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Gregory VANN . STATE of Arkansas

CA CR 84-162 684 S.W.2d 265

Court of Appeals of Arkansas
Division I
Opinion delivered February 13, 1985

*John W. Settle,* by: *J. Fred Hart, Jr.,* for appellant.

*Steve Clark,* Att'y. Gen., by: *Marci L. Talbot,* Asst. Att'y Gen.

LAWSON CLONINGER, Judge. In this criminal case, appellant argues that the trial court erred in refusing to grant a continuance and that there was insufficient evidence upon which to base a conviction for aggravated assault. We find his arguments unpersuasive and accordingly affirm.

Appellant was charged with the offense of aggravated assault under Ark., Stat. Ann. § 41-1604 (Repl. 1977) following an incident that occurred in August, 1983. From testimony at trial, it appears that appellant and Wayne Jordan had known each other for some time and there was evidence that the two had had a problem over a girl. On the day in question, Jordan was riding his motorcycle on a four lane thoroughfare in Fort Smith. He testified that appellant, who was driving a Pinto automobile, began swerving and stopping in front of him. Jordan stated further that while he was stopped at an intersection, attempting to turn, appellant followed him into the turn lane and struck the left side of the motorcycle with his car. According to Jordan, just

before impact he leapt from the motorcycle, escaping serious injury but catching his ankle beneath the falling bike and suffering in consequence a swollen leg that kept him at home for a week.

At trial, a witness for the State testified that he had witnessed part of the incident and had observed appellant apparently attempting either to collide with Jordan or to run him off the road. Upon the State's conclusion of its case, appellant moved for dismissal of the charge or, alternatively, reduction to first degree assault. Both motions were denied. Appellant took the stand and claimed that Jordan had thrown a brick and several eight-track tapes at him and was driving recklessly. He asserted that it was Jordan himself who pushed the motorcycle over, placing his foot on the bumper of appellant's car to do so, and that the automobile never came into contact with the motorcycle. Defense counsel then moved for a continuance to secure the attendance of a subpoenaed witness. The court denied the motion, and the jury found appellant guilty of aggravated assault. He was sentenced to six years in prison with three years suspended.

In his first point for reversal, appellant argues that the trial judge erred when he refused to grant appellant's motion for a continuance until an absent witness returned to the court. A hearing was held on the motion in which it was revealed that the witness had appeared in court in the morning session of the trial but had asked and received the defense attorney's permission to go to a job interview. The attorney told the witness to be back between 12:00 and 1:00, but the witness failed to return. At 2:30 p.m., the time of the hearing, the court had delayed the resumption of the trial for one hour and twenty-five minutes. At 11:50 a.m. the witness had phoned the court and had told a secretary that his wife had become ill and that he wished to take her to a doctor. The witness gave the secretary telephone numbers where he could be reached, but all efforts to contact the witness met with failure.

Defense counsel stated that he believed that the witness would testify to seeing Jordan pull up on his motorcycle

next to appellant's car, place his foot on the bumper of appellant's car, push his own motorcycle over, and jump off. The court denied the motion for a continuance, noting the length of time the proceedings had been held in abeyance and, further, the fact that other jury trials were scheduled for the next two days.

Rule 27.3, Ark. R. Crim. P., provides:

> The court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecuting attorney or defense counsel, but also the public interest in prompt disposition of the case.

In *Tippit* v. *State,* 6 Ark. App. 26, 637 S.W.2d 616 (1982), we held that the trial judge's action in denying a continuance will not be reversed on appeal in the absence of so clear an abuse of sound judicial discretion as to amount to a denial of justice. The appellant bears the burden of showing the presence of such abuse. See *Kelley* v. *State,* 261 Ark. 31, 545 S.W.2d 919 (1977). Factors which must be considered by a trial court in exercising its discretion in granting or denying a motion for continuance are the probable effect of the testimony or evidence, the likelihood of procuring the evidence, and the relevance of the testimony or evidence. *Davis* v. *State,* 267 Ark. 1159, 594 S.W.2d 47 (1980).

In the present case, the trial court properly exercised its discretion. It entertained defense counsel's proffer of anticipated testimony by the absent witness. It balanced the relevance of the expected testimony against the "public interest in prompt disposition of the case" as required by the Rules of Criminal Procedure. It considered the likelihood of securing the witness's attendance in the light of the delay of nearly an hour and one half and the failure of defense personnel to reach the witness in the interval by phone.

Moreover, it appears from the record that the witness in question had been subpoenaed originally by the prosecution. The decision by the defense to call him to the stand

was apparently reached only one day before the trial began and the defense subpoena was not actually served until the morning of the trial. Ten months had elapsed between the time of the commission of the offense and the trial and appellant had been free on bond for that period. It was with the consent and blessings of defense counsel that the witness took his leave and his release was not participated in by the prosecutor or the court. Under the circumstances, we cannot say that there was a clear abuse of judicial discretion in denying the continuance.

In his second point for reversal, appellant contends that there was insufficient evidence upon which to base a conviction for aggravated assault. Ark. Stat. Ann. § 41-1604 (Repl. 1977) provides:

> A person commits aggravated assault if, under circumstances manifesting extreme indifference to the value of human life, he purposely engages in conduct that creates a substantial danger of death or serious physical injury to another person.

Ark. Stat. Ann. § 41-203 (Repl. 1977) states that a person acts purposely with respect to his conduct or a result thereof when it is his conscience object to engage in conduct of that nature or to cause such a result.

When the evidence in this case is viewed in the light most favorable to the State, it is sufficient to support a finding that appellant acted purposely, not merely recklessly.

There was evidence sufficient to demonstrate that appellant manifested extreme indifference to the value of human life and that he purposely engaged in a course of conduct that created a substantial danger of death or serious physical injury to Wayne Jordan. In making the determination as to whether the evidence is substantial, the evidence must be reviewed in the light most favorable to the appellee. *Pickens* v. *State,* 6 Ark. App. 58, 638 S.W.2d 682 (1982). This court must affirm a conviction if there is substantial

evidence to support the verdict. *Lunon* v. *State,* 264 Ark. 188, 569 S.W.2d 663 (1978).

Affirmed.

GLAZE and CORBIN, JJ., agree.

Sue BRIMM *v.* STATE of Arkansas

CA CR 84-173 683 S.W.2d 940

Court of Appeals of Arkansas
Division I
Opinion delivered February 13, 1985

*Robert E. Irwin,* for appellant.

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

DONALD L. CORBIN, Judge. Appellant, Sue Brimm, was charged with four separate violations of the Arkansas Hot Check Law. She was also charged with a total of 14 insufficient fund checks. At her trial all of the checks were admitted into evidence. Each was signed by appellant and stamped by the First State Bank of Plainview with the notation "insufficient funds." A jury found appellant guilty of the four counts, Class C felonies, and sentenced her to pay fines of $4,000.00. We reverse and remand.

Appellant Sue Brim was the office manager of River Valley Pulpwood Company which was owned by her husband. Her job consisted of scaling and paying for pulpwood delivered to her by various woodhaulers. These woodhaulers were paid by her on checks drawn on the First State Bank of Plainview, Arkansas.

In late July and early August of 1983, the First State Bank of Plainview declined to pay checks written by appellant Sue Brimm to various woodhaulers. Ralph Wilson, executive vice-president of the First State Bank of Plainview, testified that the checks were dishonored as there were insufficient funds in the account. The bank statements for the months of July and August were admitted into evidence and established the overdraft status of the account. The account was closed on August 10, 1983. The local sheriff testified that he had contacted appellant Sue Brimm in order

to collect on the bad checks. She denied any liability on the checks but admitted to him that she had received the wood.

Sam and Junior Starr were woodhaulers who testified they received insufficient checks from appellant Sue Brimm during this period of time. They also testified that they did not believe appellant intended to cheat them out of their wood. Edmond Joe Hughes, another woodhauler, testified that he had received a bad check from appellant in this time period and that he never knew her to try to beat him out of anything.

Appellant Sue Brimm defended these criminal charges on the basis that she did not write the checks with the intent to defraud. She testified that she and her husband had made arrangements with the First State Bank of Plainview to pay the checks written to the woodhaulers. Eldon Brimm, appellant's husband, testified that they would write a check to the woodhauler for the wood and then take the wood ticket to the bank and the bank would advance the money based on the wood ticket. The bank officer testified that he was not aware of any arrangements having been made with the Brimms to carry overdrafts. He also testified that the bank had a security interest in the wood goods and the bank would advance money based on the amount of wood tickets the Brimms brought to the bank.

Appellant raises four issues on appeal for reversal. Since we reverse and remand for a new trial because of the trial court's error in excluding appellant's April and May of 1983 bank statements, we need not discuss the remaining three points. The introduction into evidence of these bank statements was objected to by the State on the basis that they were not relevant. Counsel for appellant argued unsuccessfully to the trial court that the statements were admissible to rebut the question of appellant's intent to deceive and to further establish an arrangement with the First State Bank of Plainview to carry the overdrafts of the business. The proffered April statement indicated that appellant was overdrawn in the approximate amount of $1,200.00 and the May statement started with a negative balance and ended with a positive balance of approximately $2,000.00.

It is within the trial court's discretion to admit or exclude evidence and this Court reverses only when such discretion has been abused. *Gruzen* v. *State,* 267 Ark. 380, 591 S.W.2d 342 (1979), *cert. denied,* 459 U.S. 1020 (1982). Relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ark. Unif. R. Evid. 401. Ark. Unif. R. Evid. 103(a) provides that error cannot be predicated upon a ruling admitting or excluding evidence unless a substantial right of the objecting party is affected.

We believe a substantial right of appellant was affected by the trial court's exclusion of these statements. According to Ark. Stat. Ann. § 67-722 (Supp. 1983), a prima facie case of intent to defraud is made when a check is introduced into evidence with an endorsement showing it was unpaid because of insufficient funds. As we stated in *Walker* v. *State,* 10 Ark. App. 189, 662 S.W.2d 196 (1983), in order to overcome the inference of intent to defraud, the accused must put on evidence which demonstrates the lack of intent to defraud.

The record reflects that the bank officer testified during cross-examination that it was illegal for a bank to carry an overdraft unless arrangements had been made. He was not aware of any arrangement made with the Brimms to carry overdrafts and testified that he did not know why the First State Bank of Plainview would carry overdrafts if no arrangements had been previously made. As noted previously, the April statement ended with a negative balance and the May statement began with a negative balance.

We believe these statements were relevant and admissible in order for appellant to rebut the inference of her intent to defraud and that a substantial right of appellant was affected by their exclusion. We cannot conclude that the court's erroneous ruling was harmless, and accordingly, we will remand for a new trial.

Reversed and remanded.

CLONINGER, J., agrees.

GLAZE, J., concurs.

TOM GLAZE, Judge, concurring. Although I fully agree with the majority to reverse and remand, I note that the April, 1983 bank statement reflects that the Brimms' account had a negative balance for March, 1983. Thus, if the April/May, 1983 statements had been admitted into evidence, the jury would have known the First State Bank had permitted the Brimms to overdraft checks for at least five months before the bank decided to dishonor their insufficient checks. Nonetheless, the State prosecuted this case based upon insufficient checks reflected in only the July/August, 1983 Brimm bank statements.

Ralph Wilson, a vice-president for the Bank, testified that it was illegal for a bank to honor overdrafts unless some arrangement had been entered into between it and its customer. Obviously, the length of time the Bank had honored insufficient checks written by the Brimms would be at least circumstantial evidence bearing on whether it had entered into an agreement with the Brimms. For example, if the State had contended that no such agreement existed during the entire five months in question, the clear implication would have been that the Bank participated illegally in honoring the Brimms' insufficient checks for at least three months immediately prior to the months of July and August, 1983 when it decided *not* to honor such overdrafts. The fact that no earlier action was taken by the Bank raises relevant questions of why it did not. Clearly, none of the insufficient checks for the earlier three-month period was the subject of a prosecution against either Ms. or Mr. Brimm. There is no evidence reflecting that the Bank had an arrangement with the Brimms during this three-month period but not for July and August. The jury should have been able to consider the manner in which the Bank and the Brimms did business for this entire five-month period before it decided that no arrangement existed between these parties and that Ms. Brimm possessed an intent to defraud when she wrote the four insufficient checks for which she was prosecuted.

Dollie GILCREAST *v.*
PROVIDENTIAL LIFE INSURANCE COMPANY

CA 84-148 683 S.W.2d 942

Court of Appeals of Arkansas
Division I
Opinion delivered February 13, 1985

*Simes & Associates,* by: *L.T. Simes, II,* for appellant.

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

TOM GLAZE, Judge. This appeal involves a hospital medical surgical policy issued by appellee to the appellant. Almost three years after the issuance of the policy, appellant was admitted into the hospital and had a brain tumor surgically removed. Appellee denied appellant benefits under her policy claiming that her surgery was the result of a pre-existing condition excluded under the policy. Appellant filed suit against appellee contending she had disclosed information regarding her brain tumor to appellee's soliciting agent when she applied for the policy. She alleged the agent's knowledge of her condition was imputed to the appellee, and as a consequence, appellee was obligated under the policy. At trial, the jury returned a verdict for appellee.

We must reverse because the trial court incorrectly instructed the jury. The court found that Robert Reynolds was appellee's soliciting agent and instructed the jury that Reynolds' knowledge of appellant's previous condition, if any, *could not* be imputed to the appellee. Appellant had proffered an instruction stating that such knowledge *is* imputed. In *Jackson* v. *Prudential Insurance Company of America,* 564 F.Supp. 229, 234 (W.D.Ark. 1983), the court reviewed a long line of Arkansas cases which hold that the knowledge obtained by an insurance agent, even a soliciting agent, in relation to information requested on the application for insurance is imputed to the insurance company, or that the company is estopped from denying coverage when the agent obtained from the applicant the correct information. *See also Reliable Life Insurance Co.* v. *Elby,* 247 Ark. 514, 446 S.W.2d 215 (1969); and *Mutual Aid Union* v. *Blacknall,* 129 Ark. 450, 196 S.W. 792 (1917). In discussing

the foregoing rules, the Supreme Court in a number of the cases cited in *Jackson* also discussed those exceptions or rules that apply when the insurance company is not bound by information received by its soliciting agent. E.g., *Continental Insurance Companies* v. *Stanley,* 263 Ark. 638, 569 S.W.2d 653 (1978); *Holland* v. *Interstate Fire Insurance Co.,* 229 Ark. 491, 316 S.W.2d 707 (1958); *Business Men's Assurance Co.* v. *Selvidge,* 187 Ark. 1040, 63 S.W.2d 640 (1933). For example, the Supreme Court in *Aetna Life Insurance Co.* v. *Routon,* 207 Ark. 132, 179 S.W.2d 862 (1944), stated the general rule and its exception as follows:

> "Where the fact is correctly stated by the applicant but a false answer is written into the application by the agent of the company *without knowledge or collusion upon the part of the applicant,* the company is, according to the generally accepted rule, bound. But on the other hand, if the agent in collusion with the applicant makes the false and fraudulent representations upon which the insurance is obtained, the fraud will vitiate the policy, even though the agent is acting within the apparent scope of his authority."

*Id.* at 137, 179 S.W.2d at 864 (quoting 32 C.J. § 516) (emphasis supplied).

The *Routon* court also announced another settled exception to the general rule that binds the insurer as follows:

> "The rule denying an insurer the right to assert the falsity of answers to questions contained in an application for insurance, and written into the application by the insurer's agent after the questions were correctly answered by the applicant, presupposes the continuance of good faith on the part of the insured; *this rule is not applicable if there was any taint of fraud on the part of the insured in allowing incorrect answers to stand without objection. . . .*"

*Id.* at 138, 179 S.W.2d at 864 (quoting 29 Am. Jur. § 847) (emphasis supplied).

In the instant case, the appellant claims she informed appellee's agent, Reynolds, that she had prior surgery for a brain tumor in 1976 and that Reynolds said, "We are just going to ignore it." She said that Reynolds completed her application and she signed it. Appellant claims that at Reynolds' instruction, she marked "no" on the application where it asked if she had been confined in a hospital within the past five years. Reynolds denied that appellant gave him any information concerning a prior surgery or hospitalization. Both appellant and Reynolds did agree that appellee mailed appellant a follow-up letter asking appellant to verify the information on her application, a copy of which was enclosed with the letter. Appellant signed on a line indicating that the information in the application was *incorrect* and returned the form to appellee. Appellee sent appellant a second letter, asking how and why the information/application was incorrect. Appellant erased her signature from the form and signed the line that indicated the information was *correct*. She made this change, she claims, because Reynolds had told her to ignore her prior surgery and hospitalization when they initially completed the application. She testified, "I figured if it was good at first it was still good."

In view of the foregoing law and facts, factual questions existed concerning whether appellant had informed Reynolds about her prior surgery and hospitalization and even if she had, whether, on the evidence of this case, appellee was bound by Reynolds' knowledge. In any event, the jury was precluded from considering or deciding these questions by the trial court's erroneously instructing them that Reynolds' knowledge could not — under any circumstances — be imputed to the appellee. As we previously noted, that instruction was wrong and because of that error, we must reverse this cause for a new trial.

We find appellant's other arguments without merit, but we do briefly address the one concerning the policy's incontestable provision since this cause is returned for a new trial. This provision provides that after two years from the effective date of the policy, no misstatement, except fraudulent misstatements made by the applicant, shall be

used to void the policy or to deny a claim. It also provides that no claim for a disease or condition not specifically excluded shall be reduced or denied on the ground that it existed prior to the effective date of the policy. The appellant argues that because of the incontestable provision, the claim must be paid as a matter of law because the disputed loss clearly occurred more than two years after the effective date of the policy. Appellant contends there was no misstatement and certainly no fraudulent misstatement on her part so the incontestable provision applies to the facts at hand. However, the appellant overlooks the fact that the appellee asserted fraudulent misrepresentation as a defense to appellant's claim, and the trial court properly instructed the jury on appellee's burden of proof with respect to that defense. Whether fraud had occurred, thereby effectuating the incontestable provision, was a fact question for the jury and was properly presented to them for resolution.

Reversed and remanded.

CORBIN, J., agrees.

MAYFIELD, J., concurs.

MELVIN MAYFIELD, Judge, concurring. I concur in the reversal and remand of this case but want to make my position clear on a couple of points.

The trial court's instruction No. 10 told the jury that knowledge obtained by appellee's soliciting agent could not be imputed to the appellee. This was objected to on the basis that it was an incorrect statement of the law. In addition, the court refused to give appellant's requested instruction "E" which would have told the jury that the agent's knowledge of appellant's preexisting medical condition was imputed to the appellee. I think it may be important to know why it was error to give the appellee's instruction and to refuse the appellant's.

Although some cases are explained on the basis of waiver, *Reliable Life Ins. Co.* v. *Elby,* 247 Ark. 514, 446 S.W.2d 215 (1969), or estoppel, *Interstate Fire Ins. Co.* v.

*Ingram,* 256 Ark. 986, 511 S.W.2d 471 (1974), I think the real basis is explained in *Jackson* v. *Prudential Ins. Co. of America,* 564 F.Supp. 229 (W.D. Ark. 1983), as follows:

> The distinction . . . is that . . . the insurance agent, whether a general or soliciting agent, had been given authority by the company to obtain the information necessary to complete the application, and to accept the "knowledge" obtained in doing so. That is his "job," so anything he learns in relation thereto is imputed to the company.

*Id.* at 235. *See also M.F.A. Mutual Ins. Co.* v. *Jackson,* 271 F.2d 180 (8th Cir. 1959); *DeSota Life Ins. Co.* v. *Johnson,* 208 Ark. 795, 187 S.W.2d 883 (1945); *Mutual Aid Union* v. *Blacknall,* 129 Ark. 450, 196 S.W. 792 (1917).

This reason may be important in other respects but I mention it in view of the majority opinion's characterization of *Aetna Life Ins. Co.* v. *Routon,* 207 Ark. 132, 179 S.W.2d 862 (1944), as an "exception" to the rule expressed in *Jackson.* I do not regard *Routon* as an exception. That case simply holds that "if the agent in collusion with the applicant makes the false and fraudulent representations upon which the insurance is obtained, the fraud will vitiate the policy, even though the agent is acting within the apparent scope of his authority." This issue of collusion was not raised in the first trial, but if it is to be an issue on retrial, I think it should be understood that the rule in regard to collusion is not an exception to the rule expressed in *Jackson* in regard to the imputation of the agent's knowledge to his company. Both rules may be operative in the same case. *See Mutual Aid Union* v. *Blacknall, supra.*

Also, I want to note that the appellant did not admit that she signed the appellee's first letter on the bottom line to indicate that the information in the application was incorrect. The appellant and her husband each denied that appellant ever signed that line; they both testified that she signed the top line only. Appellant said she signed the top line because she had told the agent about her prior surgery and he had said to ignore it. She said "he was selling it and I

was buying it," and "I figured if it was good at first it was still good."

This brings me to my second point. The appellant testified that at the time she made the application for the insurance she had no symptoms of her previous illness and that, three years later, when she went back to the doctor she "didn't think it was nothing like that again." In view of the appellant's testimony and the possible new issue of fraud by the agent in collusion with the appellant, I think the appellant's husband should be permitted to testify that appellant told the agent that the doctor told her the first brain tumor was not malignant. Objection to that testimony was sustained in this trial. On retrial it should be admissible, not to prove the truth of the matter asserted, but to show that the statement was made. For that purpose I do not think it is hearsay, and it would be relevant on the issue of fraud by the agent in collusion with the appellant. Of course, the appellant's testimony that the doctor made that statement to her would be admissible on the issue of her fraud.

CALION LUMBER COMPANY
and AMERICAN MUTUAL INSURANCE COMPANY,
Respondent No. 1 *v.* Benjamin B. GOFF
and ARGONAUT INSURANCE COMPANY,
Respondent No. 2

CA 84-292 684 S.W.2d 272

Court of Appeals of Arkansas
Division II
Opinion delivered February 20, 1985

*Penix, Penix, Mixon & Lusby,* for appellant.

*Law Offices of Ronald L. Griggs,* for appellee Goff.

*Shackleford, Shackleford & Phillips, P.A.*, for appellee Argonaut Ins. Co.

GEORGE K. CRACRAFT, Chief Judge. Benjamin B. Goff filed a claim against Calion Lumber Company alleging that he had sustained an injury to his back while in the course of his employment on June 16, 1980. On that date the workers' compensation insurance coverage was provided by American Mutual Insurance Company. The claimant did not notify his employer and did not miss any work as a result of his back injury until September 1981 when he ceased his employment. At that time the workers' compensation insurance coverage for Calion was provided by Argonaut Insurance Company. American Mutual contended that the injury was not sustained until September 1981 and any disability resulting from it was the responsibility of Argonaut. It further contended that the claimant was barred from any benefits for failure to give notice of injury as required by Ark. Stat. Ann. § 81-1317 (Supp. 1983). Argonaut contended that Goff did not sustain any injury during the period of its coverage. The Commission found that Goff had sustained a back injury on June 16, 1980, that his failure to give notice of the June 1980 injury was not a bar to his claim, that there had been no subsequent compensable aggravation of it attributable to his employment, and imposed liability for all benefits on American Mutual. This appeal follows.

On review of workers' compensation cases the evidence is viewed in the light most favorable to the findings of the Commission and given its strongest probative value in favor of the Commission's order. The issue is not whether a different result might have been reached but whether the evidence would support a contrary finding. The extent of our inquiry is to determine if the finding of the Commission is supported by substantial evidence. Even where a preponderance of the evidence might indicate a contrary result, we will affirm 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); *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979).

## ERRATA

*14 ARKANSAS APPELLATE REPORTS at page 20*

Detach at perforation, moisten the back, and paste over the ninth line up from the bottom of page 20 of *Calion Lumber Co. v. Goff:*

* different result might have been reached or whether the

Goff testified that in June 1980 while lifting a board he felt his back "lock up" and suffered a severe pain as a result of it. He finished his work that day before consulting a doctor. He stated that he could have missed as much as one-half day's work on account of it. He stated that he continued to work whether "sick or well, hurt or not" until forced to terminate his employment in September 1981. Goff stated that although he was aware of the procedure for reporting injuries he had not reported the incident because he considered it to be a minor strain and lost no time as a result of it. Although the pain would come and go he was able to do the heavy work required of his employment. His back condition progressively worsened from June 1980 until September 1981 when he was forced to terminate his employment. He stated that he stopped work because, "I got to where I couldn't work. There was not an event that happened in September 1981 or just before that. I did not pick up another piece of board any time during that time and reinjure my back and I have never felt another sharp pain in my back like the one I felt in June of 1980. My back just kept on getting worse."

The appellee first contends that the Commission erred in not holding that Goff's claim was barred under Ark. Stat. Ann. § 81-1317 (Supp. 1983) which provides as follows:

> (a) Notice of injury or death for which compensation is payable shall be given within sixty (60) days after the date of such injury or death to the employer, or written notice to the Commission which shall notify the employer immediately.

Ark. Stat. Ann. § 81-1317(b) provides that failure to give the notice shall not be a bar to the claim 1) if the employer had knowledge of the injury, 2) if the employee had no knowledge that his condition arose out of his employment, or 3) if the Commission excuses such failure on the ground that for some satisfactory reason such notice could not be given. On the notice issue the Commission made the following finding:

> We specifically find that there was a satisfactory reason

for claimant's failure to timely report the injury in that claimant thought he had suffered a relatively minor injury and as the disabling consequences of the injury developed over a prolonged period of time.

Arkansas is an "injury state" in that the date of an "accident" and the date of an "injury" in the compensation sense are not necessarily the same. "Injury" means the state of facts which first entitled a claimant to compensation and a claimant may suffer an injury, the consequences of which are latent at that time. *Cornish Welding Shop* v. *Galbraith,* 278 Ark. 185, 664 S.W.2d 927 (1983). The term "injury" means "compensable injury" and the injury does not become compensable until the claimant first learns the extent of his injuries *and* is off work for a period that would entitle him to benefits for a compensable injury. *Woodard* v. *ITT Higbie Mfg. Co.,* 271 Ark. 498, 609 S.W.2d 115 (Ark. App. 1980); *Arkansas Louisiana Gas Co.* v. *Grooms,* 10 Ark. App. 92, 661 S.W.2d 433 (1983). Ark. Stat. Ann. § 81-1317(a) requires notice "of injury . . . *for which compensation is payable.*" Ark. Stat. Ann. § 81-1310(a) (Supp. 1983) provides that an obligation to pay compensation commences on the ninth day of the disability. Here the evidence shows that the claimant lost no time or capacity to earn wages. His symptoms developed gradually and did not debilitate him until September 1981. The injury was therefore not one for which compensation was payable. In *T. J. Moss Tie and Timber Co.,* v. *Martin,* 220 Ark. 265, 247 S.W.2d 198 (1952) the Court stated that it would not construe a statute in a way that would "require a claimant to file a claim for disability which did not exist." Certainly this also holds true for a requirement to give notice of injury.

Appellant next contends that the Commission erred in not finding that the claimant sustained a second injury or aggravated a preexisting one while coverage was with a different carrier. We do not agree. In *Burks, Inc.* v. *Blanchard,* 259 Ark. 76, 531 S.W.2d 465 (1976) and *Bearden Lumber Co.* v. *Bond,* 7 Ark. App. 65, 644 S.W.2d 321 (1983) our courts held that all of the logical consequences flowing from an initial injury are the responsibility of the employer and carrier at the time of the initial incident. Where the

second complication is a natural and probable result of the first injury it is deemed a recurrence and the employer remains liable. Only where it is found that a second episode has resulted from an independent intervening cause is liability imposed upon the second carrier. The appellee testified that he had remained symptomatic from his first injury "off and on" until he was forced to quit his job. He specifically denied any second or intervening incident. There was no evidence to the contrary. The medical testimony did not address the issue of causation.

When the evidence is viewed in the light most favorable to the Commission's findings we cannot conclude that reasonable minds could not have reached the same conclusion.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

# DELIGHT OAK FLOORING COMPANY, INC. *v.* ARKANSAS LOUISIANA GAS COMPANY

CA 84-117 684 S.W.2d 271

Court of Appeals of Arkansas
Division II
Opinion delivered February 20, 1985

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

*McKenzie, McRae & Vasser,* for appellee.

JAMES R. COOPER, Judge. After a non-jury trial, the court awarded the appellee judgment for $5,200.62, representing the amount due for natural gas billed to the appellant. On appeal, the issue presented is whether the trial court erred in refusing the appellant's request for a jury trial. The case was set to be tried on September 23, 1983. On September 6, 1983, the appellant filed a request for a jury trial. ARCP Rule 38(a) provides that requests for a jury trial must be made "not later than 20 days prior to the trial date." Under Rule 38, the request should have been filed on or

before September 3, 1983. However, ARCP Rule 6(a) provides that where the last day of a period ends on a Saturday, Sunday, or legal holiday, the time runs until the end of the next day which is not a Saturday, Sunday or legal holiday. Since September 3, 1983 was a Saturday, and the next day was Sunday, and September 5, 1983 was Labor Day, the September 6, 1983 filing was timely.

At the time the case was set, the local court rules in Pike County provided that requests for a jury trial had to be made at least 21 days prior to pretrial. Whether such a rule was on file with the Arkansas Supreme Court Clerk or not is immaterial, since the rule conflicted with ARCP, Rule 28(a). Thus, the trial court erred in refusing to try the case to a jury.

The appellee argues that, even if the trial court erred in refusing to empanel a jury, the appellant has suffered no prejudice as no fact question was presented and the trial court would have been required to direct a verdict in the appellant's favor. We disagree.

The appellant defended this suit on the basis that its manufacturing process was shut down during the period of time involved; that the natural gas passed through the meter, but escaped due to a leak and was never used by it; that the appellant had received a shut-off notice from the appellee which indicated that service would be terminated as of a specific date unless the balance due was paid; and that practice had been followed by the appellee in the past and the appellant relied on the notice and the past practices of the appelee in assuming that the service was actually terminated as of the date on the notice. The trial court noted that, although the appellant claimed to have relied on the notice and the past practices, it acknowledged having received additional bills, and that it did nothing to seek to recover its deposit. We believe that this evidence presented a factual question as to the appellant's reliance on the notice and the past business practices of the appellee, which would have to be balanced against its inaction regarding the continued billing and the deposit. Therefore, we find that an

issue of fact was presented and the appellant was entitled to have it presented to a jury.

Reversed and remanded for a new trial.

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

WINROCK HOMES, INC. *v.* Gary DEAN and FLETCHER, MILLER, DEAN AND ASSOCIATES, INC.

CA 84-314 684 S.W.2d 268

Court of Appeals of Arkansas
Division II
Opinion delivered February 20, 1985

*Shults, Ray & Kurrus,* by: *Robert Shults* and *Thomas Ray,* for appellant.

*Owens, McHaney & Calhoun,* by: *John C. Calhoun, Jr.,* for appellee.

JAMES R. COOPER, Judge. The appellant, Winrock Homes, Inc., appeals from the chancellor's award of damages against the appellees for their failure to accurately estimate the total number of square feet in the appellant's office building, designed for the appellants by the appellees. The appellees cross-appeal, arguing that the chancellor's award of damages was not proper, and that it was error to deny the appellees' motion to transfer the matter to circuit court. We reverse.

In the spring of 1978, the appellant began planning the construction of new corporate headquarters, to be located in the Protho Junction area of North Little Rock on property owned by the appellant which was partially occupied by a subsidiary of the appellant, Planters Lumber Company. After discussion with the appellees, the appellant decided on a two-story building. After the design and features were considered, the appellees came up with a construction cost per square foot of $40.00, which was rejected by the appellant's chief executive officer as being too high. Subsequently, over a period of time, employees of both the appellant and the appellees worked with the contractor in an effort to reduce the overall price of the building. While there was emphasis on the cost per foot, the negotiations with the general contractor continued on the basis of trying to arrive at an acceptable lump sum figure for the entire

project. Several months before the contractor and the appellant entered into a formal contract for the construction of the building, the building design was changed to square up the building, a change which finally resulted in an acceptable total cost for the project. From this point on, the changes made in design did not affect the size of the building, and the chancellor found that the appellant's chief executive officer was advised that the total square footage would be approximately 14,000. At this stage in the project, the appellant requested that the appellees calculate the exact number of square feet to be contained in the building. The appellees' employee who did the calculations made an error by adding a figure rather than subtracting it, not once, but twice. However, the appellant's employees who were involved in the project had drawn in, to scale, every piece of furniture, equipment, and machinery which was intended to occupy the building. The appellant was involved in home building, and its employees were apparently familiar with such matters.

The decision was made to construct the building for the lump sum cost of $533,000.00, and the appellant instructed the appellee to prepare a standard form contract for signature by the appellant and the contractor, inserting the total cost as noted above, and the total number of square feet, as erroneously calculated by the appellees, e.g., 15,546 square feet. The building was built, the appellant moved in, and, insofar as the record reflects, the appellant was completely satisfied with the building and its officers testified that the building conformed to the appellant's every anticipated need.

Some time later the appellant terminated its home construction business, causing a reduction in the square footage needed to house its corporate offices. As a result, the appellant decided to sell the building in question. A realtor was consulted, and the realtor quoted a price which was below the construction cost. When questioned as to the reason for this opinion as to low market value, the realtor observed that the property was located in a blighted or depressed area, some distance from other commercial areas, and the building contained only 14,000 square feet.

The chancellor found, and the record supports his finding, that even if the building had contained 15,546 square feet, rather than approximately 14,000, its market value would have been the same because of the depressed area in which it was located. The chancellor also concluded that the market value measure of damages would be the better one under these circumstances. Then the chancellor proceeded to award damages to the appellants based on the difference in the price per square foot actually paid times the number of square feet they did not receive. That is, a 15,546 square foot building, built at a cost of $533,000.00, would cost $34.29 per square foot; a 14,023 square foot building, built at the same cost, would cost $38.01 per square foot, for a net difference per square foot of $3.62. Then, the chancellor multiplied that difference times the differential in square footage to arrive at the damages he awarded, $5,665.56.

We hold that this award of damages was against the preponderance of the evidence as the chancellor had already found that the value of the building was not affected by the deficiency in square footage, or, stated another way, that any damages suffered by the appellant resulted from its choice of location rather than a relatively minor deficiency in square footage. Accordingly, we reverse the chancellor's award of damages to the appellant.

We note that the case was tried in equity because the appellant initially sought rescission of its contract with the appellees. The chancellor determined that the case was not a proper one for rescission because the appellant had moved into the building, occupied it for approximately three years, and was in all respects satisfied with it until discovering the discrepancy in square footage. The appellees moved to transfer the case to law, but the chancellor determined that under the clean-up doctrine he had jurisdiction to decide the question of damages. This point is raised by the appellee in their cross-appeal, but, because of our disposition of the case, we need not deal with it.

We agree that the market value approach to damages was appropriate in this case. The chancellor specifically found that the appellant had accepted the building, used it

for several years, and found it adequate for its corporate needs. Therefore, the cost measure of damages was inappropriate. The appellant cites us to D. Dobbs, *Law of Remedies,* Section 12.21 (1973), for the proposition that neither the cost rule in measuring damages nor the value approach are adequate remedies for the architect's breach and negligence. However, we determine that, from our reading of Dobbs, and the cases cited by the appellant, that this case presents facts which make the value measure of damages appropriate. Dobbs points out that the cost measure of damages contemplates the contractor (in this case the architect) paying the owner the value of replacing or repairing the defects which exist. Here, both sides admit that such a measure of damages would be inappropriate. The second measure of damages referred to by Dobbs is the market value rule, which awards the owner the difference in value between the building as constructed and the building as it would have been had the architect performed as expected. The appellant argues that this measure was not proper, but we agree with the chancellor that it would be the most desirable method for measuring damages. In *Carter* v. *Quick,* 263 Ark. 202, 209, 563 S.W.2d 461 (1978), the Arkansas Supreme Court discussed these two measures of damages, stating:

> It has been said that as a general rule the cost of correcting defects, rather than the difference in value, is the proper measure of damages where the correction would not involve unreasonable destruction of the work and the cost would not be grossly disproportionate to the results to be obtained. 13 Am. Jur. 2d 79, Building and Construction Contracts, Section 79. See also, 5 Corbin 491, Section 1089, where the author says that the cost of curing defects should be the measure whether the breach of the contract is large or small and that it should be applied to every case, except where the actual curing of the defects would cause unreasonable economic waste. . . .

We are of the opinion that to require the appellee to pay the cost of correcting the shortage in the number of square feet in the building would be inappropriate. The appellant

accepted, used, occupied, and was satisfied with, the building. To award damages to the appellant as it seeks, by awarding it $3.62 times the total square footage in the building, is to essentially apply the cost method, and would result in unfairness.

Having decided which measure of damages not to use, we now decide which measure to use. The appropriate measure of damages is the market value approach. Under this measure of damages, the appellant sustained no damages, since the only evidence in the record on this point supports the chancellor's finding that an additional 1,500 square feet would not have affected the market value of the building. Therefore, the appellant was not entitled to the award of any damages on the proof presented in this record.

Affirmed in part; reversed on cross appeal.

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

Earl Bernard WILLIAMS *v.* STATE of Arkansas

CA CR 84-124 684 S.W.2d 821

Court of Appeals of Arkansas
Division I
Opinion delivered February 20, 1985

*James E. Smedley,* for appellant.

*Steve Clark,* Att'y Gen., by: *Patricia G. Cherry,* Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. In June 1983 appellant pled guilty to the charge of possession of a controlled substance with intent to deliver and received a four-year suspended sentence. In August 1983 appellant was again charged with possession of a controlled substance with intent to deliver. A petition was filed to revoke his suspended sentence, and a trial for the substantive crime was consolidated with a hearing on the petition to revoke. Appellant was found guilty of the substantive crime, sentenced to serve four years in the Arkansas Department of Correction, and fined $500.00. His suspended sentence was revoked and he was sentenced to four years imprisonment to run concurrently with the sentence in the other case.

This second charge of possession with intent to deliver arose when a confidential informant contacted Officer Darrell Hall of the Little Rock Police Department and informed him that appellant was selling marijuana from his home. The informant offered to make a controlled buy from appellant; the officer agreed; and they proceeded to make two controlled purchases. Before each buy the informant came to the police department where he was searched for contraband and money. After the search, the officer would record the serial number of a $10 bill which he would give

the informant, then Hall would take the informant to appellant's home, and the informant would get out of the car and go into the house. Each time the informant returned, within approximately five minutes, with a green vegetable substance that later tested out as marijuana.

Based upon the evidence of the two buys, Officer Hall obtained a search warrant for appellant's house. When officers attempted to execute the warrant, appellant was caught flushing green vegetable material down the toilet, and plastic bags containing marijuana were found in several places in the house. At the trial appellant argued that he did not even live in the house, and on appeal he argues that the trial court erred in denying his motion for discovery of the identity of the informant and in denying his motion to suppress the evidence obtained as a result of the execution of the search warrant.

Appellant bases his argument on case law which holds that when a confidential informant is an active participant in a transaction, it is error to withhold the informant's identity from the defendant. In *Roviaro* v. *United States,* 353 U.S. 53 (1957), the United States Supreme Court stated:

> What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. *Scher* v. *United States,* 305 U.S. 251, 254; *In re Quarles and Butler,* 158 U.S. 532; *Vogel* v. *Gruaz,* 110 U.S. 311, 316. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.
>
> . . . .
>
> . . .Where the disclosure of an informer's identity,

> or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.
>
> . . . .
>
> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

The Arkansas Supreme Court has considered this issue several times. In *Bennett* v. *State,* 252 Ark. 128, 477 S.W.2d 497 (1972), the prosecution presented an undercover investigator who testified that he went to appellant's apartment accompanied by two confidential informers, one of whom purchased drugs which the agent paid for. The court stated:

> Generally, whether the privilege of nondisclosure of an informer's identity applies depends upon whether the informer was present and participated in the alleged illegal transaction with which the defendant is charged, or whether the informer was "merely" one who supplied only a "lead" to law enforcement officers to assist them in the investigation of a crime. The identity of an informer is required in certain instances, particularly where he was present as a participant. [Citations omitted.] The rationale is that where the informer is a witness to an illegal transaction, his testimony could be relevant to amplify, modify, or contradict the testimony of a government witness and, therefore, essential to a fair determination of the cause.

More recently, in the case of *Jackson* v. *State,* 283 Ark. 301, 675 S.W.2d 820 (1984), the court again reviewed the question of when an informant's identity must be disclosed. The informant in *Jackson* had revealed to officers that appellant was selling marijuana from his home and that he, the informant, had made two purchases from him. Relying on this information the police obtained a search warrant and discovered in the ensuing search enough contraband to convict appellant of possession of marijuana with intent to deliver, possession of valium, and possession of drug paraphernalia with intent to use. The court held:

> Appellant also contends the trial court should have ordered disclosure of the confidential informant's identity. In this case the charge did not include the actual delivery of a controlled substance, only the possession with intent to deliver. In *Bennett* v. *State,* 252 Ark. 128, 477 S.W.2d 497 (1972), we required disclosure when the defendant was charged with the sale of drugs and the informant actually participated in the crime. We have not required disclosure where a defendant was charged only with possession and the informant merely supplied information leading to the issuance of the search warrant. [Citations omitted.]

Under the law, and in view of the facts in this case, we find no error in the court's refusal to require the disclosure of the identity of the informant insofar as the trial of this case was concerned. However, appellant also argues that the identity of the informant should have been disclosed because of the issue raised as to probable cause for the issuance of the search warrant. *United States* v. *Robinson,* 325 F.2d 391 (2nd Cir. 1963), is cited in support of this contention. We do not agree.

In *Robinson,* the issue was probable cause to arrest. The appellate court held that apart from the information furnished by the "special agent of the Government" the police officers did not have enough information to have probable cause. Thus, the identity of the special agent was required so the defendant could examine him and elicit all relevant facts so the judge could pass upon the question of

probable cause to arrest. This is not the situation here. In this case the strength of the officer's affadavit for issuance of the search warrant rested on his own knowledge. There was no need to examine the informant. In *Brothers* v. *State,* 261 Ark. 64, 546 S.W.2d 715 (1977), the court said:

> In *McCray* v. *Illinois,* 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967), the Supreme Court held that when the issue is not guilt or innocence, but probable cause for search, and the State relies in good faith on credible information supplied by a reliable informant, no due process right is violated by the assertion of informant's privilege.
>
> No confrontation clause violation occurred since the information supplied by the tipster was not used at trial. *See Cooper* v. *California,* 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967), and *McCray, supra.*

Appellant argues that he did not live in the house where the buys were made by the informant but the evidence that appellant did live in the house was overwhelming and the charges against appellant were not based on anything except what was disclosed by the search. Under these circumstances, we find the court did not err in refusing to order the disclosure of the identity of the informant or in refusing to suppress the evidence obtained as a result of the search warrant.

Affirmed.

CORBIN and GLAZE, JJ., agree.

Darrell A. ROBINSON *v.* STATE of Arkansas

CA CR 84-117 684 S.W.2d 824

Court of Appeals of Arkansas
En Banc
Opinion delivered Febrary 20, 1985

[redacted]

*William R. Simpson, Jr.,* Public Defender, by: *Thomas J. O'Hern,* Deputy Public Defender, for appellant.

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

TOM GLAZE, Judge. In this revocation case, appellant raises one issue: The trial judge erred in revoking appellant's suspended imposition of sentence in violation of his constitutional right to due process because appellant was not given notice of the basis for his revocation nor was

he afforded a meaningful opportunity to be heard on it. We agree and therefore reverse this cause for further proceedings.

On September 27, 1982, the appellant entered a guilty plea to two counts of forgery and was given a five-year suspended imposition of sentence conditioned upon his not violating any law or the court's written rules of conduct. On February 14, 1984, appellant was charged as a habitual offender based on one count of robbery and one count of misdemeanor theft by receiving. As a result of these new charges, the State also petitioned to revoke appellant's suspended imposition of sentence. On March 6, 1984, the trial court, at the close of the State's case, directed a verdict in favor of appellant, acquitting him of the robbery and theft by receiving charges. Immediately following appellant's acquittal, the court, without objection by appellant, heard the State's revocation petition. At that hearing, the State's only additional witness was the court's probation officer through whom the State introduced a copy of the rules and conditions previously given appellant. Both sides rested; the court then revoked the appellant's suspended imposition of sentence, finding him guilty of third degree battery.

After the court's decision to revoke, the following dialogue ensued:

> MR. SIMPSON (Appellant's Attorney): I think the defendant [appellant] would like to ask you a question, your Honor.
>
> THE COURT: All right.
>
> DARRELL ROBINSON [Appellant]: Who have I supposed to hit and assaulted, your Honor?
>
> THE COURT: Mr. Mohammad.
>
> DEFENDANT [Appellant]: Who?
>
> THE COURT: Mr. Mohammad has testified that you hit him and so has his employee, Ms. Ruple.

DEFENDANT [Appellant]: Did he testify that he hit me first?

THE COURT: No sir.

DEFENDANT [Appellant]: Well, I got marks and bruises on my body that this man struck me first.

THE COURT: The only thing I have to deal with here is the evidence that has been produced before this court.

DEFENDANT [Appellant]: *But I ain't been charged with no assault and battery.*

THE COURT: *You don't have to be charged with assault and battery in order for me to revoke you. You are not to do anything, commit any offense that is punishable by law. When you struck Mr. Mohammad.* . . .

DEFENDANT [Appellant]: *After he hit me.*

THE COURT: *There is no evidence that he hit you.*

DEFENDANT [Appellant]: There is no evidence that I hit him.

THE COURT: Yes there is. There is evidence from Ms. Ruple, and Mr. Mohammad. *There is no evidence whatsoever that I heard in this case today that he struck you. That will be the ruling of the court. You have 30 days in which to file a notice of appeal and designation of record.*

On appeal, appellant contends that the State's petition for revocation set out the crimes of robbery and theft by receiving and that it was only after hearing the evidence that the judge revoked appellant's probation, finding he had committed third degree battery. The State responds by arguing that battery is a lesser included offense of robbery.[1]

[1]Although the State does not argue the point, the dissent suggests affirmance in part because appellant failed to properly raise the notice issue. Because the appellant, himself, made known in clear terms that he had not been charged with battery after the court so found, the majority finds no merit in the suggestion that this issue was not raised.

Thus, since appellant's robbery charges included the same proof needed to prove battery, the State argues the appellant's contention that he was given no notice of the battery charge is without merit.

We reject the State's argument. As we pointed out in *Williams* v. *State,* 11 Ark. App. 11, 665 S.W.2d 299 (1984), battery is not a lesser included offense of robbery. Here, the court found the appellant committed third degree battery under Ark. Stat. Ann. § 41-1603(1)(a) (Repl. 1977). Section 41-1603(1)(a) provides that a person commits battery in the third degree if with the purpose of causing physical injury to another person, he causes physical injury to any person. Appellant was charged with violating Ark. Stat. Ann. § 41-2103(1) (Repl. 1977), robbery, which is consummated if with the purpose of committing a theft or resisting apprehension immediately thereafter, a person employs or threatens to immediately employ physical force upon another. Clearly, third degree battery requires proof of physical injury while robbery calls for the employment of physical force with no physical injury necessary.[2]

Appellant's case is based primarily upon *Morrissey* v. *Brewer,* 408 U.S. 471 (1972), and *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973). In fact, Arkansas' procedures for probation revocation hearings set out in Ark. Stat. Ann. § 41-1209 (Repl. 1977), are designed to comply with the *Gagnon* decision which extends to such proceedings the same due process requirements that earlier had been applied to parole revocation proceedings by the Supreme Court in *Morrissey.* Under such procedures, a probationer is entitled to: (1) notice of the alleged violations of probation, (2) an opportunity to appear and (3) present evidence in his own behalf, (4) a conditional right to confront adverse witnesses, (5) an independent decision maker and (6) a written report of the hearing.

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[2]The State cites *Sanders* v. *State,* 279 Ark. 32, 648 S.W.2d 451 (1983) in support of its argument that battery is a lesser included offense of robbery. *Sanders,* however, involved the offenses of aggravated robbery and first degree battery which are inapposite here.

Appellant argues that the State said nothing to indicate that battery would be urged as the basis for his revocation until after the revocation hearing and before he was sentenced to three years imprisonment. At his trial on the robbery and theft charges, appellant limited his cross-examination of the State's witnesses to these two charges. As previously noted, he moved for and was granted a directed verdict on these charges, and he determined it unnecessary to offer any testimony at the revocation hearing, assuming the State was relying on these same robbery and theft charges as the basis of its revocation petition. Appellant contends that had he known battery would be the basis for his revocation, he could have raised the defense of justification — which at the conclusion of the revocation hearing is reflected by his remarks that Mr. Mohammad hit him first. Appellant claims he was not afforded an opportunity to cross-examine any witnesses concerning an alleged battery charge nor did he know to present evidence to refute or to defend against such a charge.

Appellant's arguments have merit. We find his notice argument similar to that affirmed in *Hawkins* v. *State,* 251 Ark. 955, 475 S.W.2d 887 (1972).[3] In *Hawkins,* the State filed a revocation petition based upon the single ground that the defendant was guilty of grand larceny. The trial court revoked Hawkins' suspension, not upon the grand larceny charge, but upon a finding that she had been drinking whiskey, possessed whiskey, engaged in prostitution or adultery and lived with another woman whom the court found to be dishonest. On appeal, Hawkins contended, as does appellee here, the State did not give her proper notice of the reasons or basis for its petition to revoke her suspension. In reversing and setting aside the trial court's order, the Supreme Court said:

> In the case at bar the petition for revocation was

[3]The Supreme Court decided this case prior to the United States Supreme Court's *Morrissey* and *Gagnon* cases and before enactment of Arkansas' statutory revocation procedures compiled in Ark. Stat. Ann. § 41-1209. Nonetheless, *Hawkins* has never been overruled and the due process procedures required by our Supreme Court in *Hawkins* are clearly consistent with those requirements set forth in § 41-1209.

> based soley upon the assertion that the defendant had committed grand larceny. At the hearing, however, *the court permitted the prosecution to go far beyond its own pleading and to offer proof of the various forms of misconduct that were ultimately found by the court to have existed. That procedure is fundamentally unfair, for a defendant cannot properly prepare for the hearing without knowing in advance what charges of misconduct are to be investigated as a basis for the proposed revocation of the probation.*

*Id.* at 956-57, 475 S.W.2d at 888 (emphasis supplied).

In the instant case, appellant had no opportunity to prepare to defend himself against a battery charge because that charge was not even mentioned until both the State and the appellant had rested. Such failure of due process cannot be remedied by this Court's placing the burden upon the appellant by suggesting that after the trial court had used third degree battery to revoke his suspension, he immediately should have recalled all the State's witnesses to recross-examine them concerning this newly-disclosed charge.[4] It is the State's burden to properly notify the appellant regarding the basis upon which it seeks to revoke his suspension, and this Court is unable to relieve the State of that burden by requiring the appellant to present a "last minute" defense to a charge which could have been duly set forth in the State's revocation petition. This is especially true, when as here, the trial court had already expressed in unqualified terms its position that appellant did not have to be charged with battery in order for it to revoke his suspension. Without due notice by the State of its basis for seeking to revoke suspension, a defendant is left to speculate upon what charges might emanate from the State's evidence on the day of the revocation hearing. Procedural due process cannot be met by allowing the State to proceed in the fashion it suggests.

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[4]In oral argument, it was suggested that after the appellant was told he was guilty of battery, he should have offered to call witnesses or to testify in order to contradict such charge.

Reversed and remanded.

CRACRAFT, C.J., and MAYFIELD, J., dissent.

MELVIN MAYFIELD, Judge, dissenting. I do not agree with the majority opinion in this case because, in my judgment, (1) it reverses a trial judge's decision that is clearly supported by the evidence, (2) it reverses the judge's decision despite the fact that the appellant had a fair trial, (3) it reverses the judge's decision on a technicality that puts form over substance; and (4) it reverses the judge's decision for reasons not presented to the judge, but raised on appeal for the first time.

There is evidence in the record to the effect that on December 14, 1983, Mr. Hassan Mohamad, who was the manager of a 7-11 store at 16th & Pike in North Little Rock, came out of the back room of the store, saw the appellant squatting down behind a shelf, and watched him pick up a carton of cigarettes and put them under his jacket. The appellant was told that he would have to pay for the cigarettes, and the manager walked over to the front door of the store because he thought appellant might try to run out that door. After walking around the store and picking up about sixty or seventy dollars of merchandise which he put on the counter, the appellant then walked up to the front door and told the manger he was going outside to make a telephone call.

The manager told appellant he had to pay for the cigarettes before he left and told a lady employee to call the police because "I believe we've got a shoplifter." At that point appellant began screaming and hollering and started hitting the manager who then opened the door and pushed the appellant outside and told him to leave. In the meantime, the lady employee, who watched the whole episode, had called the police. They arrived shortly thereafter and, a short time later, arrested appellant at another 7-11 store.

Both the manager and his employee testified as did two of the police officers who were called to the store. The

manager testified that he never hit the appellant, but that appellant hit him in the eye and that it turned red and hurt for three days. One of the officers testified that there was a slight swelling on the left side of the manager's face and that he had a red, discolored eye.

At the time of his arrest, the appellant was on a five-year suspended sentence, and as a result of the occurrence at the store, he was charged with robbery and misdemeanor theft and a petition to revoke his suspended sentence was filed. The Information charging robbery and theft contained the allegation that on December 14, 1983, the appellant:

> employed physical force upon Honarmand Hassan Mohamad, agent of 7-Eleven Store, with the purpose of resisting apprehension immediately after committing a theft, against the peace and dignity of the State of Arkansas.

The petition for revocation stated that the appellant violated the terms of his suspended sentence because on December 14, 1983, he "was guilty of the crimes of Robbery and Misdemeanor Theft. . . ."

On March 6, 1984, the criminal charges and the petition to revoke were tried together by a judge without a jury. It is agreed that the criminal charges were tried first, but that the evidence in that hearing was made a part of the evidence in the revocation hearing. Appellant was represented by counsel at both hearings and he cross-examined the manager of the store and his employee. The appellant did not testify. At the conclusion of the evidence on the criminal charges, the appellant's attorney moved for a directed verdict. He argued that since the evidence showed, and the store manager admitted, that the manager did not actually try to stop the appellant from leaving the store, any physical force employed upon the manager by appellant was not for the "purpose of resisting apprehension immediately after committing a theft." Appellant's counsel told the judge:

> Your Honor, our position is that there may have been some criminal activity there but the charge of

> robbery is incorrect. It may have been something else —attempted theft, *it may have been battery,* it may have been something else. But not robbery. (Emphasis supplied.)

The judge, noting that the evidence did not show that appellant actually took any of the merchandise out of the store, granted the motion and dismissed the criminal charges of robbery and theft. He then announced they would proceed with the revocation hearing. The state called the probation officer who produced a form, signed by appellant, and which contained the written conditions of appellant's suspended sentence, and it was introduced into evidence. One condition on the form provided that appellant would not violate any state law punishable by imprisonment during the period of his suspended sentence. No other evidence was offered and the court heard the arguments of counsel. Counsel for the state argued that, while technically the appellant may not have committed robbery, the evidence did show that appellant had committed a third degree battery upon the store manager, and that there was, at least, an attempted theft from the store. Significantly, the complete argument of appellant's counsel in reply was as follows:

> Your Honor, I think the question the Court has to decide here is whether the State has in fact established *that* by a preponderance of the evidence. Of course, the burden of proof here is a little bit different. Less than proof beyond a reasonable doubt. And I think the Court has heard the facts and we will leave that to the Court's discretion. (Emphasis added).

The court then found that appellant had committed the crime of battery in the third degree, revoked the suspended imposition of sentence, and sentenced the appellant to three years in the Department of Correction. The dialogue that then occurred is set out in the majority opinion. I think the evidence that I have just summarized establishes the points listed in my opening paragraph.

(1) Certainly the court's finding that appellant com-

mitted third degree battery upon the store manager is not clearly against the preponderance of the evidence. That, of course, is our standard of review in revocation cases. *Pearson* v. *State,* 262 Ark. 513, 558 S.W.2d 149 (1977); *Fitzpatrick* v. *State,* 7 Ark. App. 246, 647 S.W.2d 480 (1983). Third degree battery is purposefully or recklessly causing physical injury to a person and it is a class A misdemeanor. Ark. Stat. Ann. § 41-1603 (Repl. 1977). Punishment for a class A misdemeanor shall not exceed one year imprisonment. Ark. Stat. Ann. § 41-901 (Supp. 1983). The written condition of appellant's suspended sentence provides that he will not commit any crime punishable by imprisonment.

(2) With the exception of notice of his alleged violations of probation, there can be no question but what the appellant received a fair trial. He had a hearing before a judge, he was present at the hearing, he was represented by counsel, he had the opportunity to present evidence and to cross-examine witnesses, he was furnished a written judgment of the revocation, and he was afforded all the rights required by the State of Arkansas, and all the Federal due process requirements set out in *Morrissey* v. *Brewer,* 408 U.S. 471 (1972), and *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973).

(3) As to the notice issue, the information charged appellant with robbery committed on December 14, 1983, by the use of physical force upon the store manager with the purpose of resisting apprehension immediately after committing a theft. The petition to revoke alleged appellant violated the terms of his suspended sentence because on December 14, 1983, he was guilty of the crimes of robbery and theft. All that is required by Arkansas law is that he "be given prior notice of the time and place of the preliminary hearing, the purpose of the hearing, and *the conditions of suspension or probation he is alleged to have violated.*" Ark. Stat. Ann. § 41-1209(1)(Repl. 1977). It is abundantly clear that the appellant was informed of the factual allegations that would be involved in his revocation hearing. Only by the sheerest technicality — one that absolutely puts form over substance — can it be said that the appellant did not have sufficient notice of the conditions of his suspension that he was alleged to have violated. While it may be true

that battery is legally not a lesser included offense of robbery, it is also true that one who is alleged to have employed physical force on a person to resist apprehension immediately after committing a theft, is in truth and fact apprised of the need to defend against the charge of purposefully or recklessly causing physical injury to that person.

(4) The rule is well established in this state that cases will not be reversed on points not presented to the trial court but argued for the first time on appeal. *See Wicks* v. *State,* 270 Ark. 781, 785, 606 S.W.2d 366 (1980), where the court said: "in hundreds of cases we have reiterated our fundamental rule that an argument for reversal will not be considered in the absence of an appropriate objection in the trial court." *See also Weston* v. *State,* 265 Ark. 58, 62, 576 S.W.2d 705 (1979), where the court said: "Nor will we afford relief which is not first sought in the trial court and denied."

As we have already set out, the record in the present case discloses that at the end of the revocation hearing the state's attorney argued that the evidence showed that appellant had committed a third degree battery. However, instead of objecting to that issue being considered as *Wicks* would require, the appellant's attorney told the court this was a factual issue for the court to decide.

Moreover, after the court had ruled, the appellant himself never asked the court to set aside its ruling and let him cross-examine the witnesses who had testified, or to let him testify or call other witnesses, or that he be given a continuance for time to get prepared to meet the "new" issue injected into the case by the state's argument. Contrary to the requirement of *Weston,* the appellant sought no relief from the trial court, but waited until he got to this court and now asks us to tell the trial judge to do something the appellant did not ask the trial judge to do when appellant stood before him.

I would affirm the trial court's judgment.

CRACRAFT, C.J., joins in this dissent.

George HICKEY *v.* STATE of Arkansas

CA CR 84-180 684 S.W.2d 830

Court of Appeals of Arkansas
Division I
Opinion delivered February 20, 1985

*William R. Simpson, Jr.* Public Defender, *Jerome T. Kearney,* Deputy Public Defender, and *Jacquelyn Gregan,* Deputy Public Defender, by: *Thomas J. O'Hern,* Deputy Public Defender, for appellant.

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

TOM GLAZE, Judge. Appellant was charged with and convicted of kidnapping, rape and robbery. He appeals only his kidnapping conviction, contending the evidence is insufficient to support it. We affirm.

A person commits kidnapping if, without consent, he restrains another person so as to interfere substantially with his liberty and does so with the purpose of facilitating the commission of any felony or flight thereafter. See Ark. Stat. Ann. § 41-1702(1)(c) (Repl. 1977). Appellant argues that there was no evidence that he was armed or that he directed any verbal threats toward his alleged victim, Dana Jo Carroll. Because of the absence of such evidence, appellant claims there was no objective basis for her proposed fear or her belief that she was restrained. Citing *Mills* v. *State,* 270 Ark. 141, 603 S.W.2d 416 (1980), he concludes the evidence gives rise to inconsistent inferences and is insufficient as a matter of law to sustain a conviction of kidnapping.

Appellant's argument here appears incongruent with the rape and robbery convictions which lie undisputed since they were not appealed. Robbery, for example, is consummated when a person *employs or threatens to immediately employ physical force* upon another with the purpose of committing a theft. Ark. Stat. Ann. § 41-2103(1) (Repl. 1977). Rape is defined, in applicable part, as when a person engages in sexual intercourse or deviate sexual activity with another person by *forcible compulsion.* Ark. Stat. Ann. § 41-1803(1)(a) (Repl. 1977). Although appellant's charges of robbery, rape and kidnapping all grew from the same, inextricable series of events, the proof established the commission of three distinct felonies. *See, e.g., Beed* v. *State,* 271 Ark. 526, 609 S.W.2d 898 (1980); *see also Hickerson* v. *State,* 282 Ark. 217, 667 S.W.2d 654 (1984). The evidence undisputably reflects that appellant entered Ms. Carroll's automobile at about 3:00 a.m. on a Sunday when she was parked in front of a convenience store where she intended to buy cigarettes. He proceeded to take her purse and money before driving her to what she believed was a motel. Because

he did not have enough money for a motel room, he then drove to his friend's house where he raped Ms. Carroll. Later, by the victim's account, she flagged down a police officer when appellant was driving her around town. When the police stopped her car, she fled to an officer, and appellant was subsequently arrested.

Appellant does not contest his rape and robbery convictions. As a consequence, the facts that underline those convictions are undisputed. From those facts, the jury determined that appellant employed (or threatened) physical force upon Ms. Carroll to rob her and used forcible compulsion to rape her. Because the kidnapping conviction arose from these same circumstances we find no merit in appellant's argument that no basis in evidence existed for Ms. Carroll's belief that she was unwillingly restrained and fearful for her life. To the contrary, the jury could have reasonably believed or inferred from Ms. Carroll's testimony indicating her life was threatened that the appellant had restrained and substantially impaired her liberty. The weight of the evidence and the credibility of a witness are matters for the jury and not for the court. *Jones* v. *State,* 269 Ark. 119, 598 S.W.2d 748 (1980).

Because sufficient evidence exists to sustain appellant's kidnapping conviction, we affirm.

Affirmed.

CLONINGER and CORBIN, JJ., agree.

FIRST STATE BANK OF DEQUEEN *v.*
Frank J. GAMBLE, III and Anita GAMBLE

CA 83-452 685 S.W.2d 173

Court of Appeals of Arkansas
En Banc
Opinion delivered February 20, 1985

*William H. Hodge,* for appellant.

*Smith, Stroud, McClerkin, Dunn & Nutter,* by: *Winford L. Dunn, Jr.,* for appellees.

BASIL V. HICKS, JR., Special Judge. In this foreclosure proceeding Appellant sought recovery on a series of promissory notes and an associated mortgage. The factual matters were stipulated at both the hearings held in the case. Pertinent facts are set out below. Appellee's spouse, Frank J. Gamble, III, was also a party to the proceeding, did not appear and has taken no appeal.

On April 8, 1980, July 16, 1980, August 27, 1980, and October 1, 1980, Frank J. Gamble, III, executed promissory notes in favor of Appellant. On December 26, 1980, both Frank J. Gamble, III, and his wife, Appellee, Anita Gamble, executed a promissory note in favor of Appellant. This obligation was secured by a real estate mortgage on property in Sevier County, Arkansas. Thereafter, on January 13, 1982, Frank J. Gamble, III, executed another promissory note in favor of Appellant. Appellant sought recovery in the Chancery Court against Frank J. Gamble, III, on the notes individually executed by him, upon the joint obligation of Frank J. Gamble, III, and Appellee, and, in addition, foreclosure of the mortgage as security for *all* of the above obligations.

The parties stipulated at trial to the execution of

various notes, and the mortgage, and to the amounts due thereunder, to default dates and to interest accruals. The matter was submitted to the Chancellor upon Appellant's Complaint, Appellee's General Denial and that Stipulation of Facts.

The Chancellor found that Frank J. Gamble, III, although duly served, failed to appear and defend. The relief requested against Frank J. Gamble, III, was granted. The Chancellor found for Appellant on the note executed by both parties. Appellant's request for foreclosure of its mortgage was granted only with respect to the jointly executed note and attorney's fees were assessed against Appellee and Frank J. Gamble, III.

Following entry of the Decree by the Court, Appellee timely filed a motion seeking a new trial or modification of the Decree as to interest accruing between the due date of the note and day of entry of the Decree and in addition, as to attorney's fees awarded against the Appellee. In her motion, Appellee asserted that prior to the due date of the note a tender of principal and interest due had been made to Appellant and that there was no default due to Appellant's wrongful refusal to accept tender of payment by Appellee. The motion also asserted that the property upon which Appellant held the mortgage was the separate property of Appellee. At hearing on this motion, the parties again stipulated as to the factual matters.

It was stipulated that the note in the amount of $29,556.99 was secured by the mortgage on Sevier County real estate and that the Court had ordered, under the terms of its Decree, foreclosure sale of that property. On or before the due date of that obligation in June, 1981, Appellee made a tender of payment of principal and interest on that obligation. Appellant refused the tender giving as reason for refusal its contention that the existing outstanding mortgage secured the other notes due Appellant and identified previously in the record and which were executed only by Frank J. Gamble, III.

Thereafter, on August 29, 1983, the Chancellor entered

a modified Decree finding that Appellant wrongfully refused to accept the tender of payment from Appellee of the note dated December 26, 1980, and that the amount tendered and refused on or before June 26, 1981, was $31,620.42. The Chancellor further determined that based upon the wrongful refusal of tender Appellee was discharged from further interest accrual on the note in question and should have relief from the judgment for $1,300.00 in attorneys' fees originally awarded by the Court.

Appellant takes its appeal from the modified Decree asserting that the trial court incorrectly allowed Appellee to raise in her motion the defense of tender which had not previously been pleaded prior to the entry of the original Decree and further, that the trial Court erred in denying interest to Appellant after Appellee's tender because Appellee's tender was not unconditional.

We believe that the Chancellor was correct.

Under the Rules of Civil Procedure applicable in this case (specifically, rules 59 and 60) the trial Court is granted wide authority with respect to new trials, amendment and modification of judgments or decrees and with respect to relief from judgments, decrees or orders of the Court. We believe that the Chancellor's actions here fit comfortably within the rules above cited and with existing case law. Courts have control of their judgments during the term in which they are made for sufficient cause, either upon application or upon their own motion, to modify or set them aside. *Massengale* v. *Johnson,* 269 Ark. 269, 59 S.W.2d 743 (1980). Although terms of Court have now been abolished, the principle applies to matters timely before the Court. The Court, in *Massengale, supra,* indicates that the Court's power to make changes or modifications as in the instant case is inherent and plenary and exists without reference to any statute. This power is limited only by the Court's sound discretion. *Massengale, supra.* We believe that the Court exercised here its sound discretion to reach a correct result following an appropriate motion taking into consideration all before it by way of the pleadings and factual stipulation. It appears obvious to us the Chancellor correctly considered

and decided the matter based upon such facts as title to the property involved, Appellee's execution of only one note, and Appellant's position with respect to the application of the mortgage on Appellee's property to the Frank J. Gamble, III, obligations. There has been no claim in this Court by Appellant that the Chancellor's order was incorrect with respect to the application of the mortgage on Appellee's property to the Frank J. Gamble, III, notes.

Appellant's second point for reversal of the Judgment concerns the validity of Appellee's tender of payment. The Uniform Commercial Code provides that in a case in which a tender is made, as stipulated in this case, that subsequent liability for interest and attorney's fees is discharged. Ark. Stat. Ann. § 85-3-604 (Add. 1961). We have in the record before us a stipulation that a *tender* was made. This is a legal term of art and nothing in the factual stipulation indicates anything other than a valid tender. Appellee requested with her offer only such relief to which she was entitled which was release of the mortgage which secured the only note Appellee executed. Such an offer is not conditional as Appellant asserts. 74 AmJur 2d Tender § 26. Appellant was entitled only to recovery on the one note signed by both parties in connection with the real estate mortgage as the Chancellor correctly found and from which ruling there has been no appeal. Any renewal or continuation of the tender is not required since it would have been useless, in view of Appellant's position. *Tom Miller, et ux* v. *James E. Wiley d/b/a Wiley Real Estate,* 257 Ark. 961, 521 S.W.2d 68 (1975).

We affirm.

CORBIN, J., not participating.

COOPER and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I do not agree with the decision in this case and I believe it has a procedural significance that requires a full understanding of the issue involved.

On December 26, 1980, the appellee and her husband

executed and delivered a promissory note to the appellant bank. The note was due on or before June 26, 1981, and it was secured by a mortgage on real property belonging to the appellee. Sometime before due date, the appellee offered to pay the amount due on the note but only if the bank would release the mortgage on her real estate. The bank refused to do this, and the appellee did not pay the balance due.

Eventually the bank filed suit on the note. The complaint also asked for judgment against the husband on some notes he had executed individually. Judgment was granted against the husband on his individual notes and against him and the appellee on their joint note, and the mortgage on her real estate was ordered foreclosed to pay the amount of the joint note. The decree was dated June 3, 1983, and was filed of record on July 29, 1983.

On August 8, 1983, over two months after the decree was dated and seven days after it was filed, the appellee filed a motion in which she stated that the amount of the judgment against her was excessive because it included interest up to the date of the decree but should have included interest only to the day she offered to pay the amount due on the note. At this point it should be noted that this is the first time such a contention had ever been mentioned to the court. The appellee's answer to the bank's complaint was a simple denial of each and every material allegation, and the case was submitted to the court upon a written stipulation of facts that stated, as to the joint note, that the appellee and her husband were in default under the terms of the note and that on February 5, 1982, (the day the complaint was filed), the "balance of principal and interest due thereon was $34,-158.34, together with daily interest accrual from that date [at] a daily rate of $11.33." Based on appellee's answer and her stipulation the court rendered its decree granting judgment against her in the amount of $34,158.34 "with interest thereon from February 5, 1982, at the daily rate of $11.33 until paid . . . ."

Despite the fact that no prior contention had been made that the offer to pay the note stopped the running of interest, and despite the fact that judgment had been entered against

the appellee in exactly the amount to which she had stipulated, when the court heard appellee's motion to modify the judgment she was allowed to introduce this new evidence about her offer to pay the note. The court then modified its decree by eliminating the interest that had accrued after the appellee's offer to pay and by reducing the amount of the judgment against her by the amount of the interest eliminated. The court also eliminated the attorney's fee the note authorized if suit were filed for collection. That amount had been set in the original decree, and the reason for modifying the original decree, as stated in the new decree, was that the bank "wrongfully refused to accept the tender of payment" made by appellee on or before the date the note was due. Now the court obtained this information from the evidence, in the form of an oral stipulation, made at the hearing on appellee's motion to modify the original decree. That stipulation also stated that the reason the bank refused to accept the offer to pay was because it was conditioned on the release of the mortgage, and that the bank refused to agree to the release because it contended the mortgage also secured the notes signed by the appellee's husband individually.

The majority opinion attempts to justify the modification of the original decree by Rules 59 and 60 of the Rules of Civil Procedure, the case of *Massengale* v. *Johnson,* 269 Ark. 269, 599 S.W.2d 743 (1980), and the exercise of the trial court's sound discretion. In all due respect, I think the majority is clearly wrong.

The Federal Rules of Civil Procedure were used as a foundation for the Arkansas Rules of Civil Procedure. *Third Annual Survey of Arkansas Law,* 3 UALR L.J. 145 at 177 (1980). Fed. R. Civ. P. 59(a) provides that on motion for new trial in a case tried without a jury, the court may take additional testimony, amend findings of fact and conclusions of law or make new ones, and may direct the entry of a new judgment. It has been pointed out that the court has greater freedom in handling a motion for new trial in a case that was tried without a jury than one tried with a jury since no jury problems are involved if new evidence is allowed. *See* 6A Moore, *Moore's Federal Practice* Par. 59.07 at 59-76

(1984). *Moore's* also points out that a motion under Fed. R. Civ. P. 59(a) is properly characterized as a motion for new trial whether it follows court or jury action, and that the Rule is an "amalgamation of the old motion for new trial at law and the petition for rehearing in equity." *Id.* at 59-70 n. 4. *Moore's* also states:

> Just as at law, a rehearing in equity and its present counterpart, a new trial in a court action, will not lie merely to relitigate old matter; nor will a new trial normally be granted to enable the movant to present his case under a different theory than he adopted at the former trial. As a practical matter, in equity formerly and in court actions now, three grounds for new trial are most commonly known: for manifest error of law or fact, and for newly discovered evidence.

*Id.* Par. 59.07 at 59-71 through 59-74.

Some cases supportive of the above text are *United States* v. *5.77 Acres of Land,* 3 F.D.R. 298 (E.D. N.Y. 1943), dismissing a motion filed "pursuant to Rule 59" for failure to allege any error in law or fact; *Rue* v. *Feuz Const. Co., Inc.,* 103 F. Supp. 499 (D. D.C. 1952), holding that the failure to call available witnesses does not constitute justification for reopening a case after it has been decided by the court; *Grumman Aircraft Eng. Corp.* v. *Renegotiation Board,* 482 F.2d 710 (D.C. Cir. 1973), rev'd on other grounds, 421 U.S. 168 (1975), finding that the district court properly denied a motion for rehearing as untimely where it sought to reopen proceedings to present a new theory not raised during the original proceedings; *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U.S. 321 (1971), where the trial court had refused to modify certain damages it had fixed, and the United States Supreme Court said:

> On the assumption that the trial court did hold the defenses of limitations and release to have been waived, we cannot say that the judge abused his discretion or stressed too much the value of avoiding reopening a trial to litigate matters that HRI had had an opportunity, but neglected to litigate.

*Id.* at 332.

Every one of the reasons for refusing to allow a party to reopen a trial, given by the courts in the above cases, apply to the instant case. Here, the trial was over and judgment had been entered. But without even suggesting that an error in fact or law had been made by the trial court in the judgment entered, the appellee was allowed to reopen the case and present a theory not raised before; to introduce evidence, obviously available but not offered before; and to litigate a matter she had every opportunity, but neglected, to litigate before. Assuming the trial court had the discretion to allow the new trial, I think there was a clear abuse of that discretion. ARCP 59 was not intended to be used in this manner, and surely there is enough criticism and concern about the enormous amount of litigation pending in the courts of this country to cause us to refuse to authorize the misuse of a rule that was designed to help our adversary system achieve fairness and justice, not to promote neglect and delay.

Moreover, I think this court, in reviewing the exercise of discretion by the various trial courts of the state, has a duty to try to bring a degree of balance to the exercise of that disretion. On January 30, less than a month ago, we decided *Odaware* v. *Robertson Aerial-Ag, Inc.*, 13 Ark. App. 285, 683 S.W.2d 624 (1985), in which we affirmed a trial court that refused to allow a defendant to amend his answer to plead a defense he had disclosed to the defendant in answers to interrogatories filed more than 20 months prior to trial. On the other extreme, today we approve the granting of a motion to hold a new hearing and raise a new defense after the case has already been tried and judgment has already been rendered. And this new defense is allowed without the offer of any excuse for its tardy assertion.

Neither do I believe that ARCP 60 nor the case of *Massengale* v. *Johnson, supra,* cited in the majority opinion, justifies the decision reached. Rule 60 is concerned with the setting aside of judgments under conditions and limitations that are not involved as issues in this case. And *Massengale,* although similar in some respects, is significantly different from this case.

In *Massengale,* the court had found that the appellees there were in default in payment on a contract to purchase a business from the appellants. The contract permitted postponement of payments for certain repairs and improvements and there was some evidence introduced that the appellees had made some repairs and improvements. After announcing the decision from the bench, the chancellor later vacated it and allowed the appellees to amend their original answer to allege expenditures justifying nonpayment of the annual installment in question. The matter was then set for a new hearing and the appellees were allowed to introduce new evidence. The judge then reversed the first decision by holding that the appellees were not in default. The Supreme Court affirmed that action and its opinion states that the chancellor "apparently gave little consideration" to the provision of the contract that allowed postponement of payments for repairs and improvement; but when the motion to vacate the first judgment was made, the judge realized the importance of that provision and that it had not been adequately explored, and the new hearing was granted.

The difference between *Massengale* and the instant case is that the evidence introduced at the first hearing in *Massengale* presented a complete defense to the failure to make the annual payment involved, and under ARCP 15(b) pleadings are to be treated as amended to conform to the evidence. Thus, the court simply allowed an issue to be fully developed that was already before the court. Here, the only evidence presented at the first hearing was by written stipulation and not a word is mentioned in that stipulation about the appellee's offer to pay her note. Furthermore, in this case the amount due on appellee's note was agreed to by both parties and was set out in the stipulation before the court at the first hearing. *Massengale* is so different it clearly does not support the trial court's action in this case.

Finally, I note the reference in the majority opinion to the trial court's inherent and plenary power to control its judgment during the term it is rendered. Our Supreme Court said this same thing of the chancery court in *Massengale* and of the circuit court in *Cowan* v. *Patrick,* 247 Ark. 886, 448

S.W.2d 336 (1969) and *Blissard Management & Realty Co., Inc.* v. *Kremer,* 284 Ark. 136, 680 S.W.2d 694 (1984). This power, however, in no way negates the fact, made clear by each of these cases, that the trial court's power over its judgments must be used in the exercise of sound discretion and that the trial court's action in that regard may be reversed for the abuse of that discretion. Of course, this inherent power exists to enable the court to correct its mistakes, errors, or indiscretions. *See Cowan* v. *Patrick, supra.* But, in this case, the court did not set aside its judgment for any of those reasons. Very clearly, under the circumstances in this case, there was an abuse of the court's discretion.

I would reverse and remand with directions to reinstate the original judgment.

COOPER, J., joins in this dissent.

Donald W. CHANCELLOR *v.* STATE of Arkansas

CA CR 84-61 684 S.W.2d 831

Court of Appeals of Arkansas
Division II
Opinion delivered February 27, 1985

*Charles A. Potter,* for appellant.

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

GEORGE K. CRACRAFT, Chief Judge. On April 2, 1979 the defendant entered a plea of guilty to the charge of possession of a controlled substance with intent to deliver and was placed on five years probation by Judge John H. Goodson. On April 4, 1984 the State filed a motion to revoke that

probation on the ground that appellant had violated the conditions of probation by committing a similar offense. On October 3, 1983 a hearing was held before Circuit Judge Philip B. Purifoy on the motion to revoke. At that hearing there was evidence that the appellant had been convicted in the Miller County Circuit Court on the charge for which revocation had been sought. The court revoked the defendant's probation and sentenced him to a term of ten years in the Department of Correction to run consecutively with the five year sentence received in his conviction of the second offense. We find no merit in either of the two points for reversal advanced on this appeal.

Appellant first contends that Judge Purifoy was without jurisdiction to revoke a sentence imposed by Judge Goodson, citing Ark. Stat. Ann. § 41-1209(2) (Repl. 1977) which provides in pertinent part:

> (2) A suspension or probation shall not be revoked except after a revocation hearing. Such hearing shall be *conducted by the court that suspended imposition of sentence* on defendant or placed him on probation. . . . [Emphasis supplied]

He argues that the word "court" means "judge" and therefore one judge is without jurisdiction to revoke a probated sentence imposed by a different one. This point was not raised in the trial court and cannot be raised for the first time on appeal in this court. *Nation* v. *State,* 283 Ark. 250, 674 S.W.2d 939 (1984). In *Nation* on identical facts the court stated that jurisdiction is granted to a particular position and not to the individual who fills it and that judges of different divisions within a circuit have commutable authority. Although the court in *Nation* refused to review a question not raised below it is apparent that they found no merit in the contention.

Appellant next contends that Judge Purifoy should have recused himself because he also presided at the jury trial in which appellant was convicted of the second offense. He argues that the judge's previous contacts with him would prejudice the likelihood of a fair and impartial hearing.

Disqualification of a judge is discretionary with the judge himself and will not be reversed absent abuse of that discretion. *Woods* v. *State,* 278 Ark. 271, 644 S.W.2d 937 (1983). No such abuse of discretion has been shown. Judges are presumed to be impartial and a party seeking disqualification bears a substantial burden in proving otherwise. In denying the motion the judge stated that even though he did preside over the jury trial he did not feel that this prejudiced appellant's rights in any way. The court noted that the appellant had been found guilty by a jury and that the court had mererly imposed the sentence that was recommended by the jury in its verdict.

The appellant also argues that the trial judge's bias could be inferred from his ruling that the revoked sentence run consecutive to the sentence for the second conviction. We do not agree. Whether multiple sentences are to be served concurrently or consecutively is a matter within the discretion of a trial judge. *Hinton* v. *State,* 260 Ark. 42, 537 S.W.2d 800 (1976). It is to be noted that the appellant had been convicted twice of the same type of offense. The judge could easily have found that it was in the best interest of society and the accused that his sentences run consecutively. We cannot conclude that under the circumstances the trial judge's direction that the sentences run consecutively proved bias.

Affirmed.

MAYFIELD and COOPER, JJ., agree.

Mary LAKE *v.* Don Joel LAKE

CA 84-202 684 S.W.2d 833

Court of Appeals of Arkansas
Division II
Opinion delivered February 27, 1985

*Hurley & Whitwell,* by: *Ruby E. Hurley,* for appellant.

*Hoover, Jacobs & Storey,* by: *O.H. Storey, III* and *Victor A. Fleming,* for appellee.

JAMES R. COOPER, Judge. This appeal arises from the chancellor's refusal to modify the parties' agreement concerning child support payments. The parties were divorced on December 26, 1976, and a property settlement

agreement was approved by the court at that time. The decree stated that "this agreement is a contract independent of any Decree of separation or divorce . . . and shall not be subject to modification by any Court." The agreement provided that the appellant was to have custody of the three minor children, that the appellant was to have possession of the marital home until the youngest child reached her majority, and that the appellant was to pay the sum of $500.00 per month in support, with that amount being reduced by $100.00 per month as each child reached majority. When the instant petition was filed, the parties' second oldest daughter was about to graduate from high school. The appellant sought to require the appellee to pay her daughter's high school graduation expenses, and she further sought modification of the agreement so that, upon the middle child's graduation, child support for the youngest child would not be reduced, but would remain at $400.00 per month. The chancellor determined that the separation and property settlement agreement contemplated such contingencies as an increase in the cost of living, that the agreement sufficiently provided for the children's needs, that it was not violative of public policy, and, finally, that the $300.00 was approximately the amount which would be appropriate were the court to fix support independently of the contract. From that decision, comes this appeal.

For reversal, the appellant argues that the chancellor erred in determining that the support agreement could only be modified if it violated public policy, and in determining that the only change in circumstances was the appellee's increased income. We do not agree with the appellant's interpretation of the chancellor's ruling, and therefore we affirm.

In *McInturff* v. *McInturff,* 7 Ark. App. 116, 644 S.W.2d 618 (1983), we said:

> In cases in which the parties contract is incorporated into the decree, the general rule is that the court cannot alter or modify it. *See Armstrong* v. *Armstrong,* 248 Ark. 835, 454 S.W.2d 660 (1970); and *Pryor* v. *Pryor,* 88 Ark. 302, 114 S.W. 700 (1908). An exception to this rule

> has been recognized by our courts in custody and child support matters. Provisions in such independent contracts dealing with custody and child support have been held not binding on our courts. *See Hitt* v. *Maynard,* 265 Ark. 31, 576 S.W.2d 211 (1979); and *Reiter* v. *Reiter,* 225 Ark. 157, 278 S.W.2d 644 (1955).

We therefore agree with the appellant that the chancellor had the authority to modify the parties' agreement, in the event he found sufficiently changed circumstances. However, it is apparent that the chancellor determined that the original agreement adequately provided for the children's support at the time of the divorce, and that the parties had contemplated changed circumstances, such as increased income on the part of the appellee, and increased cost of living by the manner of reducing support as each child reached majority. We do not agree with the appellant that the chancellor refused to modify the agreement because it was not violative of public policy; the agreement was certainly modifiable, but, on the evidence presented, the chancellor declined to do so.

Next, the appellant argues that the chancellor erred in finding that the only changed circumstances was the appellee's increased income. However, we again disagree with the appellant's position. Although there were changed circumstances, including increased income on the part of the appellee, and increased expenses, the bottom line of the chancellor's finding was that the parties had contemplated such changes when they entered into the original agreement. More importantly, the chancellor found that the parties had adequately provided for changed circumstances because, at the time of the hearing in the case at bar, the child support was adequate to provide for the needs of the children. Additionally, the chancellor observed that, had there been no agreement, the child support amount due was reasonable under the circumstances, and was in accordance with the recommendations of the child support chart used by the court.

Although we review chancery cases *de novo,* we will not reverse the chancellor's findings unless they are clearly

erroneous or against the preponderance of the evidence. ARCP, Rule 52(a). Here, we cannot say that the chancellor's findings are clearly erroneous or against the preponderance of the evidence, and therefore, we affirm.

Affirmed.

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

Michael Troy DEVINEY and Nancy DEVINEY *v.* STATE of Arkansas

CA CR 84-167 685 S.W.2d 179

Court of Appeals of Arkansas
Division I
Opinion delivered February 27, 1985

*Shelby R. Blackmon,* for appellants.

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

LAWSON CLONINGER, Judge. In this appeal of their conviction on second degree murder charges, appellants raise two points for reversal. We find neither persuasive, and we affirm the judgment of the trial court.

Appellants were married on December 24, 1983. They

each had a male child by previous marriages. Christopher Love, the son of appellant Nancy Deviney, was nearly sixteen months old at the time of his death on January 24, 1984. Appellants were charged two days later with murder in the second degree under Ark. Stat. Ann. § 41-1502 (Repl. 1977). A jury trial was held on June 11, 1984, and guilty verdicts were returned. Both appellants were sentenced to twenty years imprisonment.

The first point addressed by appellants is that insufficient evidence existed to support the jury's verdict of guilty. Most of the argument focuses upon the testimony given by a witness for the prosecution, Dr. Fahmy A. Malek, the State's Chief Medical Examiner, who performed an autopsy on the victim. Appellants contend, in essence, that Dr. Malek approached the autopsy convinced that the infant had been murdered and that his interpretation of the results merely conformed to the conclusion he had already reached. The jury thus based its verdict, appellants say, "entirely on surmise and conjecture furnished only by Dr. Malek in his effort to detect and prove child abuse." We cannot agree.

On appeal in criminal cases, we affirm if substantial evidence is present to support the finding of the trier of fact. *Holloway* v. *State,* 11 Ark. App. 69, 666 S.W.2d 410 (1984). Substantial evidence is that evidence which is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other; it must force or induce the mind to pass beyond a suspicion or conjecture. *Jones* v. *State,* 11 Ark. App. 129, 668 S.W.2d 30 (1984). We review the evidence in the light most favorable to the State. *Mooring* v. *State,* 11 Ark. App. 119, 666 S.W.2d 720 (1984). Our examination of the record convinces us that substantial evidence was presented at trial to warrant the jury's finding of guilt.

Appellants both worked at a dairy, milking cows. They began work at about 4:00 a.m. each morning and took their two infant sons with them. Inside the dairy barn was a small room warmed by an electric space heater hanging on a wall. Appellants would leave their children on a pallet prepared on the carpeted concrete floor while the parents milked cows

approximately seventy-five feet away. When they finished their work, usually around 8:00 a.m., appellants would collect the children and return home.

On the morning of January 24, 1984, when appellant Nancy Deviney tried to awaken her son Christopher, he did not respond. Appellant Troy Deviney called his employer who in turn phoned appellants' parents. An ambulance arrived, but efforts made to revive the child were futile. Christopher Love was pronounced dead upon arrival at the Conway Memorial Hospital. The autopsy report stated that the infant died as a result of a fractured skull.

Testimony at trial supported the finding of the medical examiner and pointed to the guilt of appellants. A criminal investigator for the Faulkner County Sheriff's Office testified that he was shown the child's body at the hospital and observed nicks, cuts, and bruises, principally on the face, and dried blood in the ear. He also stated that the back of the child's head appeared to have received a hard blow, as it was soft, puffy, and swollen. With appellants' consent, the investigator searched appellants' house and took a blood-stained pillow and sheet. On the basis of his observations, the investigator was of the opinion that Christopher Love had been abused and had suffered a severe injury to the back of his head.

Appellants, by all accounts, were most cooperative with the investigating authorities. They stipulated that the bloodstains on the seized pillow and sheet were from Christopher's ear. Appellant Nancy Deviney, in a statement given to another criminal investigator, said she had taken her son to two doctors for an ear infection. Appellant Troy Deviney also stated to the investigator that a doctor had seen Christopher for an ear infection. The theory proposed by appellants to explain the child's death was that Christopher suffered from slow subdural bleeding caused by his falling down steps at his grandparents' house about six weeks before his death.

This hypothesis was convincingly refuted by the Chief Medical Examiner. Dr. Malek discussed each stage of the

autopsy and explained the medical significance of various photographic exhibits of the procedure. He showed the jury broken bones in both arms and bruises on the body that were consistent with injuries resulting from child abuse. He demonstrated that two cracks appearing on the child's skull indicated that Christopher had sustained two separate hard blows that were inconsistent with injuries suffered in a fall. In Dr. Malek's opinion, the cracks in the skull had been caused by the child's head having been struck against a carpeted floor, or, when wrapped, against a wall, followed by a hard blow from an open hand. Dr. Malek explained that the gap between the cracks, the lack of a healing reaction, and the presence of blood denoted the fact that Christopher's injuries were inflicted within twenty-four hours before he died. Specifically, he found that the meningeal artery had been damaged by the blows, bleeding was fast, and unconsciousness ensued within half an hour. The injuries, he said, simply could not have been caused by a fall, as argued by appellants.

Appellants had exclusive custody and control of Christopher Love. The jury was satisfied that the medical evidence presented at trial connected the couple with the child's death. Of course, the evidence against them is circumstantial, a not uncommon situation in child abuse cases. The fact that evidence is circumstantial, however, does not render it insubstantial. *Holloway* v. *State, supra.* Where circumstantial evidence alone is relied upon, it must exclude every other *reasonable* hypothesis but the guilt of the accused. The question whether circumstantial evidence excludes every other reasonable hypothesis other than guilt is usally reserved for the jury. The jury is permitted to draw any reasonable inference from circumstantial evidence to the same extent that it can from direct evidence. It is only when circumstantial evidence leaves the jury solely to speculation and conjecture that it is insufficient as a matter of law. The test is whether there was substantial evidence to support the verdict when the evidence is viewed in the light most favorable to the State. *Harshaw* v. *State,* 275 Ark. 481, 631 S.W.2d 300 (1982); *Darville* v. *State,* 271 Ark. 580, 609 S.W.2d 50 (1980). We believe that when this test is applied to the

present case the jury was justified in rendering its guilty verdicts.

Appellants' second argument for reversal is that the trial court erred in admitting into evidence five photographs taken by the Medical Examiner during the autopsy. The color photographs of the victim's skull and left forearm, appellants say, served merely to inflame the minds of the jurors. We disagree. Each of the photographs in question was used by Dr. Malek to illustrate his contentions that the child died as a result of blows administered and that any falls previously sustained in no way contributed.

Under Rule 403, Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979), the determination of whether a photograph will be admitted is governed by whether its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The weighing of the opposing factors lies within the sound judicial discretion of the trial court, and its decision will not be reversed absent a clear abuse of that discretion. *Tucker* v. *State,* 3 Ark. App. 89, 622 S.W.2d 202 (1981). *See also Gruzen* v. *State,* 267 Ark. 380, 591 S.W.2d 342 (1979). We believe that the probative value and explanatory purpose of the photographs outweighed any possible prejudicial effect upon appellants and that the trial court properly admitted the evidence.

The ghastly character of a photograph does not alone warrant its exclusion. *Tucker* v. *State, supra. See also Divanovich* v. *State,* 271 Ark. 104, 607 S.W.2d 383 (1980). In the instant case, none of the photographs was unusually gruesome; each was more clinical than sensational in character. All were necessary for a more complete understanding of Dr. Malek's testimony. No error can be detected in the second point raised by appellants.

Affirmed.

CORBIN and GLAZE, JJ., agree.

Kevin Kyle COURTNEY *v.* STATE of Arkansas

CA CR 84-151 684 S.W.2d 835

Court of Appeals of Arkansas
Division II
Opinion delivered February 27, 1985

*John Wesley Hall, Jr.,* for appellant.

*Steve Clark,* Att'y Gen., by: *Clint E. Miller,* Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. Appellant was convicted of the misdemeanor of negligent homicide. He was driving on a street near the town square of Monticello, Arkansas, about 9 p.m. on June 1, 1983, when he struck Walter Vick, a pedestrian. Vick died eighteen days later. The jury verdict assessed punishment at one year in the county jail, a $1,000

fine, and recommended treatment at a drug and alcohol rehabilitation center.

The appellant admits that his vehicle struck Vick and, although appellant left the scene, he drove immediately home where he told his father what had happened, and within a few minutes appellant and his father went to the police station. A breathalyzer test was performed, and at appellant's request blood was taken for a blood alcohol test. The breathalyzer showed a .15% alcohol content, but appellant denied having had anything to drink for several hours. The result of the blood alcohol test was not introduced into evidence.

Vick, who was a diabetic, was taken to a hospital in Pine Bluff where he was treated until his death. Doctors were not aware that Vick was a diabetic and even though his blood sugar was elevated, he was not treated for diabetes until a couple of days before he died. Pulmonary embolism was listed as the cause of death, but no autopsy was performed until after the body was exhumed several months later. After performing the autopsy, the medical examiner listed the cause of death as diabetes aggravated by blunt trauma.

On appeal, the appellant argues that the evidence is insufficient to support the verdict because there is no substantial evidence that he was guilty of negligent conduct that caused Mr. Vick's death, and that there was no substantial medical evidence to prove that the injuries sustained by Mr. Vick caused his death.

Appellant argues that the evidence does not support the finding that he was negligent because he was driving in the left lane on a one-way street and Vick stepped off the curb into the side of his car. Appellant points out that the damage to the vehicle was to the left fender, post, and windshield; that Vick was retarded and blind in one eye; and that there were photographs introduced that he contends show an obstruction on the street which prevented appellant from seeing Vick before he was hit.

On the other hand, there was evidence that appellant

was speeding; that he was under the influence of alcohol; that the street was well lighted; and that he never applied his brakes before he struck Vick. In addition, parts of Vick's eyeglasses and watch were found near the center of the street in the crosswalk and there was a sign at the intersection which read, "Stop for Pedestrian in Crosswalk."

We must view the evidence in the light most favorable to the appellee and affirm if there is substantial evidence to support the conviction. *Holloway* v. *State,* 11 Ark. App. 69, 666 S.W.2d 410 (1984). Substantial evidence has been defined as "evidence that is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other." *Jones* v. *State,* 269 Ark. 119, 598 S.W.2d 748 (1980). Appellant suggests that Vick was himself negligent, but contributory negligence would not lessen appellant's culpability. The Arkansas Supreme Court considered such a theory in *Benson* v. *State,* 212 Ark. 905, 910, 208 S.W.2d 767 (1948), and the court said:

> It is also argued that the boys riding the bicycle were guilty of negligence which contributed to the injury and death of [one of them]. The doctrine of contributory negligence recognized in civil actions is inapplicable here. In 5 Am. Jur., Automobiles, § 796, it is said: "The familiar rule that contributory negligence of the person injured or killed by the negligence of the defendant in the operation of an automobile bars a recovery in a civil action has no application to a prosecution for homicide due to criminal negligence in operating an automobile. In such case, the decedent's behavior may have a material bearing upon the question of the defendant's guilt, but if the culpable negligence of the latter is found to be the cause of the death, he is criminally responsible whether the decedent's failure to use due care contributed to the injury or not.

In the present case, we believe there was substantial evidence from which the jury could have found that the appellant was negligent in striking Vick with his automobile. Once that is determined, contributory negligence on the part of the victim is not a defense.

Appellant also argues that the medical evidence did not prove that the injuries received in the accident were the cause of Vick's death. He contends that Vick's physical condition and the failure of the doctors to treat his diabetes was the true cause of death. The medical examiner listed "diabetes aggravated by blunt trauma" as the cause of death, but it is not disputed that immediately prior to the accident Vick, although retarded, blind in one eye and suffering from diabetes, was a functioning human being, able to care for himself and help out at a church. Immediately after the accident, in which he suffered broken ribs, a broken leg and a head injury, he lapsed into a coma from which he never totally emerged. The state was not required to prove that appellant was the sole cause of Vick's death, only that he was a contributing cause. In *Taylor* v. *State,* 193 Ark. 691, 101 S.W.2d 956 (1937), the Arkansas Supreme Court quoted from other authorities and then concluded as follows:

> "[I]n law, if the person dies by the action of the wound, and the medical and surgical action jointly, the wound must clearly be regarded sufficiently a cause of the death. And the wound need not be even the concurrent cause; much less need it be the next proximate one; for if it is the cause, of the cause, no more is required." [Citations omitted.] . . . "If death ensues from a wound, given in malice, but not in its nature mortal, but which, being neglected or mismanaged, the party died, this will not excuse the prisoner who gave it; but he will be held guilty of the murder, unless he can make it clearly and certainly appear that the maltreatment of the wound, or the medicine administered to the patient, or his own misconduct, and not the wound itself, was the sole cause of his death; for if the wound had not been given, the party had not died."

The evidence was sufficient to take to the jury the question of the cause of death, and, as we have seen, it was not necessary that the wounds should be the "proximate" or "exclusive" cause, but only if they were the cause of the cause, either the mediate or the immediate cause of death.

Likewise, in the case at bar, we think the evidence was sufficient to take this issue to the jury.

We find there is substantial evidence to support the finding of the jury, and we affirm the appellant's conviction.

CRACRAFT, C.J., and COOPER, J., agree.

Harold E. WILLIAMS and Brenda WILLIAMS
*v.* Larry COTTEN

CA 84-216 684 S.W.2d 837

Court of Appeals of Arkansas
Division I
Opinion delivered February 27, 1985
[Rehearing denied March 27, 1985.]

*Smith, Smith & Duke,* for appellant.

*Phillip J. Taylor,* for appellee.

TOM GLAZE, Judge. This is the second time this case has been appealed to this Court as a result of a contract dated August 14, 1980, for the sale of real estate. *Williams* v. *Cotten,* 9 Ark. App. 304, 658 S.W.2d 421 (1983). On the first appeal, we remanded for a determination of whether appellee was entitled to damages as a result of appellants' breach of contract. The chancellor found that certain damages totalling $12,166.65 resulted from the appellants' breach. On this appeal and cross appeal, the appellants contend that (1) the trial judge used the wrong measure of damages and (2) appellee should be charged interest on the appellants' $20,000 that the appellee retained in his possession. On his cross appeal, the appellee/cross appellant contends that the chancellor erred (1) in making no finding with respect to the issue of liquidated damages or, in the alternative, (2) in not awarding appellee/cross appellant each element of damage that he claims to have suffered as a result of the breach.

The measure of damages for a vendee's breach of an executory contract for the sale of land is the difference between the contract price of the land and its market value at the time of the breach, less the portion of the purchase price already paid. *McGregor* v. *Echols,* 153 Ark. 128, 239 S.W. 736 (1922). According to the undisputed facts at bar, the contract price and the market value at the time of the breach were the

same — $120,000. Therefore, the appellee's damages based upon the Arkansas rule were zero.

Appellee has cited no Arkansas authority to support awarding all the damages he maintains he suffered because of the appellant's breach. In *McIlvenny* v. *Horton,* 227 Ark. 826, 302 S.W.2d 70 (1957), a case cited by both parties, the Supreme Court considered whether a provision in a contract for the sale of real estate was or was not a valid liquidated damages clause. The Court found that the provision represented a penalty, not liquidated damages, and denied recovery thereunder. However, the Court found that the appellee vendors had suffered actual damages of $460. The damages were expenditures the vendor had made preparatory to the sale to the breaching vendees and included the cost of an abstract, revenue stamps, a survey, an escrow fee, a real estate agent's fee, and an attorney's fee.

We agree with the appellants that the chancellor in the instant case erred in awarding consequential damages that were remote from the breach. In *McGregor* v. *Echols, supra,* the court set out the general rules for awarding damages when a vendee breaches (difference between the contract price of the property and its market value at the time of the breach, less the portion of the purchase price already paid), and when a vendor breaches (difference between the contract price of the property and its value when the breach occurred, with interest on the difference). The court said:

> "In actions against a vendee on a contract for the purchase of real estate, we had supposed it to be a well settled rule that when a party agreed to purchase real estate at a certain stipulated price, and subsequently refuses to perform his contract, the loss in the bargain constitutes the measure of damages, and that is the difference between the price fixed in the contract and the salable value of the land at the time the contract was to be executed."

*Id.* at 132 (quoting *Old Colony Railroad Corp.* v. *Evans,* 6 Gray 25, 56 Am. Dec. 394 (Mass. 1856)).

In an earlier case, *Kempner* v. *Cohn,* 47 Ark. 519, 1 S.W. 869 (1886), the Supreme Court reversed an award of damages that had been awarded a vendee against a vendor who had breached. Although the situation there was opposite the one in the instant case, the Court's reasoning is equally applicable here. In *Kempner,* the trial court had permitted the introduction of evidence showing appellee's loss of interest on money he had raised by selling interest-bearing securities in order to purchase appellant's land and evidence of a lease on the subject property that he had negotiated with a third party prior to appellant's breach. The Supreme Court denied the trial court's award of that portion of damages representing interest on the vendee's investment which "lay idle and unproductive for two months," and damages for loss of profits on the lease. The Court said:

> These are not proper elements of damages, for two reasons: First. They are too remote, not flowing naturally from the wrong complained of, nor presumably within the contemplation of the parties; and, second: To allow them would be in effect to give double compensation for the same injury. In an action by a purchaser of land for breach of the contract to convey, the measure of damages is the difference between the contract price and the value of the land when the breach occurred, with interest on such difference. To this the cases usually add the expense of investigating the title, when any expense has been incurred. The vendee is entitled to have the thing bargained for, whether it be land or chattels, at the price agreed upon, and to resell it himself at its market price. And when he has received the profit, which it is shown he could have made on a resale, he has been fully indemnified.

*Kempner* v. *Cohn,* at 527-28, 1 S.W. at 872.

The rationale underlying the foregoing rule is equally applicable to a vendor when a vendee breaches — the vendor is entitled to the thing he or she bargained for. The appellee in the instant case bargained to sell his house to appellants for $120,000. Because the appellants breached that agreement, the appellee is entitled to the difference between that

agreed-upon price and the market value at the time of the breach. There was no difference; therefore, appellee suffered no damage that the law will compensate.

This is not to say a vendor could never suffer damage flowing *directly* from a breach. For example, expenses for a title opinion or an abstract that appellee incurred in preparation for the sale to the appellants may have been compensable, but *not* expenses connected with the resale to third parties, as here the Thorntons, the people to whom the appellee subsequently sold the property for the sum of $120,000. *See, e.g., McIlvenny* v. *Horton* at 830-31, 302 S.W.2d at 72. Here, the trial judge awarded appellee over $10,000 damages for monthly payments he paid on the subject property from the time of appellants' breach until he resold the property to the Thorntons. For this same period, appellee also was awarded damages for property association dues and utilities incurred. Obviously, such damages are not directly connected with appellee/appellants' breached sale and are remote and speculative in that the ultimate or total amount for these items depends solely upon when the appellee consummated a resale.[1] Although support exists in a few other jurisdictions for awarding such damages, it is clearly not the law in Arkansas.

Appellants' second point — that appellee commingled appellants' $20,000 down payment with his own funds, applied them to his own use and is thus liable for interest on that amount — is without merit. In support of their argument, appellants quote from Rule 37(a) of the Rules of the Real Estate Commission that provides, in part, that "[a] broker shall not commingle his own personal funds or place in his own personal bank account moneys coming into his hands which belong to others such as escrows . . . clients' moneys, earnest moneys. . . ." Rule 37(a) alone, does not support appellants' entitlement to the interest they seek, and

[1]The Court also awarded appellee damages for a real estate commission he paid when reselling the property. However, because the appellee incurred no such commission when contracting to sell the property to appellants, the commission damages given appellee are not directly connected with the appellants' breach and should not have been allowed.

appellants cite no other authority. Rule 37(a), while setting out a proscription against a *broker's* commingling a *client's* funds, is not a remedy provision and clearly does not provide for an award of interest. The evidence presented below does not establish that appellee and appellants were in a broker-client relationship and nothing we said in our opinion in the first appeal of this case established that as a fact. Finally, appellee testified below that he did not hold an active real estate license at the time he negotiated with appellants for the sale of his house; that testimony was not disputed. Whether the appellee did or did not hold an active license would be a factor in determining whether the Real Estate Commission's rules and its sanctions applied to him at the time. Based upon these facts and appellants' failure to show authority to support their theory, we have no basis for awarding appellants interest on their $20,000.

We find the appellee/cross appellant's two points for reversal on his cross appeal without merit but, in disposing of those, we note some discrepancies between the findings the chancellor made from the bench and those made a part of her decree which was drafted by the counsel for appellee. Appellee's first point is that the chancellor erred in the following, set out in the decree: "Court makes no finding as to the issue of liquidated damages plus the damages which occurred after the breach." However, at the end of the hearing, the following colloquy occurred.

> Mr. Taylor: Your Honor, could we ask you to make a ruling with reference to liquidated damages and findings with regard to that?
>
> The Court: Court is denying any other damages, any other connection damages other than so spelled out herein.
>
> Mr. Taylor: Is the Court making a finding that the $20,000 was not liquidated damages?
>
> The Court: Yes.

The chancellor clearly found the $20,000 was *not* liquidated

damages, a finding with which we concur, but the decree unfortunately does not reflect that finding. We think such a result — that the $20,000 is not liquidated damages — is in keeping with *McIlvenny* v. *Horton, supra,* in which the Supreme Court found that a clause providing for the forfeiture of 16% of the purchase price was out of proportion to the probable damages and was intended as a penalty by the parties. In our *de novo* review of this case, we find that a $20,000 forfeiture (17% of the purchase price) for the breach is out of proportion to the actual damages incurred and would constitute a penalty against appellants. In addition, we believe the testimony of the appellants and the appellee was that the parties intended the $20,000 to be a down payment, and possibly a penalty, but not to be liquidated damages.[2]

Appellee's second point on his cross appeal is that the chancellor erred in not awarding the appellee each element of damage he claims to have suffered by the appellants' breach. This argument is merely a rehash of what has already been covered. Suffice it to say, Arkansas law simply does not permit the remote consequential damages sought by the appellee.

We reverse that part of the decree awarding the appellee the following:

(1) nominal damages of $25.00 [from the bench, the chancellor declined to award nominal damages — but the award of $25.00 nominal damages was in the decree];

(2) consequential damages as follows:

(a) monthly house payments totalling $10,362.78;

(b) property association dues totalling $149.98;

(c) a real estate commission of $4,344 paid by appellee for the resale of the property;

[2]Actually, appellee testified in the first appeal as well as here that he believed and intended the $20,000 was consideration for an option agreement.

(d) utilities totalling $457.65;

(e) attorney's fee for abstract opinion of $60 (for the the resale); and

(f) abstract certification by Guaranty Abstract of $53 (for the resale).

Since the appellants are not being charged for house payments and property association dues, they are not entitled to credits awarded them for principal paid on the mortgage ($615.44), rent paid by the Thorntons ($2,250.00), an insurance refund ($387.00), and a refund on property association dues ($33.32). Appellants are entitled to their down payment of $20,000.

We remand for a decree to be entered in accordance with this opinion.

Affirmed in part, reversed and remanded in part. Appellee's cross appeal is dismissed.

CLONINGER and CORBIN, JJ., agree.

Juanita M. LAMBERT *v.*
GERBER PRODUCTS COMPANY

CA 84-397 684 S.W.2d 842

Court of Appeals of Arkansas
Division I
Opinion delivered February 27, 1985

*Eddie H. Walker, Jr.,* for appellant.

*Shaw, Ledbetter, Hornberger, Cogbill & Arnold,* for appellee.

TOM GLAZE, Judge. In a split decision, the Workers'

Compensation Commission affirmed the Administrative Law Judge's holding that the appellant failed to show that her back injury arose out of and in the course of her employment. Appellant contends that the Commission's decision is not supported by substantial evidence, that it erred in failing to reverse the law judge for granting appellee's motion for reconsideration when no statutory authority permits such a motion, and that it erred in not reversing because appellant was not afforded an opportunity to respond to the motion. We affirm.

We first consider appellant's procedural issues. At the conclusion of the parties' hearing on November 1, 1983, the Administrative Law Judge ruled from the bench that appellant had sustained a compensable injury. On November 22, 1983, before any written order had been entered by the law judge, appellee filed a motion for reconsideration. Significantly, appellee offered no new evidence or argument but rather requested the law judge to reconsider his oral decision, arguing that the evidence did not support it. On November 28, 1983, the law judge entered his opinion changing his earlier decision by finding the appellant had failed to prove her injury was compensable.

Here, appellant, citing Ark. Stat. Ann. § 81-1323(b) (Repl. 1976), contends she was entitled to ten days notice and to a reasonable period of time to respond to appellee's motion before the law judge entered his written opinion. In addition, she argues that the law judge had no authority to reconsider his oral decision and that appellee's recourse was to appeal that decision, not to move for its reconsideration. Even if we assumed appellant's procedural arguments had merit, we fail to see how she was in any way harmed considering the facts of this case. Appellant perfected a timely notice of appeal from the law judge's November 28, 1983, written order and her case was given a *de novo* review by the Commission. The duty of the Workers' Compensation Commission is to make a finding in accordance with the preponderance of the evidence and not on whether there is substantial evidence to support the findings of the Administrative Law Judge. *Jones* v. *Scheduled Skyways, Inc.*, 1 Ark. App. 44, 612 S.W.2d 333 (1981). Accordingly, the

Commission here not only reviewed the entire record, it also considered an additional document appellant characterized as "newly discovered evidence" which she claimed would have enhanced her case if it had been previously considered by the law judge. Having fully studied the record, the Commission found that appellant failed to sustain her burden of proving a compensable injury by a preponderance of the evidence. Thus, if the Commission's decision is supported by substantial evidence, we fail to see how appellant sustained prejudicial-reversible error by the law judge's final decision finding appellant's claim uncompensable.

Now, we consider whether the Commission's decision is supported by substantial evidence; in viewing the evidence in the light most favorable to the Commission's findings, we conclude that it is. Appellant began to experience back problems on Sunday, July 24, 1983, when she was standing at the Girl's Club where she had taken her daughter for a camping activity. She initially attributed her back symptoms to standing for a prolonged period of time. She did not attend work the next day but called the appellee's nurse expressing that she thought she might have a kidney infection. That same day, appellant saw the company's doctor who sent her back to work the next day, July 26th. Although she took medication, appellant worked (missing one day) until August 9, 1983 when she quit because of her back condition. Appellant's job entailed stripping, waxing and buffing floors, as well as moving furniture. She candidly admitted that she did not recall any specific incident or occurrence that caused her back problems, and at least initially, she did not believe her problems had anything to do with her work.

Regardless of what caused appellant's initial onset of back symptoms, she argues that her job duties aggravated her condition to the point that she was unable to continue gainful employment. Her testimony, however, reflects that after her initial symptoms, her back "just kind of stayed the same," and "it didn't really seem to get any worse until night." She said, "some days I would get up and it wouldn't be hurting at all and some. . .it would be. So the way that it

did, it just kept me undecisive about whether or not I should go back to the doctor." We believe appellant's own testimony supports the conclusion the Commission obviously reached that any disability she had incurred resulted from the natural progression of her initial condition. In any event, we find no compelling evidence to the contrary. While appellant argues that the appellee never controverted that part of her testimony that indicated her job duties aggravated her back problems, it is well settled that a party's testimony is never considered uncontroverted. *Barton* v. *J.A. Riggs Tractor Co.*, 13 Ark. App. 177, 681 S.W.2d 397 (1984).

In conclusion, the issue is not whether this court would have reached a different result than the Commission or whether a contrary finding could be supported. *Nicholas* v. *Hempstead County Memorial Hospital*, 9 Ark. App. 261, 658 S.W.2d 408 (1983). Rather, the test, as earlier stated, is whether the Commission's ruling is supported by substantial evidence, and from our careful review of the record, we hold it was.

Affirmed.

CLONINGER and CORBIN, JJ., agree.

Scott MIDDLETON *v.* STATE of Arkansas

CA CR 84-182 685 S.W.2d 182

Court of Appeals of Arkansas
Division I
Opinion delivered February 27, 1985

*John W. Settle,* by: *J. Fred Hart, Jr.,* for appellant.

*Steve Clark,* Att'y Gen., by: *Clint E. Miller,* Asst. Att'y Gen., for appellee.

TOM GLAZE, Judge. This appeal ensues from the trial court's revocation of appellant's suspended imposition of a burglary sentence. In its petition to revoke, the State alleged the appellant had failed to comply with the court's order to pay his court costs, to make restitution to the victim of his burglary and to not violate any state law. Regarding the law violation, the State asserted appellant had committed second degree battery upon his six-month-old daughter. Appellant's sole point for reversal is that the trial court's findings were against the preponderance of the evidence. We affirm.

First, appellant argues the record is devoid of any proof that he failed to pay the court costs and to make restitution. We cannot agree. On October 24, 1983, the court ordered such costs and restitution to be paid within 90 days. On March 2, 1984 (129 days after the court's order) the State filed its petition to revoke. At his revocation hearing on April 13, 1984, appellant admitted that his parents had paid the costs and restitution the previous week — at the earliest, some 159 days after the court's October 24, 1983 order. Although appellant explained that his failure to pay was because he was unemployed, the trial judge had the right to accept such portions of appellant's testimony as he believed and to reject that which he believed to be false. *See Wrather* v. *State,* 1 Ark. App. 155, 613 S.W.2d 601 (1981). In any event, the record before us reflects that the appellant failed to pay the costs and restitution as ordered by the trial court, and on this point alone, the evidence is sufficient to support the court's revocation decision.

Appellant also argues the State failed to demonstrate the appellant committed second degree battery. Under Ark. Stat. Ann. § 41-1602(1)(d)(iii) (Supp. 1983), a person commits battery in the second degree if he intentionally or knowingly without legal justification causes physical injury to one he knows to be twelve (12) years of age or younger. Appellant's battery charge involved his daughter who undisputedly was only six-months old. Appellant argues that the State failed to show he caused physical injury to his daughter. Physical injury is defined in Ark. Stat. Ann. § 41-115(14) (Repl. 1977), which provides:

> "Physical injury" means the impairment of physical condition or the infliction of substantial pain.

Appellant denied at the hearing that he hurt his daughter. Of course, the trial court was not required to believe him since he was the witness most interested in the outcome of the revocation proceeding. *Fitzpatrick* v. *State,* 7 Ark. App. 246, 647 S.W.2d 480 (1983). The State's evidence showed that he previously had given police officers a written statement admitting he was upset with his daughter because she was crying; he grabbed (squeezed) her chin, shook her face and left bruises on her. Also, the child's mother testified that she discovered bruises on the baby's *head and face,* and when she asked appellant what happened, he said, "[H]e didn't know, but that he needed help." Based upon this proof, the trial court could have inferred the appellant caused physical injury to his daughter, especially in view of the bruises left on her and the described abusive manner in which he handled her. We find little merit in appellant's argument that the State failed to show the victim was in substantial pain when he attacked a six-month-old infant who was unable to articulate a cry for help or relate how the appellant had mistreated her.

We affirm.

CLONINGER and CORBIN, JJ., agree.

OSCEOLA FOODS, INC., Employer,
AETNA INSURANCE COMPANY, Insurance Carrier
*v.* Johnny W. ANDREW

CA 84-394 685 S.W.2d 813

Court of Appeals of Arkansas
Division II
Opinion delivered March 6, 1985

*Penix, Penix, Mixon & Lusby,* for appellant.

*Charles E. Ellis,* for appellee.

GEORGE K. CRACRAFT, Chief Judge. Osceola Foods, Inc. appeals from an award of the Workers' Compensation Commission awarding Johnny W. Andrew benefits for a hernia sustained in the course of his employment. The appellants contend that there was no substantial evidence to support the findings of the Commission in that requirements (2), (3) and (5) of Ark. Stat. Ann. § 81-1313(e) (Repl. 1976) were not met in this case. We do not agree.

Ark. Stat. Ann. § 81-1313(e) (Repl. 1976) provides as follows:

> (e) Hernia: In all cases of claims for hernia it shall be shown to the satisfaction of the Commission:
>
> (1) That the occurrence of the hernia immediately followed as the result of sudden effort, severe strain, or the application of force directly to the abdominal wall;
>
> (2) That there was severe pain in the hernial region;

(3) That such pain caused the employee to cease work immediately;

(4) That notice of the occurrence was given to the employer within forth [forty]-eight (48) hours thereafter;

(5) That the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within seventy-two (72) hours after such occurrence.

On appellate review of workers' compensation cases the evidence is reviewed in the light most favorable to the findings of the Commission and given its strongest probative value in favor of the Commission's order. The issue is not whether we might have reached a different result or whether the evidence would support a contrary finding. The extent of our inquiry is to determine if the finding of the Commission is supported by substantial evidence. Even where a preponderance of the evidence might indicate a contrary result we will affirm 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); *Clark* v. *Peabody Testing Service,* 265 Ark. 489, 579 S.W.2d 360 (1979).

The appellee testified that on Thursday, February 25, 1982, he was moving a 200-pound motor onto a pallet when he felt pain in his lower abdomen and groin. Ordinarily more than one person would have performed this job but at that time he was working alone. When he first felt the pain he raised up, grabbed his groin and just stood there for a minute or two. He went into the bathroom where he remained for ten to fifteen minutes until the pain subsided. He returned to work and did no more lifting but he continued to feel the pain throughout the day. He thought that he might have mentioned the incident to his supervisor shortly thereafter but he was not positive. There is no question that he did inform his supervisor the next day.

After appellee left work he was still in pain. He went

back to work on Friday although he was hurting and worked until 11:00 or 12:00. He said he did no lifting and returned to work because he needed the money. His pain was gradually getting worse. On Saturday morning his pain was so unbearable that he could not stand up. To relieve the pain he took one of his mother's pain pills. He had a serious allergic reaction from it, broke out in a rash and went to the hospital where he was seen by Dr. Biggerstaff. The doctor treated him for the drug reaction and, after being told of the pain in his groin, determined that he had suffered a hernia and referred him to Dr. Fergus who performed surgery the following Monday.

The appellants' first contention that there was no severe pain in the hernial region as required by Ark. Stat. Ann. § 81-1313(e)(2) is based on the stipulated testimony of an insurance adjuster regarding a taped conversation with the appellee in March 1982. The transcription of that conversation contained appellee's statement that he "didn't feel very much at the time you know, kind of a little strain, but that night and the next morning I was hurting down in my lower abdomen."

> Q. Okay, then you didn't feel any sudden, you know, . . .
>
> A. Not really.
>
> Q. Pain or anything? Nothing hit you in the stomach?
>
> A. Just a little, but you know I didn't pay much attention to it.
>
> Q. Okay, so you did not have any severe pain or . . .
>
> A. No, it really wasn't nothing like that at all to start with.

When questioned about that statement appellee stated that he did not know exactly what he had told the adjuster. But he did state:

> I don't know what severe pain means. I guess the hernia is the most pain I have ever had. I had a broken jaw once before, years and years ago, but it wasn't that bad. I really don't know what severe pain means. This pain became *absolutely unbearable* Saturday morning. It kept getting worse from Thursday through Saturday. I couldn't ignore it any longer.

The administrative law judge said it was obvious upon a full reading of the statement that the claimant was attempting to explain that the pain had gotten progressively worse over several days after the occurrence until he was treated by a doctor. He pointed out that the word "severe" is a relative and subjective term and what may be severe to one person may not be severe to another. In adopting the findings of the administrative law judge the Commission clearly interpreted appellee's statement as having been made without knowing the significance of the word "severe" and found that appellee considered the pain to be severe especially when he was comparing the pain over a several-day period. The Commission apparently attached more significance to appellee's testimony given them under oath that the pain became "absolutely unbearable" than it did to his statements made to the adjuster. The determination of the credibility and weight to be given a witness's testimony is within the sole province of the Commission. We conclude that the Commission's finding that there was severe pain in the hernial region is supported by substantial evidence.

The appellants next contend that the Commission's finding that such pain caused the appellee to cease work immediately is not supported by the evidence. This argument is based upon the testimony that the appellee only ceased work for fifteen or twenty minutes and continued to work both that day and until noon the following day. Appellants argue that so short a pause in his work is not sufficient to meet the third statutory requirement of immediate cessation and that to hold otherwise would defeat the purpose of the requirement. We agree that due to possible uncertainty in determining which of several causes may have produced a hernia this requirement, among others, was made because a dramatic demonstration of the

causal connection between the work strain and the hernia leaves little doubt as to cause and effect. However, we do not agree that such causal connection can be dramatically manifested only by an instantaneous and continual cessation of work. Nor should the causal connection be determined by mathematical formulas or measured by minutes or hours. It should be based on evidence which satisfies the finder of fact that the cessation from work became necessary soon enough after the trauma to establish that there was a causal connection under the circumstances of the case.

While our courts have decided a number of cases involving § 81-1212(e)(3) counsel do not cite and we have been unable to find a case which addresses the meaning to be placed upon the word "immediately." In 1(B) Larson, *Workmen's Compensation Law,* § 39.70 (1982), Professor Larson states the rule as follows:

> The "immediacy" called for by some of these tests, in relation to descent of the hernia after injury, occurrence of pain, and cessation of work, has, on the whole, received a rather subtle interpretation by the courts. But denials may still be encountered when intervals are involved that cannot by any stretch of language be called "immediate," such as twelve days, or two months, or six months. The ultimate objective of the statute, which is to distinguish nonindustrial congenital hernias from those definitely produced by trauma or effort at work, is used by the courts to provide guidance in determining how short a time "immediate" must be in the circumstances. . . . "Immediately," then, should be interpreted in the light of its purpose of ensuring causal connection between the employment and the hernia.

In *Consolidated Coal & Coke Co.* v. *Lazaroff,* 109 Colo. 248, 124 P.2d 755 (1942) the court held that the word "immediately" has different meanings depending upon the purpose sought to be accomplished and as used in workers' compensation statutes "does not mean instantaneously, but contemplates that there may intervene permissively between

cause and effect an interval of time reasonably sufficient for effect to follow cause in the usual course of nature." The court also stated:

> Obviously such period of natural tolerance cannot be fixed arbitrarily as consisting of so many minutes, hours or days, but must be determined factually from the circumstances of each case.

In the leading case of *Borodaeff* v. *Province Line Dairy,* 110 N.J. 20, 160 A. 513 (1932), the court stated:

> Thereby it seems clear that the phrase "immediately followed the cause" should not be construed to mean "instantly followed the strain." Probably in most such cases there is some appreciable lapse of time between the cause and the descent. No doubt the word "immediately" is sometimes used in a sense of "instantly," but that is by no means its only meaning. Webster's New International Dictionary gives the following definition of "immediately": "Without intermediary; in direct connection or relation; in a way to concern or affect directly or closely; without intervention of any person or thing; proximately."
>
> We think that the phrase "immediately followed the cause" should be held to mean "soon enough and in such manner as to make it appear clear that the descent was the effect of the strain and pain complained of which forced cessation of work."

In *Lucedale Veneer Co.* v. *Rogers,* 48 So.2d 148 (Miss. 1950) the court stated the rule as follows:

> The construction must be sensible as well as liberal. Under Items (4) and (5), *supra,* a claimant has forty-eight (48) hours within which to get a doctor and to report to his employer, after noticing the occurrence of the hernia. In view of these provisions, the fair construction is that the ceasing of work must be in a reasonable time, under the circumstances, and the

> complaint must be confirmed and reported within forty-eight (48) hours.

In *Riley* v. *Monark Boat Co.*, 269 Ark. 819, 602 S.W.2d 411 (1980) although the court did not state the above rule it is clear that this court applied it. There the worker injured himself on Thursday while lifting a boat. He reported this to his supervisor immediately and was advised to continue with his work, which he did. Later in the day he saw a physician who also advised him to return to work. Although in pain he worked Friday and the following Monday and Tuesday and three hours on Wednesday before ceasing. The court held that he had met all the requirements of § 81-1313(e), including immediate cessation and stated:

> [E]ach step was met promptly and fully and in such fashion as to satisfy even the most skeptical . . .
>
> Where . . . [the claimant] ceased work immediately and reported the occurrence to his employer and, although instructed to return to work, he recognized within an extremely brief period the need to see a physician, the combined effect of these elements and the promptness with which they occurred has significant probative force.

Here there was evidence that the pain at the time of the injury was so severe as to cause appellee to grab his groin and stop working for fifteen or twenty minutes, that he was not able to work his usual way after the incident, reported his injury to his employer in 48 hours, and required, sought and received the services of a licensed physician within 48 hours. Applying the rule in Larson and the cases cited there, we cannot conclude that the finding of the Commission that the cessation of work was "immediate" is not supported by substantial evidence.

The appellants finally contend that the finding of the Commission that the appellant had suffered physical distress following the occurrence of the hernia which required the attendance of a physician within 72 hours was not supported by substantial evidence. They argue that the

appellee admitted that he went to see a doctor within the prescribed time because of his allergic reaction and not because of his hernia. The appellee did state that it was the reaction that caused him to go to the hospital and further stated that he told the doctor that he had pain in his groin and that the reason that he had taken the pain pill was because of the groin pain. He stated that on Saturday morning when he got up he was hurting so bad he could hardly walk or stand up and the pain was just unbearable.

The evidence shows that he did tell the doctor about his pain and that within the prescribed time limit the doctor diagnosed the hernia and scheduled immediate surgery. Ark. Stat. Ann. § 81-1212(e)(5) does not require that a claimant prove that he was actually attended by a physician within 72 hours but only that he needed the services of a physician during that period. *Brim* v. *Mid-Ark Truck Stop,* 6 Ark. 119, 639 S.W.2d 75 (1982). The diagnosis of a hernia would confirm the need of the services of a physician which is all that section requires.

Affirmed.

CORBIN and GLAZE, JJ., agree.

Talbert H. WHITE, et al *v.* Glenn CORDES, et al

CA 84-182 685 S.W.2d 524

Court of Appeals of Arkansas
Division II
Opinion Delivered March 6, 1985

*Herdlinger, Jacoway & Stanley,* by: *Roy E. Stanley,* for appellants.

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

JAMES R. COOPER, Judge. This case involves the validity of a bill of assurance and protective covenants. The appellees filed suit seeking to enforce a bill of assurance

against the appellants. In response, the appellants counterclaimed, alleging that the bill of assurance and protective covenants was invalid, both as to them and to those persons who might acquire an interest in the land from them. The chancellor held that the bill of assurance and protective covenants was effective as to future development of the property, but not as to the mobile home placed on the property by the appellants. From that decision, comes this appeal by the appellants, who argue that the bill of assurance is ineffective to restrict their development of the property.

In April, 1978, Rodger and Charlene Seratt conveyed approximately forty acres which they owned in Washington County, Arkansas, to Ben and Janice Williams. The warranty deed was recorded on April 17, 1978. In August, 1978, the Seratts executed a bill of assurance and protective covenants, covering the same land, which prohibited the placement of mobile homes on the property, as well as imposing certain other restrictions on development. On March 7, 1979, the Seratts contracted to sell the same land to the Whites, and a deed describing the land was placed in escrow. The Whites subsequently moved a mobile home onto the property. The bill of assurance and protective covenants was recorded on May 24, 1979, and then, on May 12, 1980, Ben and Janice Williams reconveyed the subject lands to the Seratts.

The chancellor determined that the 1980 conveyance from the Williamses to the Seratts inured to the benefit of the Whites under the doctrine of after-acquired title; that the bill of assurance, once recorded, constituted notice to White of its provisions, and that, therefore, from and after the time of recordation, White was subject to the restrictions contained in that document. However, the chancellor held that the mobile home was placed on the premises prior to the date the Whites were bound by constructive notice, and therefore the Whites should not be required to move the mobile home.

The common law doctrine of after-acquired title is codified in Ark. Stat. Ann. Section 50-404 (Repl. 1971), and provides that:

> If any person shall convey any real estate by deed purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal title in such lands, but shall afterwards acquire the same, the legal or equitable estate afterwards acquired, shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance.

A conveyance by deed is a prerequisite to the application of the doctrine of after-acquired title under the above-cited statute. The Seratts merely executed a contract for the sale of the land and deposited a warranty deed into escrow. As stated in *Mansfield Lumber Co.* v. *Gravette,* 177 Ark. 31, 5 S.W.2d 726 (1928), "[W]hen a deed is delivered merely as an escrow to take effect upon the performance of some condition by the grantee in the future, no title passes until the condition has been performed." Therefore, by the delivery of the deed into escrow, the Whites obtained no interest in the property until they fulfilled the conditions of the escrow agreement and contract. Since that is true, and since the doctrine of after-acquired title requires a conveyance, the doctrine has no application to the facts of this case.

Because we have held that the doctrine of after-acquired title did not operate so as to relate back to the delivery of the deed in escrow, it follows that the Seratts' acquisition of a deed from the Williamses on May 12, 1980 vested title in the Seratts as of that date, rather than as of the date when the escrow agreement was signed, as the chancellor found. Thus, when the bill of assurance was recorded by the Seratts, they had no title whatsoever in the lands they sought to burden, and could not validly impose restrictions on the subject lands. See Ark. Stat. Ann., § 50-427 (Repl. 1971). The bill of assurance was ineffective to restrict the Whites' use of their land. We reverse the chancellor's decision that the bill of assurance was effective from and after the date of its recordation, and we remand for the entry of an order consistent with this opinion.

Reversed and remanded.

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

Mark S. DEVER *v.* STATE of Arkansas

CA CR 84-171 685 S.W.2d 518

Court of Appeals of Arkansas
Division II
Opinion delivered March 6, 1985

*Maddox & Miller,* by: *Danny Miller,* for appellant.

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

MELVIN MAYFIELD, Judge. Appellant appeals his conviction of manufacturing, or possessing with intent to manufacture or deliver, a controlled substance, marijuana. The charge arose when officers went to appellant's cabin on July 3, 1983, at appellant's request to investigate an incident in which appellant received a superficial gunshot wound and his cabin was vandalized. While inspecting the area around the cabin, officers found a few small pots containing marijuana plants. Two days later, on July 5, 1983, the sheriff and several officers returned to appellant's cabin specifically to search the surrounding woods for marijuana. Approximately 125 yards from the cabin, a field of growing marijuana plants was found. Appellant was tried by a jury and sentenced to eight years in prison and fined $10,000. We reverse and remand.

Appellant's first argument is that the evidence taken from the field of marijuana should have been suppressed because of the sheriff's failure to obtain a search warrant. Appellant relies on *State* v. *Osborn,* 263 Ark. 554, 566 S.W.2d 139 (1978), in which the Arkansas Supreme Court affirmed a decision of the trial court suppressing evidence found when

officers lawfully entered a mobile home, observed a small amount of marijuana in the first room entered, then proceeded to make an intensive search of the entire home. The court held that in reviewing the trial court's action in granting or denying motions to suppress evidence obtained by means of a warrantless search, it would make an independent determination based upon the totality of the circumstances, but would not reverse the trial court unless its decision was clearly against the preponderance of the evidence. The court then said:

> The trial court stated that, since the officers were not making or attempting to make an arrest, and that there was no emergency after the officer's original entry into the mobile home, and no reason to believe that any contraband in the place would disappear while a search warrant was being obtained, the seizure was unconstitutional.

In the present case the officers did not search a home but the woods surrounding it. It is permissible for law enforcement officers to search open fields without a warrant. *See Wyss* v. *State,* 262 Ark. 502, 558 S.W.2d 141 (1977); *Bedell* v. *State,* 257 Ark. 895, 521 S.W.2d 200 (1975); and *Ford* v. *State,* 264 Ark. 141, 569 S.W.2d 105 (1978). However, it was held in *Durham* v. *State,* 251 Ark. 164, 471 S.W.2d 527 (1971), that evidence found in an open field had to be suppressed because officers gained entry to the field through the curtilage and information found in the curtilage led officers to the contraband in the open field. And in *Sanders* v. *State,* 264 Ark. 433, 572 S.W.2d 397 (1978), the court said:

> One's dwelling and curtilage have consistently been held to be areas that may normally be considered free from government intrusion. [Citing *Durham*]. A search warrant, or other proper legal cause, would be required for law enforcement officers to gain entry to one's dwelling and curtilage. Normally a garden is included within the curtilage.

We have no problem with the marijuana found in the yard of appellant's cabin when officers went there to

investigate the shooting and vandalizing of the cabin on July 3. What concerns us is that even though there was probable cause and ample time to obtain a warrant, the officers returned to appellant's cabin two days later, without a warrant, and conducted an intensive search of the woods surrounding appellant's home. The record is clear that the only purpose for returning to appellant's home was to search for marijuana fields, and the location of the field discovered was obtained by following a path leading from appellant's curtilage into the woods. Under these circumstances we think a search warrant should have been obtained and that the failure to do so mandates that the evidence seized pursuant to the illegal search must be suppressed.

Appellee argues that appellant could have no reasonable expectation of privacy in this patch of marijuana. *Katz* v. *United States,* 389 U.S. 347 (1967). Appellee also refers us to *Gaylord* v. *State,* 1 Ark. App. 106, 613 S.W.2d 409 (1981) and *Brown* v. *State,* 5 Ark. App. 181, 636 S.W.2d 286 (1982), in support of its contention that this field was too far from appellant's home to be protected by the fourth amendment to the United States Constitution. However, those cases turned on their facts. In *Brown* the appellant lived on property within a national forest and a game and fish commission employee happened upon the marijuana field while patrolling the forest. In *Gaylord* officers observed the marijuana patch from a road. In both of those cases the officers who say the marijuana fields had a legal right to be where they were when the field was observed. In the present case, however, the officers had no legal right to return to appellant's home. Appellant was in Hot Springs and the sheriff was in daily contact with him there; the officers had arrested a man thought to be responsible for the shooting in which appellant was wounded; but they returned to appellant's cabin and followed a path from his curtilage into the woods without a search warrant, even though they had probable cause and ample time to obtain one. We believe this was a violation of the appellant's constitutional protection against unreasonable search and seizure.

Appellant also argues that the trial court erred in overruling his motion to exclude evidence based on the

prosecution's refusal to comply with the rules of discovery. We agree.

Defense counsel filed a timely motion for discovery and was informed by the prosecution that it had an open file policy and that he was welcome to look at the file at any time. A few days before the trial, defense counsel examined the prosecution's file and found only a copy of the information, his discovery motion and the letter which accompanied it, the state's response, and the name and address of the chemist from the crime lab who was scheduled to testify. At the trial when the prosecution attempted to introduce pictures, marijuana samples, and reports, defense counsel objected based on the failure of the prosecution to provide this evidence under the discovery process, and his motion was overruled. The state argues that this evidence was all located in a file at the sheriff's office and that the appellant was informed of this by the response to his discovery motion. That response read, "All reports or statements of experts made in connection with this case, including results of physical or mental examinations, scientific tests, experiments or comparisons, are available at all times to defendant's counsel from the files of the Prosecuting Attorney or *agents of the State.*" Arkansas Rules of Criminal Procedure, Rules 17.1 through 17.3, provide that the prosecution shall cooperate with defense counsel and provide all discoverable material to the defense. Rule 17.3 requires the prosecution to obtain any information held by other government agencies and provide it to the defense. We think the prosecution's actions in this case fall far short of that required by the rules of discovery.

In *Browning* v. *State,* 274 Ark. 13, 621 S.W.2d 688 (1981), the court said:

> Where the police have an undisclosed statement, as here, we have held that knowledge of the statement is imputed to the prosecuting attorney and that the Rules of Criminal Procedure, Rule 17.1 and 17.2, require a disclosure in order to give meaning to the purpose of those rules.

And in *Lacy* v. *State,* 272 Ark. 333, 614 S.W.2d 235

(1981), a conviction for second degree murder and first degree battery was reversed because appellant's defense counsel was not timely furnished with a statement taken by police from a crucial witness. The court held:

> The trial court concluded that the motion [for continuance so the defense could call a witness whose testimony contradicted the state's evidence and whose previous statement was not given to the defense by the prosecution] came too late. We are satisfied that the court should have granted the motion. It was inexcusable for the police not to disclose Hensley's statement. While the State opened its file to defense counsel, the file did not contain Hensley's statement because the police had not given it to the prosecuting attorney. We held in *Williams* v. *State,* 267 Ark. 527, 593 S.W.2d 8 (1979), that if the police have a statement, knowledge of that statement is imputed to the prosecuting attorney. Ark. R. Crim. P. 17.1 requires disclosure and if that rule is to have any meaning it must have that interpretation.

*See also, Blakemore* v. *State,* 268 Ark. 145, 594 S.W.2d 231 (1980) and *Williams* v. *State,* 267 Ark. 527, 593 S.W.2d 8 (1979).

Appellee relies on *Robinson* v. *State,* 7 Ark. App. 209, 646 S.W.2d 714 (1983), and insists that appellant's counsel made no effort to examine the files of the sheriff. We do not read *Robinson* to hold that simply because the prosecution has an open file policy it has fulfilled its discovery obligation and defense counsel is then required to himself examine all other files in the county maintained by law enforcement officials. The prosecution is required by the Arkansas Rules of Criminal Procedure to cooperate with defense counsel. In order for these rules to have any meaning, the court must exclude evidence not properly provided to the defense (or least grant the defense a continuance of sufficient length to evaluate the evidence).

Reversed and remanded.

CRACRAFT, C.J., and COOPER, J., agree.

Tommy HIGGS and Patricia HIGGS
*v.* Virgil ANDERSON et al.

CA 84-225 685 S.W.2d 521

Court of Appeals of Arkansas
Division II
Opinion delivered March 6, 1985

*B. Michael Easley,* for appellant.

*W. Frank Morledge,* for appellee.

TOM GLAZE, Judge. This appeal ensues from the trial court's enjoinder of the appellant's outdoor dog kennel business operation finding it a nuisance which would ultimately devalue appellees' properties. After the trial court enjoined their kennel operation, appellants, by motion, offered additional testimony supporting a proposition to reconstruct the kennel to eliminate any nuisance its operation caused. The trial court refused to consider appellants' testimony, stating that they could and should have presented such testimony at the earlier hearing. Here, appellants argue the trial court erred (1) in finding the evidence sufficient to show the kennel's operation devalued appellees' properties and (2) in refusing the testimony offered by appellants to show how they would eliminate any nuisance.

Appellants' argument for their first point is framed much too narrowly because whether appellees suffered a financial or property depreciation loss is not the sole issue. In fact, the Supreme Court in *Durfey* v. *Thalheimer,* 85 Ark. 544, 109 S.W. 519 (1908), recognized the general rule that a mere diminution in value of property, which can be fully and readily compensated in damages, will not supply grounds for an injunction, and the parties will be left to the redress afforded by an action for damages. After stating this rule, the court concluded:

> But, while this is true, it by no means follows that interference with the enjoyment of the property will not furnish grounds for relief by injunction, although the property itself may sustain no physical injury whatever. The right to enjoy property is as much a matter of legal concern as the property itself.

*Id.* at 554, 109 S.W. at 522.

Thus, for the appellants to prevail, we must decide the broader issue: Whether the appellants' operation of their

commercial, outdoor kennel was constructed or conducted in a manner that destroyed the comfort of persons owning and occupying adjoining premises, and therefore should be abated as a nuisance. *See Baker* v. *Odom,* 258 Ark. 826, 529 S.W.2d 138 (1975). Our Supreme Court has defined a nuisance as an interference with the use and enjoyment of land including conduct on property disturbing the peaceful, quiet and undisturbed use and enjoyment of nearby property. *Arkansas Release Guidance Foundation* v. *Needler,* 252 Ark. 194, 477 S.W.2d 821 (1972). Equity clearly will enjoin conduct that culminates in a private nuisance in fact when the resultant injury to the nearby property and residents is certain, substantial and beyond speculation and conjecture. *Id.* at 196, 477 S.W.2d at 822. In the instant case, there is little dispute that a nuisance resulted from appellants' existing outdoor kennel. A large number of witnesses for appellees presented exhaustive proof to support the trial court's finding that the appellants' open-air kennel with barking dogs seriously and unreasonably interfered with appellees' peaceful and normal enjoyment of their homes. Some of the relevant, supportive evidence presented by appellees can be gleaned from the following testimonial excerpts:

> "I could hear the dogs from inside my house . . . when my air conditioning was on."; "We planned to have a patio party for the little league ball team, and because of the noise [barking] and disruption we cancelled the party."; "We have changed our lifestyle in that we stay indoors now because of the noise."; "It just sounds like a war of dogs."; "We do not use our yard since the dogs have come."; "Yesterday, they woke us up at 5:07 a.m. and continued to bark almost until the time we got to school."

The appellees also presented expert and lay opinion testimony that properties located near appellants' business have depreciated in value due to the noisy operation of the outdoor kennel. Furthermore, witnesses testified that they had declined to build homes in the area because of the kennel's operation. From our examination of the record, we cannot say the trial court's finding the kennel a nuisance

was clearly against the preponderance of the evidence.

Appellants next argue that after enjoining its kennel business as a nuisance, the court should have granted their motion to present evidence on how they would eliminate the noise from the kennel. The trial court ruled that the case had been fully tried and in denying appellants' motion, it declared the evidence proffered by the appellants could and should have been presented earlier.

Appellants argue they offered no evidence at the earlier hearing regarding plans to enclose or soundproof their outdoor kennel because they were denying that any nuisance existed in the first place. Appellants submit that tactically and strategically they were in no position to suggest they would "noise proof" the kennel until after the trial court had determined the kennel operation should be enjoined as a nuisance. Appellants' foregoing arguments aside, we agree that the trial court granting the injunction in the first instance is always empowered to modify it. *Young* v. *Young*, 238 Ark. 929, 384 S.W.2d 469 (1965); *see also Green* v. *Smith*, 231 Ark. 94, 328 S.W.2d 357 (1959) (Supreme Court, considering appellant's arguments on appeal, remanded the cause for further proceedings and evidence to determine whether the trial court's enjoinder of a noisy chicken plant between 9:00 p.m. and 7:00 a.m. was correct.) Here, however, the trial court only enjoined the outside kennel operation; it did not proscribe the operation of an enclosed or indoor kennel.[1] The court, in its findings, did say it was "convinced that the objectionable conditions cannot be eliminated by restrictions or changes in the manner of conducting the outside kennel." We do not read the chancellor's finding to mean the noise could not be eliminated by converting the kennel into an indoor facility. No one contends a dog kennel is a nuisance *per se*, and from our review of the record, the trial court enjoined only the appellants' outdoor kennel because of the noise and disturbance it caused adjoining neighbors. If appellants can eliminate that noise, their

[1]The appellants also operate an indoor kennel used for grooming small dogs, but the trial court found no proof that this part of appellants' operation constituted a nuisance.

kennel would obviously no longer be a nuisance which required abatement.[2]

In conclusion, while we agree with appellants that the trial court has continuing jurisdiction to modify the injunctive relief it granted, we find it was unnecessary to do so here because the court enjoined only appellants' outdoor kennel operation, not their existing or proposed indoor kennel(s).

Affirmed.

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

[2]In *Baker* v. *Odom*, 258 Ark. 826, 529 S.W.2d 138 (1975), the Supreme Court affirmed the trial court's enjoining of appellants' operation of a motorcycle dirt track but refused to uphold the lower court's order which prevented appellants from developing an automobile track. However, the Supreme Court cautioned appellants that in developing plans for an automobile track they did so at their own risk because a complainant is free to assert his rights thereafter in an appropriate manner if the contemplated use results in a nuisance.

# THE BALDWIN COMPANY *v.* WEYLAND MACHINE SHOP, INC., et al

CA 84-228 685 S.W.2d 537

Court of Appeals of Arkansas
Division II
Opinion delivered March 13, 1985

*Rose Law Firm, A Professional Association,* by: *W. Dane Clay,* for appellant.

*Howell, Price & Trice, P.A.,* by: *Carey E. Basham,* for appellee.

GEORGE K. CRACRAFT, Chief Judge. The Baldwin Company appeals from an order of the circuit court denying its petition that the Weyland Machine Shop, Inc., and Tex-Ark Joist Manufacturing Company and Consolidated Systems, Inc. be required to submit their claims growing out of a construction contract to arbitration under the Uniform Arbitration Act, Ark. Stat. Ann. §§ 34-511 et seq. (Supp. 1983).

The Baldwin Company was the general contractor for the construction of a physical education complex at the University of Arkansas at Pine Bluff in accordance with plans and specifications prepared by the architects. Weyland Machine Shop, Inc., entered into a contract with Baldwin by purchase order to furnish fabricated structural steel for the job in accordance with the specifications. Under their purchase order, delivery of the fabricated steel was to be at the job site. Baldwin Company entered into a subcontract with Vogt & Conant Southwest Corporation to erect and install the steel in accordance with the plan and specifications. Tex-Ark Joist Manufacturing Company and Consolidated Systems, Inc., were suppliers of Weyland.

Vogt & Conant asserted a claim against Baldwin for alleged damages caused by Weyland's delay in delivery of steel and demanded arbitration pursuant to the terms of certain general conditions in the prime contract which had been incorporated into the subcontract with Vogt & Conant. Baldwin Company brought this action against Weyland seeking damages for their alleged deficiency in fabrication and delays in delivery of the steel and also asked for indemnification for any amounts Baldwin might be required to pay Vogt & Conant. Baldwin Company additionally petitioned the court pursuant to the Uniform Arbitration Act that all parties be joined in and bound by a single arbitration proceeding. The trial court ordered arbitration between Vogt & Conant and Baldwin but denied the petition to require Weyland and its suppliers to participate in the arbitration proceedings because they had not consented in writing to submit to arbitration. Ark. Stat. Ann. § 34-511. Baldwin Company brings this appeal contending that the trial court erred in that finding. We do not agree.

Both parties concede that under the provisions of § 34-511 no one can be required to submit to arbitration unless he has consented to do so in a written agreement. They differ only in the interpretation of certain paragraphs of American Institute of Architects, Document No. 8201, styled "General Conditions of the Contract for Construction" which all parties agree are incorporated into the contracts between

Baldwin and Vogt & Conant and Baldwin and Weyland Machine Shop.

Section 7.9.1 of that contract deals with arbitration. It provides that all claims, disputes and other matters in question between "the contractor and the owner. . . shall be decided by arbitration. . . ." It further provides that no other party shall be joined in the arbitration other than "the owner, the contractor and any other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in the arbitration." Section 5.1.1 defines a subcontractor to perform any of the work at the site." Section 5.3.1 provides, among other things, that unless a subcontractor's contract provides otherwise he shall have the benefit of all rights, remedies and redress against the contractor that the contractor has against the owner.

It is clear that this section would require arbitration between a subcontractor and a contractor. We agree with the trial court that Weyland was merely a supplier, and not a subcontractor within the meaning of this document. Weyland did not contract to perform any work. It merely delivered steel for work to be performed by Vogt & Conant Southwest Corporation and therefore was not required under the terms of that document to submit to arbitration.

The appellant argues that even though Weyland is not a subcontractor Weyland's consent to arbitrate is found in that portion of Section 7.9.1 dealing with joinder of parties, which is as follows:

> No arbitration shall include by consolidation, joinder or in any other manner parties other than the Owner, the Contractor (subcontractor) and any other persons substantially involved in the common question of fact or law, whose presence is required if complete relief is to be accorded in the arbitration.

In appellant's brief it points out the reason for § 7.9.1 is that some courts have refused to order multiparty arbitrations where the arbitration agreements involved did not

provide for it. *Stop and Shop Cos.* v. *Gilbane Building Co.*, 304 N.E.2d 429 (Mass. 1973). In its brief it states;

> Apparently because of such decisions, in 1976 the American Institute of Architects amended its general conditions and the American Arbitration Association amended its rules to provide expressly for consolidation or joinder of substantially involved parties.

We do not interpret § 7.9.1 as contractually compelling consent to arbitration. It is a procedural provision which merely specifies circumstances under which *consenting* parties who are not owners, contractors or subcontractors *may* be joined in a single arbitrated matter. This section is construed to mean the joinder of substantially involved parties "who have consented to arbitration" and does not itself imply consent of a supplier. We find no error.

Affirmed.

GLAZE and CORBIN, JJ., agree.

James C. YOUNG *v.* STATE of Arkansas

CA CR 84-111 685 S.W.2d 823

Court of Appeals of Arkansas
Division II
Opinion delivered March 13, 1985
[Rehearing denied April 3, 1985.]

*Timothy O. Dudley,* for appellant.

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

GEORGE K. CRACRAFT, Chief Justice. James C. Young appeals from his conviction of the crime of rape for which he was sentenced to fourteen years imprisonment to run consecutive to a sentence for a similar offense he was already serving. The appellant contends that the trial court erred in refusing to dismiss the charge against him because of prejudicial preindictment delay in bringing the charge, that he was charged and convicted under an ex post facto law, and that he had not voluntariy waived his right to counsel. We find no merit in any of these contentions and affirm the conviction.

On the night of June 3, 1979 a young female reported to the Pine Bluff police that she had been raped after leaving the Yesterday Club. She was interviewed by a police officer at the Pine Bluff Hospital that night. She had obviously been beaten, was scared and refused to name her attacker because, she stated, he had threatened to kill her or her child if she did. The following day she was interviewed by another officer and though she described the incident she still would not name her attacker. He stated that she was nervous and scared and did not wish to pursue the matter or press charges. Both officers testified that she appeared to know the name of the rapist but was afraid to tell them his name. Either that same day or shortly thereafter the roommate of the victim informed the police that the victim had told her of the rape and that the appellant was her attacker. The victim's boyfriend stated that she told him that appellant was her attacker the day after the rape. He said he encouraged her to go to the police but she was too afraid. Four months later a detective again interviewed the victim and she still refused to name him or press charges for fear of reprisal. The officers testified that for lack of information and desire to prosecute the investigation was closed.

On November 11, 1982 the appellant was arrested and charged with the rape of another young woman who had left

the Yesterday Club. When it was discovered that appellant was a suspect in the earlier rape his first victim was again interviewed and finally named him as her attacker. The appellant was promptly charged and jailed for the earlier offense. A jury found him guilty of the charge on evidence which sufficiently supports the verdict.

Prior to trial the appellant filed a motion to dismiss the charge alleging that the preindictment delay of almost three and one-half years denied him due process. Although he alleged that the delay was prejudicial he did not allege in what manner he had been prejudiced. At a hearing on that motion the State offered the explanation that it had not acted sooner because of the victim's refusal to press charges or testify. The appellant argued only that it was unfair to bring him to trial at this date.

At the time this crime was committed rape was classified as a class A felony for which the statute of limitation was six years. Under ordinary circumstances the charge against this appellant could have been brought at any time within that period. In *United States* v. *Marion,* 404 U.S. 307 (1971) and *United States* v. *Lovasco,* 431 U.S. 783 (1977) the Supreme Court of the United States recognized that a statute of limitation defines only the outer limits of prosecution beyond which there would be an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced, but that within these limits the due process clause still has a limited role to play in protecting against oppressive delay which prejudices the defendant's rights. These two decisions make it clear that where an indictment is returned within the period of limitations due process considerations do not arise until prejudice to the defense resulting from delay is alleged and demonstrated and it appears that the government intentionally delayed the indictment to gain some technical advantage over the appellee. In *Lovasco* the court stated:

> Thus *Marion* makes clear that proof of prejudice is generally a necessary but not sufficient element of the due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused. . . . It requires no extended

> argument to establish that prosecutors do not deviate from fundamental conceptions of justice when they defer seeking indictments until they have probable cause to believe an accused is guilty; indeed it is unprofessional conduct for prosecutor to recommend an indictment on less than probable cause. It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.

These rules have been adopted and applied by our courts in *Scott* v. *State,* 263 Ark. 669, 566 S.W.2d 737 (1978) and *Bliss and Bliss* v. *State,* 282 Ark. 315, 668 S.W.2d 936 (1984). In *Scott* there was a three year delay between the crime and the date on which charges were filed. It was shown to the court that the delay prevented the accused from using two alibi witnesses, one whose whereabouts were not known and the other who had died a year and a half after the killing. It was stipulated that if the two witnesses were present they would testify to the alibi. The State did not respond to the motion and it was not shown why the delay had occurred or that the State had good cause for it. The court there held:

> The prosecution cannot delay simply for the purpose of gaining a tactical advantage over the accused. The United States Supreme Court has noted that there may be circumstances where prejudice occurs from prosecutorial delay which require the dismissal of charges. *United States* v. *Lovasco,* 431 U.S. 783, 79 S.Ct. 2004, 52 L.Ed.2d 752 (1977), reh. den. 434 U.S. 81. Since Scott was able to show the prejudice to his defense, unless the state can come forward with a satisfactory reason for the delay, the charges should be dismissed.

The *Scott* case was remanded to trial court with directions that unless the state showed that the reason for the delay was other than to gain a tactical advantage against the accused, the charges should be dismissed.

In *Bliss* the delay was even longer. There the children were removed from the custody of a natural parent in 1978 by

juvenile authorities on allegation of sexual abuse by the mother and stepfather. They were not charged with the rape of the minor child until 1983. The court there held that although the delay was unusually long he could not say that the prosecution intentionally delayed in order to gain a tactical advantage over the appellant and therefore found no prejudicial error in failing to bring the charges against the appellants at an earlier date. We are unable to determine from the factual recitation in *Bliss* all of the reasons for that finding. It does appear, however, that a prosecuting witness in the juvenile hearings in 1978 disappeared shortly after that hearing and the victim, who was eight years old at the time of the offense unequivocally denied the allegations made against his parents and refused to testify against them at that time.

It is clear from these cases that mere preindictment delay is not a sufficient ground for aborting a criminal prosecution within the period of limitation. The accused has the burden of first showing prejudice resulting from the loss of witnesses or physical evidence or the dimming of the witnesses' memory and how that loss is prejudical to him. The burden is then on the government to give a satisfactory reason for the delay. The courts grant the government considerable leeway in its timing of the arrest and indictment, and only the prejudice resulting from unreasonable delays, improper purposes or as a result of governmental negligence is deemed to be a denial of due process. Accommodating the administration of justice and the accused's right to a fair trial necessarily involves a delicate balancing of the reason for delay against the resulting prejudice based on the circumstances of each case. *Marion* v. *United States, supra; United States* v. *Mays,* 549 F.2d 670 (1977).

At the pretrial hearing on the motion to dismiss the appellant neither alleged prejudice nor testified to any facts which might have established it. He simply asserted that it was not fair to force him to trial. The State explained that the matter had not been pursued because of the refusal of the victim to identify the rapist and to press charges. It was not until the second rape when she was assured by the police

officers that she would be fully protected that she agreed to testify.

It was pointed out in *Lovasco* that the State is under no duty to file charges as soon as probable cause exists without being satisfied that it will be able to establish guilt beyond a reasonable doubt. It is not unusual for a young female who has been raped not to report it, or having reported it, to refuse to go through the ordeal of prosecution and risk a threat of retaliation. Except in those rare cases where there is an eyewitness it is impossible to prove a charge of rape without the testimony of the victim. To require the State to charge a person with a felony which must be proved beyond a reasonable doubt without reliable witness would be an exercise in futility. Although the delay here was unusually long we cannot say that the prosecution delayed in order to gain tactical advantage over the appellant or created a prejudicial error in failing to bring the charges against the appellant at an earlier date.

Even though he did not allege or offer to show prejudice at the hearing on the motion to dismiss he argues on appeal that he was prejudiced because there was evidence at the trial that a guest record kept at the Bogart Club had been routinely destroyed during the interim and its existence might have strengthened his defense of alibi by showing that he had not attended that club on the night in question. He also makes the novel argument that the fact that he had been convicted of a ssecond rape in the interim made it impossible for him to testify in his own behalf. Although we do not address issues raised for the first time on appeal, these arguments would in no wise affect our decision in view of our conclusion that the State has satisfactorily explained the delay to be not unreasonable.

Next appellant contends he was charged and convicted under an ex post facto law. In 1979 when this crime was committed, rape was classified as a class A felony punishable by imprisonment for not less than five years nor more than fifty years, or life. Ark. Stat. Ann. §§ 41-1803 and 41-901 (Repl. 1977). In 1981 these sections were amended to classify the crime of rape as a class Y felony for which the sentence

should be not less than ten nor more than forty years, or life. Ark. Stat. Ann. §§ 41-1803 and 41-901 (Supp. 1983). Appellant was arrested and charged after the effective date of the 1981 amendments. The information stated that the crime of rape was a class Y felony and was never amended.

We agree with the appellant that the reclassification of rape to a class Y felony was a substantive change in the law and that those charged with rape after the effective date of the amendment should be tried under the substantive law in effect when the crime was committed. *Smith* v. *State,* 277 Ark. 64, 639 S.W.2d 348 (1982).

We do not agree, however, that appellant has demonstrated any prejudicial error warranting a reversal of his fourteen year sentence. Although he did file a pretrial motion to dismiss, pointing out that he could only be charged with a class A felony, the record does not disclose that this motion was ever presented or ruled on by the court. It is incumbent on the moving party to obtain a ruling on his motion in order to preserve it on appeal. *Wood* v. *State,* 276 Ark. 346, 635 S.W.2d 224 (1982). Nor has appellant favored us with an abstract of the instructions given the jury. We do not know from the abstract what the jury was instructed on punishment or, if they were erroneously instructed, whether a proper objection was made. Arguments for reversal will not be considered for the first time on appeal where the basis for the argument is not abstracted or it is not shown that an appropriate objection was made in the trial court. *Wicks* v. *State,* 270 Ark. 781, 606 S.W.2d 366 (1980). The record discloses that appellant did not object to the sentence when imposed. Issues involving sentencing will not be considered for the first time on appeal. *Jackson* v. *State,* 266 Ark. 754, 585 S.W.2d 367 (Ark. App. 1979). These rules have been applied even when the issue is a constitutional one. *Griggs* v. *State,* 280 Ark. 339, 658 S.W.2d 371 (1983). One who elects to represent himself is bound by the rules of procedure. *Gilbert* v. *State,* 282 Ark. 504, 669 S.W.2d 454 (1984).

At appellant's request his appointed counsel was relieved and he went to trial *pro se.* He contends that he did not voluntarily waive his right to counsel and was therefore

denied his constitutional right to be represented by counsel at his trial. We find no merit to his contention.

The case was originally set for trial on July 19, 1983. On July 15 the appellant filed a handwritten motion alleging that his appointed counsel had neglected his duties and asking that he be relieved and another counsel appointed. On July 18 the trial court heard the motion and appellant testified that he had not filed his motion sooner because he had been requesting his counsel to visit him and that he had the names of witnesses to support his alibi but could not get his counsel to subpoena them. Appellant admitted that he had known of the witnesses for several months but had not notified his counsel by mail of his desire to have them subpoenaed because he wanted to tell him in person. It was his feeling that his appointed counsel was not adequately preparing his defense.

Counsel stated to the court that after his appointment he had talked to the appellant in jail on at least four, or more, occasions. He stated that the only information the appellant had furnished was that there might be a guest register at the Yesterday Club which would tend to show whether appellant was there on June 3rd. Counsel said that for several weeks he had attempted to talk with the manager of the club but had been informed that he was out of town. He had therefore arranged for a subpoena *duces tecum* to be served upon the manager or his son. The victim had testified that she first met the appellant at another club known as Bogart's. Counsel had contacted the manager of that club and had been informed that if there was a guest register for June 1979 he could not locate it. Counsel stated he had obtained the State's file and had furnished the appellant with copies of everything in it including statements of the officers and of the victim. He stated that on several occasions he had conferred with appellant's mother and sister both about the pending case and an earlier one that he was handling on appeal. He stated that during the previous week he had visited with the appellant in the jail and was advised that his services were no longer required. He had never at any time been informed that the appellant had other witnesses or desired subpoenas to be issued.

The trial court denied the motion and informed the appellant that he could either accept his court appointed attorney, retain his own counsel, or go to trial *pro se,* and if he elected to act as his own counsel the court would continue the case to give him the opportunity to furnish to the court the names of those persons for whom he wished subpoenas. The appellant stated his election to represent himself and the court continued the case until a later date. At that time the appellant informed the court that his mother and sister were seeking to obtain retained counsel for him.

Appellant concedes that an accused person is entitled only to competent counsel and not counsel of his own choosing. *Urquhart* v. *State,* 275 Ark. 486, 631 S.W.2d 304 (1982); *Caldwell* v. *State,* 245 Ark. 12, 431 S.W.2d 456 (1968). He also concedes that an accused may voluntarily and intelligently waive the right to counsel and choose to represent himself. He argues that his waiver of right to counsel was not voluntarily and intelligently made because he was given the choice of receiving ineffective assistance of counsel or proceeding *pro se.* We agree that the constitutionally guaranteed right to counsel requires effective assistance of counsel. *Franklin & Reid* v. *State,* 251 Ark. 223, 471 S.W.2d 760 (1971). We do not agree, however, that the trial court erred in finding that appellant's court appointed counsel was competent and had not been negligent in his preparation of the defense.

There is a presumption that court appointed counsel is competent. *Easley* v. *State,* 255 Ark. 25, 498 S.W.2d 664 (1973); *Cotton* v. *State,* 265 Ark. 375, 578 S.W.2d 235 (1979). The evidence in the record does not sustain a finding that the presumption was overcome. The appellant testified that his counsel "was not trying to help me." Counsel stated that he had made an investigation of the crime, obtained and furnished the appellant copies of the prosecution's file and had sought to interview and issue subpoenas for those possible witnesses made known to him by the appellant. The appellant admitted that he had not informed his counsel of the names or expected testimony of any of the alibi witnesses who ultimately testified at the trial. Appellant's principal complaint seems to be that counsel did not

visit him in prison as often as he felt he should. Appellant did not furnish information regarding his defense to his counsel by mail, but insisted that it be done in person. It would appear that the failure of preparation was attributable more to the failure of appellant to assist his counsel than to inattentiveness of his counsel.

Appellant argues that the counsel failed to properly investigate the incident. The testimony indicates that he had obtained all of the information that the prosecution had and pursued all additional information furnished him by the appellant. He also argues that the representation was ineffective because the appointed counsel had not filed pretrial motions, in particular a motion to dismiss because of a prejudicial preindictment delay and because he was charged under an ex post facto law. We have already found those motions to be without merit and in view of that finding are unwilling to say that failure to raise them was evidence of incompetence.

Affirmed.

GLAZE and CORBIN, JJ., agree.

Vivian D. PATE, Individually and as Administratrix, and Herb BEAN, Individually and as Adminstrator *v.* UNITED STATES FIDELITY AND GUARANTY COMPANY, et al

CA 84-173 685 S.W.2d 530

Court of Appeals of Arkansas
En Banc
Opinion delivered March 13, 1985

*Philip M. Clay, P.A.*, by: *Mark P. Clark, P.A.*, for appellants.

*Wright, Lindsey & Jennings*, for appellees.

DONALD L. CORBIN, Judge. This appeal is consolidated as the issues in each are identical. Larry Pate, a patient, and Sue Bean, an ambulance attendant traveling with him, were being transported by the Glenwood Rescue Ambulance Service. Keith Mangrum, the ambulance driver, crossed in front of a train and Pate and Bean were killed in the collision. Appellants, executors of Pate and Bean's estates, filed wrongful death actions against United States Fidelity and Guaranty Company, the ambulance service's auto liability insurance carrier, and Western World Insurance Company, its driver and attendants malpractice insurance carrier. The claims against United States Fidelity and Guaranty Company were settled. The claims against Western World were heard by the trial court on appellee's motion for summary judgment. Summary judgment was granted. We affirm.

Western World argued that its insurance policy did not provide coverage for the negligent operation of a vehicle because (1) the policy specifically excluded any liability that would be covered by "a standard automobile public liability policy", (2) the drivers and attendants malpractice insurance coverage did not cover auto accidents and (3) the policy specifically excluded liability arising from injury or death of any employee that arose out of and in the course of his employment.

In response, appellants argued (1) that "standard automobile public liability policy" has no accepted meaning and is an ambiguous term, (2) that driving a patient in the ambulance was a "professional service" covered by the malpractice insurance coverage and (3) that whether Bean was an employee of the insured is a fact question that must be determined before the court can know whether the employee exclusion is applicable.

This case turns primarily on the construction of Western World's policy exclusion which reads: "This policy does not apply: . . . to any liability of the insured which would be covered by a standard automobile public liability policy. . ." This provision must be viewed in light of the entire insurance policy. In the policy the named insured is designated "Ambulance Service." In the space designated "Business of the Named Insured," the words "Ambulance Service" were inserted. The policy contained spaces for various coverages which were not checked or purchased for coverages including "comprehensive automobile liability insurance." The policy clearly noted that "ambulance drivers and attendants malpractice liability insurance" was the coverage purchased. Viewing this exclusion provision in relation to the entire policy and applying the pertinent rules of construction, we believe the policy obviously intended to exclude coverage for the operation of a motor vehicle.

It is a well settled rule of this Court that in construing contracts of insurance, where a provision of an insurance policy is susceptible of two equally reasonable constructions, one favorable to the insurer and the other to the insured, the latter will be followed. *St. Paul Fire & Marine Ins. Co.* v. *Kelly,* 231 Ark. 193, 328 S.W.2d 510 (1959). However, different clauses of a contract must be read together and the contract construed so that all of its parts harmonize, if that is at all possible. *Continental Casualty Co.* v. *Davidson,* 250 Ark. 35, 463 S.W.2d 652 (1971). The intention of the parties is to be gathered not from particular words and phrases but from the whole context of the agreement. *Fowler* v. *Unionaid Life Ins. Co.,* 180 Ark. 140, 20 S.W.2d 611 (1929). The phrase "Standard Automobile Public Liability Policy" standing alone may be subject to

different constructions, but not to equally reasonable ones. When examining the entire policy we believe it is clear that liability for the negligent operation of a motor vehicle was excluded. The contract of insurance was clear in its terms as to coverage available. We are not required by the rules of contractual construction to stretch our imaginations to create coverage where none exists. Having affirmed this case on this issue we need not address appellants' other arguments.

Affirmed.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I dissent from the majority opinion affirming the trial court's granting of a motion for summary judgment in this case.

The appellee is Western World Insurance Company. The trial court agreed with the appellee's contention that it was entitled to summary judgment holding appellee's insurance policy covering an ambulance did not provide coverage for the alleged negligent operation of that vehicle. Killed in the collision of the ambulance with a train were Larry Pate, who was being transported as a passenger, and Sue Bean, who was an attendant in the ambulance.

The appellee first contends its policy did not provide liability coverage in this case because it excluded any liability that would be covered by "a standard automobile public liability policy." The appellants submitted the only evidence for consideration as to the meaning of this term. This was an affidavit by Mr. W.H.L. Woodyard, III, who was Commissioner of Insurance at the time of the collision. The affidavit states that the term "automobile liability policy" is susceptible to "differing reasonable interpretations" and appears to be *ambiguous.* Ambiguities in an insurance policy are to be construed against the insurance company and in favor of coverage. *Countryside Casualty Co.* v. *Grant,* 269 Ark. 526, 601 S.W.2d 875 (1980).

In *Rowland* v. *Gastroenterology Assoc., P.A.,* 280 Ark. 278, 657 S.W.2d 536 (1983), the court said:

> Summary judgment is appropriate only when the pleadings, depositions, and answers to interrogatories, 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. ARCP Rule 56; *Davis, Adm'x* v. *Lingl Corp.*, 227 Ark. 303, 641 S.W.2d 27 (1982). Evidence submitted in support of the motion must be viewed most favorably to the party resisting the motion. *Dodrill* v. *Ark. Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979). The object of a summary judgment is not to determine an issue but to determine whether there is an issue to be tried. If there is any doubt, the motion should be denied. *Trace X Chemical* v. *Highland Resources,* 265 Ark. 468, 579 S.W.2d 89 (1979).

Next the appellee points to a page of the policy labeled "Ambulance Drivers and Attendants Malpractice Insurance Coverage Part," and argues that the policy was not *intended* to cover automobile accidents. However, the policy's cover page is styled "General Liability Automobile Policy." In *Fausett Co.* v. *Rand,* 2 Ark. App. 216, 218, 619 S.W.2d 683 (1981), we said:

> [E]ven if the facts are not in dispute, if reasonable minds might differ as to the conclusions to be drawn from those facts, summary judgment may not be entered. (Citations omitted.)

Finally, the appellee contends the policy excluded coverage for the deceased Sue Bean because she was an employee of the non-profit company owning the ambulance and the policy excluded coverage for the death of employees arising out of their employment. The appellants contend that the evidence would show this lady was a volunteer, donating her time as an attendant in the ambulance, but nothing appears in the record other than a statement in the complaint that she was an "attendant." In this situation, whether she was an employee of the company was certainly a fact question. *Walker* v. *Countryside Casualty Co.*, 239 Ark. 1085, 396 S.W.2d 824 (1965); *Eagle Star Ins. Co.* v. *Deal,* 474 F.2d 1216 (8th Cir. 1973).

I think the trial court erred in granting the appellee's motion for summary judgment.

C. J. HORNER COMPANY and INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY
*v.* Judith Tarvin STRINGFELLOW and William Bryant STRINGFELLOW, Widow and Dependent Son of William B. Stringfellow, Deceased

CA 84-355 685 S.W.2d 533

Court of Appeals of Arkansas
En Banc
Opinion delivered March 13, 1985

*Friday, Eldredge & Clark,* by: *Elizabeth J. Robben* and *Kevin A. Crass,* for appellants.

*William F. Magee,* for appellees.

DONALD L. CORBIN, Judge. On September 14, 1982, William B. Stringfellow, Sr., suffered a fatal myocardial infarction at his desk while employed by C. J. Horner Company, appellant. The Workers' Compensation Commission affirmed the Administrative Law Judge's opinion wherein Mr. Stringfellow's widow and dependent son received benefits on the basis that there was a causal connection between the deceased employee's job and death. We affirm.

On appeal, appellants contend that there is no substantial evidence to support the Commission's finding that the death of William B. Stringfellow, Sr., arose out of and in the course of his employment.

The record reflects that the decedent was employed as an office clerk by appellant C. J. Horner Company. At the time

of his death, he had been employed in this capacity for three and one half years. His supervisor testified that the decedent's duties consisted of being in charge of transposing orders for feed or concrete onto invoices and for taking down telephone orders. It was undisputed that the decedent's job did not involve any heavy physical activity. However, the job required long hours since the decedent was required to stay until the delivery men returned from their routes. The business was located in Hot Springs, Arkansas, and its busiest time of the year was during the racing season. The decedent's wage statements were introduced at the hearing reflecting that the decedent worked an average of 61.35 hours per week for the period beginning January 8, 1982, and ending September 10, 1982.

The decedent's supervisor testified that he did not notice anything unusual about the decedent on the day of his death nor had the decedent complained of being tired. The decedent's widow, appellee Judith T. Stringfellow, testified that her husband had appeared to be excessively tired in the months preceding his death. Appellee Judith Stringfellow also testified that her husband had not seen their family physician, Dr. William R. Mashburn, in over two years preceding his death. The decedent smoked approximately two packages of cigarettes daily and participated in a musical combo which played at night in clubs and private parties around Hot Springs. Appellee William B. Stringfellow, Jr., the decedent's son, testified to essentially the same facts.

The only medical evidence presented at the hearing was the deposition of Dr. Mashburn. He stated that he had been the decedent's physician since 1975 and that he had never treated the decedent for anything related to cardiac disease nor had he ever suspected the decedent to be suffering from cardiac disease. By the time Dr. Mashburn arrived at the hospital, the decedent had expired. Dr. Mashburn diagnosed the cause of death as acute myocardial infarction based upon his examination of the body and the report of the ambulance attendants. It was his understanding that on September 14, 1982, the decedent had been sitting at his desk performing his job and bent forward, laid his head down on the desk and

died. Dr. Mashburn wrote a letter to appellee Judith Stringfellow in which he stated that it was his feeling that the long hours and job pressures were contributing factors to the decedent's heart attack. In his letter to appellee, Dr. Mashburn stated as follows:

> I feel, without reservation, that the long hours, the job pressures of Mr. Stringfellow's employment were contributing factors to his heart attack, and could well have precipitated this event.

Dr. Mashburn testified that he learned of the decedent's long hours from appellee Judith Stringfellow although he was also aware of the type of business the decedent was engaged in. He had done business with appellant C. J. Horner Company and realized the hectic nature of the work. The following exchange occurred during the deposition of Dr. Mashburn.

> Q. Thank you. When you speak about job related stress, are you speaking about emotional or mental stress?
>
> A. I'm speaking of stress in any form. I'm also an industrial physician; I've been Union Carbide's physician here in Hot Springs at their Metal Division for some twenty-three years, and I do work for Bell Telephone and Kroger and other industrial people, and we find that stress, be it mental, imagined or be it physical, it tends to aggravate pre-existing conditions; it may accelerate them; and it may actually cause physical illness. All these are brought out by Dr. Cellia, the greatest doctor on stress, from Canada, and this is all well-documented.
>
> Q. Going back maybe one step further, it is my understanding that Mr. Stringfellow's job was a desk job — he answered the phone, he took orders and did billing work — and what I was asking was whether the stress that you are talking about — that you were even told about that Mr. Stringfellow was under — is it your understanding that it was more of a mental or emotional stress?

A. I'm not hedging on your question at all, but dealing with the public as I have all of my adult life, and having been a government worker and not being able to speak back as I can as a physician, I know that dealing with the public — if something is not right — it's the bookkeeper or the person that answers the phone that catches the wrath of the dissatisfied customer. When there has been a mistake made on the other end, that the delivery man made or the person who loaded it or the person that did anything else, it's the bookkeeper or the person in accounting that catches all the flak. And that in itself — my girl at the front desk complains of stress, and we're in a medical office and it's supposed to be a quiet business, and she complains of a great deal of stress. Believe me, working with the public — and even though you may feel sitting at a desk is sedentary and is not a stressful situation, some of your biggest stress can come at that desk, because you cannot say what's on your mind when a customer unloads on you. Horner still believes — I believe they still have this concept — that the customer is right, and so if you want to be an employee of Horner, you don't back-talk the customer and you just take the flak and lump it.

It is well settled that an award of benefits will be sustained by this Court where a myocardial infarction is shown to have been aggravated or precipitated by the employment. *Kempner's* v. *Hall,* 7 Ark. App. 181, 646 S.W.2d 31 (1983). There is no requirement in Arkansas that in order for a heart attack to be compensable, it must be caused or brought on by some unusual exertion rather than by the employee's regular work. *Hoerner Waldorf Corp.* v. *Alford,* 255 Ark. 431, 500 S.W.2d 758 (1973). In the case at bar, appellants contend that the above test, when viewed in connection with the liberal construction of compensability in favor of the claimant, has led to an approach which ignores the claimant's burden of proving a causal connection between the employment and the heart attack. We do not agree. Appellants also place much emphasis on the fact that the decedent's myocardial infarction occurred five months after the conclusion of the racing season in their

argument that there was no causal connection. We do not find this controlling.

Heart attack cases are admittedly within the most difficult area of workers' compensation law. While Dr. Mashburn could not state that the decedent's job caused his myocardial infarction, he did conclude without reservation that the decedent's long hours and the pressures of the job were contributing factors and could well have precipitated the myocardial infarction. The testimony of medical experts is an aid to the Commission in its duty to resolve issues of fact. It has a duty to use its expertise and experience in translating that testimony into findings of fact. *Bearden Lumber Co.* v. *Bond,* 7 Ark. App. 65, 644 S.W.2d 321 (1983). We review the evidence in workers' compensation cases in the light most favorable to the findings of the Commission. The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding. The extent of our inquiry is to determine if the finding of the Commission is supported by substantial evidence. Even where a preponderance of the evidence might indicate a contrary result, we will affirm 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).

From our review of the evidence, we cannot say that reasonable minds could not conclude that the decedent's employment was a precipitating factor which brought on this acute myocardial infarction of September 14, 1982.

Affirmed.

CRACRAFT, C.J., and CLONINGER, J., dissent.

LAWSON CLONINGER, Judge, dissenting. I respectfully dissent. The majority's decision will, I believe, establish a precedent that may have disastrous practical consequences in the future. In its attempt to prevent hardship in a particular case, the majority has, it seems to me, struck an unwitting blow at the very foundation of workers' compensation law.

The evidence upon which the Commission based its

finding that Mr. Stringfellow's employment was a precipitating factor in bringing on the fatal heart attack was a brief note to the widow from Dr. Mashburn, quoted in full in the majority opinion. Dr. Mashburn testified that he had been Mr. Stringfellow's physician since 1975 and (as the majority acknowledges in its opinion) had never, during those seven years, treated his patient for "anything related" to heart disease. Moreover, he admitted that he had neither discussed Mr. Stringfellow's duties with him nor observed Mr. Stringfellow at work, despite his business visits to the employer's office.

In his deposition, Dr. Mashburn conceded that job-related stress did not actually cause Mr. Stringfellow's death but was only one of several possible factors contributing to it. He also mentioned in this connection heavy smoking and fatigue, yet he could not determine which factor was decisive. It appears that the only information upon which the doctor based his one sentence opinion was Mrs. Stringfellow's assertion that her husband had worked long hours during the racing season. Of course, Oaklawn Park had been closed for five months when Mr. Stringfellow died.

Although we liberally construe the law of workers' compensation, resolving all doubtful cases in the claimant's favor, the claimant still bears the burden of establishing a compensable injury by a preponderance of the evidence. *Central Maloney, Inc.* v. *York,* 10 Ark. App. 254, 663 S.W.2d 196 (1984). I do not believe that a compensable injury had been established by appellees. The evidence ultimately shows nothing more than that Mr. Stringfellow died at work. If workers' compensation is to be anything other than general insurance, surely the Commission erred in awarding benefits in this instance. After considering the meager evidence presented to support appellees' claim, I cannot agree with the majority that reasonable minds could have arrived at the Commission's conclusion. *See Black* v. *Riverside Furniture Co.,* 6 Ark. App. 370, 642 S.W.2d 338 (1982). Under the circumstances, one may be forgiven for questioning the purpose of appellate review.

I am authorized to state that Chief Judge Cracraft joins me in this dissent.

PRUDENTIAL INSURANCE COMPANY OF AMERICA
*v.* Gary STRATTON, Jr. and Bill STRATTON

CA 84-230 685 S.W.2d 818

Court of Appeals of Arkansas
Division II
Opinion delivered March 13, 1985
[Supplemental Opinion on Denial of Rehearing June 12, 1985.]

*David Solomon,* for appellant.

*Garland Q. Ridenour, Ltd.,* for appellee.

MELVIN MAYFIELD, Judge. The appellees filed suit against the appellant seeking to recover on a written

contract under which they were to clear approximately 160 acres of land owned by appellant. Appellees, a father and son partnership, were to be paid $250.00 per acre to "cut, pile and burn all trees, brush and other vegetation either standing or fallen" on the land. The contract was signed on September 10, 1981. Work was to commence "immediately" and be completed "no later" than November 25, 1981.

The appellant contends that on November 24, 1981, the appellees were advised that it was obvious they were not going to be able to finish the job by the next day and, therefore, other alternatives would be found to get the land cleared. However, the appellees contend that they were "fired" and told to stop work immediately and remove their equipment from the land. In either event, the appellees did no more work after the "message" was delivered, but subsequently filed suit alleging they were entitled to judgment for the "loss of profits" sustained by the "breach" of their contract. The appellant denied these allegations and filed a cross-claim based on the contention that appellees' failure to complete the work on time caused appellant loss of profits as the land was not ready for the planting of crops in the fall of 1981 or the spring of 1982. The jury found for the appellees and against the appellant and fixed appellees' recovery at $24,000.00, plus interest. We reverse and remand for a new trial.

Appellant's first argument on appeal is that its motion for directed verdict should have been granted. This argument is based in part upon the proposition that the appellees admit it would have taken them five days after November 25 to have completed the job. Since appellees had already been paid $24,000.00 for the work they had done, it is appellant's position that appellees' inability to complete the contract by the November 25 deadline means they are not entitled to be paid any additional amount.

Appellees point to their testimony that on November 24 they had already completed more than 80% of the work to be done under the contract; that they were "fired" before noon on the 24th and, therefore, had a day and a half left on their contract; that appellant granted them the right to sell the timber, but had also granted that right to a third party, and

appellees were delayed in their work for three weeks while appellant was resolving this matter; and that there were three weeks of rain and inclement weather during the contract period in which their heavy equipment could not work. They contend this evidence made a breach of contract issue for the jury to decide.

We consider the appellant's argument that it was entitled to a directed verdict together with its argument that the court erred in one of the instructions given to the jury over appellant's objections. The instruction involved told the jury that if appellant breached the contract, the appellees were entitled to recover the unpaid balance of the contract price less any costs they would have incurred in completing the work required by the contract. The appellant says this instruction is wrong because the undisputed evidence shows the appellees could not have completed the contract by November 25; thus, the appellant did not breach the contract and, furthermore, the correct measure of any damage to which the appellees could have been entitled would be on a quantum meruit basis.

We think the court's instruction was erroneous for the reasons stated by appellant. In the first place, the evidence that the appellees lost three weeks of working time as a result of the timber rights dispute should not have been considered by the jury. The appellant filed a motion in limine alleging that such testimony would violate the parol evidence rule and should not be admitted into evidence. The court ruled that under the cases of *Lane* v. *Pfeifer,* 264 Ark. 162, 568 S.W.2d 212 (1978) and *Sterling* v. *Landis,* 9 Ark. App. 290, 658 S.W.2d 429 (1983), the evidence as to the timber rights dispute would not be admissible to vary the terms of the contract between the appellant and the appellees but would be admissible as proof of consequential damages sustained by the appellees who claimed they had the right to sell the timber cut from appellant's land.[1] When this evidence was offered during the trial, the appellant again objected to its admissibility and the court again made the ruling it had made on the motion in limine.

[1]Appellees do not claim that they delayed cutting the timber for fear of liability to third parties.

As we view the matter, the effect of the court's ruling was to hold that the evidence was not admissible on the breach of contract issue because it would violate the parol evidence rule. To that extent, we think that ruling was correct. *Sterling* and *Lane* both recognize that parol evidence is not admissible to vary the terms of a written instrument, but *Lane* held the oral evidence there pertained to a collateral fact about which the written agreement was silent, and *Sterling* held the oral agreement there was made subsequent to the written agreement and did not violate the parol evidence rule for that reason. In the instant case, however, Mr. Bill Stratton testified that there was a discussion about who owned the timber rights *prior* to the signing of the written contract. Appellant's representative testified to the same effect. Mr. Gary Stratton testified that he at no time discussed the matter with appellant's representative but admitted that his father, Mr. Bill Stratton, did. Moreover, the written contract itself specifically provides that the appellees will "cut, pile and burn all trees, brush and other vegetation either standing or fallen" on the land. Thus, the right, claimed by the appellees, to sell this timber would not be a collateral right about which the written agreement is silent.

We think it clear that evidence by the appellees that they lost three weeks of working time as a result of appellant's dispute as to the ownership of the timber on the land could not be considered by the jury on the issue of whether the appellant breached the contract with the appellees. That testimony violated the parol evidence rule and the court on two occasions held it inadmissible because of that reason.

Nor do we find any other evidence in the record from which the jury could find that the appellant breached the contract with appellees. The contract dated September 10 clearly provided that work would start immediately and be completed by November 25. It is admitted that this eleven-week period was sufficient but for the three weeks lost over the dispute about the timber rights and the three weeks lost due to inclement weather. Appellees cite no authority to support their contention about the weather. We have found a case, however, involving the construction of a golf course, that held substantial erosion from a torrential rainfall was

insufficient to grant relief under the doctrine of "commercial frustration," *Pete Smith Company* v. *City of El Dorado,* 258 Ark. 862, 529 S.W.2d 147 (1975); and a case holding that freezing temperatures in Missouri during January, February, and March were to be expected and did not afford relief from failure to perform on a contract, *Missouri Pacific Railroad Co.* v. *Terrell,* 410 S.W.2d 356 (Mo. App. 1966). Since neither the evidence about the three weeks they claimed to have lost as a result of the dispute over title to the timber nor the evidence about the three weeks they claimed to have lost due to the weather would permit a finding that appellees' time for performance was extended, the trial court erred in giving the instruction that allowed the jury to find that the appellant breached the contract.

We also think the instruction was incorrect in regard to the manner in which it submitted the damages issue to the jury. Although there was no evidence of breach of the contract by it, the appellant was not entitled to a directed verdict because there was evidence that the appellees had substantially performed their part of the contract. We discussed this matter in the case of *Pickens* v. *Stroud,* 9 Ark. App. 96, 653 S.W.2d 146 (1983). In that case we cited D. Dobbs, *Handbook on the Law of Remedies,* § 12.24 at 918-19 (1973), as stating that the doctrine of substantial performance will allow a contractor to recover despite the fact that there has been an immaterial breach of the contract by him. We also said that doctrine is followed in Arkansas and cited *Carter* v. *Quick,* 263 Ark. 202, 563 S.W.2d 461 (1978), and *Taylor* v. *Richardson Const. Co.,* 266 Ark. 447, 585 S.W.2d 934 (1979). Those cases hold that a contractor who has substantially performed is entitled to recover the contract price, less the difference in value between the work as done and as contracted to be done, or less the cost of correcting defective work where this can be done without great expense or material injury to the structure as a whole. Those cases involved the construction of a building. However, the doctrine of substantial performance is not restricted to building contracts but applies to contracts of all kinds. 3A Corbin, *Corbin on Contracts,* § 701 (1960); 17 Am. Jur. 2d *Contracts* § 375 (1964).

The case of *Royal Manor Apts.* v. *Powell Const. Co.,*

258 Ark. 166, 523 S.W.2d 909 (1975), holds that a subcontractor who has substantially performed, but has not completed all the work, may elect to rely upon the contract and claim the full amount of the agreed price less what it would have cost him to complete the job, or in the alternative, he may seek to recover, on a quantum meruit basis, the reasonable value of the work he has performed. In the instant case, the appellees sought to recover according to the measure of damages of *Royal Manor,* but their right to recover those damages depends upon whether or not they were in substantial performance, or would have been at the end of the day on November 25, 1981. We think this presented an issue of fact, but the court's binding instruction allowed the jury to award damages to the appellees without deciding the factual issue of substantial performance. We think that was reversible error. *See Tannhaeuser Co.* v. *Holiday House,* 83 N.W.2d 880 (Wisc. 1957), where the court approved a statement from *Corbin on Contracts* that the issue of substantial performance "is always a question of fact." *But cf. Ocean Ridge Develop. Corp.* v. *Quality Plastering, Inc.,* 247 So.2d 72 (Fla. Dist. Ct. App. 1971) (finding evidence clear enough to make the question one of law). *See also Miller* v. *Ballentine,* 242 Ark. 34, 411 S.W.2d 655 (1967), where the court said "it is inherently wrong to give an instruction which ignores a material issue in the case and allows the jury to find a verdict without considering the omitted issue." *Accord Swink & Co.* v. *McEntee & McGinley, Inc.,* 266 Ark. 279, 293, 584 S.W.2d 393 (1979).

In view of a retrial, we call attention to the discussion of "What constitutes substantial performance," 17 Am. Jur. 2d *Contracts* § 378 (1964). Also, *Restatement (Second) of Contracts* § 237, comment d (1983) states that the following considerations found in § 241 are significant in determining whether performance is substantial:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform

or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

In the event there was no substantial performance by the appellees in this case, they are still entitled to recover on a quantum meruit basis for any time, labor, and materials that they may have expended on any work performed for appellant for which they have not been paid. In that event, however, the basis of their recovery is the benefit conferred upon the appellant. *See Pickens* v. *Stroud, supra.*

The appellant also argues that the appellees did not qualify as experts in the appraisal of timber and that their opinions as to the value of the timber standing on the land covered by the contract did not constitute substantial evidence to support the jury's verdict, which included an award in some amount for the value of this timber. This issue, however, is not likely to arise again on retrial as we hold that the evidence introduced in this case as to an agreement that appellees could sell the timber cut from the land violated the parol evidence rule and was not admissible on either the breach of contract issue or the issue of consequential damages.

Finally, the appellant argues that the court erred in allowing prejudgment interest. Since we are reversing this judgment, we will not discuss the interest issue as to it, but we must give some guidance for retrial. In *Berkeley Pump Co.* v. *Reed-Joseph Land Co.,* 279 Ark. 384, 653 S.W.2d 128 (1983), the court said prejudgment interest is generally not recoverable where damages are inexact and uncertain; and in *Loomis* v. *Loomis,* 221 Ark. 743, 255 S.W.2d 671 (1953), it was said that interest is not allowed where liability can be determined only by litigation, as in a suit for personal injuries or for recovery upon quantum meruit. On the other hand, *Loomis* also said that there are many instances in

which interest is allowed even though the precise extent of liability is not known until trial; for example, liability for breach of a contract. In *Love* v. *H. F. Const. Co.,* 261 Ark. 831, 552 S.W.2d 15 (1977), a contractor brought suit to recover for changes made in contracts to build dams, and the court said the claims were capable of ascertainment with a reasonable degree of certainty and affirmed interest allowed from the date of contract completion.

In the instant case, we hold that appellees will be entitled to prejudgment interest from November 25, 1981, if they recover the agreed contract price less what it would have cost to complete the contract. They will not be entitled to prejudgment interest if they recover upon a quantum meruit basis. In the event of a jury trial, it will probably be necessary to employ a special verdict in order to determine the basis of the jury's decision. *See* ARCP 49.

All the issues raised by the parties have been addressed. The judgment appealed from is reversed and the case is remanded for a new trial.

COOPER and GLAZE, JJ., agree.

Supplemental Opinion on Denial of Rehearing
June 12, 1985

690 S.W.2d 750

MELVIN MAYFIELD, Judge. One of the grounds urged for rehearing in this case is that we erred in holding inadmissible the evidence that appellees lost three weeks of working time as a result of a claim by a third party to the timber cut by appellees. This evidence was offered to support the claim that appellees did not complete their written contract by the agreed date because the appellant had given them the right

to sell the timber, but a third party made claim to it, and appellant took too long to resolve the matter. We agreed with the appellant that this evidence was inadmissible because it violated the parol evidence rule. Our opinion pointed out that the written contract provided that the timber cut by the appellees should be burned. We cited the case of *Sterling* v. *Landis,* 9 Ark. App. 290, 658 S.W.2d 429 (1983), and recognized its holding that the parol evidence rule is not violated by proof of a *subsequent* oral agreement modifying the terms of a written contract; but we said appellees' evidence about their right to sell the timber cut by them was concerned with discussions made *prior* to the signing of the written contract.

In the brief in support of appellees' petition for rehearing, it is said there was testimony concerning conversations about the timber rights that took place both *prior* and *subsequent* to the signing of the written contract. The parol evidence rule is actually a rule of substantive law which provides that all antecedent proposals and negotiations are merged into the written contract. *City of Crossett* v. *Riles,* 261 Ark. 522, 549 S.W.2d 800 (1977). We have carefully examined appellees' references to the transcript and find that the record simply will not support the contention that there was a subsequent agreement modifying the terms of the written contract as to disposition of the timber cut from the land being cleared.

In addition to the contention that the trial court erred in admitting evidence that violated the parol evidence rule, the appellant contended that the judgment in this case should be reversed because the trial court should have granted appellant's motion for a directed verdict, and because the trial court erred in giving a certain jury instruction. We agreed as to the instruction since it allowed the jury to find that the appellant breached the contract when there was no evidence properly in the record from which that finding could be made. We did not agree that the appellant was entitled to a directed verdict. In that regard, we said the evidence raised a question of fact as to whether the appellees had substantially performed their contract and, even if they had not substantially performed, they were "still entitled to

recover on a quantum meruit basis for any time, labor, and materials they may have expended on any work performed for appellant for which they have not been paid." In the latter event, we said the "basis of their recovery is the benefit conferred upon the appellant."

In our discussion of the measure of damages where there has been substantial performance, we referred to the case of *Royal Manor Apts.* v. *Powell Const. Co.,* 258 Ark. 166, 523 S.W.2d 909 (1975). However, in their rehearing argument the appellees state that *Royal Manor* did not involve the question of substantial performance. They are obviously correct as the opinion in that case clearly states that the appellee there was not in default; that the general contractor had prevented the appellee from completing the work and, therefore, the appellee could elect to rely upon the contract and claim the full amount due, less what it would have cost to complete the job, or could recover the reasonable value of its performance on a quantum meruit basis.

Since *Royal Manor* was not a substantial performance case, the rule of damages in that case which allowed a quantum meruit recovery will not apply where the right to recovery is based upon substantial performance. In that situation the measure of recovery is the contract price, less the difference in value between the work as done and as contracted to be done, or less the cost of correcting defective work where this is a reasonable alternative. *See Carter* v. *Quick,* 263 Ark. 202, 563 S.W.2d 461 (1978) and *Taylor* v. *Richardson Const. Co.,* 266 Ark. 447, 585 S.W.2d 934 (1979), cited in our original opinion. *See also* 5 Corbin, *Corbin on Contracts* § 1110 (1964) (explaining why quantum meruit recovery is not allowed a plaintiff who has substantially performed).

COOPER and GLAZE, JJ., agree.

Pat A. GIRARD *v.* REBSAMEN INSURANCE COMPANY

CA 84-365 685 S.W.2d 526

Court of Appeals of Arkansas
Division II
Opinion delivered March 13, 1985
[Rehearing denied April 3, 1985.]

*Davis, Cox & Wright,* by: *Constance G. Clark,* for appellant.

*Mitchell, Williams, Selig, Jackson & Tucker,* by: *Allan Gates* and *Douglas B. Ward,* for appellee.

TOM GLAZE, Judge. Appellant seeks reversal of the chancellor's decision upholding the validity of the non-

competition clause of the employment contract between him and appellee. Appellee cross appeals claiming the judge erred in determining the proper amount of damages awarded appellee. After careful consideration of the excellent briefs and arguments of both parties and the thorough memorandum decision by the chancellor, we affirm the trial court's decision except we modify its award of damages to appellee.

In July of 1975, appellant was hired by Pete Gardner to manage the Gardner Insurance Agency in Springdale, Arkansas. Five months later, Gardner sold his agency to appellee, and Gardner and appellant continued with the agency, Gardner as a vice-president and appellant as an insurance salesman. On September 11, 1981, the appellant and appellee entered into the contract in question. The terms of the agreement pertinent here are found in paragraphs 5 and 6 which read:

> 5. *Restrictions After Termination.*
> Producer agrees that after the termination of his employment, regardless of whether with or without cause, he will not:
>
> (a) either directly or indirectly solicit or accept, or assist in the solicitation or acceptance of, any insurance business from any account which Producer was servicing for Rebsamen at the time of such termination. . . .
>
> 6. *Violation of Restrictions.*
> If, during a period beginning with the date of termination of Producer's employment and ending after the expiration of either two (2) years or a lapse of time equal to the length of time he was employed by Rebsamen (whichever is shorter), Producer is a procuring cause for any commission or other compensation becoming payable to Producer. . .in violation of any restriction of Paragraph 5 of this Contract, Producer shall promptly pay to Rebsamen an amount equal to such compensation. This payment. . .shall not preclude Rebsamen from obtaining any injunctive

or other legal or equitable relief to which it may otherwise be entitled. . . .

On August 31, 1983, appellant quit his employment with appellee and the next day opened his own business as an independent insurance agent, selling policies of the same general types and coverages that he sold while employed with appellee. During the weeks following his departure from appellee, appellant wrote sixteen new policies for former appellee accounts which he had serviced when employed with appellee. On September 27, 1983, appellee brought this action for injunctive relief and damages, seeking to enforce its covenant not to compete that appellant had signed. Upholding the validity of the parties' agreement, the chancellor enjoined appellant from soliciting or accepting insurance accounts he had serviced when he was with appellee, held that the injunction would expire on September 1, 1985 (two years after he quit appellee) and awarded appellee $3,144.05 in damages.

In his argument appellant relies heavily on *Rebsamen Insurance* v. *Milton,* 269 Ark. 737, 600 S.W.2d 441 (Ark. App. 1980), wherein this Court found Rebsamen had failed to prove it had a valid interest to protect and therefore held the non-competition covenant unreasonable and against public policy. The appellant contends that here, as in *Milton,* the appellee failed to prove that appellant took with him any trade secrets, secret formulae, methods or devices which gave him any competitive advantage over his former employer; thus, appellant argues, appellee simply has no legitimate business interest entitled to protection by a covenant not to compete. We cannot agree.

As we noted in *Milton,* the enforceability of a covenant not to compete depends upon its reasonableness in light of the particular facts of the case. *Id.* at 742, 600 S.W.2d at 443; *see also Borden, Inc.* v. *Huey,* 261 Ark. 313, 547 S.W.2d 760 (1977). While we agree with appellant that no trade secrets were shown to exist in appellee's business, the appellee's proof did show that its customer list and related information were protected interests. Just such an interest was protected in *Borden* v. *Huey, supra,* wherein the Supreme Court said:

> The most important single asset of most businesses is their stock of customers. Protection of this asset against appropriation by an employee is recognized as a legitimate interest of the employer. A restrictive covenant, therefore, fulfills the first requirement on which its enforceability depends, if it is necessary to protect the employer against loss of his customers.

*Id.* at 316, 547 S.W.2d at 761.

The Court in *Borden* further pointed out that an employer is especially vulnerable when an employee deals with customers away from the employer's place of business and builds up personal relationships that bind the customers to himself instead of to the employer's business. From our review of the evidence, that situation exists here. Appellee's senior vice-president, Jack Garrison, testified that appellee's business plan was for its policyholders to identify with one of its sales representatives. By the very nature of the insurance business, Garrison said that a client wants to deal with a particular salesman with whom he has a comfortable relationship and who understands the client's business. This is the precise reason, Garrison stated, why appellee provided the appellant with a car and an expense account. Gardner agreed with Garrison's assessment. In fact, even appellant, while denying he solicited their business, admitted that some of the former appellee clients he had previously serviced had changed their accounts to his new agency because they were personal friends. However, these "personal friends" were customers who originated with Gardner and appellee and whose accounts had been assigned to appellant for ongoing sales and service. Thus, the clear inference is that appellant's relationship with these personal friends and clients resulted from his employment with appellee. Consistent with *Borden* and the rationale contained therein, we have no problem affirming the chancellor's finding that appellee had a legitimate interest to protect.

We next must decide whether the restrictions under the parties' covenant not to compete are broader than necessary to protect appellee's business interests. In resolving this

issue, the test, as stated in *Orkin Exterminating Co.* v. *Murrell,* 212 Ark. 449, 206 S.W.2d 185 (1947), is:

> "A contract in restraint of trade is valid when founded on a valuable consideration, if the restraint imposed is reasonable as between the parties and not injurious to the public by reason of its effect upon trade. Whether or not the restraint is reasonable is to be determined by considering whether it is such only as to afford a fair protection to the interest of the party in whose favor it is given, and not so large as to interfere with the interests of the public."

*Id.* at 456, 206 S.W.2d at 189 (quoting *Edgar Lumber Co.* v. *Cornie Stave Co.,* 95 Ark. 449, 130 S.W. 452 (1910)).

Appellant contends the restrictive covenant's two-year time limit and its silence with respect to geographical area are unreasonable. However, when viewing the covenant against the facts of this case, we find no merit in appellant's contentions. The chancellor correctly distinguished the non-competition covenant in *Rebsamen Insurance* v. *Milton, supra,* from the one in issue here. First, Milton was forbidden to engage in any insurance *or other business* in which Rebsamen was engaged, whereas, here appellant was prohibited from engaging in the insurance business only. Second, and more importantly, Milton was forbidden to solicit or accept indirectly insurance business from any current customer or account or one who had been a customer at any time within three years of Milton's termination; while here appellant is prohibited for two years from soliciting or accepting insurance only from customers whose *accounts he serviced* at the time of his termination. Undisputedly, appellant's restrictions concerning his post-termination business activities are much narrower than in *Milton.*

Under the parties' agreement, appellant is not forced to go elsewhere to open his agency. Since no geographical restriction is mentioned, he can continue his business in the same city in which he lived while employed with appellee. Appellant is free to solicit and accept business from 95% of the overall insurance market, and, in fact, is free to solicit

and accept business from 80% of the customers of appellee's Springdale office. Appellant's only restriction involves that portion of appellee's business that he serviced when he quit appellee.

Appellee's proof also establishes the reasonableness of the two-year restriction. Garrison testified that recruiting, replacing and training someone for appellant's position would require at least two years before his replacement would know the business. He stated the appellee's costs for providing this training were based upon a two-year period. From the evidence presented, we agree with the chancellor's assessment that the non-competition covenant is reasonable under the circumstances.

Appellant raises one last, challenging point which we must consider before turning to appellee's cross appeal. Relying upon the reasoning in *Evans Laboratories, Inc.* v. *Melder,* 262 Ark. 868, 562 S.W.2d 62 (1978), he contends that the non-competition covenant unreasonably interferes with the rights of the public to deal with the insurance agent of their choice. Appellant claims that he did not *solicit* any of the appellee's clients, and because the covenant prohibits him from even *accepting* such clients, the agreement unduly interferes with the right of the public to avail itself of the agent it prefers to use.

While we must admit the *Melder* case gives us pause for concern, we believe its holding must rest on its own facts. In *Melder,* the businesses involved were competing pest control companies. The employee, Mr. Cingolani, quit Evans Laboratories and agreed not to solicit or accept any former customers of Evans whom he (and co-employee Melder) had previously serviced. There was no proof of solicitation by either Cingolani or Melder. The Supreme Court held that the non-competition agreement was a restraint of trade and found that Evans Laboratories' customers had departed from it because of their satisfaction with Cingolani's service, not because of any solicitation on his part. The Court also concluded that no trade secrets were involved. Under these

circumstances, the Supreme Court concluded that the provision prohibiting Cingolani from accepting appellant's former customers was an undue interference with the public interests.

We do not read *Melder* to invalidate all non-competition agreements that prohibit an employee from accepting — as opposed to soliciting — former employer customers. Rather, in considering *Melder* along with the other Supreme Court decisions on the subject, the most that can be stated is that each contract and set of facts must be considered to determine the contract's reasonableness relative to the parties' and public's interests. *See, e.g., Bailey* v. *King,* 240 Ark. 245, 398 S.W.2d 906 (1966); *Robbins* v. *Plant,* 174 Ark. 639, 297 S.W. 1027 (1927); *Edgar Lumber Co.* v. *Cornie Stave Co., supra.* We have already noted that, as in *Melder,* no trade secrets are involved here. However, unlike in *Melder,* appellee has clearly shown a legitimate business interest which results from its sales representatives program that is designed to encourage the development of a personal or confidential relationship between its agents and the customers they service.

Also different from *Melder,* appellant here agreed not to solicit or accept directly *or* indirectly appellee accounts he previously had serviced. Although he denied directly soliciting any of appellee's accounts, appellant conceded that *prior* to his departure from appellee, he informed his customers that he planned to leave appellee. He said some of the customers expressed that they wanted him to continue to handle their business. Although he asserted that he told the customers he could not directly solicit their business, he did write their policies after leaving appellee. Appellant also testified that he advised customers concerning what they must do for him to be able to handle their business, *viz.,* produce an agent of record letter or provide him with their insurance files. Appellant further testified that some former appellee clients responded to newspaper ads he ran soon after he left appellee, and he undisputedly wrote policies for these customers. By his own testimony, the appellant has shown, at the very least, that he indirectly solicited former

appellee customers whom he previously had serviced.[1] Thus, in contrast to *Melder*, the appellee here proved it had a legitimate interest to protect and appellant's solicitation, even if indirect, contravened the parties' contract designed to protect that interest.

Having affirmed the chancellor's decision that the parties' non-competition agreement is reasonable and enforceable, we discuss appellee's cross appeal. The chancellor determined that appellant had written sixteen policies for accounts he had serviced for appellee at the time he quit and further found the premiums he received on these policies totaled $7,631.65. However, the chancellor denied damages on four of the sixteen policies because these policyholders had requested bids from both appellant and appellee, and, in each instance, appellant's bid was low and the business was awarded to him. The premiums for the four policies totalled $4,487.60. Citing no authority, the chancellor allowed the appellant the premiums on the four policies and awarded appellee the difference which was $3,144.05.[2] We find the chancellor erred in this respect. We find it difficult to distinguish these four appellee clients whom appellant previously serviced from the other twelve. To do so we fear would lead only to further problems. For example, former employees under an otherwise valid covenant not to compete could merely justify obtaining and servicing former clients on the sole basis that they had bid a few dollars less than the former employer.

Because we find the parties' non-competition contract valid in all respects, we affirm the chancellor's decision; but we remand the cause to modify the trial court's award to

[1]One customer, Ted Cordes, who manages Precision Auto Parts and Marine, testified that appellant did attempt to solicit his business. Cordes said that appellant came to his place of business to talk with Virgil Cordes, but in a brief conversation with Ted, appellant said that he had left appellee but to call him when the time comes up for insurance.

[2]In his opinion, the chancellor mentioned policies appellee wrote but cancelled for businesses owned by Bob Ward. He stated appellee should not be heard to deny appellant this business when it refused to write it. However, none of the four policies belongs to Ward and from the abstract we fail to find how Ward's situation relates to these four policyholders.

appellee so that it includes the $4,487.60 on the four policies previously excluded.

Affirmed as modified.

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

Velma Lee DAFFIN *v.* Alonzo SEYMORE, et al

CA 84-326 685 S.W.2d 539

Court of Appeals of Arkansas
En Banc
Opinion delivered March 13, 1985

*James P. Massie,* for appellant.

*Sam Boyce,* for appellee.

PER CURIAM. Appellees move to dismiss this cause based upon appellant's failure to comply with Rule 3(e) of the Rules of Appellate Procedure which provides:

A notice of appeal or cross-appeal shall specify the

> party or parties taking the appeal; shall designate the judgment, decree, order or part thereof appealed from and shall designate the contents of the record on appeal. The notice shall also contain a statement that the transcript, or specific portions thereof, have been ordered by the appellant.

Appellant's notice of appeal reflects that she appealed the trial court's decision rendering a default judgment against her and stated thereon "a copy of the record is being requested from the Court Reporter." Appellees attached to their motion an affidavit of the court reporter reflecting that the appellant's attorney never requested a transcript of the proceedings in this cause. Citing *Alexander* v. *Beaumont,* 275 Ark. 357, 629 S.W.2d 300 (1982), appellees assert the appellant's failure to designate the contents of the record or to notify the court reporter to transcribe the record is grounds for dismissal of this appeal.

Appellant does not deny that the record was never requested from the court reporter. She did, however, obtain from the circuit clerk certified copies of the pleadings, including the default judgment, entered in this cause. She filed these as the transcript in this appeal; thus, all we have before us is an abbreviated record.

In *Wise* v. *Barron,* 280 Ark. 202, 655 S.W.2d 446 (1983), the Supreme Court refused to dismiss an appeal when the appellant failed to state that the transcript had not been ordered when in fact it had been. The Court found the purpose of Rule 3(e) had not been frustrated, and the appellee had not been prejudiced because no extension of time was needed and the record was filed timely with the Supreme Court clerk. The instant case reflects almost the reverse situation to that in *Wise.* The appellant stated in her notice that she was requesting the record from the court reporter when in fact she had not. Instead, she ordered only the pleadings from the circuit clerk's office; however, in ordering this partial transcript she failed to designate she had ordered these specific portions of the proceeding as is required under Rule 3(e). If appellant had intended to designate a partial record and had properly done so, she

would have been required to serve with her notice of appeal and designation a concise statement of the points on which she intended to rely in this appeal. See Rule 3(g) of the Rules of Appellate Procedure. Appellant never filed a statement of points. Because appellant failed to order and file a complete record, appellees were compelled to order the full transcript from the court reporter and as alternative relief, they request that the record on appeal be supplemented if their motion to dismiss is not granted.

Appellant's failure to comply with Rule 3(e) has clearly caused a delay in this appeal. In addition, because the issues raised by appellant cannot be addressed properly by this court without the complete record, appellees were forced to order (as well as underwrite the costs of) the transcription of the lower court's proceedings. In one point, appellant argues that the award given appellees was excessive and not supported by the record. Obviously, to decide the issue, we need the trial court's evidentiary proceedings. In a second point, she claims the trial court should have allowed her to file a late answer. However, the trial court's judgment reflects appellant's motion to file a belated answer was denied at a pre-trial hearing held on February 6, 1984, when, at the same time, appellees were granted a default judgment subject to their proving damages. The court set the hearing on damages for May 31, 1984. As is true with appellant's first point, the transcripts of the February 6 and May 31 hearings are necessary to properly consider appellant's second point as well..

In summary, appellant's failure to correctly designate in her notice the contents or the portions of the record upon which she intended to rely contravenes Rules 3(e) and 3(g). In failing to do so, appellant caused a delay in this appeal and also shifted her burden to appellees to order and pay for the transcript so it could be lodged here. Accordingly, we grant appellees' renewal motion to dismiss based on Rule 3(e).

Appeal dismissed.

COOPER and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I am deeply disturbed by the court's dismissal of the appellant's appeal without addressing the merits of the argument she makes to this court. To understand this reaction, it is necessary to understand what is involved here.

*What Is Involved*

The appellant is a resident of St. Louis, Missouri. A suit was filed against her in the circuit court of Jackson County, Arkansas. The complaint alleged that the appellant, Velma Lee Daffin, was the driver of an automobile that was hit by another automobile on a public highway in Arkansas and that the collision was caused by the appellant's negligence. It was also alleged that the appellee, Leigh Ann Seymore, was injured in the collision and that she should have judgment against the appellant for the injuries sustained.

Notice of this suit was given to appellant by certified mail and under Arkansas law she had until September 22, 1983, to file an answer. On October 6, 1983, a Little Rock attorney filed a motion in the circuit court asking that the appellant be permitted to file an "out-of-time answer." Such an answer was tendered with the motion and it denied the allegations made in the complaint. The motion stated that appellant was unable to locate an attorney in Arkansas until after the time had expired to file her answer, that she had a valid defense to the complaint, that no motion for default judgment had been filed, and that no prejudice had incurred to the plaintiff. She asked that the court permit her to file the tendered answer and that she be given all other relief to which she might be entitled.

A response to this motion was filed by the appellee. It asked that the appellant's request to file a late answer be denied and that judgment by default be granted against appellant. At a pretrial hearing on February 6, 1984, the motion to file a late answer was denied by the court, and the appellee's motion for default judgment was granted subject to proof of damages. On May 31, 1984, evidence of damages was heard by the court and on August 9, 1984, a written judgment for $50,000.00 against appellant was filed in the circuit clerk's office. This judgment was timely appealed

and a transcript of the circuit clerk's record was timely filed in the Arkansas Court of Appeals. That transcript is certified by the clerk as "a true and complete transcript of the record and proceedings" in the circuit court, however, no transcript of evidence was included or filed with the clerk's transcript.

On November 21, 1984, the appellant filed a brief in this court. The first argument made in the brief is that the circuit court erred in not allowing an out-of-time answer to be filed and in granting a default judgment. The second argument is that the amount of the default judgment — $50,000.00 — is excessive and not supported by the evidence. Instead of filing a reply brief, the appellee filed a motion to dismiss the appellant's appeal. That motion is based upon the fact that the appellant did not file the court reporter's transcript of the "hearing on the proof of damages held May 31, 1984."

This court, after first denying it, has now on a motion to reconsider, granted the motion to dismiss appellant's appeal. I agree that we would have to have a transcript of the evidence concerning appellee's injuries before we could say that the amount of the judgment is excessive, but we do not need to dismiss the appeal to say that we must affirm the judgment because the appellant has not filed a transcript of evidence which shows that the amount of the judgment is excessive. And, of course, before we could say that the trial court should have granted the appellant an extension of time to file an answer because she was not able to find an Arkansas attorney to file an answer on time, we would have to have a stipulation or transcript of evidence showing that to be a fact. But, surely, it is clear that we do not need any evidence at all to say whether or not the fact that she could not find an attorney would entitle her to an extension of time in which to file an answer. That is one of the issues presented to us in this case, and I think it is our duty to address it. Although it is quite unlikely that we would reverse the judgment on the record filed by the appellant, it is wrong to simply dismiss the appeal.

In a situation almost exactly like this one, the Arkansas Supreme Court did not dismiss the appeal, but said: "The burden was upon the appellant to bring up a record sufficient to demonstrate that the trial court was in error. . . .

The appellant has failed to meet its burden. Therefore, we have no choice but to affirm the trial court." *SD Leasing, Inc.* v. *RNF Corp.,* 278 Ark. 530, 647 S.W.2d 447 (1983). I submit that the *dismissal of the appeal* in the circumstances of the instant case is an unprecedented action.

*What Is Not Involved*

I also respectfully suggest that the opinion of the majority of this court is based upon matters that are really not involved in this case. The per curiam opinion correctly cites *Wise* v. *Barron,* 280 Ark. 202, 655 S.W.2d 446 (1983), as holding that the purpose of Appellate Procedure Rule 3(e) had not been frustrated in that case, and the appellee there had not been prejudiced because no extension of time was needed and the record was filed timely with the appellate court. However, the statement in the per curiam that the instant case is almost the reverse situation to that in *Wise* is; in my judgment, completely wrong. The appellant's failure to file a transcript of the reporter's evidence in this case did not cause one minute of delay or one bit of prejudice to the appellee.

In this case, in keeping with the Rules of Appellate procedure, the *clerk's* transcript was filed in this court within 90 days from the day the trial court's judgment was filed in the circuit court. No extension of time to file that record in this court was needed or requested. The only delay resulting from the failure to file the *reporter's* transcript of evidence came from the fact that, after the appellant filed her appeal brief, the appellee filed a motion to dismiss the appeal because the reporter's transcript had not been filed. At that point appellee's counsel had appellant's brief and knew what she relied upon for reversal. All the appellee had to do was to reply to the appellant's brief and state, as far as the amount of the judgment was concerned, that the appellant had not filed a transcript of the evidence, which the judgment recited the court heard, and therefore the judgment should be affirmed. No prejudice and no delay to the appellee resulted from the appellant's failure to file the reporter's transcript of the evidence or to make a designation of the record on appeal.

The same is true in regard to appellant's point about filing a late answer because she was unable to obtain the services of an Arkansas lawyer in time to file her answer on time. The per curiam opinion leaves the impression that there was an evidentiary hearing on that issue at the time the court denied appellant's motion to file a belated answer. However, nothing before us indicates that such a hearing occurred. The trial court's judgment does not recite that evidence was taken at that hearing, and appellee's counsel does not state that evidence was taken at the hearing and, in fact, makes no point at all about that matter. But regardless of whether evidence was heard or not heard on that issue, the fact remains that no prejudice and no delay resulted to the appellee from the fact that no transcript of evidence on the point was filed. All that was needed was to reply to the appellant's brief and say that even if inability to obtain counsel is sufficient to warrant the filing of a belated answer, nothing in the record supports the factual contention that the appellant could not find counsel in time for her answer to be timely filed.

If, for some reason, counsel for appellee was not willing to follow the course indicated above, he could have filed a motion with either this court or the trial court and could have asked that the appellant be required to file the omitted reporter's transcript. In that way he could have avoided the problem, raised by the per curiam opinion, of underwriting the costs of the transcript, and if the transcript was not filed by appellant, a motion to dismiss would *then* be in order.

Or, when appellant filed her brief, counsel for appellee could have filed a motion, based on the Supreme Court and Court of Appeals' Rule 4, to advance this case and affirm it as a delay case. In that event, if we agreed there was no merit to the appeal based on the points argued and the record filed, we could have affirmed the judgment without any delay and without the appellee ever filing a transcript or brief.

However, none of the above matters discussed in this section of this opinion is involved in this case. I think the majority's failure to recognize this, and to make the distinction between *affirming* a trial court's decision and *dismissing an appeal* from a trial court's decision, has

caused it to err.

*Conclusion*

I started by stating that I was deeply disturbed by the court's ruling in this case. I conclude by giving two reasons for this reaction.

First, the court has construed Appellate Rule 3(e) to apply to what I believe to be an entirely new situation. Since this is a rule of the Supreme Court, under that court's Rule 29(1)(c) this case should have been certified to that court in order to avoid confusion in the interpretation and construction of our appellate rules. Certainly, an initial construction should come from that court, and I am disturbed that this did not happen in this case.

Secondly, the cases cited by the appellee and in the per curiam opinion reflect a concept that the dismissal of an appeal for failure to comply with Rule 3(e) is a sanction to be imposed when the rule is totally ignored or flagrantly violated, but not where, as in the instant case, there is no unnecessary delay in the docketing of the appeal and the appellee has not been prejudiced or misled by the failure to strictly comply with the rule. *Hudson* v. *Hudson,* 277 Ark. 183, 641 S.W.2d 1 (1982); *Alexander* v. *Beaumont,* 275 Ark. 357, 629 S.W.2d 300 (1982); *Wise* v. *Barron,* 280 Ark. 202, 655 S.W.2d 446 (1983). However, the majority has chosen to construe Rule 3(e) narrowly so as to dismiss this appeal rather than to address its merits. Under the circumstances of this case, it seems to me that this amounts to a penalty, and this disturbs me.

In fact, the majority decision in this case should disturb everyone, for when any appeal is dismissed without addressing its merits, the words of John Donne would remind us "never send to know for whom the bell tolls; it tolls for thee."

COOPER, J., joins in this dissent.

JAMES R. COOPER, Judge, dissenting. Although I have joined in Judge Mayfield's dissenting opinion, I feel

constrained to emphasize that today's action is even more strange when we remember that this Court, on January 16, 1985, granted the appellees' alternative motion to supplement the record with the transcript of the hearing on damages. Thus, by virtue of the motion filed by the appellee, we have before us all that has transpired before the trial court in this case, and those matters are before us, at least partially, because we initially chose not to dismiss this case, but to get the entire record here. It seems to me that we are being overly technical, if not clearly wrong, when we dismiss an appeal for the appellant's failure to bring up a complete record when the entire record is here before us by virtue of our own order. Perhaps we should have granted the motion to dismiss when it was first before us, but I doubt it. In any event, to now dismiss this appeal, I think, is wrong.

Ralph R. MILLER, et al *v.*
ESTATE of Dale B. DAWSON, Deceased, et al.

CA 84-251 686 S.W.2d 443

Court of Appeals of Arkansas
Division II
Opinion delivered March 20, 1985
[Rehearing denied April 24, 1985.]

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

*Robert D. Ridgeway, Sr.,* for appellee.

GEORGE K. CRACRAFT, Chief Judge. Ralph and Sandra Miller appeal from that part of a decree ordering specific performance which granted judgment against them in favor of the Estate of Dale B. Dawson, deceased, for rents and profits during a period of delay in performance of a contract for the sale of land and denied their prayer for damages against the estate resulting from delay which they say was attributable to the appellees. From our *de novo* review we find merit in the first contention and remand the case for entry of a modified decree not inconsistent with this opinion.

This voluminous record presented many issues to the chancellor which were correctly resolved by him and from which no appeal was taken. We discuss here only those facts which will bring the issues of this appeal into focus.

On June 24, 1980 Dale B. Dawson entered into a written contract for the sale of a 240 acre tract to Ralph and Sandra Miller for a total price of $150,000, of which $30,000 was to be paid on the date of closing and the balance to be paid in annual installments with interest at the rate of 9% on the unpaid balance until paid. January 1, 1981 was agreed upon as the date for the closing of the sale. The property was then subject to an outstanding lease which would expire on December 31, 1980. The contract provided that the purchasers could have possession of a dwelling on the property rent free and required them to repair and paint it at their own expense. The cost of repair was to be considered as earnest money but was not to be credited on the purchase price. The contract contained a standard provision requiring the seller to provide abstracts representing a merchantable title "to the satisfaction of the buyers' attorney."

The purchasers took posssession of the dwelling and substantially improved it. On December 31, 1980 when the outstanding lease expired they began running cattle on the

entire tract and cutting hay from it. The seller Dale Dawson died in December of 1980 and T. J. Hughes was appointed the personal representative of her estate.

The abstracts were not delivered for examination until April 1981. Each party blamed the other for the delay. Upon examination of the abstract the buyers' attorney certified that the title was not merchantable and required that the title be quieted. Appellees subsequently obtained an opinion from another attorney that the title was merchantable. As the parties were unable to settle their dispute over the title the appellees brought this action in May 1982 seeking rescission of the contract and, in the alternative, damages. The appellants counterclaimed for specific performance. By the date of trial the appellee had amended his complaint praying that if rescission were not found proper, he be granted specific performance of the contract. The chancellor found that the seller's title was merchantable but correctly concluded that as the purchasers had a contractual right to rely upon their attorney's opinion there had been no breach or ground for rescission. He further found that although the purchasers had a reasonable basis for delaying the closing they had no right to enter on the property and retain the rents and profits. The decree granted specific performance to the seller in accordance with the terms of the contract and directed the purchasers to pay the sellers the amount of rents and profits during the period of delay and denied all other relief.

The first issue presented by this appeal is whether it was error for the chancellor to award damages as at law for delay in performance of an executory contract for the sale of land. We conclude that it was. It is well settled that upon the breach of an executory contract for the sale of land the aggrieved party may have an action at law for damages for the breach. The vendor's measure of damages is the difference between the contract price of the land and its market value at the time of the breach less the portion of the purchase price already paid. The purchaser's measure of damage is the difference between the contract price and the value of the land when the breach occurred with interest on the difference. *Harold E. Williams, et al* v. *Larry Cotten,* (CA

84-216, Opinion delivered by this Court on February 27, 1985); *McGregor* v. *Echols,* 153 Ark. 128, 239 S.W. 736 (1922). It is also settled that where a court of equity denies specific performance it may award damages by those measures provided at law. *Cole* v. *Salyers,* 190 Ark. 53, 76 S.W.2d 669 (1934).

However, where specific performance is ordered in equity the rules for damages as at law do not apply. Treating as done that which ought to have been done the chancellor will apply equitable principles and attempt as nearly as possible to place the parties in the position they would have occupied had there been no delay in performance. The losses occasioned by the delay in performance are equalized by money payments. The guiding priniciple in such cases is to relate the contract back to the date set for its performance. The decree should as nearly as possible require performance in accordance with the terms of the contract, one of which is the date fixed by it for completion, and when that day has passed the court, in order to relate the performance back to it, gives the parties credit for losses occasioned by the delay. *McCoy Farms, Inc.,* v. *J. M. McKee,* 263 Ark. 20, 563 S.W.2d 409 (1979); *Loveless* v. *Diehl,* 236 Ark. 129, 364 S.W.2d 317 (1963). The money payments ordered to equalize losses occasioned by the delay have been referred to as "equitable compensation," and are to be distinguished from damages awarded for breach of contract. *Winters* v. *Shelton,* 357 P.2d 284, (Ore. 1960).

The rule applied in these cases and its rationale are most clearly set out in 71 Am. Jur. 2d 278, *Specific Performance* § 217 as follows:

> The compensation awarded as incident to a decree for specific performance is not for breach of contract and is therefore not legal damages. The complainant affirms the contract as being still in force and asks that it be performed. He cannot have it both ways, performed and broken. It follows from this theory of the remedy by decree of specific performance that damages as such and as at law for breach of contract by the vendor, is not conveying the property at the time fixed

by the contract, are not recoverable by the purchaser as supplementary to the decree, because inconsistent with the retrospective erasure of the breach. The situation is simply that, if the court orders it to be performed, the decree must as nearly as possible order it to be performed according to its terms, and one of those terms is the date fixed by it for its completion. This date having passed, the court, in order to relate the performance back to it, equalizes any losses occasioned by the delay by offsetting them with money payments. The true rationale of decision in respect of compensation for delay is that the contract is being enforced retrospectively and the equities adjusted accordingly. *In reality, therefore, the result is more like an accounting between the parties than like an assessment of damages.*

The general rule, where specific performance is granted of a contract to sell realty, is that the *vendor must account* to the purchaser for any deprivation of the use of the property from the date when possession should have been transferred, and for any detriment to the property caused by his failure to preserve it properly; as against which the *vendor is entitled to credit* for any expenses and carrying charges properly incurred by him for the improvement or preservation of the property, and for any loss of the use of the purchase money or other consideration from that same date. [Emphasis supplied]

In *Loveless, supra,* the seller remained in possession of the premises during the period of delay in performance. In ordering specific performance of the contract the chancellor awarded the purchaser the fair rental value of the land occupied by the seller during the period of delay. On appeal the Supreme Court declared that the chancellor was correct in charging the seller with the rental value of the land where he had retained possession beyond the closing date but should have gone further and charged the purchaser with interest at the legal rate upon the unpaid portion of the purchase price in the same period. There the court said:

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. . . . 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.

Here the purchasers, the Millers, were in possession during the period of delay and if the contract related back to the date set for performance they would be entitled to retain the rents and profits. It was error under these circumstances to require them to account for that sum to the seller. However, the chancellor should have allowed the seller interest on the unpaid portion of the agreed purchase price from the date of closing to the date of performance. To hold otherwise would give the purchaser the use of both the land and the money during the entire period of delay. *Loveless, supra;* 81A C.J.S. § 198(b) *Specific Performance* (1977).

On this point the decree must be modified both to require the purchasers to pay interest on the purchase price and to relieve them of the obligation of reimbursing the sellers for the rents and profits. In all other respects the decree is affirmed.

There was no error in the Chancellor's denial of appellants' claim for compensation for loss of a timber contract and oil lease occasioned by the delay. Damages for those losses would not have been recoverable in an action at law as not flowing naturally from the breach and not within the contemplation of the parties. *Kempner* v. *Cohn,* 47 Ark. 519, 1 S.W. 869 (1886). There was no error in not considering them in stating the account between the parties in specific performance.

The decree is modified as indicated and the cause is remanded so that the account may be stated in accordance with this opinion and a final decree entered.

Reversed and remanded.

CORBIN and GLAZE, JJ., agree.

Norma Louise WEATHERSBEE *v.*
James R. WALLACE, Special Administrator of the
Estate of Malvin L. HAGLER, Deceased

CA 84-333 686 S.W.2d 447

Court of Appeals of Arkansas
Division II
Opinion delivered March 20, 1985
[Rehearing denied May 1, 1985.]

*Homer Tanner,* for appellant.

*Harrold W. Madden,* for appellee.

JAMES R. COOPER, Judge. This case involves the ownership of certain funds which originally were the property of Malvin L. and Norma M. Hagler. These funds were placed in certificates of deposit which were to mature on October 13, 1982. Both certificates, aggregating $20,000.00, were issued in the names of Mr. and Mrs. Hagler. Both the Haglers were hospitalized prior to the maturity date, and Mrs. Hagler made plans to move to Florida with her daughter (Mr. Hagler's stepdaughter) so that her daughter, the appellant herein, could care for her. Mrs. Hagler apparently intended that the funds would be used to meet her needs if she moved to Florida.

The appellant attempted to redeem the certificates prior to their maturity date, but the bank refused, since she as not on the signature card. She subsequently obtained the signature cards and the Haglers signed them, authorizing the addition of the appellant's name as a payee on the certificates. The appellant then redeemed the certificates and deposited the funds in another bank in a joint checking account in her name and that of Mrs. Hagler, omitting Mr. Hagler as a payee. Mrs. Hagler died approximately six weeks after the appellant established the new account, never having been able to move to Florida.

When Mr. Hagler discovered that the certificates had been redeemed and the funds transferred, he filed suit seeking to enjoin the bank from paying the funds over to the appellant, and further seeking to restrain the appellant from attempting to withdraw the funds. The chancellor issued a temporary restraining order, and the matter proceeded to trial. The chancellor found that the appellant was authorized to renew the certificates; that the appellant, without Mr. Hagler's permission, withdrew the funds, redepositing them in an account which omitted him; that the funds withdrawn were for the upkeep and maintenance of Mrs. Hagler, if she moved to Florida; that Mrs. Hagler did not move to Florida; and that the funds in question were the sole property of Mr. Hagler. (Mr. Hagler has since died, and this appeal was revived in the name of his administrator.) From that decision, comes this appeal.

On appeal, the appellant first argues that the chancery court was without jurisdiction. The appellant raised this issue before the trial court, arguing, as she does here, that this suit is one for conversion, and not cognizable in equity. We disagree. Where the chancellor properly assumed jurisdiction to entertain a request for equitable relief, jurisdiction may be retained to adjudicate the legal issues involved. *Import Motors, Inc.* v. *Luker,* 268 Ark. 1045, 599 S.W.2d 398 (1980). Regardless of whether the appellee was entitled to bring an action at law for conversion, the mere existence of that right does not deprive the equity court of jurisdiction unless the legal remedy is clear, adequate, and complete. *Spears* v. *Rich,* 241 Ark. 15, 405 S.W.2d 929 (1966);

*McGehee* v. *Mid South Gas Co.*, 235 Ark. 50, 357 S.W.2d 282 (1962). Here, we cannot say that the chancellor erred in retaining jurisdiction.

Next, the appellant argues that the chancellor erred in granting the preliminary injunction while the case was pending. We disagree. We find no error or abuse of discretion in the issuance of the preliminary injunction which served to preserve the status quo until the ownership of the funds was established after trial, nor do we find that the chancellor erred in failing to require a bond as a prerequisite to the issuance of the injunction. As the appellant points out, the purpose of a bond is to indemnify the parties enjoined against damages occasioned by the wrongful issuance of the injunction. Rule 65(d) of the Arkansas Rules of Civil Procedure states, in part, that "[a]s a condition precedent to the issuance of a preliminary injunction or temporary restraining order, the Court may require the giving of security" in the amount deemed appropriate by the Court. Since no party enjoined has alleged, either at trial or before this Court, damages occasioned by the issuance of the injunction, we find no error in the chancellor's determination that a bond was not required.

Next, the appellant argues that the trial court should not have allowed a witness to testify. Judge Joel C. Cole was initially Mr. Hagler's attorney, and, after the initial hearing on the matter, prior to the issuance of the preliminary injunction, Judge Cole informed the court that he would withdraw from the case, because it had become apparent that he would have to testify. The appellant objected, alleging that since a major part of the case had been developed, it would be improper for Judge Cole to testify. Judge Cole responded that, because of statements made by the appellant, he would have to testify. We do not find that the chancellor erred in refusing to bar Judge Cole's testimony. The *Arkansas Code of Professional Responsibility,* 33 Ark. L. Rev. 605 (1980), adopted by the Arkansas Supreme Court in a *Per Curiam,* 260 Ark. 910 (June 21, 1976), provides in Disciplinary Rule 5-102 that where an attorney determines that it will be necessary that he testify, he must

withdraw from the conduct of the trial. That is exactly what Judge Cole did in the case at bar, and the question of whether he did so at the proper time is irrelevant to the outcome of this case for reasons which we will now explain. The appellant seems to claim that a violation of the Code of Professional Responsiblity (which we do not mean to imply occurred here) would render the attorney-witness incompetent, or would render his testimony inadmissible. We have not found, nor have we been cited, any case so holding, and the Arkansas Supreme Court, in *Montgomery* v. *First National Bank of Newport,* 246 Ark. 502, 439 S.W.2d 299 (1969) noted that no case in Arkansas had so held.

The main issue in the case at bar is who owned the funds, and who had the right to exercise control over them. The chancellor found that the funds were to be withdrawn from the certificates only for the upkeep of Mrs. Hagler, if she moved to Florida, and that the appellant had acknowledged to Judge Cole that she made no claim to the monies, which were to be used solely for Mrs. Hagler's benefit. We cannot say that these findings are clearly erroneous or against the preponderance of the evidence, and therefore we must affirm on this point. ARCP, Rule 52(a). Having so found, the chancellor was correct in determining that the funds, now converted to cash by virtue of the appellant's improper redemption of the certificates, are the property of Mr. Hagler. The certificates of deposit were established by the Haglers as joint accounts between husband and wife, and, as such, they were held as tenancies by the entirety. *Hall, Ex'r* v. *Hall,* 276 Ark. 43, 631 S.W.2d 838 (1982). Thus, but for the wrongful redemption by the appellant, the proceeds would have been the property of Mr. Hagler at the instant of his wife's death, since there was no designation in writing establishing a survivorship interest in the appellant as required by Ark. Stat. Ann. Section 67-552 (Repl. 1980). We disagree with the appellant's argument that no tenancy by the entirety was created because the certificates were issued in the names Malvin L. Hagler *or* Norma Hagler, rather than Malvin L. Hagler *and* Norma Hagler. An identical designation on a certificate of deposit was held to create such an account in *Hall, supra.* Further, the appellant errs in arguing that a designation in writing

was necessary to create a tenancy by the entirety between the Haglers. The appellant cites *Gibson* v. *Boling,* 274 Ark. 53, 622 S.W.2d 180 (1981) for this proposition, but the contesting parties in that case were not husband and wife, but sons and the father's estate. In *Hall, supra,* the Arkansas Supreme Court stated that no such written designation was required where the issuance was to husband and wife.

Finally, we consider the appellant's argument that the chancellor erred in failing to answer twenty-one (21) interrogatories propounded to the court by the appellant after the chancellor rendered his decision. The chancellor answered the interrogatories in writing, stating that the issues before the court were decided based on all the evidence and particularly on the credibility of the witnesses. The decree covers the factual decisions made by the chancellor which led him to the ultimate conclusion as to the ownership of the funds. One of the purposes of the ARCP, Rule 52(a) is to aid this Court in understanding the bases of the trial court's decision, and the rule does not require specific findings on each and every factual question arising in a lawsuit. As stated in *Golf City, Inc.* v. *Wilson Sporting Goods Co., Inc.,* 555 F.2d 426, 433 (5th Cir., 1977),

> Relating the degree-of-thoroughness question to the purposes of Rule 52(a), the findings of the trial court must be sufficiently detailed to give us a clear understanding of the analytical process by which ultimate findings were reached and to assure us that the trial court took care in ascertaining the facts.

We hold that the chancellor properly complied with the requirements of ARCP, Rule 52(a), and that he did not err in declining to answer the twenty-one (21) interrogatories propounded by the appellant. Even if the chancellor had erred in so refusing, in the case at bar no prejudice would have resulted as the findings made clearly enable us to understand the analytical processes by which the chancellor reached his decision.

Affirmed.

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

# Wesley RICE *v.* SD LEASING, INC.

CA 84-237 686 S.W.2d 450

Court of Appeals of Arkansas
Division II
Opinion delivered March 20, 1985

*Guy H. "Mutt" Jones, Sr., Phil Stratton,* and *Casey Jones,* by: *Phil Stratton,* for appellant.

*Rose Law Firm, A Professional Association,* by: *R. Davis Thomas, Jr.,* for appellee.

TOM GLAZE, Judge. In this appeal, the sole issue is whether sufficient minimum contacts exist between appellant Wesley Rice and the State of Arkansas to sustain the trial court's exercise of *in personam* jurisdiction over him. Based upon the Supreme Court's decision of *SD Leasing, Inc.* v. *Al Spain and Associates, Inc.,* 277 Ark. 178, 640 S.W.2d 451 (1982), we affirm the trial court's decision. *See also Meachum* v. *Worthen Bank & Trust Co.,* 13 Ark. App. 229, 682 S.W.2d 763 (1985).[1]

[1]In *Meachum,* the author of this opinion and Judge Corbin registered their disagreement with our appellate court's recent interpretations of this State's long-arm provisions. Because *Spain* and *Meachum* are now precedent, we both join in applying when applicable those decisions and their underlying rationale to future cases. Because we find the *Spain* case

The events revolving around the lease transactions in this case are almost identical to those in *Spain, supra.* The appellee, SD Leasing, an Arkansas corporation, sued Rice, a Florida resident, claiming sums due it by virtue of Rice's default under seven lease agreements and guarantees. All American Vending, a Florida business, originally owned these leases and guaranties covering video machines which it later sold to appellee.

The documents upon which SD Leasing based its claim were all signed in Florida. Wesley Rice, an official and the only stockholder of ABP Computers (ABP), decided that ABP should have a game room. ABP ordered seven video units from All American but actually executed leases with Peoples Acceptance Corporation (PAC), a Florida corporation, as the lessor.[2] ABP's first payment or deposit under the leases was due on September 29, 1981. However, the record reflects that on this same date, Rice executed SD Leasing's customer credit checklist authorizing SD Leasing to obtain credit information on ABP from others. On or about October 19, 1981, SD Leasing purchased these video units from All American; on this same date, Rice, on ABP's behalf and as its guarantor, signed seven leases with SD Leasing as lessor, covering the same seven video units named in the earlier leases with PAC. The All American representative, who had presented the credit and lease documents to Rice for signature caused the documents to be mailed to SD Leasing in Arkansas. SD Leasing approved and accepted the leases on November 1, 1981. Soon thereafter, SD Leasing called ABP to verify the leases, and on November 18, 1981, mailed ABP a copy of each lease with a corresponding payment book.

Although Rice does not deny that he executed SD

controlling here, we deem it unnecessary to discuss *Meachum.* We do note, however, that Meachum was a Texas resident who had no contacts with Arkansas, except he furnished the Arkansas bank a financial statement and lease-guarantee involving a lease between two Arkansas corporations. This court found that due process requirements were met, and the Arkansas court had jurisdiction over Meachum.

[2]The record is unclear concerning the relationship between All American and PAC. Nevertheless, PAC claims no interest in or title to the video units.

Leasing's leases, he testified that he had not read these documents and was unaware that SD Leasing was involved in these rental transactions. ABP made only three payments which were all payable to All American. These payments were appropriately credited when SD Leasing purchased All American's interests in the ABP leases. ABP's last payment was made in December, 1981, after which ABP defaulted. Rice claims he first became aware of SD Leasing's interest in the video units when ABP requested All American to take back the units.

On May 24, 1982, SD Leasing filed suit against ABP and Rice, as ABP's guarantor, seeking rental payments due under the terms of the seven leases. In its complaint, SD Leasing sought to establish jurisdiction and to obtain service upon ABP and Rice pursuant to Arkansas' long-arm statute, Ark. Stat. Ann. § 27-2502 (Repl. 1979). ABP and Rice responded by filing separate motions to quash summons alleging the Arkansas court had no jurisdiction over them. The trial court overruled both motions. At a jury trial held on March 8, 1984, SD Leasing obtained judgment against Rice for $15,269.86.[3]

SD Leasing submits the Supreme Court's case of *SD Leasing* v. *Al Spain and Associates, Inc., supra,* is dispositive of the jurisdiction issue here, and we agree. Rice attempts to factually distinguish the *Spain* case, but the transactions related there are virtually identical to the ones here. First, Rice points out that Al Spain and Associates, Inc., had mailed some payments to SD Leasing before Spain defaulted on the lease. Here he points out that ABP mailed no payments to SD Leasing. We find little merit in this distinction because regardless of actual payments made, both Spain and ABP were required under their respective leases to forward rental payments to SD Leasing. Here ABP merely quit making its payments earlier than did Spain.

Second, Rice argues that Spain had mailed two memos to inform SD Leasing that Spain was going out of business. We simply fail to see how the mailing of memos to SD

[3]ABP was placed in bankruptcy in February, 1983.

Leasing concerning ABP's anticipated breach adds much to distinguish this cause from *Spain*. While it mailed no memos to SD Leasing, ABP was contacted on several occasions either by SD Leasing or All American after ABP defaulted. Besides, the *Spain* court placed its emphasis on two other factors which are also existent here: (1) The lease(s) specifically provided that the lease(s) shall be governed by and construed under the laws of the State of Arkansas; and (2) the parties' agreement contained a provision in which the lessee Spain consented to the jurisdiction of the Arkansas courts to enforce the lease terms. The *Spain* court determined that these contract provisions were fair and reasonable, and upheld their enforceability. From our review of the record, we find nothing that significantly distinguishes this case from the *Spain* holding. Thus, because we believe the *Spain* decision supports the trial court's ruling that it had jurisdiction over appellant, we affirm.

Affirmed.

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

John Franklin TROLLINGER
*v.* STATE of Arkansas

CA CR 84-158 686 S.W.2d 796

Court of Appeals of Arkansas
Division II
Opinion delivered March 27, 1985
[Rehearing denied April 24, 1985.]

*Darrell E. Baker, Jr.,* Deputy Public Defender, for appellant.

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

GEORGE K. CRACRAFT, Judge. John Franklin Trollinger appeals from his conviction of the crimes of burglary and theft of property contending that the trial court erred in admitting evidence obtained in violation of his Fifth and Fourteenth Amendment rights. We find no merit to these contentions.

At a pretrial hearing on a motion to suppress the police officers testified that on November 28, 1983 they obtained information that the appellant had participated in a series of burglaries then under investigation. The appellant was voluntarily brought to the police station and after being fully advised of his *Miranda* rights he stated that he wished to have an attorney present during any further questioning. According to the police officer he ceased questioning the appellant but did tell him what he was being charged with and what he believed could be proved against him. The police officer testified that he was interrupted by the appellant who stated that he was drunk when he did it. The officer said that he told appellant that he could not talk to him and did not want to talk about the details of the charge. After completing this statement, the officer testified:

> John asked for help. He wanted to know what to do. I couldn't promise him anything or make any deals with him. He wanted to know who could. I told him that the only man that could make any kind of deal was the prosecuting attorney, Kim Smith. John asked me to call Mr. Smith and I did.

Appellant admitted his involvement in the crime to the prosecutor and was told that he could give a written statement to the officers if he wished but due to his past criminal record it would be recommended that he be sent to the Department of Correction for seven years and not placed on probation.

The police officer then readvised appellant of all of his *Miranda* rights, including the right to have an attorney present, and the appellant executed a written acknowledgment stating that he did not wish to have an attorney present. Appellant then fully admitted his participation in the crime, named his accomplices and assisted the officers in recovering the stolen articles. The appellant gave no testimony at the suppression hearing. The trial court found that although the appellant had initially asserted his constitutional right to having an attorney present during questioning, he had subsequently waived that right intelligently and knowingly.

As a general proposition once a suspect in custody requests counsel the questioning must cease and cannot be reinitiated by the officers. However, if the accused initiates contact with the authorities and knowingly and intelligently repudiates his previous request for counsel, a voluntary statement may be made. *Edwards* v. *Arizona,* 451 U.S. 477 (1981); *Oregon* v. *Bradshaw,* ___ U.S. ___, 77 L. Ed.2d 405 (1983); *Dillard* v. *State,* 275 Ark. 320, 629 S.W.2d 291 (1982).

The appellant argues that the trial court's finding that the questioning ceased when request for counsel was made was clearly erroneous. He contends that the statements of the police officer concerning what he believed he could prove amounted to interrogation. He further argues that as the police had only an anonymous tip prior to interviewing appellant, his waiver of right to counsel in the face of evidence so slight could not be said to have been either intelligent or knowledgeable.

On appeal we review these matters independently, considering the totality of the circumstances and do not

reverse the trial court unless its ruling is clearly erroneous. *Harris* v. *State,* 278 Ark. 612, 648 S.W.2d 47 (1983); *Coble* v. *State,* 274 Ark. 134, 624 S.W.2d 421 (1981). The police officer stated that at the time the request was made he ceased questioning the accused and cautioned him about spontaneous statements. He further stated that all he did was make a statement to the appellant of what information the police then had connecting him to the crime. He stated it was at the appellant's request that he was taken to the prosecuting attorney's office and after appellant initiated that further contact he was again advised of his right to counsel which he specifically waived in writing.

The facts of this case are peculiarly similar to those in *Oregon* v. *Bradshaw, supra.* There the suspect, after being advised of his *Miranda* rights, made known his desire to assert his right to counsel. All questioning stopped immediately. While being transported to jail the accused asked the officer, "What is going to happen next?" He was reminded that questioning had ceased and said he understood. A discussion about where he was being taken and the offense with which he was to be charged followed. The officer suggested and the accused agreed that he might help himself by taking a polygraph examination. The accused took the polygraph after again being read his rights and after signing a written waiver of rights. When the unfavorable result of that test was made known to the accused he recanted his earlier denials and confessed to every element of the crime with which he was charged. There the court ruled that the accused's question as to what was going to happen to him evidenced a "willingness and desire for a generalized discussion" about the case. In *Bradshaw* the court made it clear that the holding in *Edwards* was that after a right to counsel has been asserted, further interrogation was not to take place unless the accused himself initiates further communication, exchanges, or conversations with the police. It described this as a "prophylactic rule" designed to protect the accused from being badgered by the police, as happened in *Edwards.*

In that case, as in *Bradshaw,* after the request for counsel was made the officer merely outlined the nature of

the charge and the evidence against the accused. He again cautioned him not to discuss the case. However, the appellant initiated further conversation by asking for help and who could give it to him, and requesting to be taken to the prosecutor when told he would be the one to speak with. Upon arrival in the prosecutor's office appellant initiated conversation with him which implicated him and others in the crime for which he was charged. Subsequently he gave a full written statement and repudiated in writing his prior request for counsel. In *Bradshaw* the court found no violation of the *Edwards* rule and we see none here.

The trial judge was correct in holding that the interrogation ceased when right to counsel was asserted. The "interrogation" prohibited by *Edwards* extends to both express questioning and its "functional equivalent." It includes other words and actions of the police officers they should know are reasonably calculated to elicit an incriminating statement. The latter definition focuses on the perception of the accused rather than the intent of the police. *Rhode Island* v. *Innis,* 446 U.S. 291 (1979). We cannot conclude and nothing in the record suggests that the police officer should have known that his statement to the appellant was reasonably likely to elicit an incriminating statement or to invite a response. On the contrary, when appellant did respond he was cautioned not to. Voluntary statements are not barred by the Fifth Amendment. See *Innis, supra.*

The next inquiry is whether the written repudiation of his request for counsel was knowing and intelligent. This is to be found by examination of all the facts and circumstances, including the fact that the appellant reopened dialogue with the police, and the background, conduct and experience of the appellant. *Oregon* v. *Bradshaw, supra.*

From our examination of the record we find that the trial court's findings that the appellant himself reopened conversation with the police officers after requesting counsel and that his repudiation of that request was knowingly and intelligently made, were not clearly erroneous.

His statement was not given under compulsion but was motivated by his desire to exchange cooperation for leniency. He asked for help and for the person who might help him, clearly showing a willingness and desire for further discussion. Appellant's request to be taken immediately to the prosecutor and his initiation of a conversation with him evidence a knowing and intelligent waiver of rights.

At the trial on the merits the appellant took the witness stand in his own behalf. He did not give any testimony in his defense but confessed to the crime on the witness stand and on a plea for mitigation outlined his actions in assisting the police in both the recovery of the property and the arrest of his accomplices. When he did this the jury had conclusive proof of his guilt and admission of evidence, even if improper, could not have been prejudicial. *Motes* v. *U.S.*, 178 U.S. 458 (1899); *Mize* v. *State*, 267 Ark. 743, 590 S.W.2d 75 (Ark. App. 1979); *Hays* v. *State*, 268 Ark. 701, 597 S.W.2d 821 (Ark. App. 1980).

Affirmed.

CORBIN and GLAZE, JJ., agree.

Donald Eugene WING *v.* STATE of Arkansas

CA CR 84-159 686 S.W.2d 452

Court of Appeals of Arkansas
En Banc
Opinion delivered March 27, 1985

*Darrell E. Baker, Jr.,* Deputy Public Defender, for appellant.

*Steve Clark,* Att'y Gen., by: *Sandra Tucker Partridge,* Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Judge. The appellant, Donald Eugene Wing, appeals from a conviction of burglary and theft of property and sentences of twenty years and ten years, to be served consecutively. Appellant's two points for reversal are that (1) the court failed to exercise discretion in sentencing appellant to consecutive rather than concurrent terms; and (2) the court erred in using a constitutionally

invalid felony conviction for enhancement purposes under the Habitual Offender Statute. We reverse.

For his first point, the appellant relies upon *Acklin* v. *State,* 270 Ark. 879, 606 S.W.2d 594 (1980), in which the Supreme Court reversed the trial court for its failure to exercise discretion in sentencing the defendant to consecutive terms. In so holding, the Supreme Court set forth the trial judge's remarks indicating his rationale for imposing consecutive sentences. The judge said:

> I am also mindful that Mr. [Acklin] has had no defense to this case and has put the county to substantial expense to try this without a defense which he is entitled to. It's my feeling about it that if you want to see the hole card and go to a jury to see what they will do, then you ought to be willing to run the risk. . . . If you've got a legitimate defense, come over here and argue it. It won't cost you anything. But if you come over here and waste my time, the jury's time and the taxpayers' money, it may well cost you something. . . . *It's my customary rule to run consecutive sentences* imposed by jurors, not because it's an expense to the county and not because someone elects to do that; *it's just my judgment* in the matter *that generally that's what the jury intends to do.*

*Id.* at 880-81, 606 S.W.2d at 595 (emphasis supplied).

From the foregoing, the Supreme Court inferred the trial court seemed to impose consecutive sentences either because the defendant asked for a jury trial without any defense or because it was the court's rule to direct that jury sentences run consecutively. The court found nothing to indicate that the trial judge really exercised his discretion. *Id.* at 881, 606 S.W.2d at 595. Here appellant contends the trial court's comments made the case exactly like — and controlled by — *Acklin.* While in the instant case the words used by the trial judge may not be identical to those employed by the judge in *Acklin,* we agree with appellant that his words clearly reflect that as a rule he runs jury-imposed sentences consecutively. The judge stated:

> If it had been left to me in the first instance, I feel I would have had a lot more leeway to act. I think it is somewhat presumptuous of me to go against a jury verdict. *I have never done that except in a rare case* where it's clearly out of line. I'm going to set and fix punishment 20 years on the Burglary, 10 years on the Theft of Property, and direct that they run consecutive. *I think if the jury had wished otherwise, they would have noted otherwise.*

First, the judge thought he was following the wishes of the jury when he ran appellant's sentences consecutively instead of concurrently. In other words, he attempted to implement what he perceived the jury wanted rather than to exercise his own discretion relative to the sentencing. While the judge could surmise that the jury intended the sentences to run consecutively, the law actually provides that multiple sentences run concurrently *unless* the *court* orders the sentences to run consecutively. Ark. Stat. Ann. § 41-903 (Repl. 1977). Jury members who have gained experience and insight by sitting on other criminal cases may well have known or intended that any multiple sentences imposed would run concurrently. Second, like the judge in *Acklin* who had a *customary rule* to run consecutive sentences, here the judge *never* went against a jury verdict *except* in a *rare case*. Thus, he thought the jury intended consecutive sentences, and he never (or rarely) deviated from its wishes.

In summary the *Acklin* court noted that the Criminal Code vested the choice between concurrent and consecutive sentences in the judge, not the jury. In making that decision, the judge should make it clear that it is his or her discretion being exercised when entering the sentences and not the jury's. By doing so, the judge renders ineffective any argument that a defendant is penalized merely because he requested a jury trial.[1] In keeping with *Acklin*, we remand

[1]We are not unmindful of Fisk v. State, 5 Ark. App. 5, 631 S.W.2d 626 (1982), a case not cited or argued by either the state or the appellant. We merely note that the *Acklin* case was not cited or argued by *Fisk*; instead, relying upon United States v. Jackson, 390 U.S. 570 (1968), she argued the trial court's policy discriminated against defendants who exercised their right to a jury trial and therefore infringed on her Sixth Amendment rights.

this cause for resentencing without in any way implying how the sentences should be imposed.

We do not consider appellant's second point for reversal because it is raised for the first time on appeal. The appellant was sentenced as an habitual offender, Ark. Stat. Ann. § 41-1001 (Supp. 1983), based upon his prior convictions of four felonies. After the jury verdict was read, the court heard evidence on prior convictions for sentencing purposes. After a 1958 judgment was read by the prosecutor, appellant's counsel said that he had "some questions as to what the offense was in this case." Both the court and the prosecutor pointed out that the offense was listed as a felony. Appellant's counsel then stated that it appeared to be a misdemeanor charge that was advanced to a felony because of prior convictions. He questioned whether "a misdemeanor charge advanced to the status of a felony" can be used "to advance the status of another felony."

However, on appeal, the appellant's argument is based upon the fact that no showing was made that appellant was represented by counsel in the underlying misdemeanor convictions used to advance the 1958 conviction to a felony. The appellant concedes that his conviction occurred five years before *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), and that he adduced no proof at trial to show lack of representation. Not only did he not adduce such proof, he also did not raise the issue. We do not consider issues raised for the first time on appeal. *Cavin* v. *State,* 11 Ark. App. 294, 669 S.W.2d 508 (1984). Any procedural error upon which reversal might be based is waived by appellant's failure to assert it. *Id.*

Reversed and remanded.

MAYFIELD, J., concurs.

MELVIN MAYFIELD, Judge, concurring. Because of the decision of the Arkansas Supreme Court in *Acklin* v. *State,* 270 Ark. 879, 606 S.W.2d 594 (1980), I concur in the reversal and remand of this case.

UNITED STATES OF AMERICA
*v.* Charles Darwin DAVIDSON

CA 84-298 686 S.W.2d 455

Court of Appeals of Arkansas
Division II
Opinion delivered March 27, 1985
[Rehearing denied April 24, 1985.]

*George W. Proctor,* United States Att'y, by: *Fletcher Jackson,* Asst. U.S. Att'y, for appellant.

*Davidson Law Firm, Ltd.,* by: *Charles Darwin Davidson,* for appellee.

TOM GLAZE, Judge. This appeal arises from a foreclosure proceeding initiated by Mutual Life Insurance against Clarence E. Hopmann, the United States [Farmer's Home Administration (FHA), Department of Agriculture and Internal Revenue Service (IRS)], Charles Darwin Davidson and others. Mr. Hopmann owned the real and personal property involved in this cause and appellant, appellee and Mutual Life claimed certain interests in Hopmann's property. On October 6, 1983, the trial court entered a decree granting judgment to Mutual Life and determining it was secured by a first and prior lien. The court provided for a commissioner's sale and for the net sale proceeds to be applied first to the payment of Mutual Life's judgment. The

balance of such proceeds were ordered placed in escrow for distribution to the other parties with their interests to be determined at a later date. On July 11, 1984, the trial court found that the balance of the proceeds was $49,950.00 and that from these proceeds, the IRS was entitled to the amount of its September 22, 1980, tax lien. The court, considering FHA's and appellee's respective claims and interests, ordered that appellee should receive the balance of the $49,950.00, which was $23,165.09.

Appellant raises one point for reversal: The trial court erred in setting priorities because appellant's security interest (based upon its security agreement with Hopmann) was perfected in May, 1981, and was prior to appellee's judgment liens. Appellee argues, among other things, that appellant's abstract is deficient and the trial court's judgment should be affirmed. *See* Rule 9(e) of the Arkansas Rules of the Supreme Court and Court of Appeals. Appellee's specific complaint is the appellant failed to abstract the testimony given in the hearing prior to the entry of the foreclosure decree on October 6, 1983, and that it also omitted from the abstract the security agreement upon which FHA based its priority-of-lien claim. Appellant responds by stating that the October, 1983, testimony was not relevant to the July, 1984, proceeding wherein the trial court determined the priority of the parties' respective lien interests. Furthermore, appellant suggests that abstracting the security agreement would be a duplication because the testimony of Mr. Howard Forrest, an FHA representative, was abstracted, and that testimony established that the security agreement was executed on May 12, 1981. Since it also did not abstract a financing statement, we assume — though it is not argued — that appellant further relies on Forrest's testimony to show that its security interest was perfected by its filing a financing statement on May 6, 1981.[1]

Finally, appellant mentions almost in passing that no

[1]The Forrest testimony reflects nothing concerning FHA's filing the security agreement as a financing statement. Nonetheless, appellant could perfect its security interest by filing a financing statement prior to execution of the security agreement if it complies with Ark. Stat. Ann. § 85-9-402 (Supp. 1983).

execution had issued on appellee's judgments and thus, appellee had no lien on the balance of the proceeds placed in escrow. We have a problem in accepting appellant's argument that the abstract is sufficient. It is settled that the burden is on the appellant to bring up a record to show that the trial court was wrong. *King* v. *Younts,* 278 Ark. 91, 643 S.W.2d 542 (1982); Ark. R. App. P. 6. In addition, an appellate court must presume that the missing testimony in a record on appeal supports the finding of the lower court. *King* v. *Younts* at 92, 643 S.W.2d at 543. Here the trial court determined that appellee's lien interest was paramount to appellant's. In so finding, the court's July, 1984, order referred to and in part was based upon the October, 1983, proceeding (which was not abstracted) and the decree of foreclosure (which was only partially abstracted). Appellant now contends the trial court erred because its security interest was perfected prior to appellee's judgment liens, but we find nothing in the abstract setting out appellant's judgments or when those judgments were filed. From our limited examination of the transcript (which we are not required to do), we cannot locate any of appellee's judgments — which leads us to conclude that either they had been introduced at the October, 1983, hearing and were not made a part of this record on appeal or they were introduced in the July, 1984, hearing but not designated as a part of the record.[2] Either way, we are left to guess at which proceeding appellee's judgments were introduced. Without having these pertinent documents before us we can only speculate why the trial court held as it did. For example, did the court reject appellant's priority interest arguments because its documents failed to comply with the formal requisites under the law which are necessary to perfect its secured interest? Perhaps, on the other hand, appellee's judgments had been entered prior to the appellant's having perfected its secured interest. Or, maybe the trial court clearly erred as appellant asserts in this appeal. Without a proper abstract, we are unable to determine how the trial court disposed of appellant's argument that appellee's judgments posed no liens on the proceeds in escrow or, for that matter, whether such an argument was presented the trial judge. Other

[2]Appellant specifically named those matters it designated on appeal rather than designating the entire record.

possibilities can be posed, but the point we make is that the record simply fails to demonstrate the trial court's error that the appellant now argues in this appeal.

Of course, we need not (nor can we) speculate on matters either omitted from the abstract or from the transcript. We are required to affirm this appeal for two reasons: (1) Appellant's abstract fails to reflect the documents which support its claims; and (2) the appellee's judgments which appellant argues are subordinate to its interest are neither abstracted nor made a part of the record in this appeal.

Affirmed.

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

D&M CONSTRUCTION COMPANY and MARYLAND CASUALTY COMPANY *v.* Steve ARCHER and Robert SCHWITZER

CA 84-428 686 S.W.2d 799

Court of Appeals of Arkansas
Division II
Opinion delivered March 27, 1985

[redacted]

*Barrett, Wheatley, Smith & Deacon,* for appellant.

*Wilson & Castleman,* for appellee.

TOM GLAZE, Judge. The appellant, D&M Construction Company, appeals from the Commission's finding that the appellee, Steve Archer, suffered a compensable injury to his hand while employed by appellee, Robert Schwitzer, an uninsured subcontractor of D&M Construction Company, within the meaning of Ark. Stat. Ann. § 81-1306 (Repl. 1976). Under § 81-1306, the prime contractor is liable for

compensation to the employees of the subcontractor when the subcontractor fails to secure compensation coverage. Here, no dispute exists that D&M was a prime contractor and Schwitzer had no coverage. Rather, appellant contends that the Commission erred in finding: (1) Archer was an employee (not an independent contractor) of Schwitzer, (2) Schwitzer was an uninsured subcontractor (not an independent contractor), and (3) Archer's injury occurred within the scope of employment. We affirm.

Appellant's first point for reversal is that Archer was an independent contractor rather than Schwitzer's employee. As an independent contractor, Archer would not be entitled to relief from D&M Construction under Ark. Stat. Ann. § 81-1306. As we stated in *Silvicraft, Inc.* v. *Lambert,* 10 Ark. App. 28, 661 S.W.2d 403 (1983), the determination of whether, at the time of injury, a person was an employee or an independent contractor is a factual one and the Commission is required to follow a liberal approach, resolving doubts in favor of employment status for the worker. We view the evidence in the light most favorable to the Commission's decision, and affirm if it is supported by substantial evidence. *Id.* Because Archer had worked for Schwitzer only one day when he was injured and the association between Archer and Schwitzer was limited in time, the Commission had fewer facts to weigh in determining the employment status between them.

Appellant relies upon *Sandy* v. *Salter,* 260 Ark. 486, 541 S.W.2d 929 (1979), in support of its contention that Archer was an independent contractor. Appellant contends that under *Sandy,* control is an important consideration in determining whether an employer/employee relationship exists, and that Schwitzer exercised only minimal control over Archer.

In *Silvicraft, Inc.* v. *Lambert, supra,* we gave examples of factors that may be used in determining the right to control, including the right to determine the manner of completing the work, the right to terminate, the right to hire or control the hiring of helpers, the method of payment and the furnishing of necessary tools and equipment. In apply-

ing those factors to the case at bar, we note that Schwitzer hired Archer to haul rock from a quarry in Harrison to a dump site near Yellville. Archer was to be paid twenty-five percent of Schwitzer's gross pay for each load of rock with no withholding for taxes or Social Security. Schwitzer furnished the truck and equipment and paid expenses. Schwitzer took Archer to the job site and told him what to do. On the day of the accident, Schwitzer instructed Archer to take the truck to Imboden, one hundred miles from the job site, to have a broken spring repaired. Archer testified that Schwitzer would be the one to tell him "what to do or who to see." The question on appeal is not whether the facts at bar would have supported the opposite conclusion, but whether these facts supported the decision the Commission made. *Franklin* v. *Arkansas Kraft, Inc.*, 12 Ark. App. 66, 670 S.W.2d 815 (1984). We believe the Commission's finding that Archer was Schwitzer's employee is supported by substantial evidence under either the control test or the relative nature of the work test. *Id.*

Appellant's second point for reversal is that Robert Schwitzer was an independent contractor rather than an uninsured subcontractor and thus not entitled to relief under § 81-1306. Appellant relies upon *Hollingsworth* v. *Evans*, 255 Ark. 387, 500 S.W.Ad 382 (1973), to support his contention. *Hollingsworth* presented a different question than the instant case. Whereas here we are concerned with the relationship between D&M Construction Company (the prime contractor) and Schwitzer (the middleman), *Hollingsworth* involved the relationship between Hollingsworth (the middleman) and Mr. and Mrs. Evans (the workers under Hollingsworth). Hollingsworth had workers' compensation insurance and the Evanses, who were injured, were attempting to bring themselves within its provisions by showing that they were either Hollingsworth's employees or his uninsured subcontractor within § 81-1306. The Supreme Court denied the Evanses coverage, finding that they were neither Hollingsworth's employees nor employees of an uninsured subcontractor. They themselves may have been uninsured subcontractors, but the Court said that the statute does not provide coverage, as a matter of law, for the subcontractor himself, only to his

employees. Mr. and Mrs. Evans simply did not fall into the category that the statute was written to protect.

The Court set out the definition of a subcontractor as follows:

> "One who takes a portion of a contract from principal contractor or another subcontractor. . . . One who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance."

*Id.* at 394, 500 S.W.2d at 385-86 (quoting *Black's Law Dictionary* (Rev. 4th ed.)). The Court quoted also from a New Jersey case:

> "A subcontractor is one who enters into a contract with a person for the performance of work which such person has already contracted to perform. In other words, subcontracting is merely 'farming out' to others all or part of work contracted to be performed by the original contractor."

*Hollingsworth* at 394-95, 500 S.W.2d at 386 (quoting *Gaydos* v. *Packanack Wood Dev. Co.,* 166 A.2d 181, 184); *see also Bailey* v. *Simmons,* 6 Ark. App. 193, 639 S.W.2d 526 (1982).

We believe those definitions precisely describe Schwitzer. He entered into a contract with appellant D&M to perform a portion of D&M's contract with the Corps of Engineers. In other words, D&M "farmed out" to Schwitzer a part of its work (hauling rocks) to be performed in making repairs on Crooked Creek near Yellville. The evidence clearly supports the Commission's finding that Schwitzer was appellant's subcontractor.

Appellant's last point for reversal is that Archer's actions that gave rise to his injury were not within the scope of his employment. Citing no authority, appellant contends that the purpose of § 81-1306 would be subverted by applying it to this case because the provision applies to the performance of work that is necessarily done by employees

of a subcontractor in actions related to or in furtherance of the general contractor's performance. Applying the section to the instant case would create "almost limitless liability for a general contractor when an employee of an uninsured subcontractor is injured," appellant contends.

In *Dallas County Pulpwood Co.* v. *Strange,* 257 Ark. 799, 520 S.W.2d 247 (1975), the Supreme Court considered whether Strange's injuries arose out of and in the course of employment under circumstances comparable to those at hand. On the day he was injured, Strange engaged in selecting and financing a tractor he was purchasing to get logs out of the woods for his employer pulpwood company. Strange went home to get his truck to tow the tractor to the worksite so that he could resume cutting timber the next morning. As he backed his truck out of his driveway, he fell from it and was run over by one of its wheels. The Court said that an employee's preliminary preparations that are reasonably essential to the proper performance of some required task or service are generally considered within the scope of employment. *Id.* at 802, 520 S.W.2d at 248. The Court cited cases from other jurisdictions in which claimants were compensated for injuries that occurred in preparing for work. *E.g., McBride* v. *Preston Creamery Ass'n,* 228 Minn. 93, 36 N.W.2d 404 (1949) (claimant injured while sanding icy hill on private road so he could drive to work the next morning to haul milk for employer); *Fels* v. *Industrial Commission,* 269 Wis. 294, 69 N.W.2d 225 (1955) (claimant injured while repairing own dump truck in order to take it the next morning to jobsite).

In the instant case Archer testified that Schwitzer instructed him to drive the truck to a repair shop in Imboden, one hundred miles away, and to help repair the truck because it was necessary to have it available for Archer to continue working the next morning. Schwitzer also testified that he instructed Archer to drive the truck to Imboden and that it was necessary to have the truck repaired to be on the job the next morning, although he denied instructing Archer to assist with repairs. The Commission found that Archer acted at his employer's direction in driving the truck to Imboden for repairs, that the repairs

were being made on an emergency basis so that the truck could be used to conduct appellant's business the next morning, and that the speed in making repairs would accrue to appellant's benefit. To that end, Schwitzer was performing services for appellant at the time his employee, Archer, was injured, and as a consequence, Archer was insured under the appellant's policy pursuant to § 81-1306.

We believe that the Commission's reasoning illustrates exactly the purpose for which § 81-1306 was written and that substantial evidence supports its findings. Therefore, we affirm.

Affirmed.

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

Joseph FLEMING *v.* STATE of Arkansas

CA CR 84-207 686 S.W.2d 803

Court of Appeals of Arkansas
Division II
Opinion delivered April 3, 1985

*William R. Simpson, Jr.,* Public Defender, *Jacquelyn C. Gregan,* Deputy Public Defender, by: *Deborah R. Sallings,* Deputy Public Defender, for appellant.

*Steve Clark,* Att'y Gen., by: *Alice Ann Burns,* Deputy Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Chief Judge. Joseph Fleming appeals from his conviction of the offense of perjury contending that the evidence was insufficient to sustain the conviction. We do not agree.

Ark. Stat. Ann. § 41-2602(1) (Repl. 1977) defines perjury as follows: "A person commits perjury if in any official proceeding he makes a false material statement, knowing it to be false, under an oath required or authorized by law." Ark. Stat. Ann. § 41-2601(2) (Repl. 1977) defines "false material statement" as "any false statement, regardless of its admissibility under the rules of evidence, which affects or could affect the course or outcome of an official proceeding. . . . Whether a false statement is material . . . is a question of law." If the false statement is material to the issue being tried, it does not matter whether the defendant is guilty or innocent of the collateral charge being tried or whether the State's evidence may fail in its proof. *Scott* v. *State,* 77 Ark. 455, 92 S.W. 241 (1906). It is only necessary that the false statement be capable of influencing the outcome of the proceedings.

The charge against the appellant was based upon his testimony during the trial of a criminal case involving one Dennis Baugh. He was charged with making false material statements under oath in that case with knowledge that the statements were false. Both the appellant and Baugh had been charged with the crime of aggravated robbery. Those charges were based on a shoplifting incident at a K-Mart Store in North Little Rock. Appellant pled guilty to the aggravated robbery charge. At the hearing on appellant's plea the prosecutor, in stating the factual basis for appellant's plea, indicated to the court that two employees had observed the appellant and Baugh shoplifting cassette tapes. When approached Baugh produced a knife and waved it at the employees to enable the shoplifters to escape. After hearing this statement of the facts the court inquired of the appellant if the statements were true and he answered that they were true. Prior to that affirmance he had made other unsworn statements to the police that Baugh was the one who threatened the employees with the knife and that the appellant was unarmed.

At Baugh's trial, however, appellant testified under oath that although he and Baugh went to the K-Mart Store together Baugh was in a different aisle and did not participate in stealing tapes or assist him in any way. The appellant testified that when he was approached by the two employees he pulled out this knife and threatened them with it so that he could get out of the store. He testified that Baugh was not aware of what was going on until after these events had transpired.

If two inconsistent statements are made under oath in a judicial proceeding the problem is simplified since it is not necessary that it be shown which of the two is false to sustain a conviction for perjury. Ark. Stat. Ann. § 41-2604 (Repl. 1977). However, where as in this case there is only one sworn statement, proof that the statement is false is governed by Ark. Stat. Ann. § 41-2605 (Repl. 1977) which provides that in prosecutions for perjury the falsity of a statement may not be established solely through contradiction by a single witness. Conviction for the crime of perjury must be based upon the testimony of at least one witness plus corroborating

evidence. The corroborating evidence must go to material testimony adduced by the State and not the testimony on some immaterial matter. *Stubblefield, Burns & Gaston* v. *State,* 201 Ark. 611, 146 S.W.2d 688 (1941).

The appellant contends that although there was a single witness who contradicted appellant's version of events the evidence does not sufficiently corroborate testimony on a material issue to sustain the conviction. We do not agree. On appeal of criminal cases the evidence is viewed in the light most favorable to the State and if there is substantial evidence to support such finding the conviction will be affirmed. *Kelley* v. *State,* 7 Ark. App. 130, 644 S.W.2d 638 (1983); *Mooring* v. *State,* 11 Ark. App. 119, 666 S.W.2d 720 (1984).

The evidence viewed in that light discloses that a security guard testified that he observed two men putting cassette tapes in their boots. When he approached them Baugh brandished a cream colored knife which allowed them to escape from the store. He testified that he did not see a knife in appellant's possession. He identified appellant and Baugh in photographic lineups, when he again indicated that Baugh was the one armed with the knife. The police sergeant testified that the appellant had told the police that Baugh was the one armed with the knife. It was stipulated that at the time of appellant's arrest the police found in his car a gray jacket containing the tapes and a brown jacket containing the knife. That information was contained in the police general report which also showed that Baugh was wearing white pants and a brown leather jacket at the time of the incident.

The security guard's testimony that both men were at the tape counter and that Baugh, rather than the appellant, was in possession of the knife meets the single witness test that appellant's testimony at Baugh's trial was false under oath. The evidence that Baugh was wearing the brown jacket at the time of the incident and a cream colored knife was found in a brown coat in the appellant's car after his arrest corroborates the security guard's testimony that Baugh had the knife and that both men were at the tape

counter, not in some other aisle. Although the information of the officer with regard to the coats and the knife was taken from a report, the officer testified from that report without objection.

The appellant argues that as he and Baugh were charged as accomplices it was immaterial which one of them threatened the security guard with the knife and therefore his statements at Baugh's trial, even if false, did not meet the test of materiality. At Baugh's trial on the charge of aggravated robbery he interposed an alibi defense contending that he was in another department, did not threaten anyone with a knife, and was unaware of the appellant's activities when the crime was committed. The evidence of Baugh's absence from the scene at the time the crime was committed was material to his defense of alibi. There was evidence of a single witness, corroborated by the finding of the knife in his coat, that Baugh was the person who threatened the guard with the knife at the tape counter and that appellant's testimony that he was elsewhere was false. We find no error and affirm.

Affirmed.

CORBIN and MAYFIELD, JJ., agree.

Cindy C. (WALKER) O'DANIEL *v.*
Ricky E. WALKER

CA 84-295 686 S.W.2d 805

Court of Appeals of Arkansas
Division I
Opinion delivered April 3, 1985

*Boswell, Smith & Clardy,* by: *David E. Smith,* for appellant.

*Dowd, Harrelson & Moore,* by: *Gene Harrelson,* for appellee.

JAMES R. COOPER, Judge. The appellant appeals the chancellor's decision finding that she was in contempt of court because she failed to obey the chancellor's order directing her to deliver custody of her children to the appellee. She argues that the Little River Chancery Court was without jurisdiction to order a change in custody, and, lacking jurisdiction, any such order was void and therefore she cannot be punished for failure to obey such an order. We disagree and affirm the chancellor.

After about ten years of marriage, during which time two children were born, the parties were divorced in the Little River Chancery Court in 1981. The appellant was awarded custody of the children, with visitation privileges being vested in the appellee. After the divorce the appellant moved to Mississippi. She later remarried and moved to Tennessee. The appellee remained in Arkansas.

In 1983 the appellant filed a petition in Little River Chancery Court seeking modification of the appellee's visitation rights. The appellee responded and counterclaimed seeking custody of the minor children. After a hearing at which all parties were present, the chancellor entered an order on December 16, 1983, which changed custody from the appellant to the appellee. The order required that the appellant deliver custody of the children on December 25, 1983. The appellant then traveled back to Tennessee where she initiated an action seeking temporary and permanent custody, and on that same day, December 22, 1983, the Tennessee court awarded her temporary custody. Although the appellant initially filed a notice of appeal from the decision of the Little River Chancery Court, the notice of appeal was later withdrawn and no appeal from that order was ever taken.

In January, 1984, the appellee unsuccessfully challenged the Tennessee court's jurisdiction, and on March 21, 1984, he filed a petition in the Little River Chancery Court seeking a finding that the appellant was in contempt of court for her failure to deliver the children. With appellant's counsel present, the chancellor found the appellant in contempt on April 30, 1984. The chancellor denied a motion

to dismiss or to stay enforcement of the order pending appeal, and sentencing was scheduled for June 4, 1984. Later, on his own motion, the chancellor stayed execution of the order pending a decision on this appeal.

The appellant argues that the Little River Chancery Court order which changed custody was void for want of jurisdiction, citing 28 U.S.C., Section 1738A (Supp. 1984), the Parental Kidnapping Prevention Act of 1980. The basis for her argument is that the Arkansas court failed to meet one of the conditions set out in section (c)(2) which are required for the exercise of jurisdiction. We disagree. Subsection (d) of the Act provides:

> The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

Subsection (c)(1) states:

> A child custody determination made by a court of a State is consistent with the provisions of this section only if — (1) such court has jurisdiction under the law of such state, . . .

Under the Uniform Child Custody Jurisdiction Act, Ark. Stat. Ann., Section 34-2701 (Supp. 1983), *et seq.*, the Little River Chancery Court clearly had jurisdiction to modify its January 14, 1981 custody order, the original order entered at the time of the divorce. Section 34-2703(a) states:

> A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if: . . . (2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one (1) contestant, have a significant connection with this State, and (ii) there is available in this State substantial

> evidence concerning the child's present or future care, protection, training, and personal relationships; or . . .

The Little River Chancery Court has had continuing jurisdiciton over this case since its initial custody determination in 1981. Although the appellant removed herself from the State of Arkansas, the appellee has continued to reside in Little River County; that county's chancery court has exercised jurisdiction over these parties on several occasions since the entry of the original decree; and no other state, including Tennessee, has exercised any jurisdiction with regard to these children prior to the entry of the Arkansas order. Because of these facts, the requirements of subsection (d) of 28 U.S.C., Section 1738A are met. Further, since Ark. Stat. Ann., Section 34-2703(a)(1) confers jurisdiction on Little River County Chancery Court, subsection (c)(1) of 28 U.S.C., Section 1738A is also satisfied.

This Court, in *Brown* v. *Brown,* 10 Ark. App. 251, 663 S.W.2d 190 (1984) held that the trial court erred in holding that it no longer had jurisdiciton under Ark. Stat. Ann. § 34-2703 to hear or enter any order affecting child custody or visitation rights. In that case, the mother who had been awarded custody of the minor children moved to Ohio shortly after a divorce was granted in Union County Chancery Court. The father remained in Arkansas and subsequently filed a motion seeking modification of his visitation rights. Citing Ark. Stat. Ann., § 34-2703(a)(2), we stated:

> Pursuant to the above authority, Arkansas undoubtedly had jurisdiction to hear the evidence on the issue of whether or not a modification of appellant's visitation rights was in order. . . . The minor children and appellant have a significant connection in Arkansas and there is available in Arkansas substantial evidence concerning the minor children's present or future care, protection, training and personal relationships in regard to the visitation rights of appellant.

*See also Sanders* v. *Sanders,* 1 Ark. App. 216, 615 S.W.2d 375 (1981).

We hold that the Little River Chancery Court had continuing jurisdiction to modify its original January 14, 1981 custody and visitation order. Therefore, the trial court had the authority to punish the appellant for failing to obey its lawful orders. We observe that no argument is made that the change in custody was not justified, nor would such an argument be entertained now, since the appellant allowed the court's 1983 order to become final.

The appellant also argues that the Tennessee order was a valid one which superseded the Arkansas order, thus relieving her of any obligation to obey the Arkansas order. We disagree. Even if the Tennessee custody order is valid that fact would not render her immune from a finding of contempt in the Arkansas courts for violation of a valid, final Arkansas order. As explained above, the Arkansas court had jurisdiction to modify custody and visitation and its order has become final. At the time the appellant initiated the Tennessee action she was already under an order from the Arkansas court to deliver the children, and whether another state could have exercised jurisdiction concurrently with Arkansas or not, the Arkansas court may enforce its final order.

The appellant sought relief in Arkansas courts, relief which the Arkansas courts had the authority to provide, and, having received an adverse decision, the appellant seeks to find a forum which will afford her the relief she sought. Such action is contrary to the purposes of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act.

Affirmed.

CLONINGER and GLAZE, JJ., agree.

# CYCLE CENTER, INC. *v.* James R. ALLEN

CA 84-297 686 S.W.2d 808

Court of Appeals of Arkansas
Division I
Opinion delivered April 3, 1985
[Rehearing denied April 24, 1985.]

*James L. Hall, Jr.,* for appellant.

*L. David Stubbs,* for appellee.

LAWSON CLONINGER, Judge. Appellant, Cycle Center, Inc., argues on this appeal that the trial court erred in finding that a novation had occurred which relieved appellee, James R. Allen, of any indebtedness owed appellant for the purchase of a used motorcycle.

We are able to conclude that appellee made one payment on the indebtedness, and then returned the cycle to appellant for repairs; that a third party, Johnny Fair, took possession of the cycle and made payments, using appellee's payment book; and that Fair then sold the cycle to a fourth party, Clyde Daniel, who made at least one payment before defaulting.

It is the responsibility of appellant to demonstrate prejudicial error, and it has failed to do so. *See Baldwin*

*Company* v. *Ceco Corporation,* 280 Ark. 519, 659 S.W.2d 941 (1983). It is evident from a review of the evidence which is abstracted that this case cannot be properly decided upon the basis of the abstract presented by appellant. The abstract and brief of appellant contain no abstract of the pleadings, exhibits, findings and conclusions of the trial court, and no judgment of the trial court.

The abstract is flagrantly deficient in failing to abstract crucial parts of the record necessary to a proper review of the issue. *See Bank of Ozark* v. *Isaac,* 263 Ark. 113, 563 S.W.2d 707 (1978); *Evans* v. *Commercial National Mortgage Co.,* 271 Ark. 271, 610 S.W.2d 79 (1980).

Because appellant has failed to comply with Rule 9(d) of the Rules of the Supreme Court and the Court of Appeals, we affirm the judgment of the trial court.

Affirmed.

GLAZE and COOPER, JJ., agree.

# NATIONAL SECURITY FIRE AND CASUALTY COMPANY *v.* Billy R. SHAVER

CA 84-325 686 S.W.2d 808

Court of Appeals of Arkansas
En Banc
Opinion delivered April 3, 1985

*Eilbott, Smith, Eilbott, Humphries & Taylor,* for appellant.

DONALD L. CORBIN, Judge. Appellee, Billy R. Shaver, brought suit against appellant, National Security Fire and Casualty Company, to recover the policy limits for loss of his mobile home to fire. Appellant, in correspondence to appellee, denied liability because the mobile home was unoccupied sixty days prior to the fire. Appellant's policy of insurance issued to appellee contained an exclusion to coverage if the dwelling was unoccupied for a sixty-day period. We reverse and remand.

Appellee filed his complaint on October 18, 1983, and on the date set for trial before a jury on May 31, 1984, appellee filed a motion in limine requesting the court to exclude any evidence offered by appellant relating to an affirmative defense because of appellant's failure to raise any affirmative defenses in its answer to appellee's complaint. The trial court granted this motion. The issue on appeal is whether the trial court abused its discretion in granting appellee's motion in limine. Appellant argues that the trial court erred in prohibiting it from raising the issue of nonoccupancy under the insurance policy because even though the issue was not affirmatively pled in appellant's answer, it was made known to appellee in other pleadings and no surprise or prejudice would have resulted.

ARCP Rule 8(c) requires that all affirmative defenses must be contained in the response to a complaint. The purpose of the requirement of Rule 8 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. The law in Arkansas is well settled that an exception in a policy of insurance is an affirmative defense which must be specifically pleaded. *Government Employees Ins. Co.* v. *Akers,* 279

Ark. 72, 648 S.W.2d 492 (1983); *Universal Life Ins. Co.* v. *Howlett,* 240 Ark. 458, 400 S.W.2d 294 (1966). There is no question but that the occupancy clause in the insurance policy here was an exception or exemption clause. Appellant contends in the case at bar that the necessity of raising the occupancy clause in its answer was eliminated since this defense was stated in appellant's response to appellee's interrogatories, in correspondence exchanged between the parties, and in depositions taken prior to trial. We do not agree as answers to interrogatories, as well as any other information disclosed during discovery are not a pleading or a defense to a pleading. *Odaware* v. *Robertson Aerial-AG, Inc.,* 13 Ark. App. 285, 683 S.W.2d 624 (1985). However, as noted in *Odaware, supra,* such information may give rise to amendments to pleadings. ARCP Rule 15(a) permits liberal amendments to pleadings at any time without leave of court. As noted in the *Reporter's Notes* to ARCP Rule 15(a), the Committee believes that generally speaking, it is the intent of this rule that amendments to pleadings should be permitted without leave of court in all instances unless it can be demonstrated that prejudice or delay would result and the rule gives the court discretion to strike any amendment. Rule 15(b) permits amendments to conform to the proof adduced at trial and more or less makes it mandatory that pleadings be amended to conform to the proof where there has been objection to such proof. Such amendments may be made at any time, even after judgment.

In *Miller* v. *Hardwick,* 267 Ark. 841, 591 S.W.2d 659 (Ark. App. 1980),. this Court reversed the granting of summary judgment in favor of appellee. Suit had been instituted on an open account by appellee and appellant filed only a general denial to appellee's complaint. In answering interrogatories propounded to appellant, appellant admitted the existence of the contract but stated that there was a partial lack of consideration. Motion for summary judgment was filed by appellee and granted. In its response to appellee's motion for summary judgment, appellant stated that his response to discovery adequately outlined the defenses to be relied upon at trial. In reversing, this Court stated as follows:

> Pleadings are for the purpose of informing all the parties what the issues are. Where there is no surprise or substantial prejudice the court can always, and often does, treat the pleadings as amended, to conform to the proof. Defects in pleadings are to be disregarded unless they substantially affect the rights of the adverse party. A variance between the pleadings and proof is not material unless it has actually misled the adverse party to his prejudice. (cites omitted) While the general denial did not apprise Hardwick of the Millers' defense, the response to the interrogatories provided this notice. These responses, which became a part of the record without objection, were evidence to be considered by the judge. Once these became evidence, the pleadings are treated as amended to conform to the evidence. (cite omitted)

See, also, *Bonds* v. *Littrell,* 247 Ark. 577, 446 S.W.2d 672 (1969), where a similar result was reached by the Arkansas Supreme Court.

As stated previously, appellee's motion in limine and supporting brief were submitted to the trial court on the day of the trial. A hearing was held in chambers on this motion prior to selection of the jury. The record reflects that after the trial court granted appellee's motion in limine, counsel for appellant advised the trial court that his client no longer had a defense. Counsel for appellant ultimately stipulated to the amount of damages in the case and judgment was entered accordingly.

It is clear from the record that counsel for appellant objected to appellee's motion in limine throughout the course of the hearing. A proffer was made by counsel for appellant for the stated purpose of establishing absence of surprise to which counsel for appellee did not object. The proffer related to appellant's denial of coverage on the basis of the occupancy clause and the policy, correspondence between the parties, depositions and interrogatories and responses to interrogatories were offered to support this contention. In addition, appellee Billy R. Shaver was called to testify in chambers and stated that he understood since his

receipt of appellant's letter of May 31, 1983, that appellant was denying coverage on the basis of the occupancy clause.

As noted previously, appellant objected strenuously in the proceedings below to appellee's motion in limine, arguing that there was no surprise or substantial prejudice to appellee as a result of appellant's reliance upon the occupancy clause and making a proffer to support this. Counsel for appellee stated at one point during the hearing that while he agreed with counsel for appellant that there had been depositions taken and interrogatories propounded and answered and that he had seen some other areas that he felt like maybe counsel for appellant was going to use the occupancy clause as a defense, he just simply did not know what all to prepare for. The following exchange then occurred:

> THE COURT: Now, what is the story on this thing now, ah, in your position, Bill? You had a house out here that was insured by fire insurance?
>
> MR. MEEKS: Yes, sir, it was a mobile home.
>
> THE COURT: And it was vacant more than sixty days?
>
> MR. MEEKS: No, sir, our testimony is going to show that it was not. That is a defense that I guess . . .
>
> THE COURT: And you say that it has been?
>
> MR. HUMPHRIES: Yes, sir.

We believe that it is evident from the above exchange that appellee was in fact prepared to put on proof at trial to the effect that the mobile home was occupied and to rebut appellant's contention to the contrary. The record also reflects in responses to interrogatories propounded to appellee that appellee intended to call eleven witnesses to testify at trial and that their testimony was expected to be that the mobile home was occupied on a regular basis up until shortly before the fire. The record further reflects that

four of the eleven witnesses were in fact subpoenaed to testify at trial.

We find that appellee was prepared to defend against the occupancy clause in the insurance policy and that the trial court abused its discretion in refusing to allow the pleadings to be amended to conform to the evidence. It appears from the record that appellant sought to amend the pleadings by his repeated references to lack of surprise or prejudice to appellee and by his proffer although counsel did not specifically announce his desire to have the pleadings conform to the proof. We think it most important to note that this decision is narrowly drawn and limited to the facts of this particular case. It is not our intention to diminish the requirement under ARCP Rule 8(c) that all affirmative defenses must be contained in a response to a complaint. Accordingly, we reverse and remand for trial on the merits.

Reversed and remanded.

MAYFIELD, J., concurs.

MELVIN MAYFIELD, Judge, concurring. I agree that the judgment in this case should be reversed and remanded for failure to allow appellant to amend its pleadings. In my view, this decision is a move away from the direction the majority of the court took in its January 30, 1985, decision of *Odaware* v. *Robertson Aerial-AG, Inc.*, 13 Ark. App. 285, 683 S.W.2d 624 (1985). As stated in my dissent in *Odaware*, I believe that decision is contrary to the spirit of our procedure, both present and past. I am happy that today's decision cites with approval *Bonds* v. *Littrell*, 247 Ark. 577, 446 S.W.2d 672 (1969), which stated: "Ever since the adoption of our civil code a century ago it has been a basic and wholesome rule in civil cases that amendments to the pleadings are to be liberally allowed in furtherance of justice. . . ."

ALCOA, Self-Insured Employer *v.*
Douglas VANN, Administrator of the
Estate of Raymond VANN, Deceased

CA 84-398 686 S.W.2d 812

Court of Appeals of Arkansas
Division II
Opinion delivered April 3, 1985

*Rose Law Firm, A Professional Association,* for appellant.

*Kenneth E. Buckner, P.A.,* for appellee.

DONALD L. CORBIN, Judge. Appellant Alcoa appeals the decision of the Workers' Compensation Commission awarding benefits to claimant Raymond Vann for an occupational disease. Appellee, Douglas Vann, represents Mr. Vann's estate on appeal as he is now deceased. The Commission found that Vann had developed an occupational disease, pleural mesothelioma, a malignant tumor of the lung, as a result of his exposure to asbestos during his employment with Alcoa. We affirm.

Ark. Stat. Ann. § 81-1314(5)(i) (Repl. 1976) defines occupational disease:

> "Occupational disease" as used in this Act, means any disease that results in disability or death and arises out of and in the course of the occupation or employment of the employee, or naturally follows or unavoidably results from an injury as that term is defined in this Act. Provided, a causal connection between the occupation or employment and the occupational disease must be established by clear and convincing evidence.

Ark. Stat. Ann. § 81-1314(7) (Repl. 1976) provides:

> An employer shall not be liable for any compensation for an occupational disease unless such disease shall be due to the nature of an employment in which the hazards of such disease actually exist, and are charac-

> teristic thereof and peculiar to the trade, occupation, process, or employment, and is actually incurred in his employment. . . .

Ark. Stat. Ann. § 81-1314(5)(iii) (Repl. 1976) provides:

> No compensation shall be payable for any ordinary disease of life to which the general public is exposed.

These statutes require that a causal connection between the claimant's disease and his occupation be established by clear and convincing evidence and that the disease be: (1) a result of the nature of that particular employment or occupation; (2) be actually incurred in the employment; and (3) not be an ordinary disease of life. Clear and convincing evidence has been described by our Supreme Court as "that degree of proof which will produce in the trier of fact a firm conviction as to the allegation sought to be established." *Kelly* v. *Kelly,* 264 Ark. 865, 575 S.W.2d 672 (1979), citing *Brown* v. *Warner,* 107 N.W.2d 1 (1961).

In reviewing decisions of the Workers' Compensation Commission, we are limited to determining whether there is any substantial evidence to support the Commission's findings. *Ridgeway Pulpwood* v. *Baker,* 7 Ark. App. 214, 646 S.W.2d 711 (1983). In reviewing the Commission's finding that Mr. Vann developed an occupational disease, we must affirm unless we determine that fair-minded persons could not have found clear and convincing proof of the causal connection between the disease and Vann's employment. *Clark* v. *Peabody Testing Services,* 265 Ark. 489, 579 S.W.2d 360 (1979).

The Commission found that Vann's mesothelioma was caused by his exposure to asbestos during the 27 years he was employed at the Alcoa plant. Appellant argues that there was insufficient proof that Vann's exposure to asbestos while employed with Alcoa caused his mesothelioma.

After thoroughly reviewing the record, we believe there was sufficient evidence to support the Commission's finding that Vann had proved a causal connection between his

mesothelioma and his asbestos exposure at Alcoa by clear and convincing evidence.

Vann worked as a machinist for Alcoa from 1954 until his mesothelioma was diagnosed in 1981. He had several jobs prior to his employment with Alcoa. He began working for the Missouri Pacific Railroad in 1936 as a messenger boy and material hustler and eventually became a machinist's apprentice. In 1944 he entered the Navy and was discharged in 1946. He resumed railroad work in 1946 and continued to work for railroads until the early 1950's. He worked for short periods of time at the Pine Bluff Arsenal, the Timex plant, and Redmond Motors prior to his employment with Alcoa.

Vann's testimony clearly indicates that he had substantial exposure to asbestos during his years of work with Alcoa. His primary exposure to asbestos occurred when he overhauled turbines. The average overhaul took about six weeks. The turbines were surrounded by an asbestos cover which other workers removed so that the machinists could do their work. Although large blankets of asbestos were removed, a substantial residue of asbestos remained. Vann had to crawl under the turbines and knock bolts loose which would cause the asbestos residue to fall on him.

Vann also wore mittens and aprons made of asbestos in handling the hot materials that were used around the heat treating furnace. He testified that the material from the gloves and aprons would flake off after the items became worn. He also used asbestos rope and worked with asbestos gaskets and asbestos packing material, replacing the old packing and gasket material with new asbestos. In making new gaskets, Vann testified that prior to obtaining a circular gasket cutter in the 1960's, he had to cut gaskets from 4 x 8 sheets of asbestos material by laying the sheet over the edge of a table and hammering on the edge to cut the material. Asbestos particles from these sheets would break loose and become suspended in the air. It was only in later years that Alcoa provided Vann any breathing protection in the form of a double respirator to use while working on transite pipe which was made from compressed asbestos.

Two of Vann's supervisors, William T. Snow and George B. Mooney, corroborated Vann's testimony, describing heavy asbestos exposure especially during the 1950's and early 60's.

Vann also described his asbestos exposure prior to his employment with Alcoa. When he worked as a machinist mate in the Navy, he was involved in the repair of an asbestos covered pipe that ruptured while aboard ship. During his railroad work Vann testified that he did not work directly with asbestos in doing railroad machinist work but did work on boilers which were insulated with asbestos encased in metal covers. Vann testified that he worked with fiberglass but to what extent was not developed in the record. He testified that there was no asbestos used in the job at the Pine Bluff Arsenal, in the shop at Redmond Motors or at Timex.

The Commission heard medical testimony from three physicians who offered opinions relating to Vann's relative asbestos exposures and the cause of his disease. It was the opinion of Dr. Jacob Amir, one of Vann's treating physicians and an oncology specialist, that based on his treatment of Vann and the history given him by Vann, that Vann's mesothelioma was the result of his exposure to asbestos while working at the Alcoa plant. Dr. Amir pointed out that the vast majority of people develop mesothelioma from industrial exposure to asbestos as opposed to any casual exposure.

Dr. Arthur Squire, another of Vann's treating physicians and a specialist in internal medicine and pulmonary diseases, testified that exposure to asbestos was well documented as the causal factor in developing mesothelioma. He felt that Vann's mesothelioma was due to exposure to asbestos at Alcoa. His opinion was based in part on the detailed 27-year history of continuous asbestos exposure with Alcoa and the fact that such exposure so nearly described the "text book" example.

Dr. Joseph Bates, Chief of Medical Services at the Veteran's Administration Hospital and Vice-Chairman of the Department of Internal Medicine at the University of

Arkansas School of Medicine, felt that there was no way of determining if Vann's mesothelioma was the result of his exposure to asbestos while working in the Alcoa plant. He pointed out that many people who contracted mesothelioma had no known exposure to asbestos; that the lag time for those with asbestos exposure averaged 38 years; that there was little evidence that asbestos related mesothelioma was dose related; and that fiberglass exposure could also be a cause of mesothelioma.

The Commission found the evidence to be clear and convincing that Vann had developed mesothelioma as a result of his heavy asbestos exposure while employed with Alcoa. There is substantial evidence to support this finding. The testimony clearly details Vann's direct asbestos exposure during his 27 years with Alcoa. The testimony also indicates that Vann's asbestos exposure prior to his employment with Alcoa was more or less indirect and infrequent. As for the conflicting medical opinions, it is for the Commission to make findings concerning the weight and credibility of the testimony. *Gordon* v. *Hadley Construction Co.*, 256 Ark. 577, 509 S.W.2d 287 (1974). There is no requirement that a finding by the Commission be based on evidence which is medically certain. *Kempner's* v. *Hall*, 7 Ark. App. 181, 646 S.W.2d 31 (1983). We cannot say that fair-minded persons would not be convinced that Vann's asbestos exposure was attributable to his employment with Alcoa.

Appellant relies on *Ark. Dept. of Correction* v. *Chance*, 271 Ark. 472, 609 S.W.2d 666 (Ark. App. 1980) to support his argument that the evidence was insufficient. In *Chance*, this Court reversed a finding by the Commission that the claimant had contracted tuberculosis as a result of exposure to contaminated inmates at the prison farm where he was employed. *Chance* can be distinguished from the case at bar. In *Chance*, the court noted that the record was completely devoid of any proof that Mr. Chance came into contact with any specific inmate under treatment for tuberculosis, and that there was no proof of any contact by Mr. Chance with any of the three per cent of the inmates receiving treatment for inactive tuberculosis. The court in

*Chance* went on to state:

> On the state of this record the Commission would necesarily [sic] have to speculate as to if and when the "last injurious exposure" occurred. Even when the testimony is given its strongest weight in favor of the appellee, as we must do on appeal, the facts fall short of constituting substantial evidence necessary to prove by "clear and convincing evidence" when and where the disease was contracted. There is some conflict in the claimant's own proof on this point.

Whereas, in the case at bar, the facts definitely point to claimant's regular and direct exposure to asbestos at Alcoa's plant for some 27 years.

Also, under *Sanyo Manufacturing Corporation* v. *Leisure,* 12 Ark. App. 279, 675 S.W.2d 841 (1984), the facts in *Chance* fall short of meeting the criteria necessary for a finding of an occupational disease. In *Sanyo,* this Court pointed out that in order to qualify as an occupational disease, the disease must be one, the hazard of which is peculiar to the particular process or employment. The hazard of contracting tuberculosis was not characteristic of the claimant's work at the prison farm in the *Chance* case. In Mr. Vann's situation, however, the hazard of contracting an asbestos related disease was characteristic of his work at Alcoa where exposure to asbestos was so prevalent.

While there is evidence to the contrary, we cannot say that fair-minded persons could not have been convinced that Vann's mesothelioma was attributable to his asbestos exposure at Alcoa based upon the evidence in the record. Therefore, we affirm.

Affirmed.

CRACRAFT, C.J., agrees.

GLAZE, J., concurs.

D. T. HARGRAVES, Jr. *v.* Richard H. HARGRAVES and Mary Blanche HARGRAVES

CA 83-465 686 S.W.2d 816

Court of Appeals of Arkansas
En Banc
Opinion delivered April 3, 1985

*David Solomon,* for appellant.

*Daggett, Van Dover, Donovon & Cahoon,* by: *Jimason J. Daggett,* for appellees.

MELVIN MAYFIELD, Judge. D. T. Hargraves, Sr., died in June of 1982. He was survived by his wife, Mary Blanche Hargraves, and their two sons, D. T. Hargraves, Jr., and Richard H. Hargraves. He left a will that makes certain specific legacies and devises and then creates two trusts. One trust is given that share of the decedent's residuary estate that will ensure the maximum marital deduction allowed for Federal Estate Tax purposes. His widow is named as the sole beneficiary of this trust with the right to dispose of its assets in her lifetime or by will. The residue of this trust, and the residue of the estate, passes to the second trust. This trust makes income provisions to the widow for her life and, upon her death, the assets go equally to the two sons. D. T. Hargraves, Jr., is nominated as executor of the estate and as trustee of both trusts. If he is not able or willing to serve, the will designates the other son, Richard, to serve as executor and trustee.

On June 18, 1982, the will was admitted to probate and D. T. Hargraves, Jr., was appointed executor. Subsequently Richard Hargraves filed a petition in the probate court seeking to remove his brother as executor. After a hearing, an order was entered on November 12, 1982, granting the petition and appointing Richard as executor in succession. A few days later, Richard and his mother filed a petition in chancery court asking for an order "dismissing and disqualifying" D. T. Hargraves, Jr., as trustee of the two trusts and asking that Richard be named trustee in

succession. After a hearing on this petition, D. T., Jr., was enjoined and removed from serving as trustee and Richard was appointed trustee in succession. This is an appeal from that order. There is no appeal from the order of the probate court removing D. T., Jr., as executor and appointing Richard executor in succession.

The first point raised on appeal is that the chancery court erred in admitting the transcript of the proceedings in probate court into evidence in the chancery court hearing. The appellees point out that the only objection to the introduction of this transcript was to its relevancy. They say that the issue in probate was the misconduct of the executor, D. T. Hargraves, Jr., in the handling of the assets of the estate and that this is relevant in the chancery court hearing on the question of whether the same person should be trustee of the same assets. Appellees cite II Scott, *The Law of Trusts,* § 107 at 841 (3d ed. 1967), which states:

> Where a person is both executor and trustee, and he is guilty of such misconduct as executor as to cause his removal as executor, ordinarily he will be removed also as trustee, even though the two offices are not inseparably connected. . . . Where the same person is executor and trustee, evidence of his misconduct as executor is admissible in a suit to remove him as trustee.

Scott cites *Wylie* v. *Bushnell,* 115 N.E. 618 (Ill. 1917), in support of the last sentence of the above quote. That case held that in a hearing to remove Wylie as trustee, reports that he had filed as executor were admissible to contradict or impeach the reports he filed as trustee. While the statement from Scott seems broader than the case cited for its support, a case directly in point has relied upon the statement for its holding. *See In re Marshall's Will,* 65 N.E.2d 523 (Ohio Ct. App. 1946). At any event, we find no error in the trial court's holding that the evidence of misconduct by D. T. Hargraves, Jr., as executor was *relevant* in the hearing to remove him as trustee.

Appellant's second point is that the chancery court did

not have jurisdiction to enjoin or remove him from acting as trustee since the trusts were not in being at the time of the court's order. We think the answer to that contention is found in appellees' quotation from Bogert, *The Law of Trusts and Trustees* § 526 (rev. 2d ed. 1978) as follows:

> In some cases the question has arisen as to when removal proceedings may be brought, for example, when it is sought to remove a trustee for unfitness before he has taken any action in the affairs of the trust. The criterion in such a case seems to be that the trust must be in existence *as an established legal relationship,* but whether acceptance has been signified or performance of duties begun is immaterial. (Emphasis added.)

The appellant's contention is founded on a statement in the concluding paragraph of the opinion in *Alexander* v. *First National Bank of Ft. Smith,* 278 Ark. 406, 411, 646 S.W.2d 684 (1983), where the court says, "Here, the residuary trust does not come into existence until the estate is closed. Until then no trust is created and jurisdiction remains in probate." The appellees explain this statement by pointing out that the issue to which it was directed was the validity of the order of the probate court awarding attorney's fees. Appellees are arguing, as we understand it, that the court in *Alexander* was answering the objection that only chancery court had jurisdiction to allow fees for services relating to the residuary trust by saying that the fee involved was allowed for services performed for the bank as executor; that there was money paid to the bank as a result of those services; and that the fee was allowed by the probate court for services to the estate, not to the residuary trust which would receive no funds until the death of the widow.

Appellees' suggestion as to the meaning of the statement from *Alexander* is reasonable and does not conflict with the above statement from Bogert that a trustee may be removed if the trust is in existence *as an established legal relationship.* Scott indicates agreement with Bogert as to the existence of a trust by stating:

> A trust can be created although the parties do not know precisely what the subject of the trust is, if it can be ascertained from circumstances existing at the time of the creation of the trust. Thus a trust created by will of the residue of the testator's estate is of course valid although the amount of the residue cannot be ascertained until the amount of his assets and of his liabilities has been determined.

I Scott, *The Law of Trusts* § 76 at 685 (3d ed. 1967). We think the chancery court had jurisdiction to make the order enjoining or removing appellant as trustee.

Appellant's third point is that, if the court had jurisdiction, it erred in appointing his brother, Richard, as trustee in succession, but should have exercised its discretion to appoint an independent trustee. The chancellor's letter opinion, which enjoined and removed appellant from serving as trustee, contains the following findings:

> It would serve no useful purpose to review the evidence. It simply is not in the best interest of the beneficiaries for the trustee to continue. Clearly, there is longstanding ill-will and hostility between the brothers. The trustee's relationship with his mother is lamentable. Considering all these matters together (conflict of interest, reluctance to include assets of the decedent in the Inventory, malfeasance in office), the Court determines that the trustee must be removed.

The appellees contend that Richard should be allowed to serve as trustee because the will nominated him to serve in the event D. T., Jr., is "not able or willing" to serve. However, their brief in arguing that appellant should be removed as trustee, speaks convincingly to the effect that neither brother should serve as trustee.

> The trial court removed the trustee partly on the basis of the hostility and animosity which the trustee held for his mother, the principal beneficiary under the trust. The decision was soundly bottomed in fact and law. D. T. Hargraves, Jr., albeit reluctantly, finally admit-

> ted that he had gone to his mother's home, following his removal as executor, and in anger had stripped from her wall her only picture of him, announcing to her, in essence, that he did not want to continue a mother-son relationship with her and admitted that he had neither spoken to her, been in her home, nor addressed any communication of any sort whatsoever to her since that incident (Tr. 96-97). He confessed intense animosity toward his co-beneficiary in the other trust, his brother (Tr. 91-92). . . .
>
> . . . .
>
> Here, Mary Blanche Hargraves, as the sole beneficiary of one of the trusts, is one of the petitioners seeking the removal of D. T. Hargraves, Jr. as trustee. The terms of the trust require the trustee to have frequent contact with the cestui que trustents (see Item VIII of the Will, Tr. 21). Paragraph (b) provides: "The Trustee, *in his sole discretion,*" shall distribute to the cestui que trustent.

Richard Hargraves testified that at one time he was in an insurance agency with his father and the appellant, but that he left the partnership in 1977; that there had been bitterness between him and his brother for twenty-two years; that their father knew they did not get along, but that he probably did not know the full extent of the hostility between them.

We have to add to the above circumstances the provisions of the will that allows the trustee, when the first trust is exhausted, to distribute to Mary Blanche Hargraves during her lifetime *so much or all of the income and corpus* of the second trust as in the sole discretion of the trustee shall be necessary or advisable for her support, health and general welfare, and that upon her death the property left in the trust goes to each son equally.

Given the circumstances above and the possibility that Richard could distribute all the income and corpus of the estate to his mother and leave nothing for D. T., Jr.; that a

portion of the assets of the estate is the deceased father's interest in the insurance agency that the father and D. T., Jr., operated and the probability of conflict between the brothers in that regard; that, *in the trustee's discretion,* each son's share of the trust may be distributed to him, or to his descendants, for support, medical care, education or general welfare, and that the will allows the trustee to serve without bond and without accounting or supervision by any court, we think the court should have appointed an independent trustee instead of either brother.

In *Blumenstiel* v. *Morris, Executor,* 207 Ark. 244, 250, 180 S.W.2d 107 (1944), the court quoted from a work that recognized that personal hostility between trustee and beneficiary is not *per se* a ground for removal of the trustee, but said:

> [S]uch personal hostility is a factor to be taken into consideration, and will justify removal of the trustee where it appears that the personal hostility of the parties combines with other circumstances to render removal of the trustee essential to the interests of the beneficiary and the due execution of the trust. . . .

Although the appellate court affirmed the trial court's refusal to remove the trustee in *Blumenstiel,* the evidence of hostility and surrounding circumstances were far short of those here. Also, we note in *Festinger* v. *Kantor,* 272 Ark. 411, 616 S.W.2d 455 (1981), the court did not reverse the failure to remove trustees but suggested on its own motion, as the case was remanded anyway, that the hostility between the parties should be reviewed "in the light of the present situation which may well warrant a neutral trustee." *Id.* at 429.

We affirm the trial court's decision to enjoin and remove the appellant from serving as trustee but reverse the appointment of Richard Hargraves as trustee in succession, and remand for the court to appoint a neutral, independent trustee.

CRACRAFT, C.J., not participating.

GLAZE, J., dissents.

TOM GLAZE, Judge, dissenting. I respectfully disagree with the majority on each of the three points addressed, and I discuss the points in the order they are presented in the majority opinion.

First, the majority rejects appellant's contentions that admission of the transcript of the October 26, 1982, probate proceedings was improper and constitutes reversible error. While I do agree with the court's ultimate decision on this point, I do so for another reason. Appellant contends the only applicable rules on admissibility of the transcript are Rule 80 of the Rules of Civil Procedure and Rule 804 of the Uniform Rules of Evidence. Rule 80 provides for introduction of a transcript of a former trial between the same parties "when [that transcript is] admissible." Rule 804 provides an exception to the hearsay rule when a witness is unavailable. Appellant asserts that here, there was no claim that the witnesses at the former hearing were unavailable or were even called to testify in the chancery court hearing on appellant's removal as trustee. The short answer to appellant's contentions is that his objection on appeal has an entirely different basis than his objection below, when he objected to introduction of the transcript because it was irrelevant. The trial court found it relevant and admitted it on that basis. No error occurred in the judge's admission based upon relevancy, and our court cannot consider appellant's arguments based upon Rules 80 and 804 because they were not raised below. *Missouri State Life Insurance Co.* v. *Fodrea,* 185 Ark. 155, 46 S.W.2d 638 (1932).

The majority also rejected appellant's second argument that the chancery court did not have jurisdiction to remove him as trustee or to enjoin him from acting as trustee because the estate was still in probate so that the testamentary trusts were not yet in being. Here, the majority simply fails to understand or address appellant's argument, and as a consequence, rests its decision on citations of authority which are inapplicable. Appellant cites *Alexander* v. *First National Bank of Fort Smith,* 278 Ark. 406, 646 S.W.2d 684 (1983), for the proposition that the trusts created by a testator's will cannot take effect until after the estate has been

probated.[1] While appellant phrases his issue in terms of when the trust commences, the majority discusses the validity of a trust when the corpus cannot be ascertained.

The *Alexander* case can be distinguished from the instant case because the issue there concerned when the *administration* of a residuary trust *began, not* when the *trust* itself was *created.* By definition, a testamentary trust is "one created by the terms of a will . . . [to] take effect . . . [at] the testator's death." G. Bogert, *The Law of Trusts and Trustees* § 1031 (2d ed. 1969). Because the testator's estate must be administered first, the trust may not be fully funded until completion of the probate administration several years after the testator's death. *Id. See* 1 A. Scott, *The Law of Trusts* § 53 (3d ed. 1967); *see also* G. Bogert, *Handbook of the Law of Trusts* § 10 (5th ed. 1973). The issue in *Alexander* concerned an award of attorney's fees and whether the probate court or the chancery court had jurisdiction to make the award. The Supreme Court said that the award of fees was properly made by the probate court because the estate was not yet closed and the residuary trust had not yet come into existence. In other words, the fees obviously were awarded for legal work done in connection with the administration of the estate, not the trust, and therefore that award was properly made by the probate court. The question was not whether the trust had been created — which it had been by the terms of the testator's will. In the instant case, the question is simply when the trust itself was created; it was created at the testator's death.

Appellant's last point for reversal is that the court erred in appointing Richard H. Hargraves successor trustee because of hostility existing between him and his brother, the appellant. Neither appellant nor the majority cite any legal authority for the proposition that the trial court should appoint an independent trustee in appellee's stead. By his will, the testator named appellee Richard H. Hargraves as successor trustee in the event that D. T. Hargraves, Jr., became unable to serve. Under the circumstances, the judge

[1]This specific statement is not consistent with my understanding of trust law, but the statement was not really necessary in deciding any issue in *Alexander.*

was not clearly erroneous in appointing appellee successor trustee.

Although personal hostility between the trustee and the beneficiaries is a factor for the judge to consider, it is not *per se* a ground to remove a trustee. *Blumenstiel* v. *Morris,* 207 Ark. 244, 180 S.W.2d 107 (1944). In the instant case, the testator was aware of the hostility between his sons at the time he named them trustee and successor trustee in his will. It will be no more difficult for Richard Hargraves to serve as trustee in view of the hostility between him and his brother than it would have been for D. T. Hargraves, Jr., to serve. D. T.'s removal was based upon his misconduct, not upon hostility. The majority conjectures, having no evidence of misconduct on either appellee's or the mother's part, that appellee might distribute to the son's mother all the income and corpus in the trust. As discussed already, the judge removed the appellant as executor for misconduct, and he has the power to remove appellee as trustee if the facts so warrant. However, on the facts as they stand now, I fail to see any abuse of discretion in the chancellor's effectuating the wishes of the testator in naming Richard Hargraves successor trustee.

I would affirm.

Lonnie OLIVER *v.* STATE of Arkansas

CA CR 84-135 687 S.W.2d 850

Court of Appeals of Arkansas
En Banc
Opinion delivered April 3, 1985

*William Simpson, Jr.,* Public Defender, by: *Arthur L. Allen,* Deputy Public Defender, for appellant.

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

MELVIN MAYFIELD, Judge. The appellant was convicted in a jury trial of the offense of burglary and was sentenced to five years in the Department of Correction and assessed a fine of $1,000.00. We affirm.

Appellant's first argument is that the evidence was insufficient because it did not show intent to commit an act punishable by imprisonment.

A Little Rock policeman testified that in the early morning hours of October 9, 1983, he responded to an alarm call at Stephens School. After finding the doors on the east side of the building locked, he walked around a corner of the building and saw a pair of feet coming out of a window. He stepped back and watched a man, whom he identified as the appellant, climb out the window. The policeman called for the man to halt, but he started running, jumped two fences, raced through the neighborhood, and was finally taken into custody when found hiding on the back porch of a house about three blocks from the school.

The officer testified there was a security light in the area where the man climbed out of the window and that he could be clearly seen. There was testimony by the officer and school personnel that the window was in a room in which desk drawers and file cabinets had been opened, and things had been scattered all over the floor. The window had been broken, the wires to the alarm system had been cut, and a bicycle, identified by appellant's girl friend as belonging to him, was found near the broken window.

Burglary is committed by entering or remaining unlawfully in an occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment. Ark. Stat. Ann. § 41-2002 (Repl. 1977). Under Ark. Stat. Ann. § 41-2001(1), a building where people

assemble for purposes of education is an occupiable structure regardless of whether it was occupied at the time of the crime. *Barksdale* v. *State,* 262 Ark. 271, 555 S.W.2d 948 (1977). However, in *Norton* v. *State,* 271 Ark. 451, 609 S.W.2d 1 (1980), the court acknowledged that *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975), held that due process requires the prosecution to prove beyond a reasonable doubt every element of the crime charged; and the *Norton* opinion stated that specific criminal intent and illegal entry are both elements of the crime of burglary, and that existence of the intent cannot be presumed from a mere showing of the illegal entry. In *Norton* the conviciton of burglary was reversed because, "At most, the evidence revealed the appellant was standing inside the doorway of an office building which he had illegally entered and from which nothing was taken." So the appellant contends that since, in the instant case, nothing was taken from the school, there is no evidence that he intended to commit a crime punishable by imprisonment.

We think, however, there is evidence here, not present in *Norton,* that is sufficient to support a finding of the requisite intent. In *Golden* v. *State,* 10 Ark. App. 362, 664 S.W.2d 496 (1984), we said evidence that the appellant had rifled a secretary's desk and removed some Band-Aids after an illegal entry into the building was direct evidence of his intent to commit a misdemeanor theft which is punishable by imprisonment. And in *Jimenez* v. *State,* 12 Ark. App. 315, 675 S.W.2d 853 (1984), we held evidence that items had been wrapped in curtains torn from a living room window, and that dishes, glasses and silverware had been wrapped in towels and placed in a large pail was sufficient to support a finding that the appellant, who was arrested inside an unoccupied house he had broken into, intended to commit a theft punishable by imprisonment. The evidence here is somewhat similar to that in *Golden* and *Jimenez.*

In addition, in this case, there is evidence that the appellant fled from the police officer and *Norton* said, "We have consistently suggested that the flight of an accused to avoid arrest is evidence of his felonious intent." Furthermore, the evidence here is sufficient to establish criminal

mischief in the second degree, Ark. Stat. Ann. § 41-1907 (Repl. 1977), a class B misdemeanor punishable by not more than 90 days imprisonment in the county jail, Ark. Stat. Ann. §§ 41-901 and 41-902 (Repl. 1977). Of course, the jury's verdict was based largely upon circumstantial evidence, but it presented a question for the jury to determine. *Drew* v. *State,* 8 Ark. App. 120, 648 S.W.2d 836 (1983). On appeal we view the evidence in the light most favorable to the State, *Johnson* v. *State,* 7 Ark. App. 172, 646 S.W.2d 22 (1983), and when viewed in that light we find that the verdict is supported by substantial evidence.

Appellant's second argument is that a mistrial should have been granted because of a remark made during the prosecuting attorney's closing argument.

This is a matter that has been carefully considered in a number of cases. In *Phillips* v. *State,* 12 Ark. App. 319, 676 S.W.2d 753 (1984), we recognized that a prosecuting attorney's comment on the failure of the accused to testify violates the privilege against self-incrimination granted by the fifth amendment to the United States Constitution. *See Griffin* v. *California,* 380 U.S. 609 (1965) and *United States* v. *Hasting,* 461 U.S. 499 (1983). *Phillips* also discussed the Arkansas cases dealing with this issue and there is no need to reiterate that discussion here. The sum of the matter is that the prosecutor may not make any direct reference to the failure of the accused to testify but may argue the weight of the evidence and state that the testimony of a witness is uncontradicted; however, undue repetition of the fact that the evidence is uncontradicted or the use of language calculated to call the jury's attention to the failure of the accused to testify, will cause a mistrial or reversal. *See Moore* v. *State,* 244 Ark. 1197, 1209, 429 S.W.2d 122 (1968) and Hall, *The Bounds of Prosecutorial Summation in Arkansas,* 28 Ark. Law Rev. 55 (1974).

In this case the prosecutor said in his closing argument:

> As we told you in voir dire and we went through this quite a bit and all during the trial we've got two elements that we've got to prove. Three if you count the

> defendant being there and Officer Cullison said that was him. So let's make a little triangle here for the defendant and set him aside over here because Officer Cullison's testimony is unrefuted.

Counsel for appellant interrupted and at the bench, out of the jury's hearing, he objected on the basis that the prosecutor had made a comment on the defendant's not testifying, and counsel asked for a mistrial. The prosecutor responded by saying that the testimony of the officer was that he saw the defendant and that defense counsel could have asked on cross-examination whether Officer Cullison was mistaken about defendant's identity, but he did not. The prosecutor told the court that what he had said was a comment on defense counsel's cross-examination of the officer and the officer's testimony rather than on defendant's failure to testify.

We said in *Phillips:* "The prosecutor must be able to argue the weight of the evidence, including the fact that the witness' testimony was consistent and uncontradicted." And the Arkansas Supreme Court said in *Perry* v. *State,* 277 Ark. 357, 372, 642 S.W.2d 865 (1982):

> We are not in a position to know how the statement was delivered, with what inflections and emphasis, and are not able to see how the jury perceived it. The trial court has a broad latitude of discretion in supervising and controlling arguments of counsel and its decisions are not subject to reversal unless there is manifest abuse of that discretion.

In our case, the trial judge saw and heard the whole occurrence. The record shows that after the jury argument was completed, the judge went into chambers and listened to the tape of this matter. He obviously gave it careful consideration and we cannot say he erred in refusing to grant a mistrial.

The final argument made by appellant is that the court erred in refusing to allow the jury to take the written jury instructions into the jury room during its deliberations.

The record shows that after the jury had been instructed and closing arguments had been made, the court went into chambers with the attorneys to listen to the tape of the closing argument in order to pass upon the appellant's motion for mistrial as has been discussed above. After denying the motion for mistrial, the record discloses the following exchange between the court and counsel:

> THE COURT: If the State has no objection to it I will provide all of the instructions then to the jury.
>
> [PROSECUTING ATTORNEY:] Can we tear off the second part or — I am concerned about the one on the criminal trespass.
>
> THE COURT: Also on my instruction on breaking and entering that was just some cursory notes that I had made.
>
> [DEFENSE ATTORNEY:] I don't know that they need the penalty instructions since they have the verdict forms.
>
> THE COURT: I am going to change my mind. I am not giving them the instructions unless they request and then I will give them all of them.
>
> [PROSECUTING ATTORNEY:] In the meantime we can get some other ones up here changing or get a copy of criminal trespass as given.
>
> THE COURT: Right. We can cut that paragraph off of here if you want to.
>
> [DEFENSE ATTORNEY:] Your Honor, that is over my objections that you are not going to give the jury the instructions.
>
> THE COURT: All right. Bring the jury back in.

The appellant calls attention to Rule 33.3 of the Rules of Criminal Procedure which provides that it shall be the duty of the judge, upon request of counsel for any party, to deliver to the jury immediately prior to its retirement for deliber-

ation, a typewritten copy of the oral instructions read to the jury. Relying upon the case of *Parker* v. *State,* 270 Ark. 897, 606 S.W.2d 746 (1980), the appellant contends that the trial judge in the instant case committed reversible error by failing to give the jury the written instructions to take into the jury room. While *Parker* holds that it is prejudicial error for the court to fail to do this, when requested to do so, we think there are circumstances in the present case which prevent the rule in *Parker* from applying.

In the first place, it will be observed from the exchange between the court and counsel that the idea of sending the instructions into the jury room originated with the judge, and that defense counsel stated he did not think the jury needed the penalty instructions since they would have the verdict forms. In *Waganer* v. *Travelers Ins. Co.,* 269 Ark. 976, 601 S.W.2d 277 (Ark. App. 1980), the court was concerned with Ark. Stat. Ann. § 27-1732.1 (Repl. 1979), which contained provisions very similar to those in criminal procedure rule 33.3. In that case, the court held that it was reversible error to deliver instructions to the jury in a manner that emphasized one instruction over others. The court said, "The better practice would have been for the court to have given a complete set of typewritten instructions to the jury when it became apparent the jury would have before it, in writing, a portion of an instruction."

We think the principle of the *Waganer* case applies to the present case and that counsel for the appellant is not in a position to urge as error the court's failure to give the jury the written instructions when counsel himself suggested that the court not give all of the instructions to the jury. We also think it is significant that the next thing that occurred was the court's statement that he was changing his mind and was not going to give the instructions to the jury unless they requested them.[1]

[1]There is a court reporter's notation in the transcript to the effect that after the jury had deliberated for about an hour, the bailiff reported "the jury wanted the instructions which the Court refused to send back to the jury room." Although the note is ambiguous, it is clear that the request came too late for rule 33.3 to apply since the rule requires that the instructions must be delivered to the jury *prior to its retirement for deliberation.*

It is also apparent from the exchange between the court and counsel that there were notations on two of the instructions that the court felt should not be seen by the jury. While we do not know what the notations were, we must presume, at least in the absence of a record which demonstrates otherwise, that the court was correct in determining that they should not be seen by the jury. *Poindexter* v. *Cole,* 239 Ark. 471, 389 S.W.2d 869 (1965); *Haynie* v. *Dicus,* 210 Ark. 1092, 199 S.W.2d 954 (1947). In addition, it has long been the duty of counsel to prepare and submit to the court any instruction which counsel wants the court to give to the jury and that a party failing to do this cannot complain that the requested instruction was not given. *Mizell* v. *West,* 229 Ark. 224, 314 S.W.2d 216 (1958); *Bovay* v. *McGahhey,* 143 Ark. 135, 219 S.W. 1026 (1920).

We think the appellant had the duty of either offering to the court instructions that did not have notes on them or requesting that the court obtain "clean" instructions before the jury was allowed to begin its deliberations. The fact of the matter is that appellant's counsel never really requested that the instructions go to the jury. Under the circumstances of this case, we think the mere objection, made when the judge changed his mind, was not sufficient.

Affirmed.

CRACRAFT, C.J., GLAZE and CORBIN, JJ., dissent.

TOM GLAZE, Judge, dissenting. As criminal appeals go, this one is relatively simple. Rule 33.3 of the Arkansas Rules of Criminal Procedure and the case of *Parker* v. *State,* 270 Ark. 897, 606 S.W.2d 746 (1980), control the facts of this cause. I submit the special circuit judge's failure to follow Rule 33.3 as interpreted by the Supreme Court in *Parker* is clearly reversible error.

The judge's error concerns his failure to deliver typewritten instructions to the jury. Rule 33.3, in pertinent part, provides that upon request of counsel for any party, it shall be the duty of the presiding judge to deliver to the jury immediately prior to its retirement for deliberation, a

typewritten copy of the oral instructions given to the jury. In *Parker,* the Supreme Court held it is prejudicial error for the court to fail to do so.

Prior to the jury's deliberation in the instant case, the following discussion over jury instructions took place between the trial judge and counsel for the State and for the appellant:

> THE COURT: If the State has no objection to it I will provide all of the instructions then to the jury.
>
> MR. MONTGOMERY: Can we tear off the second part or — I am concerned about the one on the criminal trespass.
>
> THE COURT: Also on my instruction on breaking and entering that was just some cursory notes that I had made.
>
> MR. ALLEN: I don't know that they need the penalty instructions since they have the verdict forms.
>
> THE COURT: I am going to change my mind. I am not giving them the instructions unless they request and then I will give them all of them.
>
> MR. MONTGOMERY: In the meantime we can get some other ones up here changing or get a copy of criminal trespass as given.
>
> THE COURT: Right. We can cut that paragraph off of here if you want to.
>
> MR. ALLEN: *Your Honor, that is over my objections that you are not going to give the jury the instructions.*
>
> THE COURT: All right. Bring the jury back in.

Appellant's counsel objected and made it clear to the trial court that he wanted the instructions delivered to the jury. On its facts, the State's burglary case against appellant

was close, and the instructions regarding the lesser included offenses — breaking and entering and criminal trespass — were important alternatives for the jury to consider in this cause. The judge admittedly placed some "cursory notes" on his breaking and entering instruction, and these notes figured in his decision not to give the instruction to the jury. Of course, when appellant's counsel requested that the instructions be given to the jury, the court should have obtained clean copies or excised the notes from the instructions it had. Neither was done, and as a consequence, the trial court failed to comply with Rule 33.3. The entire colloquy between the court and counsel is set out above, and the majority's suggestion that appellant's counsel did anything to cause the trial judge's error is pure mythology.

In conclusion, I note that the majority places much emphasis on a civil case, *Waganer* v. *Travelers Insurance Co.*, 269 Ark. 976, 601 S.W.2d 277 (Ark. App. 1980) to support its decision. After reading *Waganer,* I can only say the State does not cite it, and in my opinion, the court in *Waganer* said nothing to diminish a trial judge's duty regarding the delivery of instructions pursuant to Rule 33.3.[1] In fact, the applicable civil statute in *Waganer* required the judge to deliver a typewritten copy of the instructions to the jury when *all parties* request it. Here, Rule 33.3 requires such instructions delivered when requested by *either party or the jury.* The record reflects that both the appellant and the jury requested the instructions, but the trial judge refused to deliver them — even when he previously had stated he would give the jury all of the instructions if it requested them. As both the trial judge and prosecutor had indicated, counsel and the court could have obtained clean copies of the instructions to give the jury upon its request. I believe the judge clearly erred in failing to

[1]In *Waganer,* this court reversed because the trial court gave the jury a copy of the insurance policy in question which emphasized a definition of a term contained in one of the instructions that the court previously had read to the jury. The court stated the better practice would have been for the trial court to have given a complete set of typewritten instructions. In any event, the jury here requested the instructions — not an exhibit as in *Waganer* — and under Rule 33.3, the judge was required to give all of them to the jury.

honor either the appellant's or jury's request that copies of the instructions be delivered to the jury.

I dissent.

CRACRAFT, C.J., and CORBIN, J., join in this dissent.

George Wilson PENNYBAKER *v.*
Sally Hill PENNYBAKER

CA 84-372 687 S.W.2d 524

Court of Appeals of Arkansas
Division I
Opinion delivered April 3, 1985

*Douglas W. Parker,* for appellant.

*Gean, Gean & Gean,* by: *Lawrence W. Fitting,* for appellee.

TOM GLAZE, Judge. Appellant appeals from a divorce decree because of his dissatisfaction with the chancellor's division of the parties' properties. Appellant's sole contention is that the trial court erred in not complying with Ark. Stat. Ann. § 34-1214 (Supp. 1983), by failing to state in

writing its basis and reasons for not returning appellant's nonmarital property to him. However, his disagreement with the trial court's decision extends to the court's treatment of some of the parties' marital property as well. Appellant claims that it did not divide the property equally and that it gave no reasons for not having done so. We disagree and therefore affirm.

The statutory provisions in issue are set forth in § 34-1214(A)(1), (A)(2) and (B). Under § 34-1214(A)(1), the trial court must equally divide the parties' marital property between them unless the court finds and states in the order its basis and reasons for not doing so. With the exception of those items listed in § 34-1214(B)(1) through (5), marital property is defined as all property acquired by either spouse subsequent to the marriage. Nonmarital property, on the other hand, must be returned to the party who owned it prior to the marriage unless the court states in writing its basis and reasons for dividing it otherwise. In unequally dividing either marital or nonmarital property, the court must consider those factors enumerated in § 34-1214(A)(1), *viz.*, the length of the marriage; age, health and station in life of the parties; occupation of the parties; amount and sources of income; vocational skills; employability; estate, liabilities and needs of each party and opportunity of each for further acquisition of capital assets and income; contribution of each party in acquisition, preservation or appreciation of marital property, including services as a homemaker; and the federal income tax consequences of the court's division of property.

In the instant case, the appellant and appellee each brought property into the marriage, but appellant's was the more substantial. In fact, appellant's underlying argument in this appeal is that the trial court's award to appellee failed to take into consideration the disparate amounts each party owned before their marriage, and that the court did not trace and distribute their respective property interests as required in *Potter* v. *Potter,* 280 Ark. 38, 655 S.W.2d 382 (1983).

Appellant's two major premarital assets were a trailer park and the house in which the parties lived. Appellee

brought into the marriage a mobile home and savings in the amount of $1,263.00. Appellee's premarital property was subsequently utilized in underwriting appellant's defense against a criminal prosecution. During their marriage, the parties also sold appellant's trailer park for $200,500.00 which was payable in monthly payments of $1,813.55.[1] At the time of their divorce, the parties still retained the homeplace.

In granting appellee the divorce, the trial court ordered certain marital property sold and the proceeds equally divided between them. It also awarded them the vehicles each brought into the marriage. In considering their other marital and nonmarital interests, the court awarded the homeplace to appellant and ordered $500.00 to be paid appellee from the $1,813.66 monthly payments due under the contract of sale of the trailer park. At the time of divorce, eighty-six payments were due on the contract — which, under the court's decree, results in awarding $43,000 to appellee and $112,974 to appellant if all payments are made.

In making its awards, the trial court recited in its decree the factors enumerated in § 34-1214(A)(1). The decree also set forth the following additional findings or reasons:

> [T]he . . . [appellee] has contributed much time in accounting and services which she performed in connection with the business which was operated by these parties during their marriage and that such was of great benefit to said business and the court finds that personal property of the [appellee] which was non-marital property was used in the business which was conducted by these parties during the time that they were living together as husband and wife, and that such business was operated on property owned by the [appellant] prior to marriage.

[1]Actually, this was the net amount distributed between the parties after deducting a monthly payment of $369.43 on a mortgage against the property.

Although appellant urges that the trial court failed to state its basis and reasons for making its award, his actual argument is that the court's reasons are insufficient and fail to support the unequal award it made. In his argument, appellant attempts to detail the parties' respective properties and contributions to their marriage, and he claims if one construes the evidence most favorably to the appellee, she is entitled only to $26,747, not $43,000. In so calculating, appellant credits appellee with her premarital interests and lists joint contributions made on the homeplace and trailer park business. Appellee responds with her own statistics, claiming appellant omitted certain marital contributions she made during the marriage and which were supported by the evidence and considered by the trial court in its award.

As we have stated earlier, the chancellor had authority to make an unequal division of the parties' personal property so long as he considered the factors set forth in Ark. Stat. Ann. § 34-1214(A)(1) (Supp. 1983). *Cantrell* v. *Cantrell,* 10 Ark. App. 357, 664 S.W.2d 493 (1984). Here the trial judge made an unequal division and stated his reasons for doing so. Unless his findings are clearly against the preponderance of the evidence, we will not reverse. *Carrick* v. *Carrick,* 13 Ark. App. 42, 679 S.W.2d 800 (1984). While the trial court's reasons and findings could have been more exacting, we cannot say from our *de novo* review that it clearly erred. For example, although appellant argues that at most the appellee is entitled to $26,747, he omits any reference to her age (67 years old), her employability, or the facts that she kept books for the trailer business for fifty months and was a homemaker for six and one-half years. Furthermore, appellee and her witness (appellant's ninety year old foster mother) testified that appellee worked long hours in caring for and maintaining both the homeplace and trailer park. Appellee also claimed interest (as a gift) in nine rooms of furniture which the trial court awarded appellant. In its decree, the trial court recited the factors enumerated in § 34-1214 and other reasons it considered when making its awards. In his review of the evidence, appellant falls short in demonstrating that the trial court failed to state its reasons for its distribution of the property; nor did appellant show

that the court's findings and reasons were clearly erroneous.[2] Therefore, we affirm.

Affirmed.

COOPER and CLONINGER, JJ., agree.

[2]Appellee died after the trial court's decision, and her executrix, Carolyn Jane Rowe, has been substituted as the real party in this cause immediately prior to the delivery of this Court's opinion.

Sidney WARNER *v.* Kenneth G. WARNER

CA 84-418 687 S.W.2d 856

Court of Appeals of Arkansas
Division II
Opinion delivered April 10, 1985

*Michael Everett,* for appellant.

*Daggett, Van Dover, Donovon & Cahoon,* for appellee.

GEORGE K. CRACRAFT, Chief Judge. Sidney Warner brings this appeal from an order of the probate court denying probate of a will on finding that it had been obtained by undue influence. He contends that the evidence was not sufficient to sustain such a finding and that the court erred in refusing to allow a full trial on the issues. We find no merit to either contention.

In 1981, while a patient in a Memphis hospital, Jessica Handschke executed three wills in which she disinherited her son Kenneth Warner and named her other son Sidney Warner as principal beneficiary. The testatrix died on May 28, 1982 and shortly thereafter Sidney Warner offered for probate the latest of the three wills which was dated October 23, 1981. The appellee contested the probate of this will on

the ground that it had been obtained by undue influence.

At the commencement of the hearing on the petition for probate counsel stipulated that a Memphis attorney who prepared all three wills would testify that in September he was contacted by appellant who came to his office for the purpose of having a will prepared for his mother. He prepared all three wills from information given him solely by the appellant. The second will was prepared and executed after Sidney Warner learned from an Arkansas attorney that under our law of pretermitted children it was necessary that the excluded son be mentioned in the will. The second will was drafted October 6 and included an additional paragraph which acknowledged the existence of Kenneth. The third will was prepared after learning from the Arkansas attorney that the earlier wills did not meet the statutory requirements for execution of a will signed by mark. It was also stipulated that the attorney had prepared other documents for the appellant and would testify that he had never seen or conferred with the testatrix.

Counsel also stipulated that when the proof shows that a proponent of a will was a substantial beneficiary the burden of proof shifts to the proponent to prove both that the will was executed without undue influence and that the testatrix had the mental capacity to execute the will. In its decree denying probate the court found that appellant had caused the will to be prepared by an attorney of his choosing, was solely responsible for both the preparation and execution thereof, and had failed to satisfy his burden of proving that the will was executed while the testatrix was competent and not under undue influence. Despite the earlier stipulation as to the presumption and burden of proof the appellant filed a motion for a new trial contending that as the will was executed in Tennessee it should have been tested by the law of that state. The motion for a new trial was denied but the appeal was never perfected.

After the period for perfecting an appeal had expired the appellant brought a second proceeding for probate of the will executed on October 6, 1981. Appellee filed a motion to deny probate on several grounds including that of undue

influence. Prior to the hearing on that petition it was stipulated that the entire record of the earlier hearing and all rulings, pleadings and motions filed subsequent to the earlier decree be made a part of the record. It was stipulated that the appellant might interpose any objection to any testimony introduced at the first hearing and that no other evidence would be adduced. It was further stipulated that the Tennessee attorney would testify that he did not advise the appellant of the law of either state concerning the presumption of invalidity of a will procured by the beneficiary.

After considering the record as made, the judge denied probate of the second proffered will. First, the appellant contends that the trial court erred in restricting the evidence to the record made at the hearing on presentation of the first will. He offers no citation of authority and makes no argument in support of his contentions. He simply states that "it is tremendously difficult to develop a record for appeal under the method imposed upon appellant by the court's order of August 22, 1984." We do not address this issue for two reasons. Assignments of error presented by counsel in their brief, unsupported by convincing argument or authority, will not be considered on appeal unless it is apparent without further research that they are well taken. *Dixon* v. *State,* 260 Ark. 857, 545 S.W.2d 606 (1977). Secondly, although the court's order of August 22, 1984, provided that no additional testimony would be taken it is apparent that this order was based upon the stipulation of the parties entered on May 3.

The appellant next contends the evidence does not support a finding of undue influence. His argument is two-pronged. He first contends that as the will was executed in the State of Tennessee, its validity should be tested by the law of that state. He argues that although Tennessee recognizes a similar presumption it does not place as heavy a burden as we do upon the proponent. The appellant argues that Ark. Stat. Ann. § 60-405 (Repl. 1971) settles the question of choice of law as to the execution of a will. That section provides that a will executed outside the state in a manner prescribed by our Code or in a manner prescribed by the law at the place of its execution or by the law of the testator's domicile at the

time of its execution shall have the same force and effect in this state as if executed in this state and in compliance with our law.

Ark. Stat. Ann. § 60-403 (Repl. 1971) sets out those formalities which must accompany the execution of a will in this state. It provides that the will be signed by the testator and two witnesses to whom the testator declared the instrument to be his will, that he executed it at the end of the instrument by one of the prescribed methods in the presence of his witnesses, and that the witnesses signed at the request and in the presence of the testator. Section 60-405 provides only that if a will is executed in a sister state with execution requirements different from our own we will recognize its execution once the requirements of the sister state have been met. Under this section the formality essential to the execution will be tested either by the law of the place of its execution or of the place of the testator's domicile. Proof of valid execution, however, is referrable to our own statutes because the proponent seeks to have the will initially probated in this state. *In Re Altheimer's Estate,* 221 Ark. 941, 256 S.W.2d 719 (1953). In discussing statutes similar to § 60-405 Dr. Robert Leflar in his work *American Conflicts Law* (1968), § 196 states:

> At least thirty-two of the American states now have statutes of this general sort. As an original question it might seem that such a statute ought to cover all aspects of the validity of wills, substantive as well as formal, but the opposite conclusion has been reached because the wording of the statute is restricted to manner of execution. Thus substantive grounds for the asserted invalidity of wills are left to be handled under the common law of conflicts. This would include such matters as partial invalidity of a will because of failure to mention a child or entire invalidity due to the mental incapacity of a testator or to undue influence allegedly exerted upon him.

The appellant recognizes the argument that we are concerned with a presumption of fact which might be considered procedural and thus governed by the law of the

forum. He argues, however, that this statement is not all inclusive and that there are some presumptions which are so inseparably bound to the substantive law that the *lex loci* should control. We conclude that our court has adopted a different view. Our courts have declared that on questions of the burden of proof the law of the forum governs. *St. Louis and S.F. Rd. Co.* v. *Coy,* 113 Ark. 265, 168 S.W. 1106 (1914); *Huckaby* v. *St. Louis, I.M. & S. Ry. Co.,* 119 Ark. 179, 177 S.W. 923 (1915); *St. L., I.M. & S. Ry. Co.* v. *Steel,* 129 Ark. 520, 197 S.W. 288 (1917). These cases dealt with a presumption of negligence arising against a railroad company by proof of injury to a passenger caused by the operation of its trains. In *Huckaby,* the court said:

> The presumption of negligence arises in a suit brought in this jurisdiction upon proof of the fact of injury to a passenger by the operation of a railroad train in another State where no such rule obtains, such presumption relating to the burden of proof and being governed by the law of the forum.

Dr. Leflar, *American Conflicts Law* § 124, discusses the question of presumptions and burden of proof as follows:

> Any so called 'conclusive presumption' is so obviously a rule of substantive law that it should not be called procedural. But the ordinary rebuttable presumption is for all practical purposes a substitute for evidence, or merely another kind of evidence which is offered to the court. . . . The decided weight of authority treats the applicability of presumptions, like the admissibility of evidence, as a procedural matter, with forum law governing, regardless of substantive effect.

Our cases declare that the presumption of undue influence which arises under the circumstances of this case is rebuttable. It arises because when a will is written by one who stands to benefit from it the circumstances require stricter scrutiny and make it incumbent on the one seeking to establish the will to show beyond reasonable doubt that the testator had both the mental capacity and freedom of will required to render a will legally valid. *McDaniel* v. *Crosby,*

19 Ark. 533 (1858). Whether those actions occur in this state or elsewhere they give rise to the same need for stricter scrutiny and impose upon the proponent the same burden.

In addition to the presumption arising from appellant's action there was direct evidence of his exercise of undue influence over his mother at the time the will was procured.

Prior to her hospitalization in Memphis there had been a close relationship between the mother and both of her sons. She had executed a will leaving her estate to them in equal shares. At the time the testatrix suffered her stroke and disability she executed a power of attorney giving her son Kenneth plenary power over all of her property. He properly exercised that authority until the power was revoked in writing on September 30 — the same day that appellant procured the first of the three wills and the execution of a power of attorney in his favor.

Initially the appellee had maintained his mother's existing accounts in her banks in West Memphis. It was stipulated that it was the policy of those banks not to honor a power of attorney exercised by a non-resident of Crittenden County and that the bank officers had so informed the appellee. As a result of this, and at their suggestion, he closed out those accounts and deposited his mother's funds in her own name in a bank in Marianna where he resided. At the hearing the appellant admitted that prior to the execution of the instrument, although he knew that appellee had the power of attorney and the ability to take care of any of her wants and had been doing so, he informed his mother that she didn't have money to buy "Cokes and things like that" because the appellee had taken all of her money.

There was evidence from another witness that she had visited the testatrix in the Memphis hospital and had observed Sidney talking to his mother about money and "what Kenneth had done." There was other evidence from which the court could and did conclude that these actions by the appellant so dominated and influenced the action taken by his mother as to invalidate the will.

The appellant next contends that a great deal of the oral testimony at the first hearing consisted of irrelevant evidence of appellant's alleged mismanagement of the testatrix's affairs. The appellant argues in his brief that although no objection was made to this testimony at the first hearing he did note his objections in writing to that evidence to the trial court before the second hearing. Neither the objection nor the court's ruling is abstracted. Although not required to, we have looked at the record and we find that he made his objections to testimony by reference to page and line number. For us to determine what testimony was objected to would require that we peruse the record to locate the lines and pages he refers to. This we are unwilling to do.

At the conclusion of the first hearing the trial court in announcing his findings stated:

> The court has heard a great deal of evidence, it has taken three days to try this lawsuit. *Some of the evidence is probably of little value to the court.* But the court has heard the witnesses, observed their demeanor from the witness stand, and feels that there is no question that the will of Jessica P. Handschke as executed on October 23, 1981, is the result of undue influence on the part of Sidney Warner. [Emphasis supplied]

Without an abstract we cannot tell what testimony was objected to or the court's rulings on objections.

Appellant admitted that after the power of attorney was executed he had withdrawn thousands of dollars from his mother's account and placed them in his own lock box, purchased real estate in his own name and that of his daughter and deposited sums in his daughter's account. We recognize that evidence of conduct which takes place after the will is executed does not affect the validity of the will but it is admissible for its bearing on the proponent's actions as a whole. *Gingrich* v. *Bradley,* 232 Ark. 884, 341 S.W.2d 33 (1960).

We affirm.

CORBIN and MAYFIELD, JJ., agree.

Donald G. RAY d/b/a RAY TIRE *v.*
THE SHELBY MUTUAL INSURANCE COMPANY

CA 84-261 687 S.W.2d 526

Court of Appeals of Arkansas
En Banc
Opinion delivered April 10, 1985

*Denver L. Thornton,* for appellant.

*Shackleford, Shackleford & Phillips, P.A.,* for appellee.

JAMES R. COOPER, Judge. The appellant obtained an insurance policy covering losses resulting from burglary or robbery from the appellee through an independent insurance agency in El Dorado, Arkansas. The appellant stored tires in a covered shed which was attached to his main building. The tires were in the open and were secured by means of a chain which was threaded through them. After the policy was issued, approximately $3,000.00 worth of tires were stolen from the shed. The appellant made demand on the appellee, and the appellee denied coverage. The appellee filed a motion for summary judgment, which the trial court granted. From that decision, comes this appeal.

Summary judgment should be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. ARCP Rule 56(c). Summary judgment is an extreme remedy, and should be granted only when no issue as to a material fact exists. *Purser* v. *Corpus Christi State National Bank,* 258 Ark. 54, 522 S.W.2d 187 (1975). The moving party has the burden of demonstrating that there is no genuine issue of fact for trial, and any evidence submitted in support of the motion must be viewed most favorably to the party against whom the relief is sought. *Walker* v. *Stephens,* 3 Ark. App. 205, 626 S.W.2d 200 (1981). On appeal, this Court must

view the evidence in the light most favorable to the party resisting the motion. *Bourland* v. *Title Insurance Co. of Minnesota,* 4 Ark. App. 68, 627 S.W.2d 567 (1982). 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).

The appellant argues that there are ambiguities in the insurance policy which presented a fact question for the jury. Specifically, he alleges that fact questions existed as to whether the tires were stolen from a place which was part of the "exterior" or the "interior" of the business premises, whether the policy was a blanket theft policy, and whether the place from which the tires were stolen was a "container".

The insurance policy provides coverage for losses occasioned by burglary or robbery of a watchman, while the business is closed. The coverage is limited to losses from "within the premises". Premises is defined as:

> The interior of that portion of the building at the location designated in the declarations . . ., but shall not include (1) showcases or show windows not opening directly into the interior of the premises, or (2) public entrances, halls or stairways.

Burglary is defined in the policy as:

> The felonious abstraction of insured property (1) from within the premises . . . or (2) from within a showcase or show window outside the premises by a person making felonious entry into such showcase or show window . . . or (3) from within the premises by a person making felonious exit therefrom. . . .

We agree with the trial court that the policy is not ambiguous and that the loss of the tires was excluded under the clear language of the policy in question.

The appellant argues that the agent who sold him the policy represented to him that the policy in question would

cover such a loss as occurred here. Even if that allegation is true, at most it would give rise to a cause of action against the agent, but would not serve to provide coverage for losses which were specifically excluded by the unambiguous language of the policy.

Affirmed.

CLONINGER, CORBIN, and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I dissent from the affirmance of the trial court's granting of the motion for summary judgment. As the majority opinion of this court recognizes, a summary judgment is an extreme remedy and should be granted only where the evidence submitted in support of the motion, when viewed most favorably to the party resisting it, establishes that there is no genuine issue of fact to be decided.

To determine if there is an issue of fact to be decided, let us first look at the insurance policy involved in this case. At the top of the first page under Item 1, the name of the insured is shown to be "Ray's Tires, Highway 7, South, Smackover, Union Co., Arkansas." Under Item 3 the figure $7,500.00 is typed to show the limits of the "Open Stock Burglary" coverage afforded by the policy. In Item 4 the location of the premises is shown to be the same as in Item 1, and the word "entire" is typed to show what part of the premises is "occupied by the insured." In answer to the question as to the business conducted in the premises, the words "Tire Sales and Mounting" are typed. The pertinent part of the insuring agreement reads, "To pay for loss by burglary or by robbery of a watchman, while the premises are not open for business, of merchandise . . . within the premises." The policy defines "premises" as "the interior of that portion of the building at the location designated in the declarations which is shown in the declarations as occupied by the insured in conducting the business. . . ."

A deposition of the appellant, Donald Ray, d/b/a Ray's Tires, was submitted by the insurance company in support of its motion for summary judgment. In the deposition, Mr.

Ray identified two pictures of the insured premises and the pictures are in the record. They show a building with an extension therefrom which has a roof supported by posts, and which is enclosed on one side by a wall of the building but is open on the other three sides. The pictures show a number of tires under this extension, and Mr. Ray testified that these tires were stored there with a chain threaded through each one and secured around one of the iron supports of the extension. He testified that when he arrived one morning he found that the locks on the chain had been cut and that the tires were gone. He said the theft occurred while the business was closed between six o'clock at night and eight o'clock the next morning.

The appellee cites *J. B. Kramer Grocery Co., Inc.* v. *Glens Falls Insurance Co.,* 497 F.2d 709 (8th Cir. 1974), as holding that insurance policies are to be "construed in their plain, ordinary, and popular sense." The case also says, "It is settled law in Arkansas, as elsewhere, that provisions of an insurance contract must be considered as a whole, *keeping in mind the purpose for which the contract was written.*" (Emphasis added.) The majority opinion of this court relies upon the policy language that defines "premises" as "the interior of that portion of the building at the location designated in the declarations," but fails to explain why the word "building" does not include the extension — or shed as the opinion puts it — attached to the building. Since it is proper in deciding what the word "premises" means to consider the purpose for which the policy was issued, evidence of the insurance agent's assurance that the policy he sold to appellant would cover the theft of the tires stored in the extension to the appellant's building is of extreme importance. That evidence is found in appellant's deposition where he said that before he purchased the policy involved in this case the insurance agent came to his place of business, looked at the tires stored in the extension to the building, and specifically stated that the policy would cover the theft of those tires stored at that place.

In *Countryside Casualty Co.* v. *Grant,* 269 Ark. 526, 601 S.W.2d 875 (1980), the court found a latent ambiguity in the policy involved "when considered in relation to the purpose

and circumstances surrounding the making of the insurance contract," even though the policy was not ambiguous on its face. The court said that parol evidence is admissible to bring out the latent ambiguity and to explain the true intention of the parties. Here, we have the insurance agent who sold the policy telling the insured that the policy would cover the very thing that happened. In the case of *King* v. *Travelers Insurance Company,* 84 N.M. 550, 505 P.2d 1226 (1973), the court said:

> Finally, in addition to a question of ambiguity resulting from a mere reading of the policy, Appellants point out, and the record supports, the logical inference that the insurer's agents were also in doubt as to the applicability of the pertinent provisions of the policy in question. Although Appellants do not argue that theories of waiver and estoppel are applicable here, Appellants' argument is persuasive evidence of the policy's ambiguity.

505 P.2d at 1232.

I do not agree with the majority opinion's assertion that the policy in this case is clear and unambiguous and leaves no genuine issue of fact to be determined. I would reverse this case and remand it for trial.

CLONINGER and CORBIN, JJ., join in this dissent.

# The ESTATE Of Dave KNOTT, by Charlie KNOTT, Administrator *v.* John Harris JONES and CERTAIN LANDS

CA 84-262 687 S.W.2d 529

Court of Appeals of Arkansas
Division I
Opinion delivered April 10, 1985
[Rehearing denied May 15, 1985.]

*Robert F. Morehead,* for appellant.

*Jones & Petty,* for appellee.

LAWSON CLONINGER, Judge. Appellant's statement of the issue can perhaps best be reduced to a single contention: the chancellor erred in granting summary judgment on the basis of res judicata. We do not agree, and we affirm the lower court's holding.

In his capacity as administrator of the Estate of Dave Knott, appellant filed an action in Jefferson County Chancery Court to quiet title to 14.6 acres of land. Jefferson County Circuit Court, in a previous ejectment action, had held that appellee was the owner and entitled to the possession of the land in question. The chancellor dismissed appellant's action, stating that it was barred by res judicata because of the circuit court's prior summary judgment in appellee's favor in a suit involving the same land. The chancellor found that appellant had claimed in the circuit court case that he personally owned the land and was therefore estopped from bringing an action in his fiduciary capacity. "The issues are the same," said the chancellor, "and only the capacity of the parties differs." Appellant as administrator of the estate was held to be merely a nominal plaintiff. "The real party in interest," the chancellor concluded, "is Charlie Knott, individually."

Ark. Stat. Ann. § 62-2401 (Repl. 1971) provides that realty becomes an asset in the hands of the administrator of an estate "when so directed by the will (if any), or when the court finds that such property should be sold, mortgaged, leased or exchanged for any purpose enumerated in [§ 62-2704]." The latter statute lists the following contingencies:

(1) For the payment of claims,

(2) For the payment of a legacy given by the will of the decedent,

(3) For the preservation or protection of assets of the estate,

(4) For making distribution of the estate or any part thereof, or

(5) For any other purpose in the best interest of the estate.

Since 1956, when appellant was appointed administrator, no claim has been filed against the estate, and no other "purpose enumerated" has been found by the probate court. In *Cranna, Administrator* v. *Long,* 225 Ark. 153, 279 S.W.2d 828 (1955), the Arkansas Supreme Court ruled that legal title of an intestate's lands, upon his death, descends and vests in his heirs at law, subject to a widow's dower and the payment of debts through his administrator. Thus, the property cannot be said ever to have been an asset in appellant's hands; only when real property has become an asset in an administrator's hands may he, in the language of § 62-2401, "maintain or defend an action for the possession thereof, or to determine or protect the title thereto." *See Miller* v. *Watkins,* 169 Ark. 60, 272 S.W. 846 (1925).

By 1982, appellant, through inheritance and conveyance from his brothers, had acquired all the interest in the lands comprising the estate. It was in his capacity as an individual landowner that he appeared as a party to the action in circuit court in 1983 that resulted in the recognition of appellee as owner of the 14.6 acres. Apart from the fact that appellant lacked legal capacity to maintain the action in chancery as administrator of the estate, his effort to circumvent the effect of res judicata by claiming to be a different party in the chancery suit (*i.e.,* the estate *by* the administrator) is only an exercise in semantics. Generally speaking, the principle of res judicata applies when a final adjudication occurs on the merits of an issue, without fraud or collusion, by a court of competent jurisdiction, on matters that were (or might have been) litigated. Precisely identical parties are not required; a substantial identity is sufficient. The rule will not be defeated by minor differences. Wells v. *Ark. Public Svc. Comm'n,* 272 Ark. 481, 616 S.W.2d 718 (1981); *Rose* v. *Jacobs,* 231 Ark. 286, 329 S.W.2d

170 (1959). *See also* 50 C.J.S. *Judgments,* § 763. Here, the differences were not merely minor; they were found to be altogether fictional, and that finding is supported by the evidence. We endorse the ruling of the chancellor that when a party to one action in his individual capacity and to a second in his representative capacity is, in both cases, asserting or protecting his individual rights, the doctrine of res judicata binds him. *See Vaughn's Adm'r* v. *Louisville & N. R. Co.,* 179 S.W.2d 441 (Ky., 1944).

Affirmed.

COOPER and MAYFIELD, JJ., agree.

Richard A. WILLIAMS and Mary L. WILLIAMS
*v.* Thomas R. HUFSTEDLER and
Marjorie HUFSTEDLER

CA 84-305 687 S.W.2d 531

Court of Appeals of Arkansas
Division I
Opinion delivered April 10, 1985

*Ponder & Jarboe,* by: *Dick Jarboe,* for appellants.

*Burris & Berry,* by: *John Burris,* for appellees.

TOM GLAZE, Judge. Appellants initiated a quiet title action to nine acres abutting the Eleven Point River in Randolph County and appellees filed an answer claiming title to the acreage based upon adverse possession. The trial court found in appellees' favor. Appellants argue the court erred in so finding because appellees' activities were insufficient to establish title by adverse possession. In sum, they contend appellees' acts were not sufficient to put appellants or their predecessors on notice of appellees' adverse claim to the nine acres. We cannot agree and affirm the trial court's decision.

The instant case is similar to *Horseman* v. *Hincha,* 138 Ark. 415, 211 S.W. 385 (1919), and that holding requires us to reach the same result. In *Horseman,* the disputed land was enclosed by fences on three sides and by a river on the other. The south fence actually ran through Horseman's property which abutted the south side of the land in controversy. Because this land was hilly and rocky, Horseman's acts of possession were limited to taking timber from it and raising stock on the land. The Supreme Court determined Horseman's acts tended to support his claim of ownership of the disputed land. The court reached its finding by applying the rule announced in *Dowdle* v. *Wheeler,* 76 Ark. 529, 89 S.W. 1002 (1905), that in establishing adverse possession of land, "[i]t is no objection that natural barriers are taken advantage of . . . [i]f the natural, together with the artificial, barriers used are sufficient to clearly indicate dominion over the premises, and to give notoriety to the claim of possession. . . ." 76 Ark. 533.

Here, as in *Horseman,* the nine-acre tract in dispute and appellees' property which abuts it on its east boundary are enclosed with fences on the north and south sides extending to Eleven Point River which borders the disputed tract's west

side. The south and north fences also extend to a county road along the east side of appellees' property. A cross fence is situated on the east boundary.[1] Appellee Thomas Hufstedler testified that for twenty-two years he treated and used the nine-acre tract the same as the property he purchased that adjoins the tract. He stated that he ran twenty to fifty cattle on it, repaired the north and south fences along the properties, and on occasions cut timber on the disputed land. Testimonies by other witnesses supported Hufstedler's claims and tended to negate appellants' other assertions. For example, appellants, who lived across from the nine acres on the west side of the river, said that appellees' cattle were not visible and could not get to the river for water. However, appellees presented evidence that the cattle went down the south side of the tract to reach the river and others testified they either saw cattle or signs of cattle on the river.

In sum, we believe the evidence here is comparable to that presented in *Horseman* and thus clearly supports the chancellor's decision. He viewed the disputed property, observed the witnesses and weighed their testimonies, resolving the conflicts in appellees' favor. Therefore, we affirm.

Affirmed.

CLONINGER and COOPER, JJ., agree.

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[1]Although appellants argue the proof is insufficient to show the fences actually met to enclose the disputed property, our review of the evidence indicates otherwise. For example, appellee Thomas Hufstedler testified that when he bought his property in 1962, the south and north fences extended from the county road to the river. The Hufstedler property had been previously rented by Carl Mitchell, who testified the property was fenced along the county road as early as 1954. From this testimony, the court reasonably could infer the south and north fences met the east fence along the county road, enclosing appellees' land by purchase as well as that which they claim by adverse possession.

UNIVERSITY OF ARKANSAS MEDICAL SCIENCES CENTER, et al *v.* Matthews Lou RALEIGH

CA 84-426 688 S.W.2d 303

Court of Appeals of Arkansas
Division I
Opinion delivered April 10, 1985

*E. Diane Graham,* Public Employee Claims Division, Arkansas Insurance Department, for appellant.

*James F. Swindoll, P.A.,* by: *H. L. "Buddy" Slate,* for appellee.

TOM GLAZE, Judge. The appellant appeals from a unanimous decision of the Workers' Compensation Commission finding appellee's claim compensable and awarding her disability and medical benefits. We affirm.

The appellee, Matthews Raleigh, was employed as a staff LPN in the cardiac unit of appellant hospital. On December 15, 1983, the appellee injured her arm when she fell during the lunch break at a seminar she was attending at the Holiday Inn in Little Rock. Appellant's only point on appeal is that substantial evidence does not support the Commission's finding that appellee's injury arose out of and during the course of her employment.

The evidence showed that appellee attended the seminar on "Advances in Cardiac Care" on her own time and that she paid her own tuition. Appellant's witnesses testified that appellee was not required, requested, urged or encouraged to attend the seminar. Witnesses for both parties testified that the appellant hospital keeps a book on its premises in which the nurses record their hours of continuing education and in-service training. The record-keeping procedure is required by both the Joint Committee on Accreditation of Hospitals and the State Health Department. Appellant's witness testified that even though the book is kept, continuing education is not required for employees to maintain their positions or to get raises or promotions.

Appellee, on the other hand, testified that they "have to have continuing education" and have "to report the continuing education hours to the employer." She described the requirement that employees write all in-service training in the book kept on the floor where she works. Appellee testified that she did not know whether she would be disciplined for not meeting continuing education require-

ments but that "my thoughts are I would . . . because I am required to tell them how many hours."

Appellee also testified that, with her supervisor's approval, she traded shifts with another employee to be able to attend the seminar. She testified about specifics that she learned in the seminar and described how the training would help her in her job. She said that it was her understanding that she had to have so many continuing education hours each year and that she thought it would help her to keep her job, although it was not her understanding that she would lose her job if she did not attend.

Carol Wolfe, the head nurse of the cardiac unit, testified that she did not encourage anyone to attend the seminar and that appellee did not request official leave to attend. She denied giving permission for or having knowledge of appellee's trading shifts with another employee.

Ann Harris, acting director of nurses, testified that she did not encourage or require the appellee to attend the seminar and that neither appellee nor any of the others who attended was representing the appellant Medical Center at the seminar. She testified that her understanding was that appellee was attending on her own, non-work time.

In finding the appellee's claim compensable, the Commisison noted that a key factor in its decision was the appellant's maintenance of a log book for employees to record their attendance at professional seminars, workshops and other continuing education events. The Commission pointed out that not only was a log book kept but that new employees were given log sheets to be filled out and inserted in the book when they commenced employment.

Both parties have cited Professor Larson to support their respective positions that the appellee's injury either did or did not arise out of and during the course of employment. Larson says that when an employee is injured while undertaking educational or training programs, "[c]ompensability turns on whether claimant's contract of employment contemplated attendance as an incident of his work. . . . Employment connection may be supplied by varying degrees of employer encouragement or direction.

. . . It is . . . sufficient if attendance, although not compulsory, is 'definitely urged,' or 'expected,' but not if it is merely 'encouraged'." 1A A. Larson, *The Law of Workmen's Compensation,* § 27.31 (1979). Relying on the foregoing rule in Larson, both parties presented testimony to establish whether appellant did or did not urge or expect its employees to participate in continuing education programs. Neither party has cited an Arkansas case dealing with this issue, and we are aware of none.

Of course, the determination whether appellant's injury arose out of and in the course of employment is not ours to make in the first instance. We review the evidence to determine only if substantial evidence supports the Commission's decision, giving deference to their judgment in matters of credibility. *Jones* v. *Scheduled Skyways, Inc.,* 1 Ark. App. 44, 612 S.W.2d 333 (1981). Whether the appellant hospital "urged" or "expected" or whether it merely "encouraged" its employees to attend seminars, workshops and courses was a question of fact for the Commission. The appellant's primary arguments on appeal involve credibility issues. Appellant asks us to weigh the testimonies of appellant's witnesses against the testimony of the appellee which "stood alone." We are unwilling to do that.

The primary case upon which the appellant relies, *Loggins* v. *Wetumka General Hospital,* 587 P.2d 455 (Okla. 1978), did involve a similar issue, but turned upon the court's standard of review of workers' compensation cases. The Oklahoma Supreme Court noted that it does not weigh evidence to determine the preponderance, but examines the record only to ascertain whether the order is supported by any competent evidence. The court affirmed the Industrial Board's finding that the claim was not compensable. We, too, must adhere to our well-settled standard of review when considering factual determinations made by the Commission. Because substantial evidence exists in the record to support the Commission's decision that appellee's injury occurred during the course of her employment, we affirm.

Affirmed.

COOPER and CLONINGER, JJ., agree.

Eddie DONAHOU and Lavonne DONAHOU
*v.* Pearl FOREHAND, et al

CA 84-270 687 S.W.2d 864

Court of Appeals of Arkansas
Division I
Opinion delivered April 17, 1985

*Benjamin C. McMinn,* for appellant.

*Warner & Smith,* by: *P. K. Holmes, III,* for appellee Thomas C. Mueller.

*Peel & Eddy,* by: *David L. Eddy,* for appellee Pearl Forehand.

JAMES R. COOPER, Judge. This case involves the ownership of one acre of wild and unimproved land. The appellant Eddie Donahou's uncle conveyed the subject land to Eddie Donahou's father and he also conveyed the same land to the appellee Mrs. Forehand's predecessor in interest. The appellant's uncle owned 15 acres in Pope County until he conveyed the acre to a Mr. and Mrs. Jones in 1947, but that deed was not recorded until 1982. Mr. and Mrs. Jones conveyed the acre to Mrs. Forehand and her husband in 1948 and they promptly recorded their deed. In 1956, the appellant's uncle conveyed three acres out of the remaining 14 acres to the City of Dover, and that deed was promptly recorded.

The conveyance from the appellant's uncle to his father took place in 1959, and the deed contained a description of the entire 15 acre tract, without excepting out either tract previously conveyed. Eddie Donahou's father died intestate in 1964, and over the next ten years the heirs worked out a series of conveyances which served to settle the estate. The other heirs conveyed their partial interests in the land to Eddie Donahou in 1975, and in 1982 Eddie purchased the three acres previously conveyed to the City of Dover. In the course of a title examination, the claim of Mrs. Forehand to the acre surfaced and then she recorded the deed from Eddie Donahou's uncle to the Joneses.

After hearing the appellant's suit to quiet title, the chancellor held that Mrs. Forehand had paid taxes on the acre for over seven years under color of title, that she had exclusively occupied the land since the conveyance from the Joneses, and she had not subsequently lost title to the tract by virtue of any actions of Eddie Donahou. The trial court also found that Eddie Donahou and his predecessors in title had not been in possession of the disputed land since the conveyance to the Joneses in 1947. We cannot say that the chancellor's findings were clearly erroneous or against the preponderance of the evidence, and therefore we affirm. ARCP, Rule 52(a).

The appellant's first argument is that the chancellor erred in finding that Eddie Donahou was not an innocent purchaser when he acquired the property from his father's other heirs. We agree with the chancellor on this point, but not for the reason stated by the chancellor. The chancellor stated that, at the time of Eddie Donahou's purchase there were sufficient facts available to give notice of Mrs. Forehand's claim of ownership. The significant purchase, in terms of the availability of notice, was not the purchase by Eddie Donahou in 1975, but the purchase by his father, N. C. Donahou, in 1959. N. C. Donahou's heirs could only inherit that interest which he had at the time of his death, *Rich, Ex'r* v. *Rosenthal,* 223 Ark. 791, 268 S.W.2d 884 (1954); *Hobbs* v. *Lenon,* 191 Ark. 509, 87 S.W.2d 6 (1935), and the exchange of deeds to settle his estate could not vest in them a more valid title or claim to the land than was possessed by the deceased. At the time of the conveyance from W. R. Donahou to N. C. Donahou, there was on record a deed conveying three acres to the City of Dover and the deed from the Joneses to the Forehands. The tax records indicated that the Forehands paid taxes on the subject tract for each year after their deed was recorded. Thus, in 1959, N. C. Donahou received a deed calling for 15 acres, yet, on the records of the tax assessor and recorder, four acres had already been conveyed.

Thus, the question presented is whether these facts constituted such notice to N. C. Donahou as to prevent him from being an innocent purchaser from his brother in 1959. The appellants argue that the notice was insufficient because the Forehand's grantor's deed was not recorded until 1982, thus making the deed from the Joneses to the Forehands a "wild deed". Although it is true that the deed would appear to be a wild one, in 1959 W. R. Donahou was still living, the Forehands had been paying taxes on the land for 11 years, and minimal effort to inquire as to the status of the one acre would have surely revealed the unrecorded deed from W. R. Donahou to the Joneses. See *Bowen* v. *Perryman,* 256 Ark. 174, 506 S.W.2d 543 (1974). Likewise, N. C. Donahou was clearly put on notice that he was not purchasing the entire 15 acres since three acres had been conveyed, and the deeds recorded, to the City of Dover. Thus, contrary to the appellants' position, N. C. Donahou had

actual notice of the conveyance to the Forehands from the Joneses; there were abundant facts available to demonstrate that the Forehands claimed ownership to the one acre, and the mere fact that the deed from their grantor's grantor was not recorded does not render the Jones to Forehand deed ineffective to give notice to N. C. Donahou.

The appellant finally argues that the chancellor erred in admitting into evidence certain letters which involved offers to compromise the suit. It was error to admit the letters into evidence under Rule 408 of the Uniform Rules of Evidence, but we find the error harmless. The chancellor clearly informed the parties that, since there was no jury, it did not matter whether the evidence was in the record or not since he would consider only relevant and competent evidence. The appellants have failed to demonstrate prejudicial error requiring reversal.

Affirmed.

CLONINGER and MAYFIELD, JJ., agree.

Howard S. LESSMAN and Clara LESSMAN
*v.* Ray DAWSON, et al.

CA 84-386 687 S.W.2d 860

Court of Appeals of Arkansas
Division II
Opinion delivered April 17, 1985

*Boyce & Boyce,* by: *Wayne Boyce,* for appellants.

*Daggett, Van Dover, Donovan & Cahoon,* by: *Jimason J. Daggett,* for appellee.

MELVIN MAYFIELD, Judge. The appellees, Ray Dawson and members of his family, are residents of Arkansas who owned a farm in the State of Mississippi. In March of 1982, the appellees sold the farm to a group of investors from Illinois which included Howard Lessman, one of the appellants. Mr. Dawson agreed to take a promissory note from the Illinois group for $600,000 as part of the purchase price, but only after reviewing Mr. Lessman's individual financial statement that assessed his total assets at more than $1,500,000 and which included a 700-acre rice farm located in Independence County, Arkansas. The promissory note called for interest to be paid on March 1, 1983, and for interest and unpaid principal to be paid on March 10, 1984.

The Illinois group executed two other promissory notes in connection with the transaction; one in the amount of $3,150,000, to the Germantown Trust Savings and Loan Association in Memphis, Tennessee, and the other in the amount of $426,090, to a trustee employed by the two real estate agents who negotiated the sale of the farm. At the time of the sale, the Illinois group anticipated reselling the Mississippi farm in the very near future and making a substantial profit. Unfortunately various problems ensued, the property did not resell, and the group defaulted on all three of its promissory notes.

In November of 1983, the appellees obtained a judgment against Mr. Lessman in the Phillips County Circuit Court on the unpaid $600,000 note and they then attempted to levy execution on the rice farm in Independence County. They discovered, however, that in May of 1982, Mr. Lessman had conveyed a substantial amount of his property, including the farm, to his wife, who is the other appellant in this case. The appellees were thus unable to collect on their

judgment and filed suit in the Independence County Chancery Court to have the conveyance of the farm property from Mr. Lessman to his wife set aside as fraudulent and void.

The chancellor found that the conveyance of the farm, which was accomplished by a deed dated May 10, 1982, but not recorded until September 20, 1982, was indeed fraudulent and void and he ordered it set aside as against the claims of the appellees. The appellants make two arguments on appeal. First, they argue that the chancellor erred in finding that the conveyance was fraudulent as there was no showing that Mr. Lessman was insolvent at the time of the conveyance. Second, they argue fraud is never presumed and that the evidence is not sufficient to establish intent to defraud.

The appellants recognize that Ark. Stat. Ann. § 68-1302 (Repl. 1979) provides that the conveyance of property with the intent to delay, hinder, or defraud creditors shall be void. They also cite 37 Am. Jur. 2d *Fraudulent Conveyances* § 5 (1968) for the general statement that a debtor's assets constitute a fund out of which his creditors have a right to be paid, but that an individual should be permitted to exercise extended discretion as to the time and manner of disposing of his property, provided he does so fairly and honestly in reference to the equitable rights of his creditors. And from 37 Am. Jur. 2d, *supra,* § 15, appellants quote the following:

> Insolvency is to be determined as of the time of the conveyance, which, even though without fair consideration is not fraudulent because of the debtor's insolvency if the conveyance itself does not render the debtor insolvent and *he does not become insolvent until some time afterward.* (Emphasis added.)

The Arkansas cases of *Wasson* v. *Patton,* 190 Ark. 397, 79 S.W.2d 276 (1935), *Mente & Co., Inc.* v. *Westbrook,* 181 Ark. 96, 24 S.W.2d 976 (1930), and *Fisher* v. *Knight,* 211 Ark. 465, 200 S.W.2d 799 (1947), are cited by appellants for the proposition that a conveyance will not be set aside as fraudulent as to creditors if the debtor is not insolvent at the time of the conveyance.

On the other hand, the appellees contend that it is not required that the grantor be insolvent at the time of the conveyance in order for the conveyance to constitute a fraud on creditors. They point out that Ark. Stat. Ann. § 68-1302, *supra,* does not even use the word "insolvent" and that it speaks of conveyances made with the "intent to hinder, delay, or defraud creditors." Appellees also cite *United States* v. *Johnston,* 245 F. Supp. 433 (W.D. Ark. 1965), where the court stated:

> In a suit to set aside a conveyance as fraudulent, it is not indispensable for the plaintiff to prove that the transferor was insolvent at the time of the transfer or that he was made so by the transfer. If prejudice to creditors results, a transfer made with intent to hinder, delay or defraud them will be set aside even though the transferor was solvent at the time of the transfer and remained so thereafter. . . .

Appellees argue that the date to use in determining the intent of the transferors is the date the conveyance is filed for record and not the date of its execution. For support, they cite *Chronister* v. *Jernigan,* 196 Ark. 615, 119 S.W.2d 538 (1938) and *Kaufman* v. *Citizens' Bank,* 189 Ark. 113, 70 S.W.2d 572 (1934).

We think the questions of whether the debtor must be insolvent, and whether the date to use in determining intent is when the conveyance is executed or when it is filed for record, are not ultimate questions but are simply matters for consideration in making the determination of whether the conveyance was made with intent to delay, hinder, or defraud creditors.

In this case there is evidence that on the date the Independence County farm was conveyed by Mr. Lessman to his wife, he had obligations totaling more than $4,000,000. As of the date the deed to his wife was executed, Lessman owed, for accrued interest only, more than $126,000, and by the time the deed was filed for record, the accrued interest obligation amounted to over $380,000. The evidence shows that buyers for the Mississippi land did not materialize, that

appellants had trouble renting the land, and that they had trouble farming it. Within six weeks after he executed the $600,000 note to appellees, Lessman had made property transfers to his wife which made it impossible for him to pay the appellees' note. He admitted this at the trial of this matter. He also admitted that he had judgments against him in excess of $2,000,000, taken after he transferred assets worth more than $1,000,000 to his wife for no consideration save love and affection, and she is not liable for any of his debts.

In *Dereuisseaux* v. *Bell,* 238 Ark. 60, 378 S.W.2d 208 (1964), Sam Bell had shot a man in 1961. At that time he owned property worth about $25,000. During the first half of 1962, Bell gave all his property to his niece, Leila Dereuisseaux. In May of 1962, the man who was shot sued Sam Bell for $120,000. In a suit to set aside the conveyances to the niece, the chancellor entered a decree granting the relief sought. The Supreme Court said:

> It was stipulated at the beginning of the trial that "Sam Bell gave all of his property, both real and personal, except the truck, to Leila Dereuisseaux." Mrs. Dereuisseaux and others gave testimony indicating that Bell was motivated not by any desire to defraud William Robert Bell but by the wish to provide for this niece, for whom he had great affection. It is argued that in view of this proof the appellee failed to prove such actual fraud as would justify the chancellor in setting aside the gifts.
>
> This argument is unsound, for there is no requirement that conscious fraud be shown. We have repeatedly held that conveyances by an embarrassed debtor to his near relatives are presumably fraudulent, and when the debtor's condition proceeds, as here, to the point of insolvency, such conveyances are, with respect to existing creditors, *conclusively* presumed to be fraudulent. *Wilks* v. *Vaughan,* 73 Ark. 174, 83 S.W. 913; *Kaufman* v. *Citizens Bank,* 189 Ark. 113, 70 S.W.2d 572; *Connelly* v. *Thomas,* 234 Ark. 1024, 356 S.W.2d 430. Since the presumption of fraud is conclusive it cannot be rebutted by proof that there was actually no

intentional wrongdoing. . . . (Emphasis in original.)

The appellees cite other cases to the same effect. In one, *Tunstill* v. *J. T. Fargason Co.,* 156 Ark. 513, 246 S.W. 856 (1923), the court said:

> It occurs to us that this testimony was sufficient to warrant the trial court in finding that Tunstill was insolvent. That is to say, after conveying the property described in the deed, he was wholly unable to pay the debt due the appellee. The deed was executed upon the nominal consideration of $1. At the time the conveyance was made, Tunstill was indebted to the appellee in a sum which the latter claimed to be over $1,500, which sum Tunstill has not challenged by his evidence and does not dispute in his brief, his only contention as to this being that he was not insolvent. The court was warranted in finding that Tunstill was in debt in a large amount to the appellee, and that this conveyance would render him utterly unable to pay this debt. There was ample testimony to justify the court in finding that the conveyance from Tunstill to his wife was a voluntary conveyance and made to defraud creditors.

We see no need to discuss actual intent to defraud since the evidence in this case, considered in light of the law set out in *Dereuisseaux* and *Tunstill,* clearly supports the chancellor's decision. *See also Keck* v. *Gentry,* 238 Ark. 672, 384 S.W.2d 242 (1964); *Collatt* v. *Bowen,* 181 Ark. 268, 25 S.W.2d 770 (1930); *Papan* v. *Nahay,* 106 Ark. 230, 152 S.W. 107 (1913); and *Allis* v. *Jones,* 403 F.2d 707 (8th Cir. 1968).

Affirmed.

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

PATTERSON DENTAL COMPANY
*v.* Barry and Patsie BRAZIL
d/b/a AMERICAN DENTURE CENTER

CA 84-309 688 S.W.2d 310

Court of Appeals of Arkansas
Division II
Opinion delivered April 24, 1985

*Rose Law Firm, A Professional Association,* by: *Richard T. Donovan,* for appellant.

*Ronald J. Bruno & Associates,* by: *Ron Bruno,* for appellee.

GEORGE K. CRACRAFT, Chief Judge. This case comes up for review on appeal and cross appeal. We find no merit in either and affirm the judgment of the trial court as entered.

It was undisputed that the parties first entered into an oral agreement under which Patterson Dental Company agreed to sell to Barry and Patsie Brazil dental equipment and supplies. Although it was not disputed that they agreed that Patterson would sell the supplies at a discount and would allow a discount on the equipment provided the Brazils could obtain financing from a party other than Patterson, the evidence was conflicting as to the amount of discount and what constituted outside financing. Brazil testified that he was to receive a 25% discount on the equipment. Officials from Patterson testified that the discount on the equipment was to be determined on an item by item basis and would range from 15% to 25%. There was no dispute that they had agreed the financing must be from someone other than Patterson.

Brazil initially arranged for financing through Credit Alliance Corporation. In order for that financing to be obtained Credit Alliance required that the equipment be installed. In accordance with that requirement Patterson installed the equipment before financing was available and before a written sales agreement was executed. When Credit Alliance learned of the discount it declined to finance the transaction. The parties subsequently executed an installment sales contract and a security instrument in favor of Patterson which made no mention of discount on either supplies or equipment and was unclear as to the responsibility for the payment of the sales tax. The parties disagreed as to the terms of their oral agreement on those issues. It was

not disputed that Patterson would allow the discount after the written installment contract and security instrument were executed provided the outside financing could be obtained.

The appellees subsequently obtained financing from Dental Capital Corporation. Patterson then refused to allow the discount because Dental Capital was its wholly owned subsidiary. It contended that this was not "outside financing" within the meaning of their agreement. Patterson decided that the appellees were in arrears on their account, initially placed them on C.O.D. status, and subsequently refused to deliver any more supplies to them on any basis. Patterson then brought suit alleging that the Brazils owed it $26,631.91 on account plus an additional sum of $4,703.52 as sales tax on the $157,000 equipment purchase. The Brazils denied the indebtedness, claimed that they were entitled to a discount in an amount in excess of that claimed by Patterson, and denied any liability for the sales tax, contending that under the agreement the tax was to have been paid by Patterson. By way of counterclaim the Brazils alleged that the failure of Patterson to continue to sell supplies to them at discount forced them to purchase supplies from other outlets at much higher prices, for which they prayed damages.

By agreement of the parties the matter was referred to a master. The master found that the contract provided for a discount if the purchase was financed by one other than Patterson. He further found that although Dental Capital was a subsidiary of Patterson it was an entirely separate and distinct entity and met the requirement of outside financing as a condition of the discount. He also found that although the contracts did not expressly so provide, the Brazils were obligated under their agreements to pay the sales tax. On the complaint he found that the sales tax and the open account owed to Patterson equalled the sum of $26,631.91 and recommended offsetting judgments accordingly.

The appellant filed an exception to the report insofar as it found that financing with Dental Capital met the requirement of outside financing. Appellant did not except

to any other finding. Brazil filed no exceptions. The court overruled the exception to the report, approved the master's findings and conclusions, and entered judgment in favor of Brazil in the sum of $1,368.09, that being the difference between the two judgment.

Patterson appeals contending the finding that Dental Capital constituted outside financing was clearly erroneous. The Brazils cross-appeal arguing the trial court erred in holding them liable for payment of sales tax and in disallowing their claim for damages. They also contend that the amount allowed as discount was erroneously computed.

On Patterson's direct appeal we cannot conclude that the finding of the trial court was clearly erroneous. Although it was not disputed that the agreements contained an understanding that the discount would be allowed if the Brazils obtained outside financing from some concern other than Patterson, Patterson argues that as Dental Capital was its subsidiary it was not outside financing and that they had so informed the Brazils in a letter of December 27.

The appellees, on the other hand, testified that in making the agreement the words "affiliates, partnerships or subsidiaries" were never mentioned. It was simply agreed that the financing must be from some source other than Patterson. Brazil testified that he knew that he had to get financing from someone other than Patterson but he was never told that Dental Capital was Patterson's subsidiary. Nor was he informed that if Dental Capital provided the financing he would lose his rebate until after all arrangements with Dental Capital had been completed. He testified that the understanding between the parties was that the discount would be allowed if financing were obtained from any entity other than Patterson and that the exclusion of any other financial institution was not within the contemplation of the parties.

On conflicting evidence the master found appellees' testimony to be correct. Under ARCP Rule 53(e)(2), the court shall accept a master's findings unless they are clearly erroneous. Under ARCP Rule 52(a) we review the findings

of a master to the extent that the court adopts them as if they were the findings of the court and will not set them aside unless they are clearly erroneous. We find that the master's findings and the action of the court in adopting them were not clearly erroneous.

We do not address any of the other points advanced in the direct appeal or cross-appeal because they were not raised in the trial court by exception to the master's report. If any of the findings of the master were deemed to be incorrect, they should have been pointed out to the trial court by a specific objection. ARCP Rule 53(e)(2) provides that the court shall accept the master's findings of fact unless they are clearly erroneous. It allows the filing of written exceptions to the report within twenty days of the filing of that report and a ruling by the court on those exceptions in which it may adopt the report or modify it, reject it in whole or in part, receive further evidence, or recommit it to the master with further instructions.

ARCP Rule 53 contains wording similar to that found in superseded Ark. Stat. Ann. §§ 27-1812 and 27-1814 (Repl. 1962). In *Dashko* v. *Oil Fields Corp.*, 174 Ark. 1067, 298 S.W. 351 (1927); *Wally* v. *Heck*, 125 Ark. 597, 185 S.W. 444 (1916); *Walworth* v. *Birch*, 81 Ark. 52, 98 S.W. 717 (1906) our court in applying those sections held that exceptions to the report of a master made for the first time on appeal will not be considered. In the early case of *Burns* v. *Rosenstein*, 135 U.S. 449 (1890) the U.S. Supreme Court, in construing similarly worded Federal Equity Rule 83, stated that where no exceptions were filed to the master's report the issues might not be raised for the first time on appeal:

> The master was directed to report all issues of fact made by the pleadings, and to take an account of the dealings and transactions between the parties, and all claims for damages arising out of said transactions. He could not intelligently discharge that duty without adopting some theory as to the scope and effect of the partnership agreement. If he went beyond the order of reference, or if the account taken by him involved a misconception of the provisions of that agreement, the defendants

> should have brought those matters to the attention of the court by exceptions to the report. Having failed to do this, they cannot, in this court, for the first time, object that the master proceeded upon erroneous views as to the contract between the parties.

In this case the master's report construed the agreement of the parties with reference to the sales tax and the obligation of Patterson to continue to furnish supplies at discounts. His rulings were based on those determinations. If either party deemed them to be erroneous he should have brought those matters to the attention of the master and to the court by exceptions. Having failed to do so they cannot object that the master proceeded on an erroneous view of their contract for the first time on appeal.

Affirmed.

CORBIN and MAYFIELD, JJ., agree.

In the Matter of the ESTATE of
Betty Jo HODGES, Deceased, Joyce LONG, Executrix
*v.* Thomas W. WILKIE III et al

CA 84-359 688 S.W.2d 307

Court of Appeals of Arkansas
Division I
Opinion delivered April 24, 1985

*Dan Dane,* for appellant.

*Sharpe & Beavers,* for appellee Thomas W. Wilkie III.

*Butler, Hicky, Hicky & Routon, Ltd.,* for appellee L'Anguille River Enterprises.

LAWSON CLONINGER, Judge. On this appeal, appellant and cross-appellee Joyce Long raises three points for reversal, appellee and cross-appellant Thomas W. Wilkie III raises one point for reversal, and appellee and cross-appellant L'Anguille River Enterprises raises one point for reversal while responding to appellant's arguments.

Appellant, acting as executrix of the estate of the late Betty Jo Hodges, obtained an order from St. Francis County Probate Court to sell the nine tracts of estate lands at a public sale in order to pay the estate's debt to the First National Bank of Eastern Arkansas. The order provided that the executrix was to offer separate tracts for sale until the aggregate price would equal $350,000; if, however, the aggregate of the sales of the separate tracts did not equal that figure, appellant was to sell all nine tracts together as one unit.

When the nine tracts were offered separately, the total of the bids reached only $296,000; all were then offered as one parcel. Appellee and cross-appellant Wilkie placed the highest bid, but the figure, $416,000, was less than the statutory requirement of three-fourths of the appraised value of the lands, $422,000. After making his final bid, Mr. Wilkie learned that the amount failed to exceed the minimum set by law. He then approached the auctioneer and informed him that he wished to raise his bid to $424,000. In his Report of Sale, the auctioneer made no mention ofthe post-auction offer.

At a hearing on the Report of Sale, the executrix, on behalf of the heirs, filed a petition for a private sale, appellee and cross-appellant L'Anguille River Enterprises filed a petition requesting that the executrix be required to sell one tract to it as the highest bidder. A party who had not been present at the sale, Sid Fogg, testified that he was willing to purchase some of the property at a price higher than that bid

at the public sale. The court, at the conclusion of the hearing, rejected Mr. Wilkie's bid of $416,000 as insufficient and refused to consider the proposed enhanced bid of $424,000.

Appellant's arguments revolve around the question of the probate judge's discretion. In judicial sales, the court is the vendor and is vested with great discretion. In reviewing the action of a trial court to determine whether an abuse of discretion has occurred, we do not substitute our own decision for that of the judge; instead, we merely review the case to see whether the decision below was within the latitude of decisions a judge could make. *Kiers* v. *Mt. Comfort Enterprises, Inc.*, 266 Ark. 523, 587 S.W.2d 8 (1979); *see also* the dissenting opinion of Cooper, J., in *Lytle* v. *Citizens Bk. of Batesville,* 4 Ark. App. 294, 630 S.W.2d 546 (1982).

For her first point, appellant contends that the trial court erred in finding a representative of L'Anguille River Enterprises to be an "interested person" within the statutory meaning and hence able to participate in the confirmation hearing with the executrix, the heirs of the estate, and the high bidder. An "interested person," under Ark. Stat. Ann. § 62-2003(k) (Repl. 1971); "includes an heir, devisee, spouse, creditor or any other having a property right or interest in or claim against the estate being administered, and a fiduciary." Although the order for sale clearly stated that the nine tracts would be offered as a unit if the aggregate bids did not exceed $350,000, we are of the opinion that the judge did not abuse his discretion in permitting L'Anguille River Enterprises to participate in the hearing. Appellee and cross-appellant had lodged the highest bid, $36,000, for a separate tract and believed itself to have a claim against the estate, as events have shown. The judge may have been over-solicitous, but he surely did not exceed the bounds of his discretion in allowing a representative of the partnership to be present at the hearing.

Appellant's second contention is that the court erred in admitting the testimony of Sid Fogg and Thomas Long, both of whom were called as witnesses by appellee and

cross-appellant L'Anguille River Enterprises. In view of the fact that we find it necessary to reverse the decision of the trial court on the basis of appellant's third point for reversal, we will not address her second argument.

We find reversible error in appellant's third point. She asserts that the trial judge should not have ordered another public sale at the conclusion of the hearing. The executrix had withdrawn her petition for a public sale, and the heirs of the estate had individually written letters to the judge who had originally heard the matter expressing their desire for a private sale. The proffer of proof attached to the executrix's petition for a private sale stated that firm offers totalling $538,900 had been received through private negotiations.

Ark. Stat. Ann. § 62-2719 (Repl. 1971) provides: "If satisfied that the sale . . . is not advantageous to the estate or has not been made in conformity with law, the court may reject the sale . . . or require a re-execution of the order upon such terms and conditions as it may direct." The issue here revolves around the extent of the trial court's discretion in re-executing an earlier public sale order under the facts presented in the present case.

Once the trial judge rejected the report on the public sale, the status of the parties to this action changed. Appellee and cross-appellant Wilkie and appellee and cross-appellant L'Anguille River Enterprises could no longer be described as interested parties. At best, their position was that of potential bidders at any future sale and hence was in no way superior to that of any other prospective purchaser. Neither Wilkie nor L'Anguille had any standing to contest a petition on behalf of the heirs of the estate, who then, through their representative, appellant and cross-appellee Long, remained the only interested parties.

It is the responsibility of the court in such matters to do that which is best for the estate. When the executrix, with the approval of all the heirs, withdraws her petition for a public sale, it is difficult to find a justification for a court's action in overriding the clearly expressed wishes of the interested parties.

Appellee and cross-appellant Wilkie argues that his increased offer of $424,000 for the total estate lands was a valid bid made prior to the completion of the sale and should have been confirmed by the court. He asserts that no substantial amount of time had elapsed between the delivery of his final bid and his notification of the auctioneer of his enhanced offer.

Mr. Wilkie quotes *Fleming* v. *Southland Life Ins. Co.*, 262 Ark. 272, 564 S.W.2d 218 (1978) for the long-established rule that "a judicial sale is not complete until confirmation." While we cannot disagree with this legal truism, we also cannot see how this precept leads Mr. Wilkie to the proposition that the auction had not concluded with the submission of the highest bid, Mr. Wilkie's own $416,000, and the sounding of the gavel. The language in *Fleming, supra,* refers, of course, to the court's ratification or rejection of transactions occurring within the formal framework of a judicial sale. The procedure would have no meaning if parties at an auction were allowed to increase their offers after the auctioneer closed the bidding.

Finally, appellee and cross-appellant L'Anguille River Enterprises argues that the trial court erred in refusing to confirm the sale of one of the tracts to the partnership. L'Anguille River Enterprises had entered a bid of $36,000 for Tract VI during the initial phase of the public sale. The figure was 140 per cent of the appraised value of the parcel, which was appraised at $25,600. Because it exceeded the statutory minimum bid with respect to that particular tract, cross-appellant insists that it is entitled to the land.

We cannot agree. The Order of Sale stated explicitly:

> 3. That the sale of the Estate real estate should be made by offering separate tracts or parcels for sale at a public sale until the aggregate price of the separate tracts is equal to at least Three Hundred Fifty Thousand ($350,000.00) Dollars. After the parcels have been offered for sale separately or so many thereof as the aggregate purchase price shall equal at least Three Hundred Fifty Thousand ($350,000.00) Dollars all

> parcels offered for sale up to that point should be offered for sale together as one unit and the lands should be sold to the highest bidder.

The trial court's refusal to confirm the sale of Tract VI to L'Anguille River Enterprises was merely a recognition that the terms of the sale order had not been fulfilled. Although L'Anguille's individual bid was higher than the minimum prescribed by statute for the tract in question, the aggregate figure reached for the separate parcels of land was $296,000. The language of the order clearly requires that the tracts be offered intact together as a single unit if previous efforts to secure the necessary price for the separate parcels failed.

We find that the trial court exceeded the bounds of its discretion in ordering a second public sale. We reverse the trial court's decision and remand this case with instructions to the court to entertain any motions or petitions presented by interested parties and to complete the administration of the estate in a manner not inconsistent with the holdings in this opinion.

Reversed and remanded.

COOPER and MAYFIELD, JJ., agree.

# SUZUKI OF RUSSELLVILLE, INC. *v.* MID-CENTURY INSURANCE COMPANY

CA 84-412 688 S.W.2d 305

Court of Appeals of Arkansas
Division I
Opinion delivered April 24, 1985

[redacted]

*Bullock & McCormick,* for appellant.

*Alex G. Streett,* for appellee.

TOM GLAZE, Judge. Appellant argues the trial court erred in granting appellee's motion for directed verdict. This case centers on appellant's sale of a motorcycle to a Charles McNeese. First National Bank of Russellville financed the sale, and appellee issued an insurance policy which, among other things, covered the theft of the motorcycle. Soon after the sale,. McNeese reported the motorcycle stolen. Because McNeese defaulted on his note payments to First National Bank, the bank pursued its right of recourse against appellant which paid the note in full. Alleging it was the Bank's subrogated lien holder, appellant subsequently sued appellee for insurance proceeds the appellant charged were due under the policy covering the theft of the motorcycle. Although appellee admitted it issued theft coverage on the motorcycle, it denied the vehicle had been proven stolen. The parties tried this cause to the court, and after hearing appellant's evidence, the trial judge directed a verdict for the appellee. We reverse.

The sole question is whether the trial judge, sitting without a jury, properly directed a verdict for the appellee at the conclusion of appellant's case. When considering this question, the test is to take that view of the evidence that is most favorable to the party against whom the verdict is sought and to give it its highest probative value, taking into account all reasonable inferences deducible from it and to grant the motion only if the evidence viewed in that light would be so insubstantial as to require that a jury verdict for the party be set aside. *Henley's Wholesale Meats, Inc.* v. *Walt Bennett Ford, Inc.,* 4 Ark. App. 362, 631 S.W.2d 316 (1982). The applicable rule, stated in other terms, is that the duty of the trial court, sitting without a jury, when asked to give a "directed verdict" at the close of the plaintiff's case, is to consider whether the plaintiff's evidence, given its strongest probative force, presents a *prima facie* case. *Id.*

In granting appellee's motion, the court stated that except for hearsay evidence, appellant failed to show a theft occurred, which would have entitled it to recover under appellee's policy. From its statement, the court clearly weighed and discounted the testimony presented by appellant rather than giving such testimony its strongest probative force as it is required to do in this situation. While some, not all, of the appellant's evidence was hearsay, appellee failed to object to it and the fact that such hearsay evidence was inadmissible does not prevent its use as proof so far as it has probative value. *See New Empire Ins. Co.* v. *Taylor,* 235 Ark. 758, 764, 362 S.W.2d 4, 8 (1962). Appellant's evidence bearing on the theft issue may be summarized as follows:

1. Monte Sims, criminal investigator for the Morrilton Police Department, testified without objection that he investigated McNeese's allegation and complaint that the motorcycle was stolen.

2. Sims located the vehicle in Sallisaw, Oklahoma, where McNeese identified it.

3. Sims also discovered a bill of sale for the vehicle that bore the false name of Don or Danny Martin; but, he determined a Danny Moquette had sold the motorcycle.

4. Also without objection, Sims testified Moquette said that while he was in an area east of Russellville, Arkansas, McNeese had given the motorcycle to Moquette, but McNeese denied Moquette's story.

5. Appellant's owner, Michael L. Johnson, testified that he received notice the motorcycle had been stolen and afterwards, First National Bank demanded that appellant pay off the note.

From the foregoing, substantial evidence clearly exists to establish a *prima facie* case that a theft occurred. Appellee urges that we find the trial court erred in excluding Sims' opinion testimony in which he stated, "[F]rom the evidence that we were able to uncover in this case, it was our belief

that the motorcycle was not stolen." However, even if such opinion testimony were admissible (which we do not hold), appellant's other evidence, given its strongest probative force, still indicates a theft occurred. In its argument, appellee relies on *General Contract Corp.* v. *Roe,* 208 Ark. 951, 188 S.W.2d 507 (1945). Appellee argues that, as in *Roe,* the parties agreed that the judge would sit as trier of both law and fact, and that on an instructed verdict the judge's finding has the same effect as a verdict of the jury, *i.e.*, if there is substantial evidence to sustain the trial court's ruling, the appellate court should affirm. Appellee's reliance upon *Roe* and the rules therein are simply misplaced. There, both parties moved for instructed verdicts after each side had presented its evidence. Here, only the appellant presented its case, and rather than having the effect of submitting the fact questions to the trial judge, we are mandated, instead, to give appellant's evidence its highest probative value in deciding if the trial court erred in granting appellee's motion for directed verdict.

For the reasons stated above, we reverse and remand this cause for further proceedings consistent with this opinion.

Reversed and remanded.

COOPER and CLONINGER, JJ., agree.

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[redacted]