuchelli* v. *Silberburg*, 29 N.J. 15, 148 A.2d 8 (1959) the court gives a comprehensive history of the partnership act in that respect. In *Mazzuchelli* the court said:

> The Uniform Partnership Law, adopted in this State in 1919, did not embrace the so-called "entity" theory. Lewis, "The Uniform Partnership Act," 29 Harv.L.Rev. 158, 291 (1915); Mechem, Partnership (2d ed. 1920), § 6, p. 11. An early draft by Dean Ames for the commissioners was based on the entity theory and accordingly defined a partnership as "a legal person formed by the association of two or more individuals for the purpose of carrying on a business with a view to profits." Crane, Partnership (2d ed. 1952), § 3, p. 18, n. 31. Dean Lewis, however, advocated the view "that with certain modifications the aggregate or common

> law theory should be adopted." The history appears in the Commissioners' prefatory note, 7 U.L.A. (1949), p. 2. As there revealed, the recommendation of Dean Lewis led to the adoption of a resolution rescinding any prior action which might limit the committee to "what is known as the entity theory." In 1910 the committee and a group of experts recommended that the act "be drawn on the aggregate or common law theory with the modification that the partners be treated as owners of the partnership property holding by a special tenancy which should be called tenancy in partnership." In 1911 Dean Lewis was requested to prepare a draft in "the so-called common law theory," and in 1912 the committee reported a draft, "drawn on the aggregate or common law theory, with the modifications referred to." With amendments not negating that basic thesis, the uniform act was recommended for adoption. In harmony with the decision thus reached, a partnership was defined to be "an association of two or more persons to carry on as *co-owners* a business for profit, " . . . as contrasted with the Ames proposal of "a *legal person* formed by the association of two or more individuals for the purpose of carrying on a business with a view to profits."

In the adoption of our Uniform Partnership Act the legislature followed the recommendation of the drafters to retain the common law or "aggregate" theory. Ark. Stat. Ann. § 65-106 (Repl. 1980) defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." Our legislature did not, as did many other legislatures, accept the Ames definition of "*a legal person* formed by the association of two or more individuals for the purpose of carrying on a business with a view to profits," or make provisions for liability of individual partners sued in the partnership name. Our Uniform Partnership Act adopts the common law approach with modifications consistent with the "entity" approach of the purposes of facilitating the acquisition and transfer of partnership property, marshalling of assets and protecting the business operation against immediate impact of personal involvement of the partners. *Mazzuchelli* v. *Silber-*

burg, supra; McKinley v. *Truck Insurance Exchange,* 324 S.W.2d 773 (Mo. 1959).

The appellee contends that appellant should be precluded from arguing that the judgment is void and cites *Spaulding Mfg. Co.* v. *Godbold,* 92 Ark. 63, 121 S.W. 1063 (1909). In that case Spaulding Manufacturing Company, a partnership, brought suit and obtained judgment against Godbold in its firm name. They levied execution on a piece of property and Spaulding's owners purchased the property at the sale and were given a deed naming Spaulding Manufacturing Company as grantee. Godbold excepted to the deed for the reason that there was "no grantee." The circuit court agreed and ordered the deed stricken from the record. Spaulding had the case removed to chancery where Godbold argued that the judgment itself was void as rendered in the firm name. The chancellor said that this was a matter of form rather than substance and since the objection to the plaintiff's capacity to sue was not taken earlier it was waived and the judgment became a valid one. However, *Spaulding* differs from the present case in several respects and is not controlling here. In *Spaulding* the judgment was *against an individual,* not a partnership. There was no necessity there for the court to take notice of who the partners were or to state that a judgment against the partnership name also constituted a judgment against the partners' individual properties. It should also be noted in *Spaulding* that the suit was in equity. The court held that a conveyance to a partnership by its firm name which did not include the name of the partners did not vest legal title because the partnership is not recognized in law as a person. It held, however, that because a deed is void in law doesn't mean that it cannot be corrected in equity. The individual members of the firm had testified that they were the purchasers of the land and the mistake was made in the draftsmanship of the deed. The court found that, as this was true and equity treats that done which ought to be done, the deed could be reformed and enforced. This case also states the proposition that a partnership is not recognized as a person.

We conclude that the award of the Workers' Compen-

sation Commission against the partnership in its firm name only and which makes no reference to the individual partners may not be enforced at law as a judgment by garnishment or execution against a co-partner. This case is reversed and remanded to the circuit court with directions to enter an order not inconsistent with this opinion.

CLONINGER and CORBIN, JJ., agree.

O'NEAL FORD, INC., *v.* Joann EARLY

CA 84-88 681 S.W.2d 414

Court of Appeals of Arkansas
Division II
Opinion delivered January 2, 1985

Frierson, Walker, Snellgrove & Laser, by: *Malcolm Culpepper,* for appellant.

Wilson, Grider & Castleman, for appellee.

JAMES R. COOPER, Judge. The appellee purchased a used 1980 Ford Granada from the appellant on May 12, 1982. The appellee, at the time of the sale, stated to the appellant's salesman that she needed a dependable car to drive to and from work, a distance of approximately 200 miles per week. While test driving the car before purchasing it, the appellee noticed a "rumping" sound in the rear of the car, and she was assured by the appellant's salesman that the noise could be attributed to the car's radial tires. The appellee traded in her 1977 model Granada, receiving a $1,500.00 credit, and financed the remainder of the purchase price, $4,250.00, through Ford Motor Credit Corporation. The appellee testified that she drove the automobile back to her home, went to a service station, and was informed that the car was two quarts low on engine oil. The next day, the appellee's daughter drove the car back to appellant to have an AM/FM radio installed. On her return trip to Maynard, the appellee's daughter noticed a "pinging" sound in the vehicle's engine.

On Friday, May 14, the appellee returned the car to the appellant because of her concern about this "pinging" noise. The appellant had a mechanic check the automobile, and then produced a list of needed repairs which appellant offered to make pursuant to the Limited Car Use Guarantee that appeared in the contract of sale entered into by both parties. The guarantee, in rather confusing language, stated that it applied to the car's motor, rear end and transmission only, and called for the appellee and the appellant to equally share the costs of any parts and labor necessary to repair the automobile. The appellee, being dissatisfied with the situation, requested that the appellant return to her the 1977 Granada which she had traded. The appellant informed her that this car had been sold. The appellee then requested that her $1,500.00 credit on the trade-in be applied to another

vehicle, which the appellant also refused. The appellee then left the appellant's business, but returned the next Monday in an attempt to trade the 1980 model Granada, but testified that the appellant offered her only $4,200.00 for the car if she traded for another. After consulting with an attorney, the appellant had the attorney send a letter notifying the appellant of her revocation of acceptance of the automobile.

The appellee then filed suit on July 15, 1982, seeking to enforce her revocation of acceptance and a return of the payments made by her towards the purchase of the automobile, as well as incidental and consequential damages, cost and attorney's fees.

At trial, the appellee testified as to the various problems reported by the appellant's mechanic when she returned the vehicle. The evidence disclosed that the car needed valve work only three days after the appellant sold the car to the appellee, needed relocation of the radiator and had various other problems which she could not recall. The jury found that the automobile which the appellant sold to the appellee was nonconforming and that such nonconformity substantially impaired the value of the automobile to the appellee, that the appellant's revocation of acceptance occurred within a reasonable time and thus she was entitled to recover her purchase price along with her incidential damages. The appellant asserts that the trial court erred in failing to grant its request for a directed verdict. We disagree with the appellant, and affirm.

The appellant argues for reversal that a directed verdict was proper below because the appellee failed to introduce any proof which would entitle her to revoke her acceptance of the automobile. We disagree. The appellee's testimony about the required repairs was sufficient proof that the automobile was nonconforming pursuant to the provisions of Ark. Stat. Ann. § 85-2-608 (Add. 1961). This section of the Uniform Commercial Code provides as follows:

> Revocation of acceptance in whole or in part. —(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially

impairs its value to him if he has accepted it
(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the sellar's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

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

It is clear from a reading of this Code section and the cases applying it that the nonconformity must substantially impair the value to the buyer. The question whether goods are nonconforming and whether a revocation of acceptance was given within a reasonable time are questions of fact. *Dopieralla* v. *Ark. La. Gas Co.*, 255 Ark. 150, 499 S.W.2d 610 (1973); *Frontier Mobile Home Sales* v. *Trigleth,* 256 Ark. 101, 505 S.W.2d 516 (1974). It is obvious from the jury's verdict that this question was resolved in the appellee's favor, and our review of such decisions is controlled by the substantial evidence rule. We find substantial evidence in the testimony of the appellee, the only witness to testify at the trial below, to support the jury's finding.

Encompassed in the appellant's motion for a directed verdict was its argument that the Limited Car Use Guarantee, which the appellee signed, limited her recourse against the appellant in the event of a nonconformity in the automobile. We cannot agree. The guarantee may have limited the appellee's other warranties provided for by the Uniform Commercial Code, or remedies therein for the breach of such warranties, but in no way can be construed to

have foreclosed her right to revoke her acceptance within a reasonable time of discovery of a nonconformity in the automobile. As stated in *Blankenship* v. *Northtown Ford, Inc.,* 420 N.E.2d 167 (Ill. App. 1981):

> In this case, the evidence unequivocally demonstrated that the substantially defective nature of the vehicle clearly impaired its value to the plaintiffs and thus revocation of acceptance is appropriate even if the dealer has properly disclaimed all implied warranties.

See also, *Ford Motor Credit Company* v. *Harper,* 671 F.2d 1117 (8th Cir. 1982).

Therefore, we hold that the appellee's agreement to limit her warranty rights under the Code did not affect her right to revoke acceptance. The trial court correctly denied the appellant's motion for a directed verdict, and, since the jury's verdict is supported by substantial evidence, we affirm.

Affirmed.

GLAZE and MAYFIELD, JJ., agree.

AMERICAN RED CROSS, et al *v.* Billie HOGAN

CA 84-299 681 S.W.2d 417

Court of Appeals of Arkansas
Division I
Opinion delivered January 2, 1985

Michael E. Ryburn, for appellants.

Whetstone & Whetstone, by: *Zan Davis,* for appellee.

LAWSON CLONINGER, Judge. In their appeal from the decision of the Workers' Compensation Commission, appellants argue that appellee was improperly awarded benefits because she was not injured during the course and scope of her employment. They insist that the going and coming rule is applicable and that none of the exceptions apply. We agree, and we reverse the Commission's award.

Appellee was employed by appellant American Red Cross as a nurse working in a mobile unit that traveled to various locations for the purpose of collecting blood donations. The Red Cross headquarters, at which the unit was stationed, is in Little Rock; appellee lived in North Little Rock. Ordinarily, appellee would report to the main office at 7:30 a.m. to begin work in the unit; occasionally, however, appellee would be required to meet the unit at another, more convenient, location, and from there travel in the mobile unit to the designated place of work.

On the morning of January 18, 1982, appellee was ordered to meet the mobile unit at Protho Junction in North Little Rock. From Protho Junction, appellee was to ride in the mobile unit to the Remington Arms Plant, the place of work for the day. En route to the rendezvous, appellee, while attempting to avoid a collision with a skidding truck, ran into a telephone pole and was injured. Appellants accepted her claim initially and made payments for over a year. When the matter was brought before an administrative law judge, the question was resolved in favor of appellee. The Workers' Compensation Commission subsequently adopted the law judge's opinion in affirming his decision.

Appellants contend that the going and coming rule precludes compensation for appellee. Injuries sustained by employees while going to and returning from their regular place of employment are not, as a general rule, deemed to arise out of and in the course of employment within the meaning of the Workers' Compensation Law. *Ark. Power & Light Co.* v. *Cox,* 229 Ark. 20, 313 S.W.2d 91 (1958). The rationale for the going and coming rule is the fact that all

persons, including employees, are subject to the recognized hazards of travel to and from work in a vehicle. In *City of Sherwood* v. *Lowe,* 4 Ark. App. 161, 628 S.W.2d 610 (1982), we stated:

> In order for the injury to be compensable, the employee must fall within one of the exceptions to the 'going and coming' rule. . . .There are numerous exceptions to the 'going and coming' rule: (1) where an employee is injured while in close proximity to the employer's premises; (2) where the employer furnishes the transportation to and from work; (3) where the employee is a traveling salesman; (4) where the employee is injured on a special mission or errand; and (5) when the employer compensates the employee for his time from the moment he leaves home until he returns home. (Citation omitted).

The Commission held that the going and coming rule did not apply in the present case because (1) American Red Cross was aware of the hazards to which appellee was subjected; (2) American Red Cross had provided transportation because of the dangerous road conditions on at least one occasion a few days before appellee's injury; and (3) appellee went on the Red Cross payroll from the time the mobile unit left the Little Rock headquarters.

In considering a claim, the Workers' Compensation Commission must follow a liberal approach and draw all reasonable inferences favorably to the claimant. To further the beneficent and humane purposes of the Workers' Compensation Law, all doubtful cases should be resolved in favor of the claimant. *Central Maloney, Inc.* v. *York,* 10 Ark. App. 254, 663 S.W.2d 196 (1984). In the instant case, appellee's testimony regarding the time she went upon the Red Cross payroll was somewhat inconsistent: at one point she stated that she was paid from the time the mobile unit left the Little Rock center, and at another she said that she would have been paid only from the time she would have entered the mobile unit. The Commission, however, in accepting the former version of appellee's testimony, we believe, failed to consider the explanation later made by

appellee with regard to the apparent conflict in her testimony. The following testimony of appellee on cross examination clearly indicates that appellee was not on the Red Cross payroll at the time of the accident:

> Q. Were you an hourly worker? Were you paid wages by the hour?
>
> A. Yes, sir, by the hour.
>
> Q. What time did your hourly wages start? When would they start?
>
> A. From the time the mobile left the unit, left the Center.
>
> Q. Are you talking about from the time you reached the mobile site?
>
> A. I'm talking about — No, I 'm talking about from the time you would leave the Center, or wherever you were picked up, see, your hours would start. You got traveling time.
>
> Q. So in other words, you were supposed to meet these nurses at Protho Junction, is that right?
>
> A. Right. Yes sir.
>
> Q. And Protho Junction to Remington you would have been paid?
>
> A. Right, you'd been paid for your half hour traveling time, yes, sir.
>
> Q. But you weren't paid from your house to Protho Junction?
>
> A. No, sir.

The employer was aware of the hazardous driving conditions on the day of the accident, but appellee was

subject to no risks not common to all others on the streets and highways. There was no substantial evidence to support a conclusion that a customary practice of providing transportation during inclement weather had been established, although the employer had, on at least one occasion, provided transportation.

We reluctantly arrive at the conclusion that appellee was going from her home to the point, Protho Junction, where her employment would begin, and that she has not brought herself within one of the heretofore recognized exceptions to the going and coming rule. We decline to further extend the rule.

Reversed.

CRACRAFT, C.J., and CORBIN, J., agree.

Hideko YOUNG *v.* HEEKIN CANNING CO.

CA 84-220 681 S.W.2d 419

Court of Appeals of Arkansas
Division I
Opinion delivered January 2, 1985
[Rehearing denied January 30, 1985.]

Bramhall and Duncan, by: *Phillip J. Duncan* and *Ralph C. Ohm,* for appellant.

Reid, Burge and Prevallet, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Workers' Compensation Commission.

Robert Young was employed at a Blytheville plant where he operated a machine that placed bottoms on metal cans. About three weeks prior to his fatal heart attack, Young suffered pains in his left shoulder and arm. He consulted doctors at the Blytheville Air Force Base who told him he probably had bursitis in that shoulder. On Thursday and Friday immediately preceding his fatal heart attack, he did not go to work and continued to feel bad all through the weekend. Nevertheless, he returned to work at 7:00 a.m. on Monday, November 17, 1980, and worked until about 3:15 p.m. when he was found collapsed and unconscious at his work station. He was taken by ambulance to the office of a Blytheville physician, then to a Blytheville hospital, and subsequently to a Memphis hospital where, on December 7, he died without regaining consciousness.

The administrative law judge denied the claim by Young's widow on the basis that she had failed to prove by a preponderence of the evidence that Young's death was the result of his work. The full Commission affirmed. This appeal followed. We affirm.

Essentially, the argument on appeal is that there was not sufficient evidence to sustain the decision of the Commission. Appellant points out that Young's job was in an area where the noise level was very high and involved watching and refilling a machine that held 22,000 can bottoms and applied 750 per minute. She argues that this presented a stressful work environment which increased the metabolic demand on the heart and caused Young's fatal attack.

Young's widow testified he was 48 years old when he died, that he had retired from the Air Force after 20 years, and had been working at the appellee company since the mid

1970s. She did not know of any heart trouble he had previous to his heart attack on November 17.

An ambulance brought Young to Dr. Ronald Smith's office where they got a heart beat started and then the ambulance took him to the base hospital. Smith testified that, based on his examination of Young and the information he obtained from Mrs. Young, it was his opinion that Young had a heart disease that predated his employment with the appellee company and that his work did not "contribute" to his heart attack but was "an incidential factor." The doctor said the heart attack would have occurred anyway, regardless of what Young was doing, and the fact that he was at work when it happened was "a coincidental fact." Dr. William Flannigan, who treated Young in Memphis, testified that considering the symptoms Young was having on November 17, he would have advised bed rest and restricted activities and he would have told Young that it would be dangerous to work that day. However, he said, if Young had not gone to work, his attack could have occurred at home.

The appellant directs us to a number of cases involving workers' compensation coverage for heart attacks under conditions similar to the one in this case. In *Reynolds Metals Company* v. *Robbins,* 231 Ark. 158, 328 S.W.2d 489 (1959), the court said the fact that Robbins was engaged in only usual and ordinary duties at the time of his death did not bar recovery. The court relied upon a previous decision where it had said:

> Notwithstanding anything we may have said in prior cases, we hold that an accidental injury arises out of the employment when the required exertion producing the injury is too great for the person undertaking the work, whatever the degree of exertion or the condition of his health, *provided the exertion is either the sole or a contributing cause of the injury.* In short, that an injury is accidental when either the cause or result is unexpected or accidental, although the work being done is usual or ordinary. (Emphasis supplied.)

Other cases cited by appellant as standing for the same

proposition are *Hoerner Waldorf Corp.* v. *Alford,* 255 Ark. 431, 500 S.W.2d 758 (1973); *Reynolds Metals Company* v. *Cain,* 243 Ark. 483, 420 S.W.2d 872 (1967); and *Kempner's* v. *Hall,* 7 Ark. App. 181, 646 S.W.2d 31 (1983) We have no problem with those cases because in each the Commission found for the employee, the appellate court affirmed, and the Commission's decision was supported by substantial evidence. This is clearly in keeping with our standard of review which requires that we view the evidence in the light most favorable to the Commission's decision and affirm that decision if it is supported by substantial evidence, *Clark* v. *Peabody Testing Service,* 265 Ark. 489, 579 S.W.2d 360 (1979). We affirm even though a preponderance of the evidence might indicate a contrary result, if reasonable minds could reach the Commission's conclusion, *Bankston* v. *Prime West Corp.,* 271 Ark. 727, 610 S.W.2d 586 (Ark. App. 1981); *Roc-Arc Water Co.* v. *Moore,* 10 Ark. App. 349, 664 S.W.2d 500 (1984). It is because we believe the Commission's decision is supported by substantial evidence that we affirm its decision in this case.

One case cited by appellant does give us a problem. That case is *Dougan* v. *Booker,* 241 Ark. 224, 407 S.W.2d 369 (1966), where the appellate court reversed the decision of the Commission. The distinguishing feature of that case, however, is that an employee with a bad heart collapsed and died on the job shortly after he had "put forth unusual exertion" in his work, and the court makes it clear that it was this unusual exertion that required the Commission's decision to be reversed. Here there is evidence that Young's job was one of the easiest in the plant; that while the machine operated by Young was running, one could leave it long enough to get a cup of coffee and that eight pounds was the most weight Young ever had to lift. Also there was testimony that the noise level was not considered to be "all that loud" and that earplugs were supposed to be worn. Because of this evidence we conclude that *Dougan* v. *Booker* did not require that the Commission find for the appellant as there was substantial evidence from which the commission could find that there was no unusual exertion being made by Young at the time of his collapse on the job and absent unusual exertion it was up to the Commission to determine whether

the exertion used was either the sole or a contributing cause of the heart attack. *Reynolds Metals Company* v. *Robbins, supra.*

Appellant points out that Dr. Smith testified that Young's heart attack was "incidential" to his work and that the doctor said Young's work could have affected the "timing" of his attack. Thus, it is contended that Young's heart attack was compensable because his work aggravated his preexisting condition. *Reynolds Metals Co.* v. *Cain, supra.* Again, applying the substantial evidence rule, we think the Commission could find that Young's work did not aggravate or contribute to his heart attack since Dr. Smith said the work was only incidential to the heart attack and in his opinion the attack would have occurred on the very same day whether Young had been at home or at work.

Finally, we note appellant's argument that the Commission was required to give appellant the benefit of the doubt and to draw all the reasonable inferences favorable to her claim. *Boyd Excelsior Fuel Co.* v. *McKown,* 226 Ark. 174, 288 S.W.2d 614 (1956); *O.K. Processing, Inc.* v. *Servold,* 265 Ark. 352, 578 S.W.2d 224 (1979); and *Bunny Bread* v. *Shipman,* 267 Ark. 926, 591 S.W.2d 692 (Ark. App. 1979). However, the Arkansas Supreme Court has said that the Commission's failure to apply that standard in its determination is not a basis for appellate reversal as the appellate court must affirm if the Commission's decision is supported by substantial evidence. *Buckeye Cotton Oil* v. *McCoy,* 272 Ark. 272, 613 S.W.2d 590 (1981); *Clark* v. *Peabody Testing Service, supra.*

Affirmed.

CRACRAFT, C.J., and GLAZE, J., agree.

Robert Bennett HUNTER
v. Barbara R. HUNTER

CA 84-74 681 S.W.2d 424

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

Billy J. Hubbell of *Smith, Smith & Hubbell,* for appellant.

James W. Haddock, for appellee.

TOM GLAZE, Judge. This appeal involves the parties' separation agreement and the trial court's refusal to modify it to relieve appellant's obligation to make payments on the parties' marital residence. In essence, appellant contends the house payments were intended as additional child support which the trial court should have terminated as a result of changed circumstances. Consistent with the trial judge's holding, appellee argues that the house payments were not for child support, and that they resulted from an independent contract between the parties which could not be modified or altered by the court. We affirm.

Appellant relies primarily upon the decisions of *Nooner* v. *Nooner,* 278 Ark. 360, 645 S.W.2d 671 (1983), and *Williams* v. *Williams,* 253 Ark. 842, 489 S.W.2d 774 (1973). Both cases are distinguishable from the one at hand. The *Williams* case is significantly different in that the Court determined the parties' agreement could be altered because it employed the terms "unless otherwise ordered by the Court." In addition, the Court, finding the house payments agreed upon were to be made "in lieu of" child support, then rejected appellant's argument that the house payment provision in the parties' agreement was unrelated to child support. Next, the *Nooner* case is inapposite because it did not involve a house payment provision. Instead the Court in *Nooner* considered an independent contract provision obligating appellant to pay $100 per week for the support of his wife and their two chidren. Because the *Nooner* agreement failed to divide and allocate the $100 support into alimony and child support payments, the Court held the chancellor had authority to determine those respective amounts. Apparently, the Court reached this conclusion based upon the proposition that either party has a right to ask for a change in child support regardless of any independent contract entered into between them. *Contra Bachus* v. *Bachus,* 216 Ark. 802, 227 S.W.2d 439 (1950).

Unlike either *Williams* or *Nooner,* the parties' agreement here contained *separate* paragraphs, one wherein they agreed appellant would pay $193 per month child support so long as the children resided at the marital home and another wherein they divided their properties. Under the property provisions, appellee remained in possession of the marital residence until the youngest child graduates from high school or reaches age twenty, whichever shall extend the longer; during this period, appellant agreed to make the house payments. In contrast to the *Williams* case, the parties here agree that their contract is independent and was duly incorporated into their divorce decree.

We believe the circumstances and agreement presented here are more closely aligned with those in *McInturff* v. *McInturff,* 7 Ark. App. 116, 644 S.W.2d 618 (1983). There, as here, the parties executed an independent contract, express-

ing the desire to settle their respective property rights as well as to establish their respective obligations to the children. Under the contract, the appellant wife was awarded custody of the parties' children and the husband was credited with a lump-sum payment to cover his child support obligation by releasing his equity interest in the parties' property. About two years later, both children had moved in with their father. He subsequently gained legal custody and asked the court at the same time to give him a pro rata referral of the lump-sum payment he made toward his child support obligation. We held that when parties executed an integrated property and support agreement which is incorporated into their divorce decree, the court cannot later alter or modify that decree unless the parties have provided for or agreed to such modification. In *McInturff,* we reviewed the record and found the parties' independent agreement was integrated so that the property, debt, alimony and support provisions were reciprocal and were intended to be a final settlement with respect to all property, financial, alimony and support matters. Accordingly, we concluded the trial court could not modify such an agreement.

Here, the trial court terminated appellant's obligation to pay the child support required by the parties' agreement and divorce decree, because the oldest boy is eighteen years old and the youngest son is now in appellant's custody. However, the court found that the appellant had a contractual duty to maintain payments on their former marital residence because such duty was a part of their property agreement and was not intended as child support. As in *McInturff,* the parties here expressed their desires to make a complete settlement of their respective property rights, both waiving their rights or claims in the other's property as divided under their written agreement. By a separate paragraph captioned "DIVISION OF PROPERTY," the parties described their rights and obligations involving their real and personal properties. This paragraph contains appellant's duty to make payments on their marital residence. Under another paragraph captioned "CHILD CUSTODY," appellant agreed to pay $193.00 per month as child support, but the parties agreed such support would terminate when each child reached eighteen years of age or in the

event either of the children decide to live with the appellant. The parties made no mention that appellant's house payments — required under their property division paragraph — would terminate because the children obtained majority or lived with appellant.

In sum, the trial court found the youngest son was only fifteen years old and under the property division provision of the parties' contract, appellee is still entitled to retain possession of the marital home rent free. We agree. From our review of the parties' agreement, we believe the conclusion is inescapable that appellee's rent-free entitlement to the home was one basis of consideration for the manner in which the other properties were divided between them. This being so, we agree with the trial judge's decision finding this part of the parties' agreement to be unmodifiable.

We affirm.

MAYFIELD and COOPER, JJ., agree.

Billy Thomas SIMMONS *v.* STATE of Arkansas

CA CR 84-136 681 S.W.2d 422

Court of Appeals of Arkansas
Division II
Opinion delivered January 2, 1985

Steven G. Beck and *Herman H. Hankins, Jr.,* for appellant.

Steve Clark, Att'y Gen., by: *Joyce Rayburn Greene,* Asst. Att'y Gen., for appellee.

TOM GLAZE, Judge. The appellant, Billy Thomas Simmons, appeals from the revocation of his probation and his sentence of five years in the Department of Correction. We affirm.

On September 15, 1982, the appellant pleaded guilty to burglary. He was sentenced to five years probation and was assessed a $250 fine, $125 restitution and costs. At a revocation hearing on April 16, 1984, the appellant testified that he had failed to pay as ordered, failed to report to the probation office, and failed to notify the probation office of a change of address after he moved from Kirby to Hot Springs. He stated that he remembered that the trial judge had outlined in detail his conditions of probation and that he knew if he violated the terms of probation he could be sent to prison. Even with that knowledge, according to appellant, he moved and did not report in.

On appeal, appellant contends the trial court abused its discretion in revoking his probation for de minimus violations of probation. Appellant contends that his failure to pay was remedied by his payment of fines, restitution, court costs, and attorney's fees prior to the revocation hearing. He contends that his failure to report to his probation officer and to notify the officer of his change of address was merely negligence on his part and nothing in the record indicated that he was engaged in bad acts. Appellant relies upon *Cogburn* v. *State,* 264 Ark. 173, 569 S.W.2d 658 (1978), for the proposition that his violations are excusable.

In *Cogburn,* the Supreme Court noted that the statute permits revocation of a suspended sentence when the court finds that a defendant has *inexcusably* failed to comply with a condition of suspension. Ark. Stat. Ann. § 41-1208(4) (Repl. 1977). The Court found that Cogburn's noncompliance was *not* inexcusable. His condition of suspension was to work for eighty hours each month at the Arkansas Children's Colony. The evidence showed that he worked for fifty to sixty hours each week for his employer; he and his wife both had been ill; as a consequence, he had worked fewer than eighty hours a month at the Children's Colony for several months in a row, although he had worked

each month. At the revocation hearing, the trial judge misunderstood the number of hours that Cogburn had actually worked to satisfy the condition and revoked his suspended sentence. In reversing the trial court's revocation, the Supreme Court said that in view of the circumstances, Cogburn's failure was excusable.

In the instant case, the appellant admitted that he did not comply with the terms of his probation, and the trial court found his failure inexcusable. Unlike the defendant in *Cogburn* who had reasons for his failure to fully comply, the appellant here had no reason for his failure and did not even attempt to comply until after he was arrested for violations of probation. It was then that he paid his fine and restitution. His excuse for not notifying the probation office that he had moved was that he did not have the address of the Arkadelphia office. In view of appellant's failure to comply with the terms of probation and the absence of any excuse for that failure, we find no error in the trial court's revoking the probation for what appellant contends are de minimus violations.

Appellant raises a second point for reversal, and argues that the trial judge imposed an erroneous sentence when he revoked appellant's probation. On September 15, 1982, the trial court took appellant's plea under advisement for a probated period of five (5) years, commencing September 15, 1982. The court's order listed appellant's conditions of probation under eight paragraphs, the last of which sentenced him to five years probation, a $250 fine, $75 costs, $125 restitution and $200 attorney's fees as a part of the costs. The order further provided that appellant's probation was subject to good behavior, no law violations, three years active supervision by the court's probation officers and the court's standard conditions of probation. Appellant contends that because the trial judge originally imposed a fine on September 15, 1982, the appellant's five-year sentence should have run from that date rather than the date of revocation. We disagree.

Appellant cites Ark. Stat. Ann. § 41-1201(3) (a) (Repl. 1977), which provides that the court, when it places a

defendant on probation (or suspends his imposition of sentence) must enter a judgment of conviction if it sentences him to pay a fine and places him on probation (or suspends imposition of his sentence to imprisonment). Appellant next refers to that part of the commentary to § 41-1201(3) that states when a fine is imposed, the court must enter a judgment of conviction. Appellant concludes that when the trial court fined him on September 15, 1982, such action was tantamount to the entry of a judgment of conviction and his probated time ran from that date.

Appellant's argument ignores other relevant statutes that bear on this issue. Unquestionably, appellant pleaded guilty to burglary, a Class B felony, and the trial court had authority under Ark. Stat. Ann. § 41-803 (Supp. 1983) to either suspend imposition of sentence or place him on probation. Pursuant to § 41-803(5) — because burglary is punishable by fine and imprisonment — the trial court chose to sentence appellant to pay a fine and placed him on probation. When the trial court revoked appellant's probation, it was authorized under Ark. Stat. Ann. § 41-1208(6) (Repl. 1977) to enter a judgment of conviction. At that time, it could impose any sentence on appellant that might have been imposed originally for the burglary offense provided that any sentence to pay a fine or to imprisonment, when combined with any previous fine or imprisonment imposed for the same offense, not exceed the limits of Ark. Stat. Ann. §§ 41-901(c) (Supp. 1983) and -1101(l) (a) (Repl. 1977). The trial court's power under § 41-1208(6) is clearly explained by the commentary to that statute as follows:

> The power to impose any sentence originally authorized is qualified to the extent that a fine or imprisonment was actually imposed at the time suspension or probation was ordered. For example, assume that a defendant is found guilty of a class B felony and the court imposes a fine of $10,000 and suspends imposition of sentence as to imprisonment. If the defendant is subsequently revoked, he may be sentenced to a term of imprisonment up to 20 years but the maximum fine that can be imposed is $15,000 (statutory limit for class B felony) less $10,000 (fine already imposed), or $5,000.

> Similarly, if the court had imposed a 5-year term of imprisonment followed by a period of suspension, the maximum sentence upon revocation is 15 years.

Following the foregoing example, the trial court here imposed a $250 fine but released appellant on probation for a five-year period without pronouncing sentence. When appellant's probation was revoked, the trial court could have sentenced him to a term of imprisonment up to twenty years (the statutory limit for a Class B felony), but the maximum fine imposed could not exceed $14,750 (the $15,000 maximum for a Class B felony minus $250 — the fine imposed on September 15, 1982). Instead, the trial judge sentenced appellant to the minimum term of imprisonment for a Class B felony (five years) and imposed no additional fine. Accordingly, we hold the sentence imposed by the trial court was well within its power to make.

Affirmed.

MAYFIELD and COOPER, JJ., agree.

Tom L. FITE *v.*
FRIENDS OF MAYFLOWER, INC.

CA 84-118 682 S.W.2d 457

Court of Appeals of Arkansas
Division I
Opinion delivered January 9, 1985

Russell L. "Jack" Roberts, for appellant.

Tom F. Donovan and *Ann C. Donovan,* for appellee.

TOM GLAZE, Judge. This appeal arises from the chancery court's denial of appellant's specific performance suit against appellee, the Friends of Mayflower, Inc. (FOM). Appellant alleged FOM breached its agreement to sell appellant a building for $65,000. The court held the

agreement unenforceable because the parties had "no meeting of the minds" concerning the contractual terms. We reverse the decision of the lower court because it erroneously refused appellant's request to exclude witnesses from the courtroom.

Immediately before trial, FOM requested that its shareholders be permitted to stay in the courtroom during trial. Appellant objected, stating FOM's designated representative could stay but requesting that the other shareholders be excluded. The court overruled appellant's objection, stating FOM's shareholders were party litigants and could remain in the room.

Rule 615 of the Uniform Rules of Evidence covers the exclusion of witnesses and provides as follows:

> Rule 615. Exclusion of witnesses. — At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

The foregoing rule on sequestering witnesses is mandatory when requested by one or both of the parties. *Morton* v. *Wiley Grain & Chemical Co.,* 271 Ark. 319, 609 S.W.2d 322 (1980); and *Chambers* v. *State,* 264 Ark. 279, 571 S.W.2d 79 (1978). In *International Harvester Corp.* v. *Hardin,* 264 Ark. 717, 574 S.W.2d 260 (1978), the Supreme Court found the trial court had violated Rule 615 and reversed, holding the lower court's error was presumed to be prejudicial unless the contrary affirmatively appeared from the record.

Here, after appellant requested they be excluded, the trial court allowed six FOM shareholders to remain in the courtroom. Of course, under Rule 615(1), a *party* who is a natural person is exempt from exclusion, but here the

shareholders were not party litigants — their corporation, FOM, was. These shareholder witnesses could only be exempt from exclusion under Rule 615 if FOM's attorney had designated any one of them as FOM's officer or employee or if their presence was shown by FOM to be essential to the presentation of its cause. From our review of the record, neither exemption was shown. FOM's counsel never designated any of the shareholders as its representative[1]; nor did he provide a reason why their presence was essential to the management of FOM's case.

The sequestration or exclusion of witnesses is employed to expose inconsistencies in their testimonies and to prevent the possibility of one witness's shaping his or her testimony to match that given by other witnesses at trial. In the instant case, four FOM shareholders' interests were not only antagonistic to those of appellant; they also conflicted with two other FOM shareholders' interests as well. For example, these four shareholders wished to purchase the building in question and had obtained a loan commitment to do so. Meanwhile, two other shareholders' (Mr. and Mrs. Cisnes') efforts to remove their names off a bank indebtedness — apparently involving FOM — depended upon FOM's accepting appellant's offer to purchase the building.

Appellant and Mrs. Cisne testified that appellant offered $65,000 for the building, and this sale amount was *not* due the day after FOM accepted the offer. To the contrary, five FOM shareholders (including the four who wanted to purchase the building) each testified consistently that they understood appellant's $65,000 offer *was payable* the day after FOM accepted it. The trial judge relied on these five shareholders' testimonies when it held the appellant and FOM had no meeting of the minds and concluded no agreement was reached. Whether these five shareholders' testimonies would have been the same if the trial court had sequestered them, we cannot say. However, because this

[1]Professor Weinstein relates that it is unclear whether Rule 615 permits more than one representative and suggests the trial judge should have wide discretion to allow multiple representatives. See 3 *Weinstein's Evidence,* Par. 615[02] (1982). We need not reach that question because no attempt was made to designate a representative in this cause.

cause was decided by the trial court upon the conflicting testimonies presented by each party, this case typifies the situation when the witness-exclusion rule is needed, *viz.*, to avoid the possibility of a witness's shaping his or her testimony by that given by other witnesses. In sum, the trial court failed to exclude FOM's witnesses, as required under Rule 615, and because we are unable to say the court's error was harmless, we must reverse and remand this cause for a new trial.

Since this cause is remanded for another trial, it is necessary to consider appellant's second point for reversal. Prior to this chancery court lawsuit, FOM brought an unlawful detainer action in circuit court against appellant for his nonpayment of rent. After the chancery suit was filed, the parties agreed to certain matters in the circuit case, pending a full trial of the issues in chancery. This agreement was reduced to an order and largely dealt with appellant's responsibilities under the parties' oral rental agreement pending the chancery trial. Among other things, they agreed that *appellant maintained* that the $2,000 check tendered was a down payment for the purchase of the building and that he was not by contract required to pay rent for the months of August, 1982, and thereafter. They further agreed that *FOM's position* was that the $2,000 was being credited as back rent for the months of August, 1982, and thereafter. Upon reaching his decision, the chancellor construed the circuit court's agreed-order as a ruling on the dispositon of the $2,000 earnest payment, finding the circuit court applied the $2,000 to accrued rental arrearages owed by appellant. The chancellor held that order was binding on the chancery proceeding, and that he could not reconsider any issue dealing with the disposition of the $2,000. We cannot agree. The circuit court order merely contains the parties' respective *contentions* concerning the appellant's $2,000 payment, and the chancery court is in no way prevented from considering any issues surrounding that payment in its retrial of this cause.

Reversed and remanded.

CORBIN and MAYFIELD, JJ., agree.

Ronnie HEIFNER and Virgie HEIFNER,
Husband and Wife *v.*
Clara Virginia HENDRICKS

CA 84-85 682 S.W.2d 459

Court of Appeals of Arkansas
Division I
Opinion delivered January 16, 1985

Douglas & Douglas, by: *Troy R. Douglas,* for appellant.

Orvin W. Foster, for appellee.

LAWSON CLONINGER, Judge. The appellants, Ronnie and Virgie Heifner, brought this action in chancery court against appellee, Clara Hendricks, for rescission of a real estate contract. The court granted the rescission but ordered that appellee, the seller, should be given credit on the sales price for the fair rental value of the property for the period of

use and occupancy by the appellants. On appeal the appellants contend that the chancellor erred in not awarding the appellants interest on the purchase money for the time during which the purchase money was in appellee's possession. Appellants also contend that the court should have awarded them special damages. We agree with the appellants on their first contention, and we reverse and remand.

The evidence established that in March of 1981, the appellants purchased for cash a mobile home and a tract of land from the appellee for the sum of $17,000. Several witnesses testified that the parties understood and agreed that the appellants would share a well and septic tank on an adjoining tract of land which the appellee owned. During the months following the sale, the appellants had various problems with the well and the septic tank. It became evident that neither was adequate to serve both the appellants' mobile home and the house on appellee's adjoining tract of land. The appellee testified that the sharing arrangement was understood by the parties to be temporary and that the appellants should have acquired their own well and septic tank. The appellants contended that the arrangement was to be permanent. The chancellor ordered rescission based on his finding that the arrangement was to be permanent but that the system was not adequate to serve both pieces of property. The chancellor entered his order subject to the appellants' payment to the appellee of the rental value of the property for the time they were in possession.

We think the chancellor should also have awarded the appellants interest on the purchase money which was in appellee's possession during the same period. The Arkansas Supreme Court has recognized that in an action for rescission the court applies equitable principles and attempts to restore the status quo or place the parties in their respective positions at the time of the sale. See *Bates* v. *Simmons,* 259 Ark. 657, 536 S.W.2d 292 (1976). In *Bates,* the chancellor granted rescission of a real estate contract, and considering the payments made under the contract as rent, did not award either party any judgment. The Supreme Court, applying

equitable principles, held that the seller should have been awarded rental payments and that the purchasers were entitled to recover the purchase money paid, with interest, from the date of each payment. The court there stated:

> Since appellants were seeking a rescission, the parties were entitled to be placed, as nearly as circumstances would permit, in their respective positions at the time of the sale.
>
> . . . .
>
> Applying equitable principles, appellants are entitled to recover the purchase money paid, with interest from the date of each payment.

In *Bates,* the court did not explain its reasoning in its award of interest, but that reasoning has been set forth in cases involving specific performance. In *Loveless* v. *Diehl,* 236 Ark. 129, 364 S.W.2d 317 (1963), the court ordered specific performance of a real estate contract. The court found that the purchasers were entitled to the rental value of the land while the sellers remained in possession and the sellers were entitled to interest at the legal rate upon the unpaid purchase price during the same period. The court explained:

> The court was right in charging the sellers with the rental value of the land while they were in possession, but he should have gone farther and charged the purchasers with interest at the legal rate upon the unpaid purchase price during the same period. The two charges are equitably offsetting and should go together. The sellers are charged with the rental value because they have had the use of the buyers' land, and the buyers are charged with interest because they have had the use of the sellers' money. Both charges are ordinarily made in situations where the creditor, such as a mortgagee, for example, has been in possession of the debtor's property. [Citations omitted]. To make either charge without the other is evidently unwarranted, for it gives the favored party the

use of both the land and the money. On this point the decree must be modified to require the purchasers to pay interest upon the purchase price and to require the sellers to pay interest upon each monthly installment of rent from its accrual.

We agree with the reasoning in *Loveless* and remand to the chancellor to modify his decree accordingly. If appellants are required to pay the rental value of the property from the time they took possession, we believe that equity requires that appellee should be required to pay interest upon the purchase money. To do full equity, the appellants should also be charged interest on the rental payments from the date each accrued.

Appellants also argue that they are entitled to special damages. These include $520.15 for the purchase and installation of a water pump and $331.50 for Arkansas sales tax and license tags for the mobile home. Appellants characterize these as improvements and argue that the court must make compensation for these improvements in order to do full equity.

We think that the evidence is insufficient to award special damages as requested by the appellants. The measure of damages for improvements placed on property is the amount such improvements have increased the property's value. See *Burns* v. *Meadors,* 225 Ark. 1009, 287 S.W.2d 893 (1956); *Williams* v. *Jones,* 239 Ark. 1032, 396 S.W.2d 286 (1965). Practically no evidence of increase of value was introduced and we cannot say that the chancellor erred in not awarding these elements of damages to the appellants. The parties agree that the chancellor intended to place the parties as nearly as possible to the position each was in at the time of the transaction and to avoid unjust enrichment. The chancellor also declined to award special damages for abuse of the property by appellants as requested by appellee, and the court's refusal to award special damages to either party is not clearly against the preponderance of the evidence. Arkansas Rules of Civil Procedure, Rule 52(a).

Reversed and remanded.

CRACRAFT, C.J., and CORBIN, J., agree.

Sammy Joe ELMORE *v.* STATE of Arkansas

CA CR 84-121 682 S.W.2d 758

Court of Appeals of Arkansas
Division I
Opinion delivered January 16, 1985

John Wesley Hall, Jr., for appellant.

Steve Clark, Att'y Gen., by: *Michael E. Wheeler,* Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Judge. Appellant, Sammy Joe Elmore, was convicted of fleeing and criminal attempt to commit capital murder and was sentenced to three years and ten years imprisonment respectively. On appeal, appellant alleges the following errors for reversal:

(1) That the trial court erred in ordering the case to be tried in one day and in refusing to order a new trial for that reason.

(2) That the trial court erred in suggesting before the jury that it would be defense counsel's responsibility if they had to hold the trial over another day, and in threatening counsel with contempt if his witnesses from out-of-state did not appear.

(3) That the trial court erred in failing to record an exchange with a juror in the presence of appellant's counsel.

(4) That the trial court erred in denying appellant's motion to recuse in the hearing on the motion for a new trial when it became apparent that the trial judge would need to testify as a witness.

(5) That the trial court erred in requiring appellant to use AMCI 4104 on physical force in self-defense and AMCI 4105 on deadly force in self-defense or neither when appellant requested only AMCI 4104.

Appellant argues that the trial court erred in ordering that the trial be completed in one day. Appellant argues that it was prejudiced by the expedited nature of the trial, by the trial court's suggestion to the jury that it was appellant's fault if the trial required another day, and by the trial court's threat to hold appellant's counsel in contempt if he held the trial over and his witnesses failed to appear. A review of the facts is enlightening. Appellant's case was set for Wednesday, September 14, 1983. Appellant's counsel understood that three days had been set aside for appellant's trial and had scheduled two out-of-state witnesses for the second day of trial. Sometime during the trial Wednesday, it became apparent that the trial court had set aside only one day for the trial. Appellant's counsel, the trial judge and the prosecuting attorney discussed in chambers whether or not the trial would need to be carried over in light of the confusion. Appellant's counsel argued that he had clearly understood he would have three days for trial and impressed on the court the need for additional time. The trial court denied knowledge of any three day setting and pointed out the disadvantages of making the jury return for an additional day. The trial judge indicated that the following day, Thursday, was unavailable as other matters were scheduled, and that Friday or Saturday morning were the only available options. Upon returning to the courtroom, the trial judge informed the jury that they would need to return for a second day to hear two of appellant's witnesses who were coming from out-of-state. He then inquired as to whether Friday or Saturday morning would be preferable. Two jurors had commitments on Friday and another juror had a commitment on Saturday. The trial judge told the jurors to remain available by phone on Thursday and he would notify them when to return.

After appellant's last available witness was heard on Wednesday, the following exchange took place:

MR. SCOTT: (appellant's counsel)

That's all we've got except the two witnesses that are coming.

THE COURT:

Now, I want to have an understanding here so that this jury can depend on us. We've got what? Two witnesses?

MR. SCOTT:

Yes. I tell you what I would do. If it's the preference of the jury to complete tonight, I'll just forget about those two witnesses and we'll go on and complete it tonight if you'd rather do that.

THE COURT:

I think the jury wants to get this over with.

MR. SCOTT:

If that's what they want to do.

The prosecutor asked that the record reflect that the appellant knowingly waived the two witnesses and the following exchange took place:

MR. SCOTT:

Oh, yes. We're waiving them. We've made a decision there.

THE COURT:

All right. Now, there was some request for more time and what have you because of two witnesses out of Texas. And it's now my understanding that you want to forego their testimony and their presence. And you just want to go on and argue this and submit it to the jury.

MR. SCOTT:

Yes. That's correct.

THE COURT:

Is that what you want to do?

THE DEFENDANT: (appellant)

That's correct.

Appellant characterizes the situation which developed as one in which the judge ordered that the case be tried in one day. We think this characterization is inaccurate. From the testimony set out above, we believe it is clear that the trial judge did not order appellant's counsel to do anything, rather, appellant's counsel *chose* not to call his remaining two witnesses and avoid having the jury return for an additional day of testimony. We can appreciate appellant's argument that he was faced with an untenable choice in deciding whether to run the trial over another day or to forego his witnesses, but it is just such difficult decisions that attorneys are called upon to make daily. Appellant argues that the trial judge suggested it was appellant's fault if the trial ran over and that this was prejudicial to appellant. We see no such suggestion on the part of the trial court. The trial judge merely explained the time schedule to the jury; something he could hardly avoid doing. Appellant's counsel's primary responsibility in deciding to forego his witnesses was to his client, not the jury. While the jury might not have wanted to return for an additional day, they surely could have understood the heavy responsibility that required them to do so. We cannot seriously consider that a jury would be biased against a defendant due to the length of a trial. As for appellant's contention that the judge threatened to hold him in contempt if he held the trial over and his witnesses failed to appear, we find nothing in the record to support such an allegation. What the trial judge did in this case is what many judges do daily: urge attorneys to make the most efficient use of jury time. Trial attorneys must necessarily steel themselves to judges' entreaties to "hurry

up" when they believe it is not in their client's best interest. We cannot say that a judge's encouragement to speed up proceedings is error. When time is at a premium attorneys are going to be urged to press forward. An attorney's decision to comply or hold out for more time is just that: his decision. Here, we believe appellant's counsel made the decision to pass his two witnesses based on what he believed was in his client's best interest at the time. It was a judgment call. He cannot complain, upon deciding that the decision was wrong in retrospect, that someone else coerced him into making that decision. Appellant's contention that the trial court erred in failing to grant a new trial on this issue is without merit for the same reasons discussed above.

Appellant argues that the trial judge erred in failing to make a record of an exchange between himself and a juror and in refusing to recuse himself when it became apparent that he would need to testify about the exchange on appellant's motion for a new trial. The facts which led to this situation were developed in the hearing on appellant's motion for new trial and are not in dispute. During the trial a juror approached the trial judge and told him that she recognized someone in the defendant's family. The trial judge asked her if that would influence her judgment in the case. She said it would not. The trial judge made no record of this conversation at the time. After the verdict was rendered appellant's counsel apparently learned of this exchange through another source. Appellant argued in his motion for a new trial that the trial judge's failure to record the conversation and notify appellant's counsel entitled him to a new trial. We do not believe that the trial court's failure to record the conversation, nor his failure to notify appellant's counsel was reversible error in this particular case. A review of appellant's counsel's testimony at the hearing on the motion for a new trial reveals that counsel knew of the juror's acquaintance with appellant's family. Appellant's counsel apparently did not believe it was a matter of concern as he failed to bring it to the court's attention at that time. Too, there is no evidence whatsoever that the juror's knowledge in any way affected her decision. The communication itself indicated no bias. See *Bryant* v. *State,* 254 Ark. 447, 494 S.W.2d 126 (1973), for a case with similar facts. The

trial court's failure to inform counsel of the communication and its failure to record it are not reversible errors here because of their harmless nature. We would point out however, that the practice should always be to record any communication with a juror and to notify counsel on both sides. The advisability of maintaining a record so that a judge need not face the prospect of reconstructing the record from memory, or becoming a witness, has been noted by our Supreme Court. See *Orman* v. *O. E. Bishop,* 243 Ark. 609, 420 S.W.2d 908 (1967). We cannot overemphasize the advisability of this practice.

At the hearing on the motion for a new trial, it became necessary for the trial judge to testify to what had passed between himself and the juror. Appellant asked the trial judge to recuse himself from ruling on the motion for a new trial because he was going to testify in the hearing. The trial judge denied appellant's motion to recuse. This put the trial judge in the position of ruling upon his own credibility and thus open to a charge of impartiality. This is one situation that the A.B.A. Code of Judicial Conduct cautions us against. Canon 3.C(1) of the Code states:

> A judge should disqualify himself in a proceeding which his impartiality might reasonably be questioned, including but not limited to instances where: (a) he has . . . personal knowledge of disputed evidentiary facts concerning the proceeding . . .

Our Supreme Court has recognized the need for a judge to disqualify when he must appear as a witness for want of a record. *Meyers* v. *State,* 252 Ark. 367, 479 S.W.2d 238 (1972). Our judicial system is founded upon the premise that justice is impartial. When a trial judge sits as judge and as witness, the appearance of impartiality is destroyed. It is clear that the trial judge should have recused himself when it became necessary for him to testify. However, we do not find that his failure to do so is reversible error under the facts of this particular case. While it was clearly error, we believe the appellant suffered no prejudice as a result. For the reasons discussed above, we do not believe that the trial court's failure to record the juror's communication or to inform

counsel was prejudicial and therefore, appellant was not entitled to a new trial on that basis. Having reached that decision, the trial judge's failure to recuse himself becomes a moot issue. However, in the interest of maintaining the integrity of our judicial system, we would emphasize the need for trial judges to diligently avoid all appearance of impropriety.

Finally, appellant argues that the trial court erred in requiring appellant to use AMCI 4104 and 4105 or neither when only AMCI 4104 was requested. AMCI 4104 pertains to the use of physical force in self-defense while AMCI 4105 pertains to the use of deadly physical force in self-defense. In appellant's case, there was sufficient evidence presented to warrant instruction on the use of both physical force and deadly physical force. Therefore, the trial judge was correct in his insistence upon giving AMCI 4105 if AMCI 4104 was given. It is the trial court's responsibility to give wholly correct instructions. *Johnson* v. *State,* 6 Ark. App. 342, 642 S.W.2d 324 (1982). The jury heard evidence from which it could have found that appellant used physical force or deadly physical force. Thus to instruct the jury upon the use of one without also instructing upon the use of the other would have resulted in incomplete instructions. For the above stated reasons we affirm.

Affirmed.

MAYFIELD and GLAZE, JJ., agree.

H. Wayne MEACHUM *v.*
WORTHEN BANK & TRUST COMPANY, N.A.

CA 83-468 682 S.W.2d 763

Court of Appeals of Arkansas
En Banc
Opinion delivered January 16, 1985
[Rehearing denied February 13, 1985.*]

*CORBIN and GLAZE, JJ., would grant rehearing.

Haley, Polk & Heister, P.A., by: *Peter B. Heister,* for appellant.

Wright, Lindsey & Jennings, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a trial judge's decision that found the appellant, H. Wayne Meachum, liable as guarantor of a lease agreement between Telecompo of Arkansas and the appellee, Worthen Bank & Trust Company.

Evidence not in dispute reveals that appellant is an attorney who resides and practices in Dallas, Texas. He is also an officer, a director, and general counsel of Composition Management Company (CMC), a Texas corporation with its principal place of business in Dallas. CMC was intended to be the center for a network of outlying stations which would feed data to CMC for computerized typesetting. CMC's marketing director, Jerry Sizemore, negotiated with Arkansas resident Charles Thornton, who agreed to set up a station in Conway, Arkansas, with CMC providing part of the financing. Pursuant to this agreement, Thornton formed Telecompo of Arkansas. CMC then purchased two computers and allied items and sold them for $19,936.68 to the appellee, Worthen Bank, whose leasing agent, First Arkansas Leasing Corporation (FALCO), in turn leased the equipment to Telecompo. Before agreeing to purchase and lease the equipment, the appellee required several guaranties including the individual guaranty of appellant. The appellant sent his financial statement to the appellee and then signed the lease guaranty in Dallas in his individual capacity and as an officer for CMC.

Telecompo subsequently defaulted on the lease agreement. Six months later the appellee repossessed the equipment and sixteen months after repossession the equipment was sold for $1,000.00. Meanwhile, the appellee instituted this action on the lease agreement and on trial the court found Telecompo and each of the individual guarantors jointly and severally liable for the amount of the remaining lease payments minus the $1,000.00 received from the sale.

The trial court found jurisdiction over the appellant based on our long-arm statute, Ark. Stat. Ann. § 27-2502 (Repl. 1979), which states that a trial court may exercise

personal jurisdiction over a person as to a cause of action "arising from the person's . . . transacting any business in this State. . . ." The appellant's first argument on appeal is that he did not transact any business in Arkansas within the meaning of the statute and, therefore, the trial court erred in finding that it had personal jurisdiction over him. We do not agree.

It has been held that each question of jurisdiction must be decided on a case-by-case basis. *Gardner Engineering Corp.* v. *Page Engineering Co.,* 484 F.2d 27 (8th Cir. 1973). In *Jagitsch* v. *Commander Aviation Corporation,* 9 Ark. App. 159, 655 S.W.2d 468 (1983), this court set out the two-part analysis to be used in determining whether a trial court had jurisdiction over a nonresident defendant. First, we must decide whether the nonresident's actions satisfy the "transacting business" requirement of our long-arm statute and, second, we must decide whether the exercise of *in personam* jurisdiction is consistent with due process.

The Arkansas legislature intended for the term "transacting business" to be construed "to expand jurisdiction to the modern constitutional limit." *Mountaire Feeds, Inc.* v. *Agro Impex, S.A.,* 677 F.2d 651 (8th Cir. 1982); *SD Leasing, Inc.* v. *Al Spain and Associates, Inc.,* 277 Ark. 178, 640 S.W.2d 451 (1982). Using this liberal standard, we think the appellant in the instant case was "transacting business" in Arkansas within the meaning of our long-arm statute. Appellant was extensively involved with CMC as director, officer and general counsel, and CMC was directly responsible for the formation of Telecompo, the lessee corporation. Telecompo was formed in Arkansas and the appellant personally drafted its articles of incorporation and mailed them to Arkansas. CMC was also instrumental in the negotiation and execution of the lease agreement between appellee and Telecompo and the appellant's individual guaranty was clearly required by appellee because of his extensive involvement with CMC. These same facts also indicate that the court's exercise of personal jurisdiction was consistent with due process.

In *International Shoe Co.* v. *Washington,* 326 U.S. 310

(1945), the United States Supreme Court stated that due process requires only that certain "minimum contacts" exist between the nonresident and the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." *Id.* at 316. The Supreme Court further discussed the minimum contacts concept in *McGee* v. *International Life Ins. Co.,* 355 U.S. 220 (1957), where it held that for purposes of due process, a single contract could provide the basis for the exercise of jurisdiction over a nonresident defendant if the contract had "substantial connection with [the forum] State."

We think that the lease agreement which appellant guaranteed clearly had substantial connection with Arkansas. In reaching this conclusion, we have considered the five factors outlined by the Eighth Circuit Court of Appeals in *Aftanese* v. *Economy Baler Co.,* 343 F.2d 187 (8th Cir. 1965) and recognized by this court in *Jagitsch, supra.* These factors are to be considered in determining whether due process requirements have been satisfied and are listed in *Jagitsch* as follows:

> (1) the nature and quality of the contacts with the forum state; (2) the quantity of contacts with the forum state; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience to the parties.

Id. at 163.

Although appellant's contacts with Arkansas may have been few, we find that those contacts were substantial in nature and quality. Knowing that the appellee would require his individual guaranty, the appellant sent his financial statement to the appellee in Arkansas and then signed the guaranty agreement which was contained in the lease of personal property between two Arkansas corporations, and admits that he knew the lease would be sent to the appellee in Arkansas, that the property was in Arkansas, and that the payments would be made in Arkansas. In *Telerent Leasing Corp.* v. *Equity Associates,* 245 S.E.2d 229 (N.C. Ct.

App. 1978), the court held that the fact that a nonresident appellant guaranteed a debt owed to a North Carolina resident was by itself sufficient contact to withstand a due process challenge to the exercise of *in personam* jurisdiction over that appellant.

The remaining factors are also present in this case. The cause of action is directly related to the appellant's signing as guarantor of an Arkansas contract, and then failing to carry out his promise to guarantee; the Arkansas courts are obviously interested in providing a forum for Arkansas citizens to resolve disputes over contracts executed in Arkansas; and considering the fact that most of the parties were residents of this state, we think the convenience of the parties was best served by the hearing of the case in Arkansas.

The appellant points out that there is no evidence that he ever entered the State of Arkansas in connection with the lease or the guaranty, but in *SD Leasing, supra,* the court found sufficient contacts to meet due process standards even though the defendant never physically entered the State of Arkansas. In *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286 (1980), the Court stated that "the defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there." *Id.* at 297. We think that when a party personally guarantees a lease between two Arkansas corporations, he should reasonably anticipate being haled into court in Arkansas if the lease goes into default. We find that due process requirements were met in this case, and the trial court was correct in finding that it had jurisdiction over appellant.

Appellant's second argument is that the trial court erred in finding that appellee's disposition of the computer equipment was commercially reasonable under the applicable provisions of the Commercial Code. See Ark. Stat. Ann. § 85-9-504(3) (Supp. 1983). The lease agreement provided that upon repossession, appellee was entitled to recover from Telecompo all future rental payments less the rental or other value of the leased property. Appellant argues that the 22-month delay between the default and the

disposition by sale, combined with the low sale price, made the sale commercially unreasonable. Therefore, it is argued, the court should have applied the presumption that the value of the collateral was equal to the debt, *Henry* v. *Trickey,* 9 Ark. App. 47, 653 S.W.2d 138 (1983), and should not have allowed appellee to recover the unpaid rental minus the resale price. In support, the appellant cites *McMillan* v. *Meuser Material & Equipment Co.,* 260 Ark. 422, 541 S.W.2d 911 (1976), which held that a 14-month delay before a resale was commercially unreasonable under the Code.

Appellee tacitly agrees that this issue is governed by the Commercial Code and argues that it made timely, good faith efforts to resell but the equipment had become obsolete and no bids were received (except for one that was later withdrawn). The appellee distinguishes *McMillan,* because there the plaintiff did not attempt to resell for a year, whereas the plaintiff in the instant case began immediate efforts to resell the equipment.

There was evidence that six months of the 22-month period between default and disposition was occasioned by Telecompo's request for a delay in repossession so that it could try to work out some arrangement with CMC. During that period both Worthen and Telecompo tried to sell the computers. After repossession, appellee Worthen made extensive efforts to sell the equipment but could not find a buyer. Appellee's expert testified that the equipment could not be sold because (1) for this area the equipment was overpriced and cheaper computers could be found that would do the same job, (2) there was a lack of software available for new programs for these particular units, and (3) these units were cassette driven machines which were obsolete after the advent of floppy disc drives. He said appellee was lucky to get anything for the equipment.

In *Thomas* v. *Int'l Harvester Credit Corp.,* 5 Ark. App. 244, 636 S.W.2d 296 (1982), we said under the evidence there the question of a commercially reasonable disposition was one of fact. We think that is true in this case also. We cannot say the trial judge's finding was clearly against the prepon-

derance of the evidence and, therefore, we do not set it aside. ARCP 52(a).

Appellant's last point presents two arguments: (1) the lease was so subsequently altered as to excuse performance, and (2) the lease is void for lack of mutuality.

The first argument is based upon the fact that two 24K memory expansions were not delivered to the lessee Telecompo. Appellant says the plain intent of the lease was for appellee to lease this equipment and that the failure to do so constituted a material alteration of the lease that the appellant guaranteed. *Moore* v. *First National Bank of Hot Springs,* 3 Ark. App. 146, 623 S.W.2d 530 (1981), is cited as authority for holding that a material alteration in the obligation assumed, made without the assent of the guarantor, discharges him.

Appellee responds by arguing that there was no material alteration in the terms of the lease in this case. First, appellee says the failure to deliver the 24K memory equipment left the lessee with equipment that had only a 16K memory capacity, but that there was no specification anywhere in the lease that called for equipment with any certain memory capacity. Second, appellee says even if a term of the lease was altered as alleged by appellant, such an alteration could not be found material because there is no evidence that the difference between a 16K and a 24K memory capacity would have any effect on the operations of the lessee had that corporation become operative. Appellee's computer expert so testified and also said this difference did not, in fact, affect the resale value of the equipment. Third, appellee says there was really no alteration of the lease but only a mutual mistake in failing to deliver the 24K memory equipment as invoiced to appellee's leasing agent FALCO. The evidence does show that neither FALCO nor the lessee knew the memory capacity of the equipment until after the lessee's operation had failed and there is no evidence that either party agreed to accept any equipment other than that invoiced. We agree that the trial court could hold there was no material alteration in the lease for any or all of the three reasons advanced by appellee.

We think the record will also support the court's rejection of appellant's contention that the lease was void for lack of mutuality. The lease did exempt appellee from liability if the supplier or manufacturer failed to fill appellee's order for the computer equipment to be leased. However, *Moore* v. *First National Bank, supra,* rejected the argument that this type provision made a lease void for lack of mutuality. Although the lease also contained an indemnity agreement, the appellee was clearly obligated to perform under the lease and the court did not err in refusing to hold the lease void for lack of mutuality.

Affirmed.

GLAZE and CORBIN, JJ., dissent.

TOM GLAZE, Judge, dissenting. I must dissent. Our Supreme Court in *SD Leasing, Inc.* v. *Al Spain & Associates, Inc.,* 277 Ark. 178, 640 S.W.2d 451 (1982), held that this State's long-arm statute conferred jurisdiction on an Arkansas court by the completion of the contract in Arkansas although prior negotiations and the contract's subject matter were in another state. Dr. Robert A. Leflar politely referred to *SD Leasing* as a "marginal case." *See* Leflar, *Conflict of Laws: Arkansas, 1978-82,* 36 Ark.L.Rev. 191, 195 (1982-83). *Webster's New Collegiate Dictionary* defines "marginal" as close to the lower limit of qualification, acceptability, or function. If the *SD Leasing* case is marginal, I must say the instant case clearly falls short of the minimum contacts — or if you will the lower limit of qualification — necessary to confer jurisdiction on Arkansas. Although the majority opinion refers to "appellant's contacts with Arkansas being few," I submit that the contacts sufficient to confer jurisdiction on this State are simply non-existent.

In reviewing this case, the reader must keep in mind that this Court is affirming the trial court's decision finding the appellant, a Texas resident, liable as a *personal* guarantor of a lease agreement between two Arkansas corporations. Appellant's only contact with these Arkansas corporations was by virtue of his relationship with Compo-

sition Management Company (CMC), a Texas corporation. He was CMC's general counsel and one of its officers and directors. Admittedly, Jerry Sizemore, CMC's Marketing Director, came to Arkansas and negotiated the sale of two computers to the appellee Worthen Bank which, in turn, leased the equipment to the second Arkansas corporation, Telecompo. Worthen Bank required several guarantees regarding its lease with Telecompo; one was required of the appellant. Appellant's only involvement with the leasing arrangements that took place in Arkansas was his mailing a financial statement and lease-guarantee to Worthen Bank.

No one questions Arkansas' jurisdiction over CMC, most likely because CMC (through Sizemore) conducted the business negotiations in Arkansas that led to the lease which was executed and performed in this State.

Indisputably, the appellant was never physically within the State of Arkansas. The financial forms (including the individual guarantee) were prepared in Arkansas and mailed to the appellant in Texas. Upon receipt of these instruments, appellant signed and returned them by mail. It is also unrefuted that appellant never personally participated in any of the negotiations in Arkansas that led to the lease in controversy.

The majority opinion relies on the fact that appellant was involved with CMC as a director, officer and general counsel and that CMC was directly responsible for the formation of Telecompo. Obviously, appellant had a close connection with CMC, but I am puzzled how my colleagues can parlay CMC's contacts with this State into exercising *in personam* jurisdiction over appellant. Again, the majority in part relies upon *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286 (1980), stating that "appellant should have reasonably anticipated being haled into court in Arkansas if the lease went into default." Of course, appellant's expectations or anticipations are not the benchmark for determining whether his contacts with Arkansas were sufficient to withstand a due process challenge to the exercise of *in personam* jurisdiction over him.

In sum, the majority opinion is premised on appellant's relationship with CMC to substantiate this Court's decision to extend *in personam* jurisdiction over him. Unquestionably, we have fewer contacts here than in *SD Leasing*.

Under the test of minimum contacts and fair play, I am convinced that Arkansas' assumption of *in personam* jurisdiction over appellant violates his due process rights. I cannot conceive of our Supreme Court's interpreting its long-arm statute to gather in out-of-state residents who, like appellant, have virtually no personal contacts with our State's borders.

I would reverse.

I am authorized to state that Corbin, J., joins in this dissent.

William K. MAAS, d/b/a MAAS & ASSOCIATES *v.* MERRELL ASSOCIATES, INC.

CA 84-18 682 S.W.2d 769

Court of Appeals of Arkansas
Division I
Opinion delivered January 16, 1985

Butler, Hicky, Hicky & Routon, Ltd., for appellant.

W. Frank Morledge, P.A., for appellees.

MELVIN MAYFIELD, Judge. This is an appeal from the trial court's dismissal of a real estate broker's suit to recover from another broker an amount alleged to be due under an agreement to divide the commission earned from the sale of a motel in Morrilton, Arkansas.

The complaint was filed on October 16, 1980, and the appellee filed an answer denying the allegations of the complaint. Ultimately the case was set for jury trial on June

22, 1983. On the day before trial appellant filed an amendment to his complaint alleging, for the first time, that he was licensed in Arkansas as a real estate broker. A provision of Ark. Stat. Ann. § 71-1302 (Repl. 1979) states:

> No recovery may be had by any broker or salesman in any court in this State on a suit to collect a commission due him unless he is licensed under the provisions of this Act and unless such fact is stated in his complaint.

At an in-chambers conference on the morning of the day of trial, the appellee moved that the amendment to the complaint be stricken on the grounds that it was not timely filed. The motion was granted and the complaint dismissed.

On appeal the appellant argues that the trial court erred because the licensing requirement of section 71-1302 does not apply in the situation involved here where a nonresident broker is seeking to recover a share of the commission earned by an Arkansas broker for the sale of property in Arkansas. We do not have as much problem with the law as we do with the facts to which the law is to be applied.

The appellant cites the case of *Folsom* v. *Young & Young, Inc.,* 216 F.2d 352 (5th Cir. 1954), where a Florida corporate broker and two individual brokers in Georgia agreed to refer prospective purchasers to each other and to divide any commissions made on any sales to the referred prospects. The Florida broker referred a prospective buyer to the Georgia brokers and the buyer purchased real property located in Georgia. The Georgia brokers refused to pay the Florida broker any part of the commission earned and a suit filed in Georgia by the Florida broker was met by a motion to deny recovery based on the fact that the Florida broker was not licensed in Georgia. The motion was denied and the appellate court affirmed on the following rationale:

> The law of Georgia is clear that by referring a prospective purchaser to appellants, appellee was not engaged in the business of real estate broker in Georgia. A real estate broker earns his commission by bringing together a seller and a purchaser ready, able, and

> willing to buy property on the stipulated terms. Such was not the nature of appellee's promised services, and since no act agreed by it to be done was performed in Georgia, then by the settled law of Georgia, which this court is bound to follow, appellee was not engaged in the business of a real estate broker in Georgia, notwithstanding the location of the land.

To support the same principle, the appellant also cites the following cases: *Bell* v. *United Farm Agency,* 296 P.2d 149 (Okla. 1956); *Howell* v. *Steffey,* 204 A.2d 695 (D.C. App. 1964); *Hayes* v. *Reeves,* 571 P.2d 1177 (N.M. 1977); and *Pokress* v. *Tisch Florida Properties, Inc.,* 153 So.2d 346 (Fla. Dist. Ct. App. 1963). We agree that these cases support the appellant's position. The *Pokress* case is cited in another Florida case and the difference in the two cases demonstrates the principle involved. In the case of *Meadows of Beautiful Bronson* v. *E.G.L. Inv. Corp.,* 353 So. 2d 199 (Fla. Dist. Ct. App. 1978), the court held that members of an organization that made an agreement to "engage in and control the selling, marketing, advertising, and servicing of appellant's Florida realty" could not recover on the agreement as there was no allegation that either the organization or its members were licensed or registered real estate brokers or salesmen in Florida. The obvious difference in the two cases is that the agreement in *Meadows* required the "rendition of real estate brokerage services in Florida" whereas the *Pokress* case involved a Florida broker who employed out-of-state brokers to assist him to find a purchaser — not in Florida — but in the states where the out-of-state brokers were licensed.

The only Arkansas case cited by the parties on this point is *Circle Realty Co.* v. *Gottlieb,* 257 Ark. 160, 589 S.W.2d 574 (1979). In that case two brokers licensed in Arkansas agreed to divide a commission, but it was later claimed that the agreement was void because the participation of one Arkansas broker "came through" a New York broker who was not licensed in Arkansas. This contention was rejected and the case is at least compatible with the principle that an out-of-state broker does not have to be licensed in Arkansas in order to enforce his contract in this state, provided the

contract does not require the out-of-state broker to perform brokerage services in this state. We think a careful reading of our statute makes this clear. Ark. Stat. Ann. § 71-1301 (Repl. 1979) explicitly states that it is unlawful to act as a real estate broker or salesman *in Arkansas* without a license issued by the Arkansas Real Estate Commission.

While we think the law is clear enough, the facts to which we must apply that law are not clear. The appellant's argument assumes that he was an out-of-state broker at the time the motel in Morrilton was sold, but his complaint alleges he is a resident of Arkansas and the amendment to the complaint alleges he is licensed in Arkansas as a real estate broker. Probably the explanation is found in statements by appellee's attorney made in an argument to the trial court.

On the day before trial there was a hearing before the trial judge with the attorneys for both sides present. The hearing concerned a motion filed for appellant asking that a setoff and counterclaim filed for the appellee be stricken. The setoff and counterclaim were based on the allegation that appellant owed appellee a portion of the commissions received by appellant from the sale of motel properties in Rogers and Springdale, Arkansas. Appellee's attorney explained to the court that at the time of the Morrilton, Rogers, and Springdale transactions both appellant and appellee were members of the NBAA Association; that this is a very select organization of brokers who specialize in motels; that is a nationwide organization which generally has one member in each state; and that, under the rules of the organization, if an out-of-state broker brokers a motel property in a state where there is a member of the NBAA, he uses that broker and they split the commission. Appellee's attorney stated that the appellant came to Arkansas and sold the Rogers and Springdale motels and that the appellee was entitled to a portion of the commission on those sales.

Comparing the above statement with appellant's argument that assumes the appellant was an out-of-state broker at the time the motel in Morrilton was sold, it is possible that both the statement and the assumption made in the argument are true. In his reply brief the appellant acknowledges

that the facts involved are not clear and suggests that we "should remand this case for additional proof on the question of what acts were done in the State of Arkansas by the appellant non-resident broker, rather than merely affirm the trial court's dismissal of the Appellant's Complaint."

We agree with this suggestion. After granting the motion to strike the amendment alleging appellant was licensed in Arkansas, the trial court dismissed appellant's complaint. Civil Procedure Rule 12(c) provides: "If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . . ." Neither Rule 12 nor Rule 56 authorizes the trial court to summarily dismiss a complaint where there are matters before the court that show there is an issue of fact to be decided. We think such matters were before the court in this case and that the court erred in dismissing appellant's complaint. Therefore, we reverse and remand for further proceeding in keeping with this opinion.

In view of the remand it does not appear that there is any issue concerning the setoff and counterclaim that we need to discuss. However, the case of *Little Rock Crate & Basket Co.* v. *Young,* decided by the Arkansas Supreme Court on December 21, 1984, might be of interest to the parties.

Reversed and remanded.

CRACRAFT, C.J., and GLAZE, J., agree.

David A. GARRISON *v.* STATE of Arkansas

CA CR 84-154 682 S.W.2d 772

Court of Appeals of Arkansas
Division I
Opinion delivered January 16, 1985

Bob Keeter, for appellant.

Steve Clark, Att'y Gen., by: *Velda P. West,* Asst. Att'y Gen., for appellee.

TOM GLAZE, Judge. Appellant appeals from his jury convictions of breaking and entering, theft of property and criminal mischief in the first degree. He raises four points on appeal, but we find that none of them requires reversal.

First, appellant contends the court erred in denying his motion for new trial because his convictions were based on the uncorroborated testimony of an alleged accomplice. We easily dispose of this contention because this issue was not raised below. *See Gardner* v. *State,* 263 Ark. 739, 569 S.W.2d 74 (1978). Appellant never requested an instruction on accomplice liability nor, in reviewing the record, do we find from the evidence that appellant had an accomplice for the three crimes with which he was convicted.

Second, appellant argues the verdicts were not supported by the evidence and were contrary to the law. This argument is inextricably a part of appellant's first argument. There appellant argued that a Kenny Maddox, Jr. was an accomplice. Maddox also was the State's witness who clearly implicated appellant as the one who had committed the crimes. Because appellant and the evidence failed to show Maddox an accomplice, Maddox's testimony alone was sufficient to support appellant's convictions. There was, however, other accompanying evidence which aids in sustaining the verdicts. On December 5th or 6th of 1982, an Ed McCormick's house was broken into and considerable damage ($8,000 to $9,000) was done to its interior. In addition, McCormick said that he was missing a .243 Winchester rifle with a scope, two silver trophies and a full one-half gallon of vodka. He testified that prior to the

incident, appellant had threatened, cursed and harassed him because he had dated appellant's former wife.

Kenny Maddox, Jr., testified that appellant admitted to him that he had entered McCormick's house through its back window and after entering, had "pulled drawers out, put bleach on the furniture, busted eggs and stuff, poured catsup around the house, busted his t.v. and stereo." Maddox further stated appellant said that he had taken a .243 rifle, a bottle of vodka and a trophy which appellant said he threw in a creek. Maddox's father testified the appellant attempted to sell him a .243 rifle with a scope which Mr. Maddox, Sr., described as a Remington make. However, in a prior statement given the police, Mr. Maddox, Sr., described the rifle as a ".243 caliber Winchester with a scope." We believe the foregoing testimonies substantially support appellant's convictions and the evidence is clearly consistent with the crimes for which he was found guilty.

Appellant's third point for reversal reveals other evidence which tends to connect appellant with the theft of McCormick's .243 caliber rifle. A deputy sheriff, Jimmie Jacobs, testified that pursuant to appellant's written consent, he searched appellant's automobile and found a .243 caliber shell in the trunk. Appellant urges, however, this testimony and the shell should have been suppressed because the State could not produce the consent form appellant allegedly signed. We cannot agree. Appellant made his motion to suppress for the first time at trial, arguing that he had been assured by the State that a consent form had been freely and voluntarily executed and that he did not know it was unavailable until Jacobs testified at trial. Rule 16.2 of the Rules of Criminal Procedure requires a motion to suppress to be filed not later than ten days before the date of trial, although the trial court may otherwise entertain such a motion for good cause. Here, appellant filed a pre-trial discovery motion to which the State responded by stating its files were open for inspection. The State specifically answered that appellant could inspect all statements he had made and any written waivers he allegedly had signed while he was under arrest. If appellant had diligently inspected the files and requested the whereabouts of the

consent form, he would have known well in advance of the trial that the form was missing. As we have stated before, a defendant in a criminal case cannot rely upon discovery as a total substitute for his own investigation. *Robinson* v. *State,* 7 Ark. App. 209, 646 S.W.2d 714 (1983).

Even if appellant had filed a timely Motion to Suppress, his argument would be of no avail. In *Scroggins* v. *State,* 268 Ark. 261, 595 S.W.2d 219 (1980), the Supreme Court upheld the validity of an automobile search based upon an officer's *uncontradicted* statement that Scroggins orally and voluntarily gave his consent to search his vehicle. Here, Deputy Sheriff Jacobs, Patrolman Charlie Edmonson and Jailer Harold Webb all testified without contradiction that appellant had signed a written consent form allowing his vehicle to be searched. They merely said that none of them could find the executed form. Based upon the Court's holding in *Scroggins,* we hold these three officers' uncontradicted statements met the State's burden of proving by clear and positive testimony that the consent to search was freely and voluntarily given without actual or implied duress or coercion.

Appellant's final argument is the trial court erred in refusing to allow appellant to be sentenced under Ark. Stat. Ann. §§ 43-2339 *et seq.,* the "Alternative Service Act."[1] As was pointed out in *Haynes* v. *State,* 269 Ark. 506, 602 S.W.2d 599 (1980), this Act is discretionary. An eligible offender under the Act is defined in relevant part as follows:

> "Eligible Offender" means any person convicted of a felony offense, other than a capital felony offense, or murder in the first degree, murder in the second degree, first degree rape or kidnapping, or aggravated robbery and who has never been previously convicted of a felony offense, and whose interests, and the interests of the State, *in the opinion of the sentencing trial court,* could be [better] served by diversion under the provisions of this Act than by sentencing under other applicable penalty provisions established by law.

[1]Prior to 1983, this Act was previously known as the "Youthful Offender Alternative Service Act of 1975."

> Those persons under the age of twenty-six (26) years at the time of the commission of a felony offense, other than a capital felony offense, or murder in the first degree, murder in the second degree, first degree rape or kidnapping, or aggravated robbery for which they are convicted shall still be "Eligible Offenders" under this Act if they had one (1) previous felony conviction other than a conviction for a capital felony offense, or murder in the first degree, murder in the second degree, first degree rape or kidnapping or aggravated robbery.

Ark. Stat. Ann. § 43-2340(f) (Supp. 1983) (emphasis supplied). Under the Act, the trial court must determine if any convicted person may be an eligible offender as defined in § 43-2340(f), *supra; see also* Ark. Stat. Ann. § 43-2342 (Supp. 1983). As noted in *Turner* v. *State,* 270 Ark. 969, 606 S.W.2d 762 (1980), the trial judge has discretionary authority under the Act in two pertinent respects: one, the offender is eligible for sentencing under the Act if "in the opinion of the sentencing trial court" his interests and those of the State would best be served by resorting to the Act. Two, if it appears to the trial court that the defendant "may be an eligible offender," the court shall postpone the imposition of sentence for not more than 30 days to allow the submission of written reports with regard to the eligibility of the offender for sentencing under the Act. *See also Barnes* v. *State,* 4 Ark. App. 84, 628 S.W.2d 334 (1982).

In the instant case, the trial judge simply found that the State's interests would not be served by resorting to alternative sentencing under the Act. Appellant was convicted of breaking and entering, theft of property and first degree criminal mischief and these crimes involved what the Judge described as "one of the most horrible situations I have heard." Appellant also had been recently convicted of harassment which, considering the magnitude of the threats made and damages caused by appellant in this case, prompted the judge to state:

> I believe, Mr. Garrison, you need someone to kind of keep an eye on you a little bit. . . . Normally, I would grant such . . . request[s], [alternative and concurrent

sentencing] . . . but I believe you deserve a little extra attention. I believe that the people of this county are entitled to their peace and quiet and I don't know what your problem is but I think you need to devote some time to trying to solve it somehow.

From the judge's remarks, he clearly considered whether appellant was an eligible offender under the Act and decided he was not. Based upon the record before us, we cannot say he erred.

Affirmed.

CORBIN and MAYFIELD, JJ., agree.

THE FIREMAN'S INSURANCE COMPANY *v.*
Wanda SMITH and Betty WADE, et al.

CA 84-135 683 S.W.2d 234

Court of Appeals of Arkansas
En Banc
Opinion delivered January 23, 1985
[Rehearing denied February 20, 1985.*]

*COOPER and MAYFIELD, JJ., would grant rehearing.

Rieves & Mayton, by: *Connie Lewis Mayton,* for appellant.

Fletcher C. Lewis and *Jim O'Hare,* for appellee.

GEORGE K. CRACRAFT, Chief Judge. The Fireman's Insurance Company appeals from a declaratory judgment from the Circuit Court of Woodruff County that its homeowner's insurance policy issued to Dudley C. Roane afforded coverage for liability and a duty to defend an action for the wrongful death of Herschel Wane Smith brought by his administratrixes against the insured's estate, and that coverage was not precluded under a policy which excluded from coverage "bodily injury which is expected or intended by the insured" and placed a duty upon the insured to give written notice of an accident or occurrence "as soon as practicable." Appellant contends that the trial court erred in failing to direct a verdict and refusing to grant judgment notwithstanding the verdict on both points. Our conclusion

that there was error in the first point makes it unnecessary for us to address the second one.

On March 4, 1982 Dudley C. Roane shot and killed Herschel Wane Smith in or beside a truck parked outside a tavern near Fair Oaks in Cross County. On March 26, 1982 Wanda Smith and Betty Wade as co-administratrixes of Smith's estate, brought a wrongful death action against Roane alleging that the killing was *"willful, malicious and intentional."* Roane employed his own counsel to represent him in that action and the insurance carrier was given no notice of either the event or the filing of the suit. On April 12, 1983 the appellant was notified of the killing and complaint for the first time in a letter from Roane's counsel in a wrongful death action, saying that he understood that Roane had had a homeowner's policy and asking that the complaint be evaluated by the appellant since the attorney did not know what the terms of the policy were.

Roane committed suicide on May 24, 1983 and the action was thereafter revived in the name of his estate. Appellant upon receipt of the copy of the complaint employed local counsel to defend the suit on reservation of its right to deny coverage either for failure of the insured to give notice of the event and complaint "as soon as practicable" as provided by the policy, or under a policy provision excluding coverage for bodily injury which is "expected or intended by the insured." On July 12, 1983 the appellee amended the complaint to include an alternative plea that the killing resulted from Roane's "ordinary negligence." On April 12 appellant filed this action for a declaration of its obligations under both policy provisions.

Both at the close of the plaintiff's case and after all the evidence was in, the appellant's motion for a directed verdict was overruled. The matter was submitted to a jury on written interrogatories. The jury found that Roane did not intend to shoot Smith or intend or expect the result and that appellant was not prejudiced by notice of the occurrence not being given as soon as practicable. The court thereafter overruled appellant's motion for judgment notwithstanding the verdict. This appeal followed.

The interpretation and application of an exception in an insurance policy which excludes coverage for personal injury which is "expected or intended" by the insured has been settled by this court in *Talley* v. *MFA Mutual Ins. Co.*, 273 Ark. 269, 620 S.W.2d 260 (1981) and *CNA Ins. Co.* v. *McGinnis*, 282 Ark. 90, 666 S.W.2d 689 (1984). In *Talley* the insured admitted firing the shotgun blast which severely injured two persons but denied that he knew they were in his line of fire or that he intended to cause them or anyone else an injury. There was evidence corroborating that testimony. The court held that if the insured intended to shoot the injured party there was no coverage, but if he did not and the injury was the result of mere negligence on his part, there was coverage.

In *CNA Ins. Co.* suit was brought against the insured for sexually abusing a small child over a period of years, the abuse having allegedly resulted in multiple injuries to her. There the insured admitted the conduct with which he was charged but denied that he intended any harm from his activities. There was evidence from a psychologist that males involved in similar activities do not intend or expect that the young females will sustain any injury. The trial court found that the insurer had failed in its burden of proving that although the act was intentional the result was expected. The Court of Appeals affirmed the trial court. *CNA Ins. Co.* v. *McGinnis*, 10 Ark. App. 234, 663 S.W.2d 182 (1984). On review the Supreme Court reversed, agreeing with the dissent in the Court of Appeals that for a stepfather in such a situation to claim that he did not expect or intend to cause injury "flies in the face of all reason, common sense and experience." It cited with approval *Clark* v. *Allstate Ins. Co.*, 22 Ariz. App. 601, 529 P.2d 1195 (1975) where there was a similar disclaimer of intent to do harm when one person struck another in the face causing serious injury. The Arizona court held that such an action is one which is recognized as one so certain to cause a particular kind of harm that we can say a person who performed the act intended the resulting harm. *CNA Ins. Co.* concluded that the language in an insurance policy such as this is to be construed in its plain, ordinary and popular sense and means that there is an exclusion from coverage for injuries

which the average run of reasonable people would expect or intend to inflict by engaging in the conduct in question.

Under our rules of appellate review we will not reverse a jury's verdict unless we find it to be unsupported by substantial evidence. From our review of the testimony in this case we conclude that the jury's finding that Roane did not intend to shoot Smith and did not intend to inflict injury on him is not supported by substantial evidence.

Several witnesses established that Roane was a stranger to them who had arrived at the tavern around 10:00 p.m. on the evening of the killing. He bought a round of drinks for everyone in the tavern and was invited to join certain of them for a period of time. He became intoxicated and began flashing large sums of money which everyone observed. There was evidence that he went to sleep inside the tavern and at closing time was escorted by the owner and several others to his truck which was parked outside and told that he could sleep in the truck until morning. The evidence indicated that he entered the truck and went to sleep on the pillow he kept for that purpose.

The persons who escorted him out returned to the tavern until it closed. Douglas Ridgeway testified that when the tavern closed he left with Terry Armstrong and intended to drive home with him. As they walked past Roane's truck they mention that he had quite a bit of money with him and one or the other suggested that they take his money while he was sleeping. Armstrong testified that although such a conversation did take place it was only in jest. For some reason, which is not explained by either of them, Armstrong got in Roane's truck with him. According to Armstrong, Roane became unruly and abusive and Armstrong struck Roane several times on the nose causing excessive bleeding. Armstrong left the truck for a moment but he returned to it. His explanation was that he wished to apologize to Roane for having struck him. There was some testimony that while the altercation between Armstrong and Roane was taking place, Roane had reached under the seat as if to remove a weapon and someone heard Armstrong tell him not to reach under it. Armstrong stated that Roane did reach under the

seat and he thought he had a gun and had told him not to do so.

Armstrong testified that before he got to the truck he saw Jake Morgan and Herschel Smith come out of the tavern together. Morgan grabbed Armstrong by the arm and told him to leave Roane alone because he was drunk and didn't need to be bothered. At that time Herschel Smith was at the truck door and Morgan was heard to say that Roane had a gun. Morgan ran in one direction and Armstrong and ridgeway ran back to their truck. As they were leaving Armstrong heard a shot. Smith, the deceased, had last been seen by the door of the truck. There was no indication of why Smith went to the truck or what he did after he was last seen standing by the open door.

Dudley Roane testified by deposition which was read to the jury. He was a resident of Clarksdale, Mississippi and on March 3rd he cashed a check for $500 intending to go to Mountain Home, Arkansas to seek employment. He placed some of the money in his billfold and about $400 in his boot. When he passed through Fair Oaks he stopped at the tavern because he was tired and thought a beer might pick him up. While he was there some other occupants asked him to join them and he bought a round of beer with money which he took out of his boot. He admitted drinking three bottles of beer but denied that he was intoxicated. He stated that he was then told that he had to leave because the tavern was closing and he went to sleep in his truck due to his fatigue. The next thing he recalled was being awakened roughly by someone coming into the truck and demanding money. He stated that the gave the man a $20 bill which infuriated him because he said he knew he had more money than that. He testified that this person was trying to pull him out of the truck and threatened to get the money and cut his throat with a knife. Roane stated, "He kept coming after me and that's when I fired the gun. He was just up inside the opened door of the truck. The person I shot at was the one that had been in the truck. I didn't see or shoot at any other particular person. As far as I knew I was trying to defend myself. I didn't know what else to do. I did not see another person." Roane testified that he saw a knife in the hand of his

assailant and that he had attempted to cut him on the throat with it. A knife was found on the ground beside the truck after the shooting which was delivered to the sheriff. The sheriff had been unable to determine the ownership of the knife and it had been misplaced in the sheriff's evidence room and could not be produced at the trial.

There were no eyewitnesses to the killing. Roane's testimony that he intentionally fired the pistol to repel what he believed to be an assault with a deadly weapon is undisputed. The intent to inflict injury can be inferred from the very character of the act. Any reasonable person would expect or intend serious injury to be inflicted by shooting another at point blank range with a .38 caliber pistol. Reasonable minds could not conclude otherwse.

The jury's finding that Roane did not intend either the shooting or the result could only be reached by disregarding the testimony of Roane in which he admitted that he fired the shot intentionally and intended to harm his assailant. As there were no facts or circumstances contradicting that testimony it was arbitrary for the jury to disregard it entirely. Our courts have said many times that the jury is the judge of the weight and credibility of the witnesses but it has no right to arbitrarily disregard the testimony of any witness which is consistent in its entirety and there are no facts or circumstances which contradict or conflict with it. *St. Louis-S.F. Ry. Co.* v. *Harmon,* 179 Ark. 248, 15 S.W.2d 310 (1929); *St. Louis-San Francisco Ry. Co.* v. *Williams,* 180 Ark. 413, 21 S.W.2d 611 (1929). While it is true that as a general rule the testimony of an interested witness does not stand as uncontradicted, the rule is not inflexible. Where the uncontradicted testimony of an interested witness is unaffected by conflicting inferences to be drawn from it and is not improbable, extraordinary or surprising in its nature or where there is no ground for hesitating to accept it as true there is no reason for denying the verity of that evidence. *Knighton* v. *International Paper Co.,* 246 Ark. 527, 438 S.W.2d 721 (1969); *McClarty Leasing Systems, Inc.* v. *Blackshear,* 11 Ark. App. 178, 668 S.W.2d 53 (1984).

All the witnesses admitted that they had not known

Roane before that night and that he had left the tavern and gone to sleep in his truck parked outside the tavern. Although Armstrong stated that his statement about "rolling the drunk" was in jest and he denied assaulting Roane with a knife, he did admit that for no apparent reason he entered the cab of Roane's truck. It was not disputed that Armstrong had hit him and caused his nose to bleed profusely and that Roane was mad about it. Nor was it disputed that, within minutes of that encounter, Smith, also for no apparent reason, entered the darkened truck. These facts do not give rise to conflicting inferences that Roane accidentally fired the weapon or that he intended to injure a person other than the one entering his truck at the time. On the contrary they would be entirely consistent with Roane's testimony. Roane's testimony is not extraordinary, improbable or surprising in nature. It is also to be noted that Roane's testimony is actually adverse to his own interest in this proceeding. It would establish every fact required to denude him of insurance coverage in the wrongful death claim. As there were no facts or circumstances contradicting Roane's testimony we conclude that the jury acted arbitrarily in totally disregarding it and the trial court erred in denying appellant's motion for judgment notwithstanding the verdict. The case is reversed and remanded with direction that the trial court enter an order not inconsistent with this opinion.

COOPER and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. In this case as in *Talley* v. *MFA Mutual Ins. Co.*, 273 Ark. 269, 620 S.W.2d 260 (1981), the question is "whether a liability policy such as this one provides coverage for the unintended results of an intentional act." The answer there was that such coverage was provided. The policy here contains the same provision; therefore, it provides the same coverage.

Talley held that whether the results in that case were intended or not was a question of fact. In this case the insured testified that he intended to shoot the man who had attacked him but he actually shot another man. If that testimony is believed, the result of the intended act was

clearly unintended. In answer to an interrogatory, the jury found that the insured did not intend to shoot the man he actually shot. I cannot agree that this court should set that verdict aside.

The jury also found, by answer to an interrogatory, that the insurance company was not prejudiced by failure of the insured to give earlier notice of the occurrence or of the filing of this suit. I think that finding was supported by the evidence and I would affirm the judgment of the trial court entered upon the verdict of the jury.

COOPER, J., joins in this dissent.

James Ronald POMRANING *v.* Carol Ann POMRANING

CA 84-169 682 S.W.2d 775

Court of Appeals of Arkansas
Division II
Opinion delivered January 23, 1985
[Rehearing denied February 20, 1985.]

Jerry Ryan, for appellant.

Phillip B. Boudreaux, for appellee.

GEORGE K. CRACRAFT, Chief Judge. James Ronald Pomraning appeals from a divorce decree entered in the chancery court of Polk County. He contends that the chancellor erred both in granting the divorce when appellee failed to prove and corroborate statutory grounds and in assuming jurisdiction to determine the issue of child custody. We do not agree.

The appellee sought her divorce on grounds of indignities. Divorce is a creature of statute and can only be granted when statutory grounds have been proved and corroborated. Ark. Stat. Ann. § 34-1202 (Supp. 1983) authorizes the granting of a divorce when one spouse proves that the other had offered such indignities to her person as to render her condition in life intolerable. Personal indignities may consist of rudeness, unmerited reproach, contempt, studied neglect, open insult and other plain manifestations of settled hate, alienation or estrangement so habitually, continuously and permanently pursued as to create that intolerable condition contemplated by the statute. *Copeland* v. *Copeland,* 2 Ark. App. 55, 616 S.W.2d 773 (1981).

Appellee testified that during the marriage appellant was constantly angry at her and would not speak to her for days at a time except in situations of necessity. This behavior occurred every two or three weeks throughout the marriage. He openly criticized her about her housekeeping and the way she cared for the children. He showed her little affection. On two occasions he lost his temper and became

"physical" with her. On one occasion they were separated for over three months and during this period he did not provide any support for her or their child. They were reconciled thereafter but his conduct toward her continued to be the same. She stated that she had separated from him five months before the hearing and he had contributed nothing toward her support or that of the children, although he visited them regularly. As a result of the "constant fighting" she has developed health problems. This testimony, if believed, would constitute acts of rudeness or unmerited reproach, studied neglect and other manifestations mentioned in *Copeland.*

Corroboration is testimony of a substantial fact or circumstance, independent of the statement of a complaining spouse, which leads a reasonable mind to believe that the material testimony of that spouse is true. Corroborating testimony may not consist of mere generalities or opinions, beliefs and conclusions on the part of the witness but must be directed toward specific language, acts and conduct. *Welch* v. *Welch,* 254 Ark. 84, 491 S.W.2d 598 (1973); *Copeland* v. *Copeland, supra.* In a contested matter in which it is apparent that there is no collusion the corroboration required may be relatively slight. *Copeland* v. *Copeland, supra; Coffey* v. *Coffey,* 223 Ark. 607, 267 S.W.2d 499 (1954).

The appellee's mother testified that she regularly visited in the parties' home every six to eight weeks and had an opportunity to observe their relationship. She stated that appellant would not communicate with appellee and would never talk to her during meals. He criticized her about everything, including the house and the food. This reproach took place in her presence, and she stated that any criticism about her housework and care of the children was wholly unmerited. She stated that he had yelled and screamed at appellee in her presence and that she knew that the appellee was nervous and distressed and had developed an upset stomach as a result of it. At the time she had left the appellant she had lost a lot of weight, but since the separation she has relaxed, eats better, and has gained weight. This testimony adequately corroborates the appellee's statements as to rudeness, unmerited reproach, contempt and studied neglect.

Although the appellant denied any marital misconduct we give due regard to the chancellor's superior position to determine the weight of the testimony and the credibility of the witnesses. Although we review chancery cases *de novo,* we do not disturb a chancellor's finding unless it is clearly against a preponderance of the evidence. ARCP Rule 52(a); *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W.2d 404 (1981).

Prior to her marriage appellee had been a lifelong resident of Arkansas. In 1979 she married the appellant in Louisiana and maintained her marital domicile in that state until July 28, 1983 when she separated from her husband and brought her two children to her mother's home in Mena. On September 27, 1983 she filed suit in Arkansas seeking a divorce and custody of the two children. The appellant appeared, answered and prayed that, if a divorce be granted, he be awarded joint custody of the two children.

The case was set for trial on December 29, 1983 but was continued until January 5, 1984 because of a winter storm. On January 3rd the appellant filed an amended answer challenging the court's jurisdiction to determine the custody issue and asserting that because Louisiana was the home state of the children the Arkansas court lacked jurisdiction under Ark. Stat. Ann. § 34-2701(a) (Supp. 1983). The following day he obtained an Ex Parte order from the Louisiana court finding that Louisiana had jurisdiction of the custody issue and directing the appellee to appear and show cause why the children should not be placed in the appellant's custody. On January 5th the appellant presented his motion to dismiss to the chancellor and exhibited the Louisiana order. The chancellor denied the motion.

Appellant contends that the chancellor lacked jurisdiction to make a custody determination under the provisions of the Uniform Child Custody Jurisdiction Act, Ark. Stat. Ann. §§ 34-2701 et seq (Supp. 1983). Ark. Stat. Ann. § 34-2703 deals with jurisdictional requisites for custody determinations and states in pertinent part that a court has jurisdiction if:

(a) (1) this State (i) is the home state of the child at the

> time of commencement of the proceeding, or (ii) had been the child's home state within six (6) months before commencement of the proceeding . . . *or*
>
> (2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one (1) contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; *or*
>
> (3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; *or*
>
> (4) (i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction. [Emphasis supplied]

Ark. Stat. Ann. § 34-2702(5) defines "home state" as the one in which the child has resided with one or both parents for at least six consecutive months immediately preceding the time involved.

Appellant primarily argues that as the children had not resided in this state for six months preceding the commencement of appellee's action, the court lacked jurisdiction of that issue under § 34-2703(a)(1). This argument must fail because the section as a whole provides for alternate bases for jurisdiction, only one of which is based on establishing a "home state." Subsection (a)(1) *confers* jurisdiction in any event if the child has resided in this state for six consecutive months before the commencement of the action. Subsections (a)(2), (3) and (4) outline those circumstances under which

jurisdiction is conferred where the child has resided here for less than 6 months.

The chancellor found that he did have jurisdiction under subsection (a)(2) which confers jurisdiction where it is shown that the child and at least one parent have significant connections with this state and there is available in the state substantial evidence concerning the child's present or future care, training and personal relationships.

We find no error in the chancellor's conclusion. Appellee was born and raised in this state and lived most of her life in Polk County. She was not "shopping" to find a forum in which to obtain a divorce and custody order but was returning to the home in which she had been raised and to which she had returned on both occasions when marital problems developed. The children were present in this state and had been for several months. The older child had resided in Polk County during an earlier separation. The maternal grandparents with whom both appellee and her children had maintained a close relationship resided there. They had provided appellee and the child a home and financial support during her first and second separations from the appellant and gave assurance that they would do so for so long as was necessary. The appellee considered Mena her home and stated her intention to remain in that community indefinitely. A full contested hearing was had before the chancellor with both parties present. Appellant does not point out to us any evidence regarding the child's present or future care which was not made known to the chancellor. under these circumstances the fact that appellee and her children had lived in this state for a shorter period than that required to establish it as their "home state" did not preclude jurisdiction over the custody issue.

The facts in this case are readily distinguishable from those in *Biggers* v. *Biggers,* 11 Ark. App. 62, 666 S.W.2d 714 (1984) and *Hogan* v. *Durgan,* 11 Ark. App. 172, 668 S.W.2d 57 (1984). In *Hogan* the child's home state was in the State of Washington and neither she nor her mother had ever been in or had any connection with Arkansas. In *Biggers* the home state of the children and their mother was Missouri. The

only connection with this state was that the father had moved here after the divorce. The children had been in this state only on short and infrequent visits and were present at the time of the hearing only because their father had abducted them and brought them here for the purpose of obtaining a custody award.

Appellant also contends that the chancellor should have declined to exercise jurisdiction because Louisiana was a more convenient forum. Ark. Stat. Ann. § 34-2707 provides that a court *may* decline to exercise its jurisdiction on a custody determination where it finds it to be an inconvenient forum taking into account the fact that another state was the child's home state or has a closer connection with the child and parent, or that evidence of present and future care is more readily available in another state. Considering the factors previously outlined we cannot conclude that the chancellor abused his discretion in deciding to exercise jurisdiction in this case.

Affirmed.

CLONINGER and COOPER, JJ., agree.

Gerald MOELLER, G. W. PHELPS and E. D. BERTELL
v. THEIS REALTY, INC.

CA 84-138 683 S.W.2d 239

Court of Appeals of Arkansas
Division II
Opinion delivered January 23, 1985

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

Taylor, Vandergriff & Morris, for appellee.

JAMES R. COOPER, Judge. On October 10, 1979, the appellants entered into an Exclusive Listing Contract with the appellee. The listing agreement was to expire January 10, 1980. The listing agreement provided that the appellee "shall have the sole and exclusive right to sell said property." It further provided that "if the property be sold or otherwise disposed of by agent or any other person, association or corporation or owner during the period of this contract, Owner agrees to pay Agent a professional fee of ten percent of the gross amount of the sale." On December 28, 1979, the appellants executed a lease agreement between themselves, as lessors, and Ratliff Brothers. The lease was for three months, commencing on January 1, 1980, and ending March 31, 1980. The lease included an option to purchase which was effective during the term of the lease. Ratliff Brothers exercised the option to purchase on March 31, 1980. The appellee filed suit for its commission on the sale to Ratliff Brothers and the trial judge granted the appellee's motion for summary judgment. From that decision, comes this appeal.

The appellants argue that the trial court erred in granting the appellee's motion for summary judgment because a fact question existed as to whether the lease with an option to purchase was on its face a disposition of the property as that term is used in the listing agreement between the parties. The appellants also argue that summary judgment was not proper because they had raised the issues of unjust enrichment and failure of consideration. We find no error in the trail court's ruling, and therefore we affirm.

First, we find it unnecessary to deal with the appellants' argument concerning whether a lease with an option to

purchase is a disposition of property. In the case at bar, the option was granted during the listing period, and the optionee exercised the option. We are mindful of the fact that the option was exercised after the exclusive listing contract had expired. We see little difference in the granting of an option which is ultimately exercised, and the execution of a contract to sell property which is signed during the listing period but performed afterwards. The trial judge properly granted summary judgment on this point. In *Swift* v. *Erwin,* 104 Ark. 459, 148 S.W. 267 (1912), the court stated, "Instead of being a sale, an option excludes the right to sell during its life." The option here effectively prevented the appellee from exercising its exclusive right to sell the appellants' property during the remainder of the exclusive listing. Also, the exercise of the option by Ratliff Brothers consummated the sale by the appellants in derogation of the appellee's rights under the exclusive listing agreement. Therefore, the appellee was entitled to its commission pursuant to the listing agreement.

Next, the appellants argue that summary judgment was improper because they raised the issues of unjust enrichment and failure of consideration, which created a fact question for the jury. We disagree. The appellants and the appellee entered into a valid exclusive listing contract and the appellants failed to show by affidavit or other proof the basis of their claim that there was in fact a failure of consideration. In *Tate* v. *Goine,* 212 Ark. 51, 204 S.W.2d 900 (1947), the court held that "the mere fact of listing, coupled with anticipated effort in procuring a purchaser, would be sufficient consideration." There was no showing that the appellee did not attempt to discharge its obligations under the contract with the appellants and we will not reverse on the mere allegation of failure of consideration.

The appellants' argument concerning unjust enrichment is likewise without merit. There was no evidence presented which would show that the listing contract was not freely entered into by the appellants, and therefore nothing upon which a jury could find the contract void. Thus, the concept of unjust enrichment has no application to these facts as it is a legal theory that exists in the realm of

quasi-contract, and not when an express written contract exists. See, *Dunn* v. *Phoenix Village, Inc.*, 213 F. Supp. 936 (W.D. Ark. 1963).

The appellee's motion for summary judgment was filed on October 6, 1981. The appellants obtained extensions of time in which to file their response to the motion, and they finally did respond on December 31, 1981. Accompanying their response to the motion was the affidavit of Russell Ratliff, the lessee and purchaser of the appellants' property. A hearing on the motion was held on July 21, 1982, and summary judgment was granted on March 17, 1983. The trail court found that Mr. Ratliff's affidavit was not sufficient to set forth specific facts showing that there was a genuine fact issue for trial. The ambiguities claimed by the appellants, and their other arguments addressed above, were not supported by the one affidavit which was filed in resisting the motion.

ARCP, Rule 56 (e) provides that:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegation or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment if appropriate, shall be entered against him.

We cannot say that, based on the facts presented at the hearing on the appellee's motion, the granting of the summary judgment was error.

On appeal from the granting of a motion for summary judgment, this Court must review the evidence in the light most favorable to the party resisting the motion. *Bourland* v. *Title Ins. Co. of Minnesota*, 4 Ark. App. 68, 627 S.W.2d 567 (1982). See also *Dodrill* v. *Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979). The burden is on the appellee to demonstrate that, even though the facts may be in dispute, reasonable minds could not differ as to the conclusion to be

drawn from them. *Hendricks* v. *Burton,* 1 Ark. App. 159, 613 S.W.2d 609 (1981).

Summary judgment is an extreme remedy and should be granted only when no genuine issue of fact exists. *Purser* v. *Corpus Christi State Nat'l Bank,* 258 Ark. 54, 522 S.W.2d 187 (1975). In *Davis, Adm'x* v. *Lingl Corp.,* 277 Ark. 303, 641 S.W.2d 27 (1982), the Arkansas Supreme Court stated:

> A summary judgment is appropriate only where the pleadings, depositions and answers to interrogations, together with the affidavits, show there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. Rule 56, ARCP; *Turner* v. *Baptist Medical Center,* 275 Ark. 424, 631 S.W.2d 275 (1982).

We have reviewed the evidence before the trial judge when he granted the motion for summary judgment and find that he did not err. Also, the appellee has met its burden by showing that no genuine issues of fact existed and the judgment was correct.

Affirmed.

CRACRAFT, C.J. and CLONINGER, J., agree.

Anita D. BIERMAN *v.* William L. BIERMAN

CA 84-139 683 S.W.2d 241

Court of Appeals of Arkansas
En Banc
Opinion delivered January 23, 1985

Hall, Tucker & Lovell, for appellant.

Meredith Wineland, for appellee.

LAWSON CLONINGER, Judge. The issue on appeal is whether the trial court erred in refusing to enforce a property settlement and child support agreement. We are of the opinion that, under the circumstances, the minor's service in the armed forces, followed by his enrollment in college nearly a year after his discharge, ended appellee's obligation. Thus, we affirm the trial court's decision.

Appellant and appellee were divorced in 1976. By agreement of the parties, appellant was granted custody of the couple's minor child, Brian. A property settlement and child support agreement provided that appellee would pay $150 per month for support and maintenance of the child

and would continue this support "through college if [the] child elects to attend an accredited college and so long as [he] works toward an accredited degree." Provision was made for payments to continue through all twelve months of each college year. In 1977 monthly child support payments were increased from $150 to $200.

Brian, still a minor, enlisted in the United States Navy in November, 1980. He was discharged in March, 1982, at the age of eighteen, following an automobile accident. He received no benefits from the Navy. In the spring of 1983, the young man matriculated at the University of Arkansas at Fayetteville. He continued there through December 1983, and then transferred to the University of Arkansas at Little Rock for the next semester. The testimony indicates that between March, 1982, the date of Brian's discharge from the Navy, and January 16, 1984 — the date of the hearing — a period of some twenty-one months, the young man had earned twenty hours of college credit. At the time of the hearing, the parties' son was enrolled for sixteen academic hours and was employed part-time.

When appellee learned in December, 1980, that his son was serving in the Navy, he discontinued child support. After Brian's release and subsequent enrollment in college, appellee continued to refuse to make payments, asserting that his son had emancipated himself by joining the Navy and that he was no longer obligated to provide support. Appellant filed a motion in December, 1983, seeking enforcement of the child support agreement. Appellee responded that a change of circumstances had occured because the child had held himself out as an adult on entering naval service. In January, 1984, appellee petitioned Saline Chancery Court, requesting that he be relieved from any duy to pay child support. A hearing was held, and the chancellor found that appellee was no longer obligated to provide child support to appellant for Brian's support and education because any duty ceased at the time of the son's enlistment.

A parent is not under an absolute legal obligation to support an able-bodied child who has reached the age of majority. Any order for support beyond that age must be

responsive to the particular circumstances of the case. *Hogue* v. *Hogue,* 262 Ark. 767, 561 S.W.2d 299 (1978). *See also Matthews* v. *Matthews,* 245 Ark. 1, 430 S.W.2d 864 (1968); *Jerry* v. *Jerry,* 235 Ark. 589, 361 S.W.2d 92 (1962). In addressing the particular circumstances in this case, we must ask whether, at the time of the settlement, the parties contemplated the course of action pursued by their son.

It seems reasonable to infer that appellee was agreeing to provide child support under the ordinary pattern of enrollment for full time college study in the autumn semester following graduation from high school. Appellee surely did not envision obligating himself indefinitely. Fundamental principles of equity demand that appellee not be held liable for child support for the period during which Brian was away from home and receiving income from the Navy. On his discharge from the armed forces, Brian was no longer a minor and was no longer unable to pay his way at home. His academic career resumed approximately nine months after his naval career ended. Given these facts, we cannot fault the chancellor's finding of emancipation.

Affirmed.

GLAZE, J., concurs.

Ted QUEEN *v.* ROYAL SERVICE COMPANY and HARTFORD INSURANCE COMPANY

CA 82-19 682 S.W.2d 779

Court of Appeals of Arkansas
En Banc
Opinion delivered January 23, 1985
[Rehearing denied February 20, 1985.*]

Holmes and Trafford, by: *Winfred A. Trafford,* for appellant.

*COOPER AND MAYFIELD, JJ., would grant rehearing.

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

DONALD L. CORBIN, Judge. This is the second appeal of this case involving appellant, Ted Queen, and appellees, Royal Service Company and Hartford Insurance Company. In the first appeal, we reversed the decision of the Workers' Compensation Commission wherein the Commission denied benefits because appellant was the "alter ego" of Royal Service Company. On petition for rehearing, we remanded the case to the Commission to make a determination as to whether or not the injury sustained by appellant arose out of and in the course of his employment because the Commission had not addressed that issue in the prior proceeding. The Commission then remanded the case to the Administrative Law Judge who found that appellant had failed to prove by a preponderance of the credible evidence that he was acting in the course and scope of his employment when he sustained injuries as a result of a motor vehicle accident on June 15, 1979. The Commission affirmed and adopted the ALJ's decision. We affirm.

The issue on appeal is whether the Commission's decision is supported by substantial evidence. For reversal, appellant relies principally upon the decision of *Guidry* v. *J & R Eads Const. Co.,* 11 Ark. App. 219, 669 S.W.2d 483 (1984). There, the claimant was injured and subsequently underwent surgery for a ruptured disc. The claimant was given a permanent partial disability rating as a result of the job-related injury and released to return to work. On appeal, the claimant contended that the rating was insufficient, that his healing period had not ended, that he should be allowed a retroactive change of physicians and that he was entitled to future medical treatment. At a hearing before the Administrative Law Judge, the claimant admitted that he was involved in an automobile accident some five months after his original compensable injury and that suit was filed against the employer of the driver of the other vehicle. The claimant's complaint alleged that he had suffered pain and injuries and acute aggravation of previous disc disease. The claimant also stated under oath in answers to interrogatories that the injury sustained in the auto collision aggravated the

previous back injury. The Commission denied benefits on the basis that there was a new event that occurred which aggravated the claimant's prior injury and went on to state in its opinion that it would not award benefits to a claimant who had previously given sworn statements in a pending lawsuit to the effect that his physical difficulties related to a non-job related auto accident and who later changed his mind and decided to file a workers' compensation claim for additional benefits. In remanding the decision, this Court stated that it was not the Commission's prerogative to refuse compensation to a claimant simply because he was untruthful.

The record in the case at bar reflects that hearings were held on November 1, 1979, and August 8, 1983, to determine whether appellant sustained a compensable injury on June 15, 1979. Following the Commission's remand to the Administrative Law Judge, appellant's attorney requested permission to submit additional evidence "relative to the scope of employment of Mr. Queen and some business records relative to his comp rate." Appellant attempted to introduce an affidavit by Calvin Murphy and ledger sheets of Royal Service Company from August 1978 through July 1979. Calvin Murphy's affidavit was disallowed as appellees objected to the affidavit itself because they had no opportunity to cross-examine and the evidence did not qualify as newly discovered evidence. The second hearing was held on August 8, 1983, to proffer Calvin Murphy's testimony. Calvin Murphy did not appear at the hearing and his deposition was taken later that month. The ALJ subsequently determined that the deposition did not qualify as newly discovered evidence pursuant to the authority of *Walker* v. *J & J Pest Control,* 6 Ark. App. 171, 639 S.W.2d 748 (1982). Calvin Murphy testified in the proffered deposition that he was working on a job at a Bill Fowler's residence in Pine Bluff and that appellant, who was the plumber on the job, "came by to fix the plumbing;" Calvin Murphy could not, however, remember the specific date that appellant came to the job.

In her conclusions, the ALJ stated the following:

> Claimant was the only person in the truck at the time of the vehicular accident, and he apparently is the only person who can verify why he was traveling from Pine Bluff to Benton. Under the principle that all reasonable doubts should be resolved in favor of the claimant, claimant's testimony, standing alone, would, in most instances, be sufficient. However, claimant is simply not a credible witness, and I do not believe his testimony that he was acting within the scope of his employment when the accident occurred. Claimant submitted fraudulent income tax returns to the federal government for at least two years. Claimant issued a fraudulent wage statement to Hartford Insurance Company after the injury occurred. Claimant brought a cane to the hearing and testified that he was permanently and totally disabled; however, he was able to win the Senior's Division of the state golf tournament some months previously. Claimant paid for personal expenses out of company funds and listed those expenses as corporate expenses on his corporate income tax returns. In short, it is difficult for me to believe that the only time this claimant has told the truth is when he testified regarding his injury.
>
> In addition, claimant testified that he was going to see a plumber, Bobby Chase, in Benton when the accident occurred. However, the testimony of Bobby Chase has never been submitted or proffered to substantiate that testimony. (Although I have held that the deposition of Mr. Calvin Murphy is not admissible since it does not qualify as newly discovered evidence, and I considered Mr. Murphy's deposition, it would not have changed the result of this opinion since Mr. Murphy did not know what date claimant came by Bill Fowler's residence).

We do not view the above language as amounting to a denial of compensation to appellant solely because appellant was found to be untruthful. Nor do we believe that the holding in *Guidry, supra,* mandates a reversal of this decision.

It is well settled that questions of credibility of witnesses and weight to be accorded evidence presented to the Commission are prerogatives of the Commission and not of the reviewing court and that courts must rely on the Commission's findings because they are better equipped by specialization, insight and experience in matters referred to them than are the appellate courts. *DeFrancisco* v. *Arkansas Kraft Corp.*, 5 Ark. App. 195, 636 S.W.2d 291 (1982). The record in the instant case reflects that the only evidence adduced at the hearings to establish that the injury of June 15, 1979, arose out of and in the course of appellant's employment was the testimony of appellant himself and the Commission determined that appellant was not a credible witness. This determination by the Commission was certainly within its powers and we cannot say that it was not supported by substantial evidence. The burden was upon appellant to establish that the injury he sustained arose out of and in the course of his employment in order for the disability to be compensable.

The Commission found that appellant had failed to prove that his injury arose out of and in the course of his employment and we are unable to say that fair-minded persons, with the same evidence before them, could not have reached that same conclusion.

Affirmed.

COOPER and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. The majority decision in this case dramatically demonstrates that a hiatus exists in the adjudication of workers' compensation benefits in this state.

In *Central Maloney, Inc.* v. *York,* 10 Ark. App. 254, 663 S.W.2d 196 (1984), handed down almost exactly one year ago, we recognized that "the doctrine of liberal construction has evolved through precedent handed down by the Arkansas Supreme Court to its present state which is best summarized" in the case of *O.K. Processing, Inc.* v. *Servold,* 265 Ark. 352, 578 S.W.2d 224 (1979). The latter case held that, in the

light of the "beneficent and humane" purposes of the Workers' Compensation Law, all "doubtful cases should be resolved in favor of the claimant." And in the case of *Guidry v. J & R Eads Const. Co.*, 11 Ark. App. 219, 669 S.W.2d 483 (1984), we said it is not "the Commission's prerogative to refuse compensation to a claimant simply because he is untruthful."

However, despite the holding in both of these cases, we are today affirming a decision where the Commission, without any discussion, merely adopted the law judge's finding that "the claimant is simply not a credible witness, and I do not believe his testimony that he was acting within the scope of his employment when the accident occurred."

The reasons given by the law judge for the conclusion reached are not related to the purpose of the trip which resulted in the motor vehicle accident of June 15, 1979, which the appellant contends occurred within the scope of his employment. The first two reasons — that appellant submitted fraudulent income tax returns and made a fraudulent wage statement to the insurance adjuster — were matters explored in the first hearing of this case and the law judge rendered a decision at that time without mentioning any problem with appellant's credibility. The fact is that by resolving the doubts in appellant's favor, the law judge could have found that the appellant did not report any personal income for the period involved because his corporate employer, Royal Service Company, did not pay him what he earned since the company did not have the money, but that he did "earn" the amount he told the insurance adjuster he "earned" although he did not actually receive it.

The other two reasons stated by the law judge for not believing the appellant were that at the second hearing appellant said he was permanently and totally disabled but had won the "Senior's Division" of the state golf tournament a few months previously, and had paid personal expenses out of company funds but listed them as corporate expenses on his corporate income tax returns. Of course, it is possible to play golf and still be permanently and totally disabled from working as a plumber, but the appellant

testified that he and another man won the tournament and it is also possible to win with a partner who plays well even if you cannot play at all. As to listing personal expenses on corporate income tax returns, the appellant testified this was "real possible" but it is significant that the corporate returns are not in the record.

We are left then, with the law judge's reference to the fact that the appellant was the only person in the truck at the time of the accident and that no one else could verify the purpose of his trip. The law judge, however, would not allow the introduction of the deposition of Calvin Murphy who corroborated appellant's testimony that on the day of the accident appellant went by a job where Murphy was working (which would have been in the scope of appellant's employment), but the law judge stated Murphy's testimony would not have made any difference anyway since Murphy did not remember the *specific* date that appellant came by the job.

It is clear to me that in making the determination of the purpose of the trip that appellant was making on the day of the accident neither the law judge nor the Commission followed the rules of law which hold that doubtful cases are to be resolved in a claimant's favor and that it is not "the Commission's prerogative to refuse compensation to a claimant simply because he is untruthful." Indeed, neither rule is even mentioned in the Commission's opinion.

The hiatus that exists in the adjudication of these cases results from the fact that it is the duty of the Commission to resolve doubtful issues in the claimant's favor but on appeal the question is whether there is substantial evidence to support the Commission's decision. This is similar to the situation in a civil case where the jury must return a verdict based upon a preponderance of the evidence but on appeal the verdict is affirmed if it is supported by substantial evidence. In that situation, however, the Rules of Civil Procedure, Rule 59(a), allows the trial judge to grant a new trial if the jury's verdict is "clearly contrary to the preponderance of the evidence." In workers' compensation cases comparable procedure has not been employed to enforce the

requirement that the Commission resolve doubtful cases in the claimant's favor. I would adopt such a procedure by reversing this case and remanding it with directions that the Commission afford the parties a rehearing in accordance with the rules discussed in this opinion.

I, therefore, dissent from the majority decision.

COOPER, J., joins in this dissent.

Bobby PROFFITT and Mary PROFFITT *v.* Arthur ISLEY and Bonnie ISLEY, et al.

CA 84-104 683 S.W.2d 243

Court of Appeals of Arkansas
Division II
Opinion delivered January 23, 1985

Marc I. Baretz, for appellant.

No brief filed for appellees.

MELVIN MAYFIELD, Judge. In 1974 Bobby and Mary Proffitt sold one and one-half acres of real estate to Truman and Earline Atkinson, who sold it to Shirley Carter in 1978,

who sold it to Arthur and Bonnie Isley in 1980. About two months after the Isleys bought it they discovered that the land had been mortgaged by the Proffitts and that the mortgage was still outstanding. The Isleys sued Carter, the Atkinsons, and the Proffitts for damages based on the general warranties in the warranty deeds. The jury held for the Atkinsons and Carter, but held the Proffitts liable to the Isleys for $4,390.78 representing the unpaid balance on the mortgage plus interest and costs. The Proffitts appeal. We reverse.

The usual covenants of title in a general warranty deed are the covenants of seisin, good right to convey, against incumbrances, for quiet enjoyment and general warranty. An incumbrance is any right to an interest in land which may subsist in third persons, to the diminution of the value of the land, not inconsistent with the passing of title. Examples of incumbrances are an outstanding lease, a timber deed, dower, an easement, and a mortgage. P. Jones, *The Arkansas Law of Title to Real Property,* §§ 383, 386 (1935). In *Logan* v. *Moulder,* 1 Ark. 313, 320 (1839), the court said:

> The covenants of seisin, and of the right to convey, and against incumbrances, are personal covenants, not running with the land, nor passing to the assignee, but are declared to be mere *choses in action,* not assignable at common law. The covenants of warranty, and of quiet enjoyment, are in the nature of a real covenant, and run with the land, and descend to the heirs, and are made transferable to the assignee.

In 7 G. Thompson, *Thompson On Real Property* § 3185 at 303 (Repl. 1962), the *Logan* case is cited in support of the general rule that a covenant against incumbrances is not assignable and does not pass to a grantee. Since the covenant against incumbrances is personal between the grantor and the grantee, the remedy for a remote grantee, when the incumbrance has not been removed from the property, is against his immediate grantor, whose recourse is against his grantor and so forth back up the chain of title to the original grantor whose conveyance breached the war-

ranty against incumbrances. However, the covenant of general warranty may be breached where steps are taken to enforce an incumbrance. *See The Arkansas Law of Title to Real property, supra,* § 388 at 247. *See also Brawley* v. *Copelin,* 106 Ark. 256, 153 S.W. 101 (1913), and *Thompson* v. *Dildy,* 227 Ark. 648, 300 S.W.2d 270 (1957).

With some exceptions, not applicable here, unless the covenantee is evicted or has satisfied the outstanding incumbrance, he may only recover nominal damages. *See Thompson* v. *Dildy, supra; Van Bibber* v. *Hardy,* 215 Ark. 111, 219 S.W.2d 435 (1949). In *Smith* v. *Thomas,* 169 Ark. 1110, 278 S.W. 39 (1925), the court stated:

> The measure of damages for the breach of a covenant against incumbrance is the amount necessary to remove the incumbrance, not exceeding the consideration expressed in the deed containing the covenants of warranty, and ordinarily the covenantee cannot recover on the mere existence of the incumbrance but must first discharge it by payment, unless he has actually lost the estate in consequence of the incumbrance. In 7 R.C.L. p. 1104, the rule is stated as follows: "In a number of jurisdictions it has been held that, although a covenant against incumbrances, like a covenant of seisin, is broken if at all as soon as made, yet the covenantee can found no right to actual damages on the mere existence of incumbrances, but will be limited to a nominal recovery, unless he has paid off the incumbrance or actually lost the estate in consequence of it."

In the present case the appellees had incurred no expense because of the outstanding mortgage on the property, and the mortgagee had made no effort to either evict appellees or foreclose on the property. Therefore, appellees' only cause of action was a technical breach of the covenant against incumbrances which could be brought against their grantor, Carter, with the recovery of only nominal damages.

Therefore, the judgment against the Proffitts is reversed and dismissed.

COOPER and GLAZE, JJ., agree.

Ray ODAWARE *v.* ROBERTSON AERIAL-AG, INC.

CA 84-59 683 S.W.2d 624

Court of Appeals of Arkansas
En Banc
Opinion delivered January 30, 1985

Odell C. Carter, for appellant.

Mullis, Davis & Chadick, by: *Mark B. Chadick,* for appellee.

GEORGE K. CRACRAFT, Chief Judge. Ray Odaware appeals from a judgment entered against him in the Lincoln County Circuit Court in favor of Robertson Aerial-AG, Inc. He contends that the trial court erred in granting a summary judgment and abused its discretion in not permitting the appellant to amend his answer on the day of trial to assert a set-off. We find no merit.

On October 8, 1981 the appellee filed an action against the appellant to recover on an open account. The appellant

answered by general denial and asserted by way of set-off a claim for damages for the negligent application of herbicides to his crops which was the subject of an action pending in the circuit court of Lincoln County, assigned No. CIV 81-100. The appellant further stated in his answer that as the action was on an open account and no verified, itemized statement was attached the appellant could not adequately defend until such an account was filed. On January 9, 1982 the appellee filed an amended complaint to which it attached the requested verified, itemized statement of account. On January 26, 1982 the defendant filed an answer to the amended complaint, again generally denying the allegations of the complaint and asserting the same set-off. The appellee then propounded certain interrogatories to the appellant. One interrogatory asked him to explain why he had not paid for the services outlined in the complaint and account. In his response filed February 12, 1982 the appellant stated:

> On May 28, 1980, the plaintiff flew so high that he did not get any chemicals on my beans. The plaintiff said they would make it good, but never have. Also, in the spring of 1980, the plaintiff had a plane to fall in my bean field that damaged about 8 acres of prepared ground in order to get the plane out and delayed planting. The plaintiff promised to have the damages taken care of on this also, but never has. The plaintiff has also damaged my 1980 crops due to negligent application of chemicals and has not settled with me for damages in that case.

The appellant's claim for damages in civil action CIV 81-100 was subsequently settled and dismissed with prejudice.

The case now under review was set for trial on three or four occasions but was continued. It came up for jury trial on November 3, 1983. On the day set for the jury trial appellee moved that, as the claim pled as a set-off had been settled and dismissed with prejudice, the appellant not be allowed to mention anything about the subject matter of

that suit and be limited only to the general and specific denial contained in his answer. The court then ruled that in view of the order dismissing the case with prejudice appellant would be directed not to refer to any matters that were involved in CIV 81-100.

The appellant's counsel then responded: "We have raised in our Response to Request for Admissions and Interrogatories and informed the plaintiff on February 12, 1982 that we were raising a defense to his claim on the basis that the plaintiff had flown his plane so high that no chemical got on the soybean land and also that there had been a plane landed in the defendant's field which had done substantial damage to the defendant's ground and caused other damages to crops." The appellant then moved for permission to amend his pleading to set up that set-off or in the alternative for a continuance to give him time to amend his pleadings. The trial court overruled both motions.

After the court announced its ruling that it would not permit an amendment at that late date and would exclude any testimony of a set-off as outside the scope of the pleadings appellant's counsel stated: "Well, in that case, I don't see that we have anything to try, and I don't see that there is any point in going through the motion of seating a jury." Although he refused to confess judgment he stated that if he could not ask questions tending to prove the set-off, then he took it that, "the court, in effect is granting a summary judgment *because I have no defenses.* And so if we go to the end of Mr. Robertson's testimony and I have no testimony, then the court is going to grant a directed verdict at that time. So I take it, what the court has done to me, as a practical matter, is to grant a summary judgment as if it had been on a request for admissions." He stated further that it was not necessary to put a jury and the court through a trial because the court's ruling had left him without a defense. He stated that it had always been the appellant's understanding that the appellee had done the work, but that it was done in an unsatisfactory manner, and he suggested that the jury be discharged and a precedent for judgment be prepared and entered. The court thereafter entered judgment for the

amount sued for which was styled "Summary Judgment."

The appellant first argues that the trial court erred in entering summary judgment contending that summary judgment is improper where there are issues of fact. The appellee contends that the judgment was entered by consent and therefore appellant is in no condition to complain about it.

From our review of the record we cannot conclude that the judgment of the court was either a summary one or one entered by consent. It is clear to us that as the appellant could offer no proof that appellee had not rendered the services for which it claimed payment or that the services were unsatisfactory, he merely waived his right to demand that the appellant strictly prove his account.

The appellant next contends that the trial court erred in not granting his motion to amend his pleadings to plead a set-off on the morning of trial. ARCP Rule 8(c) requires that all affirmative defenses must be contained in the response to a complaint and specifically includes as affirmative defenses failure of consideration and set-off. The purpose of the requirement of Rule 8(b) and (c) that a party state in ordinary and concise language his defenses and affirmative defenses to each claim for relief against him is to give fair notice of what the claim is and the ground on which it is based so that each party may know what issues are to be tried and be in a position to enter the trial with his proof in readiness. *Reporter's Notes* to ARCP Rule 8. It is the method by which the issues are joined, enabling each party to know what issues he must be prepared to meet at the trial.

Answers to interrogatories, as well as any other information disclosed on discovery are not a pleading or a defense to a pleading. While such information may give rise to amendments to pleadings, it does not in and of itself constitute an amendment to a pleading or inject new issues into the case. The appellant does not seriously contend otherwise. He relies primarily on ARCP Rule 15(a) which permits liberal amendments to pleadings without leave of

court. ARCP Rule 15(a) and the *Notes* indicate that amendments to pleadings should be allowed in nearly all instances without special permission from the court except where on motion of an opposing party the court determines either that prejudice would result or that disposition of the cause would be unduly delayed. In those instances the court may strike such amended pleadings or grant a continuance of the proceedings.

The appellant argues that although he did not affirmatively plead the set-off, his answers to interrogatories made the appellee fully aware of it, and that since appellee was fairly apprised prior to trial he could not have been prejudiced by the amendment. The record shows that the appellee had not prepared to defend against the set-off. The appellee had brought witnesses to the court prepared to establish the verified account, but had brought none to defend against a set-off. In the absence of a showing to the contrary we see no abuse in the court's discretion in not requiring the appellee to go to trial and defend against an affirmative defense which had never been duly asserted.

The appellant next contends that the trial court abused its discretion in not granting a continuance upon overruling his motion to amend. It is well settled that a trial court is vested with a broad discretion in determining whether to grant a continuance and that his determination will not be overturned by this court unless that discretion has been manifestly abused. *Bolden* v. *Carter,* 269 Ark. 391, 602 S.W.2d 640 (1980); *Johnson* v. *Coleman,* 4 Ark. App. 58, 627 S.W.2d 565 (1982). A trial court has an obligation to manage and control its docket in an efficient manner. *Bolden* v. *Carter, supra.* The record shows that the case had been on file since October 18, 1981 and that appellant's answer had been filed in its present form since January 1982. The Court commented that whatever defenses the parties had to this action had existed prior to the filing of the answer and had not been asserted. The case had been set for trial and continued several times. The trial court noted that the jury was present and had been awaiting the conclusion of the hearing in chambers and that he felt it would be an abuse of

the jury to have called and dismissed the jury for nothing. Any question about the pleadings could have been resolved before the jury was called.

Under these circumstances we cannot say that there was a manifest abuse of discretion.

Affirmed.

MAYFIELD AND COOPER, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree with the result of the majority opinion because I think the trial court should have allowed the appellant either to amend to plead the set-off disclosed in his answers to the interrogatories, or to grant him a continuance so that he could amend to allege the set-off.

The majority opinion concedes that ARCP 15(a) allows a party to amend its pleadings at any time unless the court "determines that prejudice would result or the disposition of the cause unduly delayed because of the filing of the amendment."

It is difficult to believe the appellee would have been prejudiced by the amendment proffered by the appellant since the answers to the interrogatories had been filed over 20 months before the day the matter came on for trial. Nevertheless, the appellee claimed it was not prepared to defend against the amendment because it had no witness present except its president and he was prepared only to submit the verified account.

Assuming the appellee would have been prejudiced by the filing of the amendment on the day of the trial, why would the court not allow the appellant a continuance so he could amend to plead the set-off without prejudice to the appellee? Of course, ARCP 15(a) provides that an amendment to a pleading may not be allowed if the court determines that it will unduly delay the disposition of the case, but the trial judge made no mention of any undue delay.

Actually what troubled the judge, and he so stated, was the fact that a jury was present and the judge did not want to tell them to "go home without doing anything." I agree that this is a proper concern, but for many years what is now Ark. Stat. Ann. § 27-1404 (Repl. 1979) has provided that continuances may be granted upon the condition that the party obtaining the continuance pay the cost due for the term in which the continuance is granted. *See also Boone* v. *Skinner,* 85 Ark. 200, 107 S.W. 673 (1908). I think the court should have granted appellant's motion for continuance but should have conditioned it upon an agreement that appellant pay the cost of the jury for the day.

In *Baldwin* v. *Baldwin,* 266 Ark. 892, 587 S.W.2d 592 (Ark. App. 1979), this court allowed a petition for a set-off for child support to be filed after a decree for partition had been entered and the property had been sold. And in the early case of *Turner* v. *Tapscott,* 30 Ark. 312, 327 (1875), the court said:

> The Code practice is liberal with regard to amendments when the object is to obviate an omission, either in pleading or evidence, if amended or allowed, which would tend to facilitate the final disposition of the case upon its merits.

It would have been in keeping with the spirit of our procedure, both present and past, to allow the appellant to amend to allege his set-off. I would reverse and remand this case for that purpose on the condition set out above.

COOPER, J. joins in this dissent.

ARKANSAS STATE HIGHWAY COMMISSION *v.*
Harold D. SCHELL, and Bertha E. SCHELL, His Wife

CA 83-466 683 S.W.2d 618

Court of Appeals of Arkansas
Division I
Opinion delivered January 30, 1985

Thomas B. Keys, and *Charles Johnson,* for appellant.

Pearson, Woodruff & Evans, by: *C. Thomas Pearson, Jr.,* for appellee.

DONALD L. CORBIN, Judge. Appellant, Arkansas State Highway Commission, appeals from a judgment entered on a jury verdict assessing compensation in the amount of $50,000.00 for the taking of the lands of appellants, Harold D. and Bertha E. Schell. Appellant contends that the trial court erred in refusing to adopt its statement of the evidence, in refusing to grant its motion for a new trial and in refusing to allow appellant to inquire into the basis of the opinion of witness Neil Palmer. We reverse and remand.

Appellant condemned part of a forty-acre tract of appellees' land for construction of the Highway 71 Relocation project. Appellees raised poultry in four poultry houses located on the property. The area of taking acquired by appellant consisted of 4.44 acres and divided appellees' forty-acre tract into two parts, leaving the west residual with 27.58 acres and the east residual with 7.98 acres. Due to the construction of the controlled access facility, appellees' east residual was landlocked following the taking. The record reflects that after construction of the new highway, appellees' easternmost poultry house would be approximately 250 to 270 feet from the nearest traffic lane of the highway.

Mark Risk, an expert witness who testified at the trial for appellees, determined the amount of damages from the taking to be $61,000.00. Appellee Bertha E. Schell testified that the damages from the taking amounted to $75,000.00. Larry Dupree and Neil Palmer, expert witnesses for

appellant, testified that the amount of compensation owed appellees was $20,600.00 and $25,800.00, respectively.

As a result of a mechanical failure of the court reporter's recording equipment, the parties attempted to reconstruct the record pursuant to Ark. R. App. P. 6. Appellant's first assignment of error concerns the trial court's refusal to adopt appellant's statement of the evidence and proceedings and its denial of appellant's motion for a new trial. Since there is little or no likelihood of another mechanical failure of the recording equipment upon the new trial of this cause, we do not address this issue.

The issue of concern to this Court and the one which we hold constitutes reversible error is the refusal of the trial court to allow appellant to inquire into the basis of the opinion of witness Neil Palmer. Neil Palmer was a real estate appraiser for appellant and was called by appellees as their second witness.

The record reflects that Neil Palmer was asked on direct examination by counsel for appellees to tell the jury how he went about making his appraisal. He was further questioned as to whether he considered any severance damages to the property. Neil Palmer responded by stating that he was involved in a study and determined that severance damages were improper. During his questioning of the witness, counsel for appellant attempted to go into the basis of Neil Palmer's opinion that no severance damages were assigned by him to the fourth poultry house by virtue of its proximity to the highway. Counsel for appellees objected and the following exchange took place:

> MR. PEARSON (counsel for appellees): Your Honor, I, — I object. Ugh, — who he talked to is totally irrelevant, and he can't testify as to what they said. This, I believe, is for the purpose of trying to prejudice the jury without going into the parties' qualifications.
>
> THE COURT: Well, I think you're right, Mr. Pearson. I'll sustain the objection. He may testify that he talked to people he considered knowledgeable, and that's it.

MR. PUTMAN (counsel for appellant): Your Honor, aren't we going to be allowed to show the nature and depth and extent of his investigation?

THE COURT: Ugh, — No, because, I think you'd be, — ugh, — I think you'd be lending weight to their opinion. Ugh, — he may testify that he made an investigation —

Counsel for appellant then made the following proffer:

MR. PUTMAN: Let the record show that if he were allowed to answer, the witness would testify that the nature of his study about whether or not there were any severance damages to the poultry house number four, or what's been referred to as poultry house number four; he consulted with a poultry expert at the University of Arkansas in the College of Agriculture; that he consulted with people who were involved in the poultry industry who have, I believe, the designation of integrators, who organize and present overall poultry programs, and place poultry in certain particular locations . . . . And, also, he talked to poultry raisers; the people in the field, who raise both chickens and turkeys; that he went on site, and examined the poultry houses in which both chickens and turkeys were being raised at distances ranging from fifteen feet to two hundred and over from the highway, and determined in each case that there were no deleterious effects, and further, had the benefit of a particular study conducted by the University of South Carolina in a field called poultry hysteria, dealing specifically with the effects of noise and other such phenomena on the raising of poultry, and from all of these, determined that the proximity of the highway would have no effect whatsoever on the raising of the poultry in the house in question.

THE COURT: Well, the Court's ruling is that the witness would be permitted to testify that he talked to people he considered to be experts in the field, — ugh, — including poultry raisers and, — ugh, — including,

— ugh, — people, — ugh, — who are considered expert in the area; but, if you go any further than that, you are lending weight to his conclusion. You're bringing in testimony of experts when they are not here.

MR. PUTMAN: Well, I think it's true what Your Honor says. It does lend weight to his testimony; but, I think it's the type of weight which the jury is entitled to know about.

THE COURT: I don't think so.

The questions that were asked of Neil Palmer were proper and his answers were admissible. It is well settled that an expert may base his opinion on facts learned from others despite their being hearsay. *Dixon* v. *Ledbetter,* 262 Ark. 758, 561 S.W.2d 294 (1978); *Ark. State Hwy. Comm'n* v. *Bradford,* 252 Ark. 1037, 482 S.W.2d 107 (1972); *Ark. State Hwy. Comm'n.* v. *Russell,* 240 Ark. 21, 398 S.W.2d 201 (1966). When an expert's testimony is based on hearsay, the lack of personal knowledge on the part of the expert does not mandate the exclusion of the opinion but, rather presents a jury question as to the weight which should be assigned the opinion. Stated another way, Neil Palmer's method of gathering the data he utilized in forming his opinion should have been explained in order for the jury to weigh his opinion. The rule for admission of expert testimony does not depend on the relative certainty of the subject matter of testimony, but rather on the assistance given by the expert testimony to the trier of fact in understanding the evidence or determining a fact in issue. Ark. Unif. R. Evid. 702. Moreover, the relative weakness or strength of the factual underpinning of the expert's opinion goes to the weight and credibility, rather than admissibility. *Polk* v. *Ford Motor Co.,* 529 F.2d 259 (8th Cir.), *cert. denied,* 426 U.S. 907 (1976).

Ark. Unif. R. Evid. 703 provides:

Basis of opinion testimony by experts. — The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type

> reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Under this rule an expert must be allowed to disclose to the trier of fact the basis facts for his opinion, as otherwise the opinion is left unsupported in midair with little if any means for evaluating its correctness. E. Cleary, *McCormick on Evidence* (3d ed. 1984). § 324.2, p. 910. Underlying Rule 703 is the idea that an expert is likely to understand better than a court the quality and nature of data essential to support an opinion in his own field. This rule does not, however, abdicate judicial responsibility to the expert for it leaves room for rejection of testimony if reliance on the facts or data is unreasonable. The rule directs the trial judge to accord deference to the expert's explanation of what is reasonable, but it does not require the trial judge to accept what amounts to wishful thinking, guesswork, or speculation. The reasonable reliance standard set by Rule 703 obviously points toward broad admissibility of expert testimony. D. Louisell and C. Mueller, *Federal Evidence* (1979), § 389, p. 658. Once the evidence is admitted, adequate safeguards remain to deal with this evidence such as cross-examination of the expert.

Ark. Unif. R. Evid. 705 has simplified the manner in which expert testimony may be presented by eliminating mandatory preliminary disclosure of the facts or data underlying an expert's opinion. Rule 705 provides:

> Disclosure of facts or data underlying expert opinion. — The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Requiring the jury to be informed of the basis of the expert's opinion makes sense. The opinion would be irrelevant if grounded on facts found by the trier of fact not to exist in the particular case; but obviously the trier of fact cannot assess

the validity of the assumed facts without knowing what they are. J. Weinstein, *Weinstein's Evidence Commentary on Rules of Evidence for the United States Courts and State Courts* (Vol. 3 1982), § 705[1], pp. 705-4, 705-5. Emphasis is placed upon the function of cross-examination by this rule and the burden is put upon the opponent of the calling party to demonstrate that the conclusion of the expert lacks adequate support in order for the testimony to be subject to being stricken by the trial court. D. Louisell and C. Mueller, *supra,* § 400, p. 709. See, *Martin* v. *Arkansas Arts Center,* 627 F.2d 876 (8th Cir. 1980); *United States* v. *1,014.16 Acres of Land,* 558 F. Supp. 1238 (W.D. Mo. 1983); *Rounsaville* v. *Ark. State Hwy. Comm'n,* 258 Ark. 642, 527 S.W.2d 922 (1975); Annot., 49 A.L.R. Fed. 363 (1980); Annot., 12 A.L.R. 3d 1064 (1967). Rule 705 does not limit the disclosure of facts or data underlying an expert's opinion to cross-examination. This rule merely removes any legal requirement to develop in the beginning the basis for an expert's conclusions. Instead, he may state his conclusions straight away. The pressures of orderly presentation will often lead to divulgence of at least some of the supporting data. J. Weinstein, *supra,* § 705[1], p. 705-7. An expert may be asked on direct examination to state the grounds of his opinion, i.e., the general data which form the basis of his judgment upon specific data observed by him. J. Wigmore, *Evidence in Trials at Common Law* (Vol. 2, 1979), § 562, p. 759.

From our review of the record, we believe that the court's erroneous ruling on the admissibility of expert Neil Palmer's basis for his opinion unduly circumscribed appellant in its examination of the witness. Further, we believe that there is a reasonable likelihood that the limitation imposed by the court could have affected the jury's impression as to the basis of the expert testimony and the credibility of the witness. We cannot conclude that the court's erroneous limitation was harmless, and accordingly, we will remand for a new trial.

Reversed and remanded.

COOPER, J., agrees.

MAYFIELD, J., concurs.

MELVIN MAYFIELD, Judge, concurring. Uniform Evidence Rule 703 allows an expert witness to base an opinion or inference, under proper circumstances, upon facts or data not admissible in evidence, and I have no problem with the statement from E. Cleary, *McCormick on Evidence* § 324.2 (3d ed. 1984), relied upon in the majority opinion, that an expert must be allowed to disclose the basis for his opinion. However, I want to emphasize the following statement found in the same section of *McCormick on Evidence:*

> It does not mean that the expert becomes the sole judge of the admissibility of the basis facts: they must still be of a type reasonably relied upon by experts in the field, and they are subject to such general evidentiary principles as exclusion for prejudice or irrelevancy.

In connection with the above statement, I also want to emphasize the following statement from Saltzburg & Redden, *Federal Rules of Evidence Manual* 467 (3d ed. 1982):

> Evidence not otherwise admissible is not admitted under this Rule for its truth; it is admitted to explain the basis of the expert opinion. A limiting instruction often should be required to explain this to the jury. However, we would emphasize that Rule 403 could be used to keep such evidence out where its admission might be unfair to an opposing party. One of the things that a Court might consider in assessing the reasonableness of reliance by an expert on facts not in evidence is whether an opposing party could effectively examine the expert concerning the reasonableness, reliability, significance, strengths and weaknesses of the facts not in evidence.

Another quotation that I think worth special notice is found in 3 Louisell & Mueller, *Federal Evidence* § 389 at 663 (1979):

> While Rule 703 permits an expert witness to take into account matters which are unadmitted and inadmissible, it does not follow that such a witness may simply report such matters to the trier of fact: The Rule was not

> designed to enable a witness to summarize and reiterate all manner of inadmissible evidence, but rather to pave the way for whatever assistance may be provided by expertise in analyzing, explaining, and interpreting such data in the whole context of the case.

Some cases that are cited by the above authorities in support of the statements I have quoted are: *United States* v. *Brown,* 548 F.2d 1194 (5th Cir. 1977); *United States* v. *Cox,* 696 F.2d 1294 (11th Cir. 1983); and *Northern Nat. Gas* v. *Beech Aircraft,* 202 Neb. 300, 275 N.W.2d 77 (1979).

In *Brown* the defendant was charged with counseling, procuring and advising the preparation and filing of fraudulent income tax returns. An IRS agent was allowed to testify that between 90% and 95% of about 160 returns prepared by the defendant contained overstated itemized deductions. The opinion stated that the agent must have obtained this information through conversations with each of the taxpayers audited. The court pointed out that the defendant had no opportunity to cross-examine these taxpayers or to even adequately cross-examine the agent since she testified from memory. "Thus," the opinion states, "the jury had no way to examine the trustworthiness of [the agent's] testimony." In a footnote the opinion noted that the agent's testimony was not admissible under Rule 703 because she was not testifying as an expert but "to establish as a fact — not opinion — that defendant had committed similar acts in the past."

In *Cox* the court said: "Although certain hearsay testimony by experts is permitted, it must be based on the type of evidence 'reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.' . . . The testimony being offered by this witness was of a historical nature." And in the *Northern Nat. Gas* case the trial court declared a recess when it became apparent that there was a problem with the admissibility of the expert's testimony. After an offer of proof in chambers, the court held that the data sought to be introduced by the expert's testimony went far beyond data reasonably relied upon by experts in his field. In affirming the trial court's action, the appellate court said:

> While under our Rules of Evidence the expert may not be required to disclose the underlying facts or data before rendering his opinion, the trial court on its own motion can require such disclosure. . . . In this case the trial court made such a requirement, and upon hearing what the expert proposed to testify, concluded that neither the record nor the apparent qualifications of the expert would justify such an opinion. A trial court is given large discretion in determining whether or not the witness' qualification to state his opinion has been established, and this discretion will not ordinarily be disturbed on appeal unless there is an abuse of that discretion.

I have called attention to the above because the question involved in this case has not been previously considered by us and I have found very little discussion of the matter. It is with reluctance that I agree to reverse this case; however, I think in fairness to all involved, an opportunity should be given for a new trial after court and counsel have been able to carefully consider the matter. It should be noted that the majority opinion is based on the record we have before us. In the event of a new trial, it seems to me that a proffer of this evidence by question and answer, out of the presence of the jury, might be helpful. In that way the real purpose of the evidence sought to be introduced could be determined and, if admissible, any limitations upon its use could be set in the calm of the court's chambers instead of the pressure of the courtroom.

I concur in the reversal and remand of this case.

W.C. LEE CONSTRUCTION *v.* Dewey STILES,
Director of Labor, and Kendall HUDSON

E 84-89 683 S.W.2d 616

Court of Appeals of Arkansas
Division I
Opinion delivered January 30, 1985

Hall & Rogers, by: *Rick Rogers,* for appellant.

George Wise, Jr., for appellee.

DONALD L. CORBIN, Judge. Appellant, W. C. Lee Construction Company, the former employer of Kendall Hudson, appeals from the decision of the Board of Review allowing Hudson unemployment benefits. It is appellant's contention that Hudson was not fired because of his religious beliefs but for misconduct connected with the work. We affirm.

Appellee Kendall Hudson is a member of the Seventh Day Baptist religion which religion observes its Sabbath on Saturday. Among the teachings of this religion is a proscription against work on the Sabbath. On Friday, May 6, appellant informed its employees that they would be required to work on Saturday, May 7. The employees were also told that if they did not show up for work on this date they would be fired. Appellee Hudson did not appear to work on Saturday and was discharged the following Monday. Appellee Hudson filed and was awarded unemployment benefits by the Agency pursuant to Ark. Stat. Ann. § 81-1106(b)(1) (Supp. 1983). Appellant appealed to the Appeal Tribunal and a hearing was held. It affirmed the Agency's decision and appellant appealed to the Board of Review. Pursuant to an order of remand by the Board of Review, the Appeal Tribunal conducted two separate tele-

phone hearings to allow appellant an opportunity to submit additional evidence and to allow appellee Hudson the opportunity to rebut.

The employer testified that appellee Hudson was discharged for his refusal to work on a Saturday during an emergency. Appellee Hudson testified that his refusal to work was based upon his religious observance of Saturday as the Sabbath. Appellee Hudson stated that it was agreed at the time of his employment that he would work Saturdays only in cases of an emergency. Appellant testified that it was necessary for appellee Hudson to work on that Saturday because the construction of a facility for the immediate storage of twelve million pounds of fresh cucumbers was behind schedule.

The issue on appeal is whether there is substantial evidence to support the Board of Review's decision that appellee Hudson was discharged for reasons other than misconduct in connection with his work. Whether there is substantial evidence to support the Board's findings is a question of law. *Cooney* v. *Daniels,* 270 Ark. 930, 606 S.W.2d 615 (Ark. App. 1980). A reviewing court is not privileged to substitute its findings for those of the Board of Review even though the court might reach a different conclusion if it had made the original determination upon the same evidence considered by the Board. *Stagecoach Motel* v. *Krause,* 267 Ark. 1093, 593 S.W.2d 495 (Ark. App. 1980).

Ark. Stat. Ann. § 81-1106(b)(1) provides that an employee is disqualified from receiving unemployment compensation benefits if he is discharged from his last employment for misconduct in connection with the work. In order for an employee's action to constitute misconduct so as to disqualify him, the action must be a deliberate violation of the employer's rules, an act of wanton or willful disregard of the employer's interest, or a disregard of the standard of behavior which the employer has a right to expect of the employees. *Brewer* v. *Everett,* 3 Ark. App. 59, 621 S.W.2d 883 (1981).

In *Willis Johnson Co.,* v. *Daniels,* 269 Ark. 795, 601 S.W.2d 890 (Ark. App. 1980), this Court stated that:

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

Whether or not the acts of the employee are willful and wanton or merely result from inefficiency, unsatisfactory conduct or unintentional failure of performance, is a question of fact for the Board of Review to determine. *Arlington Hotel* v. *Emp. Sec. Div.*, 3 Ark. App. 281, 625 S.W.2d 551 (1981).

The Board of Review in the case at bar specifically found that appellee Hudson's refusal to work on the Saturday in question was based upon a good-faith religious belief and that his actions did not contain the necessary element of willfulness in disregard of the employer's interests. Appellant contends that appellee Hudson was not discharged because of his religious beliefs but because he refused to work when it was made known to him that he was needed on a Saturday. Appellant also argues that appellee Hudson never explained that not working on Saturday was a cardinal principle of his religion. Appellee Hudson testified to the contrary. It is well settled that the determination of credibility of witnesses and the drawing of inferences is for the Board and not for this Court. *Willis Johnson Co., supra.* In the case at bar the Board obviously resolved the conflicts of testimony and the credibility of the witnesses in favor of appellee Hudson and we find no error in this regard.

After a review of the record, we are satisfied that there is substantial evidence to support the Board's decision awarding benefits to appellee Hudson on a finding that appellee Hudson was discharged for reasons other than misconduct connected with the work.

Affirmed.

MAYFIELD and GLAZE, JJ., agree.

Richard HILL *v.* STATE of Arkansas

CA CR 84-90 683 S.W.2d 628

Court of Appeals of Arkansas
Division II
Opinion delivered February 6, 1985

Atchley, Russell, Waldrop & Hlavinka, by: *Victor Hlavinka,* for appellant.

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

JAMES R. COOPER, Judge. The appellant was charged with the delivery of a controlled substance, and the State also charged that his sentence should be enhanced because he was a habitual offender, having been convicted of two or more felonies. The jury found the appellant guilty of the offense charged, determined that he was a habitual offender, and sentenced him to twenty years in the Arkansas Department of Correction. From that decision, comes this appeal.

For reversal, the appellant first argues that the trial court erred in refusing to instruct the jury on this affirmtive defense of entrapment. We must review the facts.

In the spring of 1983, Officer Jimmy Morris of the Arkansas State Police was participating in an undercover operation designed to purchase drugs in the Texarkana area. In the course of this investigation, Officer Morris made contact with Anthony Scott, who agreed to arrange for Morris to make a buy. The record reflects that Scott was not aware of Officer Morris' status as a police officer, that he was not paid for his efforts, and that no promises were made to induce him to cooperate with the police. On March 1, 1983, Scott and the appellant went to a motel room in Texarkana which was occupied by Officer Morris, and, according to the police officer's testimony, the appellant sold him one-fourth of a pound of marijuana for $278.00. The substance was identified as marijuana by a chemist from the Arkansas State Crime lab. The appellant did not put on any proof, but he did request that the trial court instruct the jury on the affirmative defense of entrapment. The court refused, noting that there was no evidence before the jury which would give rise to the defense of entrapment. We agree with the trial court's decision.

Entrapment is an affirmative defense which must be proved by a preponderance of the evidence. Ark. Stat. Ann.,

Section 41-110 (Repl. 1977); *Walls* v. *State,* 8 Ark. App. 315, 652 S.W.2d 37 (1983). "Entrapment exists where the criminal designs originate not with the accused, but with the officers of the law, and the accused is lured into the commission of an unlawful act by persuasion, deceitful representation or inducement by the officers.." *Sweat* v. *State,* 5 Ark. App. 284, 635 S.W.2d 296 (1982). Officer Morris' testimony was insufficient to require that the jury be instructed on entrapment. He testified that he did not induce the appellant's actions, but that the appellant was at all times willing to engage in the sale of marijuana. The appellant's argument is premised on the allegation that Officer Morris, acting in concert with Anthony Scott, concocted a plan to induce the appellant to sell marijuana to Morris. The argument clearly is without merit, since Scott was not working with Officer Morris as a true informant, paid or not, since he did not know Morris' true identity. There is no evidence that Officer Morris promised anything to Scott in exchange for his cooperation, and it is worth noting that Morris had observed the appellant and Scott engaged in similar illegal activity in the past. In fact, Scott was later convicted of delivery of marijuana himself. The appellant offered no evidence which supported his claimed affirmative defense, and he has failed to sustain his burden of proof.

Instructions in the law should be given to the jury if there is evidence to support the giving of that instruction, *Lucas* v. *State,* 5 Ark. App. 168, 634 S.W.2d 145 (1982), but where no evidence exists to support the giving of an instruction, it is not error to refuse to give it. *Blaney* v. *State,* 280 Ark. 253, 657 S.W.2d 531 (1983).

Secondly, the appellant argues that the trial court erred in applying the habitual criminal statutes, Ark. Stat. Ann., Section 41-1001 et seq., (Supp. 1981), to him, because his prior convictions were on appeal at the time of sentencing. The delivery of the marijuana in the case at bar occurred on March 1, 1983, and the enhanced punishment statute applicable to this crime was the 1981 amendment to the statute, as the substantive law in effect as of the date of the offense governs. *Smith* v. *State,* 277 Ark. 64, 639 S.W.2d 348 (1982). The State's amended information alleged that the

appellant had two or more prior convictions, and, according to the applicable statute, the State was required to prove that he had more than two convictions. Of the appellant's three convictions, two are appealed under A.R.Cr.P., Rule 37, seeking post-conviction relief, and the other conviction is a direct appeal to this Court. The appellant argues that, since his convictions are on appeal, they are not final, and, therefore cannot be used to enhance his punishment. We disagree.

Adopting the theory advanced by the appellant would result, as a practical matter, in rarely ever being able to apply the habitual criminal statutes, since criminal defendants have numerous avenues through which to seek relief, including direct appeal, petitions under Rule 37, and federal habeas corpus petitions. We do not believe that the legislature intended the result urged by the appellant. For enhancement purposes, the appellant's three convictions, though pending on some sort of appeal, were final. See, *Rogers* v. *U.S.*, 325 F.2d 485 (C.A., 10th Cir. 1963); *Jackson* v. *State,* 418 So. 2d 827 (Miss. 1982); *People* v. *District Court, Etc.,* 559 P.2d 235 (Colo. 1977); *Sutton* v. *State,* 519 S.W.2d 422 (Tex. Crim. 1975); *People* v. *Sarnblad,* 26 Cal. App. 3d 801, 103 Cal. Rptr. 211 (1972).

Affirmed.

CRACRAFT, C.J., and CLONINGER, J., agree.

Richard D. SNYDER, Administrator of the
Estate of Dan E. Snyder, Deceased
v. Dorothy SNYDER

CA 84-172 683 S.W.2d 630

Court of Appeals of Arkansas
Division II
Opinion delivered February 6, 1985

Bethell, Callaway, Robertson & Beasley, by: *Edgar E. Bethell,* for appellant.

Daily, West, Core, Coffman & Canfield, by: *Wyman R. Wade, Jr.,* for appellee.

LAWSON CLONINGER, Judge. Richard D. Snyder, as administrator of his father's estate, appeals from an order of the Probate Court of Sebastian County whch allowed a claim against the estate filed by the appellee, Dorothy Snyder. We think the court was correct in allowing the claim and affirm.

The appellee and the appellant's father, Dan E. Snyder, were married in October of 1970, and divorced in January of 1973. At the time of their divorce, the couple owned a

residence in Fort Smith, Arkansas. The divorce decree recited that:

> [T]he use and occupancy of said property should be awarded to the plaintiff [Dorothy Snyder] and defendant [Dan Snyder] required to pay the balance owed Peoples Federal Savings & Loan Association on said property, and plaintiff should be required to pay the improvement loans thereon.

The divorce decree then ordered that ". . . plaintiff [Dorothy Snyder] make the improvement loan payments and the defendant [Dan Snyder] make the mortgage payments. . . "

Dan Snyder made the mortgage payments until his death in 1982. The appellee then filed a claim against the estate of Mr. Snyder for $4,062.88, the balance of the mortgage. The appellant filed an objection to this claim alleging that his father's liability under the divorce decree terminated upon his death. After a hearing, the court allowed the claim and ordered the appellant to pay it.

On appeal, the appellant argues that the mortgage payments made by Mr. Snyder were in essence alimony payments because they were made "at regular intervals for support from year-to-year." The appellant points out that no other "alimony" award was made to the appellee. The appellant then cites the well-established general rule that alimony continues only during the joint lives of the parties and therefore cannot be recovered from a spouse's estate. *Brown* v. *Brown,* 38 Ark. 324 (1881).

The appellant contends that requiring the estate to pay the balance of the mortgage, in essence, is requiring Mr. Snyder to pay "a specific sum of money as alimony." The appellant cites *Birnstill* v. *Birnstill,* 218 Ark. 130, 234 S.W.2d 757 (1950), which held that a court should not decree a certain and specific sum of money as alimony because alimony is a "continuous allotment of sums, payable at regular intervals, for . . . support from year to year. . . " *Id.* at 131 *(quoting Brown, supra).*

Finally, the appellant argues that it would be inequitable to allow the appellee's claim because Mr. Snyder had already paid a considerable amount on the mortgage and because the appellee became the sole owner of the property upon Mr. Snyder's death.

The appellee argues that the mortgage payments should not be characterized as "alimony". The divorce decree ordered Mr. Snyder to pay a certain and specific sum of money, that is, the balance of the mortgage. According to the appellee, this was an order to pay a debt rather than an order of support. Therefore, the trial court was correct in allowing the claim against Mr. Snyder's estate.

This court has indicated that the characterization of installment payments made pursuant to an award in a divorce decree depends on the circumstances surrounding the award. In *Stout* v. *Stout,* 4 Ark. App. 266, 630 S.W.2d 53 (1982), the chancellor awarded the wife "alimony" in the amount of $300 per month for a period of one year. The court pointed out that an "award of alimony in a gross sum payable in installments is contrary to its long established rule that alimony should not be a fixed sum but a continuing allowance payable at regular intervals." *Id.* at 272. The court then concluded that even though the decree referred to the award as alimony, the payments were not an award of alimony "in gross", when all the circumstances were considered.

It is our opinion that the trial court did not err in allowing the appellee's claim, because we think that the provision of the divorce decree finding that Mr. Snyder should pay the balance of the mortgage, and the resulting order to make the mortgage payments, was a provision in the nature of property division rather than alimony. The surrounding circumstances support that conclusion. The mortgage payments were not referred to as alimony in the decree, and there is no indication in the decree that Mr. Snyder was ordered to make the payments for the support and maintenance of the appellee. On the contrary, it appears that the court was making an equitable property division in that it required the appellee to make payments on home

improvement loans. The record is silent as to the amount of those loans. Until Mr. Snyder's death, his continued payments on the mortgage served to increase and protect his survivorship interest in the property, and if appellee had predeceased Dan Snyder, then Mr. Snyder would have benefited from the payment of the home improvement loans by appellee. The trial court was justified in not characterizing the mortgage payments as alimony and in allowing the appellee's claim.

Affirmed.

CRACRAFT, C.J., and COOPER, J., agree.

Jimmie Joe MILLER *v.* STATE of Arkansas

CA CR 84-128 683 S.W.2d 937

Court of Appeals of Arkansas
Division I
Opinion delivered February 6, 1985

Herman H. Hankins, Jr. and *Steven G. Beck,* for appellant.

Steve Clark, Att'y Gen., by: *Marci L. Talbot,* Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Judge. Appellant, Jimmie Joe Miller, plead guilty to burglary and theft of property January 27, 1978. The Clark County Circuit Court sentenced him to five years imprisonment, stayed execution of that sentence and placed him on probation for a period of five years. Appellant did not appeal this sentence.

On January 14, 1983, a revocation hearing was held on the prosecutor's petition to revoke appellant's probation for his failure to support his dependents. The trial court revoked appellant's probation and sentenced him to five years imprisonment.

On January 18, 1983, the trial court reconsidered its order of January 14, 1983, and substituted an order sentencing appellant to five years imprisonment, staying execution of that sentence, placing appellant on probation for a period of five years beginning January 14, 1983, and further fined him $1,000.00 and court costs. Appellant did not appeal this sentence.

On April 8, 1983, appellant again appeared before the trial court with his probation officer, apparently for

continued failure to support his dependents or pay his fine. Neither appellant's counsel nor the prosecuting attorney was present. At this hearing, the trial court revoked appellant's probation, sentenced him to 15 years imprisonment, stayed execution for 9 years, 9 months and 19 days, subject to good behavior, and further fined him $915.00 and court costs. Appellant did not appeal this sentence.

On April 2, 1984, another revocation hearing was held upon the prosecutor's motion to revoke appellant's probation for failure to support his dependents since January 1983. The trial court revoked appellant's probation and sentenced him to 8 years, 9 months and 26 days imprisonment. It is from this final order that appellant appeals.

Appellant raises four points for reversal: (1) That the trial court was without authority to sentence appellant to a term of imprisonment and suspend execution of that sentence; (2) that the trial court erred in setting a new sentence at a revocation hearing; (3) that the trial court erred in revoking appellant's probation and imposing a greater sentence than originally imposed; and (4) that at the April 2, 1984 hearing, the court had no jurisdiction to impose any sentence on appellant because the term to which he had been sentenced expired on January 27, 1983.

Appellant first argues that the trial court had no authority to sentence him and then suspend execution of his sentence. Prior to the passage of the 1976 Criminal Code, a trial court was authorized to suspend the execution of a sentence. However, in 1976 this procedure was changed by Ark. Stat. Ann. § 41-803 (Supp. 1983), which states in pertinent part:

> Authorized dispositions. — (1) No defendant convicted of an offense shall be sentenced otherwise than in accordance with this Article [§§ 41-801 —41-1309].
>
> . . .
>
> (5) If a defendant pleads or is found guilty of an offense other than capital murder, . . . the court may

suspend imposition of sentence or place the defendant on probation, in accordance with Chapter 12 [§§ 41-1201 — 41-1211] of this Article.

The Arkansas Supreme Court in *Culpepper* v. *State,* 268 Ark. 263, 595 S.W.2d 220 (1980), interpreted Ark. Stat. Ann. § 41-803 to mean that a trial court was only authorized to suspend *imposition* of a sentence not the *execution* of a sentence. Thus, appellant is correct in arguing that the trial court was not authorized to suspend execution of his sentence. Appellant falls short of obtaining relief on this point due to his failure to make a timely objection or to appeal from that decision. *Wicks* v. *State,* 270 Ark. 781, 606 S.W.2d 366 (1980). Having failed to make a timely appeal appellant was limited to raising this objection in post-conviction proceedings when the State attempted to enforce the sentence. *Deaton* v. *State,* 283 Ark. 79, 671 S.W.2d 175 (1984).

Appellant argues that the trial court erred in setting a new sentence at the January 1983 revocation hearing. The trial court sentenced appellant to five years imprisonment on January 27, 1978. On January 14, 1983, the trial court had authority to revoke appellant's probation and sentence him to the remainder of the five year sentence imposed in January 1978. Ark. Stat. Ann. § 43-2332 (Supp. 1983). The trial court was without authority to set a new sentence at that revocation hearing. *Easley* v. *State,* 274 Ark. 215, 623 S.W.2d 189 (1981). However, no appeal was taken. Appellant was again limited to post-conviction relief. *Deaton, supra.*

Appellant argues that the trial court erred in imposing a greater sentence at the April 8, 1983 hearing than originally imposed. As with the previous point for reversal, the trial court at this hearing could only have sentenced appellant to the term remaining on his suspended sentence. Ark. Stat. Ann. § 43-2332. Because of appellant's failure to object or appeal, he was again limited to post-conviction relief. *Deaton, supra.*

Appellant argues that the trial court was without jurisdiction to impose any sentence on appellant at the April

2, 1984 revocation hearing because the term to which he was originally sentenced expired on January 27, 1983. This argument overlooks the fact that since his original sentence, appellant has been sentenced on two other occasions. He failed to appeal either of these other sentences and is therefore deemed to have accepted them. *McGee* v. *State,* 271 Ark. 611, 609 S.W.2d 73 (1980). We would further point out that it is only upon execution of a sentence that the trial court loses jurisdiction to modify a sentence. *Massey* v. *State,* 278 Ark. 625, 648 S.W.2d 52 (1983).

On April 2, 1984, the trial court revoked appellant's probation and put into execution the remainder of the sentence imposed on April 8, 1983. This fourth sentencing is the only one appellant appealed. However, it is not a new sentence appellant appeals but the execution of one from which appellant failed to appeal. Under *Deaton,* we have no choice but to affirm the trial court's action. Unfortunately, because this sentence was not appealed when imposed, any relief must be sought in post-conviction proceedings when the state attempts to enforce the sentence.

Affirmed.

CRACRAFT, C.J., and CLONINGER, J., agree.

[redacted]

[redacted]

[redacted]