Carl J. BLAIR, Haden DAVIS, Jr., and Terry LANCASTER *v.* STATE of Arkansas

CA CR 85-34 696 S.W.2d 755

Court of Appeals of Arkansas
En Banc
Opinion delivered September 18, 1985

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Q. Byrum Hurst, Jr., for appellant Carl Blair.

Herby Branscum, Jr., for appellants Haden Davis, Jr. and Terry Lancaster.

Steve Clark, Att'y Gen., by: *Joel O. Huggins*, Asst. Att'y Gen., for appellee.

LAWSON CLONINGER, Judge. In these appeals from their criminal convictions, appellants Davis and Lancaster raise four points for reversal, and appellant Blair raises five. We affirm the convictions of Davis and Lancaster and affirm the conviction of Blair on all points but one, which we reverse.

On January 2, 1984, two Arkansas Game and Fish Commission officers on patrol in Perry County discovered appellants Davis and Lancaster walking in a cemetery and appellant Blair sitting in a pickup truck nearby. Dogs were running nearby, and one of the appellants admitted that the dogs belonged to them. The officers examined appellants' hunting licenses and guns and found buckshot in Lancaster's shotgun. At the time, the use of buckshot was prohibited as it was muzzle loading season. After finding the buckshot in one weapon, the officers looked inside the cab and saw another round of buckshot in the floorboard. Next to it, beneath the passenger's seat, was a Tupperware cake box. One of the officers opened the box and found, in addition to more buckshot, a green leafy substance and scales. No citations were issued at that point, but the officers ordered appellants to drive to the Perry County Sheriff's office in Perryville in their own vehicle.

As the officers and appellants were leaving, more hunters appeared in another vehicle. The officers approached the other vehicle, leaving their own vehicle unguarded, and checked hunting licenses and guns. In the meantime, according to the officers, appellant Blair ran away and disposed of the cake box.

Appellants assert that there was no cake box and that Blair simply went to look for his dogs with the officers' permission. At trial one of the officers acknowledged that permission had been granted.

When it appeared that Blair would not return, the officers issued citations to Davis and Lancaster for failing to wear hunter orange, to Lancaster for attempting to take deer with a modern firearm in muzzle loading season, and to Davis for aiding and abetting. On February 7, 1984, the prosecuting attorney filed a felony information containing eight counts, charging appellants Davis and Lancaster with possession of a controlled substance with intent to deliver, tampering with evidence, breaking or entering, hindering apprehension, and failure to wear hunter orange, appellant Lancaster with unlawful hunting of wildlife in closed season with a modern firearm, and appellant Davis with aiding and abetting Lancaster in unlawful hunting in closed season with a modern firearm.

Motions to suppress any evidence regarding marijuana on the basis of an illegal, warrantless, non-consensual search were denied at a pre-trial hearing. At the conclusion of the trial, the jury found appellant Davis guilty of possession of a controlled substance, appellant Lancaster guilty of possession of a controlled substance and unlawful attempt to take deer with a modern firearm, and appellant Blair guilty of possession of a controlled substance, escape in the third degree, breaking or entering, and tampering with evidence. From those verdicts, appellants bring these appeals.

All three appellants argue, in their first point for reversal, that the trial court erred in denying their motions to suppress any evidence obtained from the warrantless and non-consensual search of the pickup truck. They contend that only the buckshot found in the one shotgun was illegal and that any buckshot that might be found in the vehicle itself was legal and hence could not constitute probable cause for a search.

The Arkansas Game and Fish Code provides, at § 01.00-B:

> Wildlife officers shall be commissioned by the Commission and shall, concurrently with the sheriffs, constables and

> other peace officers throughout the State, have the right to apprehend persons detected violating any of the laws of the State enacted for the protection of game, fish, fur-bearing animals and other wildlife, and to take such offenders before any court having jurisdiction in the county where such offense is committed. Such persons shall also serve all processes issued by a court of competent jurisdiction relating to the enforcement of all laws pertaining to game, fish, fur-bearing animals and other wildlife of the State; to go upon any property outside of private dwellings; posted or otherwise, in the performance of their duties; to carry firearms while performing duties, and may with or without a warrant, according to law, conduct searches.

This section clearly authorizes wildlife officers to conduct warrantless searches within prescribed legal bounds. Those limitations are set forth in the Arkansas Rules of Criminal Procedure.

Under A.R.Cr.P. Rule 12.1(d), an officer may make a search incidental to an arrest "to obtain evidence of the commission of the offense for which the accused has been arrested or to seize contraband, the fruits of crime, or other things criminally possessed or used in conjunction with the offense." Additionally, A.R.Cr.P. Rule 12.4 provides that an arresting officer may search a vehicle "if the circumstances of the arrest justify a reasonable belief on the part of the arresting officer that the vehicle contains things which are connected with the offense for which the arrest is made." Nothing in either rule is inconsistent with the principle enunciated by the United States Supreme Court in *New York* v. *Belton*, 450 U.S. 1028 (1981), that when a law enforcement officer "has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *See also Arras* v. *State*, 3 Ark. App. 134, 623 S.W.2d 537 (1981).

While the buckshot in the floorboard of the truck may not have been "criminally possessed," the officer who searched the passenger compartment was acting within the bounds prescribed by Rule 12.1(d). The buckshot could certainly be said to be "used in conjunction with the offense" of attempting to take deer with a modern weapon. The circumstance of finding a round

of buckshot in one of the guns and spotting another in the floorboard surely justified "a reasonable belief on the part of the arresting officer" that the truck contained items "connected with the offense for which the arrest [was] made."

Appellants Davis and Lancaster contend in their second point that there was insufficient evidence to convict them of possession of a controlled substance when no competent proof was offered concerning the actual existence of any marijuana on the scene. Their argument is based on the fact that no chemical analysis was conducted on the substance the officers found in the Tupperware container. We have held, however, in *Armstrong* v. *State*, 5 Ark. App. 96, 633 S.W.2d 51 (1982), that lay testimony and circumstantial evidence may be sufficient without the introduction of an expert chemical analysis to establish the identity of a questionable substance.

In the instant case, both officers testified concerning their training in the visual identification of marijuana and their experience in making arrests for possession. We have previously found such qualifications adequate for lay identification. In *Boyd* v. *State*, 13 Ark. App. 132, 680 S.W.2d 911 (1984), we ruled admissible the statement of a sheriff that the substance he had obtained from the appellant's residence was marijuana when the sheriff gave testimony regarding his previous law enforcement experience, his training in the visual identification of marijuana, and the hundreds of times he had actually seen marijuana.

An argument somewhat related to the above is raised in appellant Blair's second point and in appellants Davis and Lancaster's third point. They urge that there was insufficient evidence to prove that any of them either actually or constructively possessed the marijuana said to have been concealed in the Tupperware cake box. We are of the opinion, however, that the evidence demonstrates constructive possession.

In *Llewellyn* v. *State*, 4 Ark. App. 326, 630 S.W.2d 555 (1982), we quoted a definition of constructive possession found in *Cary* v. *State*, 259 Ark. 510, 534 S.W.2d 230 (1976):

> Constructive possession occurs when the accused maintains control or a right to control the contraband; possession may be imputed when the contraband is found in a

> place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another.

Joint occupancy of a place where contraband is found will not be sufficient in itself to establish possession or joint possession unless there are additional factors from which a jury may infer possession. *Booth* v. *State*, 10 Ark. App. 216, 662 S.W.2d 479 (1984). In the present case, as in *Llewellyn, supra*, not only was a shared vehicle involved, but the substance was found in the passenger compartment. Officer Harper testified at trial that appellants Blair and Lancaster asked him to throw the substance away and fine them for the buckshot instead. These factors were sufficient to enable the jury to infer constructive possession on the part of appellants.

Appellant Lancaster argues in his fourth point that the evidence was insufficient for the jury to find him guilty of unlawful attempt to take deer with a modern firearm. Testimony at trial revealed, however, that Lancaster had in his possession on January 2, 1984, during muzzle-loading season, a 12-gauge shotgun loaded with a round of buckshot. Although appellant Lancaster claimed that he was hunting rabbits, the fact that his gun was loaded with buckshot, ammunition used for killing deer, might suggest to a jury another intention. In addition, appellant Lancaster and his friends were found with dogs in a hunting area. The circumstances certainly entitled the jury to reach the conclusion that appellant Lancaster was hunting deer. As we have repeatedly held, the fact that evidence is circumstantial does not render it insubstantial. *Graham* v. *State*, 6 Ark. App. 376, 642 S.W.2d 342 (1982).

We find no reversible error in appellant Blair's third point, in which he contends that the evidence was insufficient to sustain his conviction on the charge of third degree escape. Ark. Stat. Ann. § 41-2812 (Repl. 1977) provides:

> (1) A person commits the offense of third degree escape if he escapes from custody.
>
> (2) It is a defense to a prosecution under this section that the person escaping was in custody pursuant to an unlawful arrest.

Blair left the cemetery area after the Game and Fish officers had detained the three young men and had searched their vehicle. Blair asserted that he had received permission to look for his dogs, which were running loose, and Officer Harper testified that he had told appellants that they could get their dogs if they wished to do so. Implicit in both the request and the approval, however, was the timely return of appellant Blair, with or without his dogs. When the officers returned to the vehicle, Blair had disappeared with the Tupperware cake box and was not seen again that day. The testimony presented to the jury a question of fact, and we conclude that there was substantial evidence for the jury to decide that appellant Blair was guilty of third degree escape as defined by the statute.

Finally, appellant Blair argues in his fourth and fifth points for reversal that the evidence was insufficient for the jury to find him guilty of breaking or entering and tampering with evidence. While we are convinced that there was sufficient evidence on both counts, we are compelled to merge the offense of breaking or entering with that of tampering with physical evidence and dismiss the former and affirm the latter.

Ark. Stat. Ann. § 41-2003 (Repl. 1977) provides, in pertinent part: "A person commits the felony of breaking or entering if for the purpose of committing a felony he enters or breaks into any . . . vehicle . . ." The offense is graded as a class D felony. One who "alters, destroys, suppresses, removes or conceals any record, document or thing with the purpose of impairing its verity, legibility, or availability in any official proceeding or investigation" commits the offense of tampering with physical evidence, under the facts of this case, where a controlled substance was involved, in a class D felony. The jury assessed a fine of $500 for each offense, with no imprisonment.

Convictions for more than one offense are prohibited by Ark. Stat. Ann. § 41-105(1)(a) (Repl. 1977) when, as here, "one offense is included in the other." In the instant case, the charges of breaking or entering and tampering with physical evidence were based upon the same elements, *i.e.*, appellant Blair's breaking into the Game and Fish officers' vehicle to remove the Tupperware cake box. Ark. Stat. Ann. § 41-105(2)(a) states that a lesser included offense is one "established by proof of

the same or less than all the elements required to establish the commission of the offense charged." Up through the point where Blair entered the vehicle to remove the container the elements necessary to prove the commission of the two offenses were identical. Because the element of actual removal was also required for tampering with physical evidence, we find it appropriate to merge the two felonies into one. Thus we affirm appellant Blair's conviction for tampering with physical evidence and reverse and dismiss his conviction for breaking or entering.

Affirmed in part; reversed and dismissed in part.

CRACRAFT, C.J., not participating.

J.B. ANDERSON *v.* CITY OF PARAGOULD

CA CR 85-72 695 S.W.2d 851

Court of Appeals of Arkansas
Opinion delivered September 18, 1985

Michael Everett, for appellant.

Robert F. Thompson, City Att'y, for appellee.

TOM GLAZE, Judge. Appellant was tried by a jury and convicted in Greene County Circuit Court of violating a Paragould city zoning ordinance, prohibiting the placement of a mobile home in a R-1 zone. He raises four points on appeal, but we find none of them require a reversal.

Appellant lived in a mobile home on the lot in question until he sold the lot and home in 1981. After the mobile home was sold and removed from the property, appellant traveled extensively in a second mobile home, living in Nevada part of the year and returning to Paragould for short periods of time. In either August or September of 1983, appellant returned to Paragould and rented an apartment. Although it was unclear when, appellant regained his lot because the purchaser failed to meet a condition of the sale. In August 1984, a planning commission hearing was held on appellant's request that his lot be rezoned from R-1 to R-2 so that he could build some apartments. Appellant's application was denied, and the next day, he moved a mobile home onto the lot. After being notified several times that he was violating a city ordinance, a warrant was issued for appellant's arrest.

In this appeal, it is uncontested that appellant had a valid nonconforming use of his property when the zoning ordinance was adopted sometime during 1970. Rather, the issue is whether that nonconforming use ceased.

The Paragould zoning ordinance provides:

> A nonconforming use of land which shall cease for a continuous period of more than thirty days shall be deemed permanently abandoned, and any use thereafter established shall be in conformity with these regulations.

It is undisputed that, from either August or September of 1983 until August 22, 1984, appellant had no mobile home on his property and was living in a rented apartment. Nevertheless, appellant argues that he had no intent to abandon the nonconforming use of his property. In this respect, he claims the court erred in preventing him from testifying concerning his intent and in refusing his proffered instructions on this issue. Because he

believed the evidence failed to show he abandoned the nonconforming use of his property, appellant also asserts the court erred in denying his motion for directed verdict. We believe the court ruled correctly in each instance.

The Paragould zoning ordinance provides that after a certain lapse of time—thirty days—the discontinuance of a nonconforming use will be deemed to constitute an abandonment. Where the ordinance in question contains a discontinuance time limitation, courts have held that such nonexercise of the nonconforming use is sufficient, of itself, to terminate the nonconforming use, regardless of intention to abandon. *Canada's Tavern, Inc.* v. *Town of Glen Echo*, 260 Md. 206, 271 A.2d 664 (1970); *State ex rel. Brill* v. *Mortenson*, 6 Wis.2d 325, 94 N.W.2d 691 (1959), *reh'g denied*, 7 Wis.2d 325, 96 N.W.2d 603 (1959). *See also* 82 Am.Jur.2d *Zoning and Planning* § 220 (1976); 101A C.J.S. *Zoning and Land Planning* § 174 (1979). Furthermore, in order to prove a violation of an ordinance such as the one in this cause, it is not necessary to prove the element of intent. It is a general rule, and Arkansas case law supports the proposition, that criminal intent is not a necessary element of an offense that is merely *malum prohibitum*, where no provision as to intention is put in the ordinance. *Kirkham* v. *City of North Little Rock*, 227 Ark. 789, 301 S.W.2d 559 (1957). Accordingly, we find, in view of established law, the trial judge properly denied appellant's motion for directed verdict and correctly excluded his testimony and proffered jury instructions pertaining to his intent to abandon the nonconforming use in issue.

We note appellant's reliance on *Blundell* v. *City of West Helena*, 258 Ark. 123, 522 S.W.2d 661 (1975) and *Hendrix* v. *Hendrix*, 256 Ark. 289, 506 S.W.2d 848 (1974), but we find neither case controlling here. In *Blundell*, the central or decisive issue involved whether Blundell *established* a nonconforming use, not if he discontinued it—which is the principle issue here. The *Hendrix* case is clearly not in point since that case involved the question of whether the heirs to land had relinquished their interest in the land by failure to participate in earlier litigation.[1]

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[1] We note the similarities in facts between this cause and those in *Trice* v. *City of Pine Bluff*, 279 Ark. 125, 649 S.W.2d 179 (1983), but the issues raised there were not

Appellant's final point for reversal is that the trial judge erred in allowing the appellee's attorney to ask leading questions. Appellant complains about a series of questions, particularly those asked of the city inspector, Mr. Howard Anderson, regarding the sale of appellant's mobile home in 1981, and the alleged zoning violation. Almost all of the questions asked required either a yes or no answer:

Q. At any point in the past, have you heard Mr. Anderson testify or otherwise state that he sold that property to Mrs. Thorne on or about that date?

A. I believe so.

Q. Mr. Anderson, was it reported to your office anything relevant to a violation of any kind involving Mr. Anderson on or about August the 22nd?

A. Yes, sir.

Q. And in furtherance of that report, did you go to that property?

A. That afternoon.

Q. Did you confront or see Mr. Anderson, on that occasion?

A. Yes, sir.

Q. Did you observe a mobile home, in that area?

A. Yes, sir.

Q. Was this a R-1 zoned area, that this mobile home was situated on?

A. Yes, sir.

Even though a question can be answered yes or no, it can hardly be classed as leading unless it suggests a particular answer. *Parker* v. *State*, 266 Ark. 13, 582 S.W.2d 34 (1979). But even if the questions here were leading, they were not prejudicial as there was no dispute as to the facts being elicited during this

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argued in this cause below.

particular line of questioning. It is in the discretion of the trial court to permit a witness to be asked leading questions on direct examination, *Hamblin* v. *State*, 268 Ark. 497, 597 S.W.2d 589 (1980), and in this cause we find no abuse of that discretion.

Affirmed.

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

Phyllis Renee LIPSMEYER *v.* STATE of Arkansas

CA CR 85-55 695 S.W.2d 848

Court of Appeals of Arkansas
Opinion delivered September 18, 1985

William R. Simpson, Jr., Public Defender, by: *Jerry R. Sallings*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Connie Griffin*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Judge. Appellant was convicted of burglary and sentenced to five years in the Arkansas Department of Correction. Appellant contends that she was convicted solely on the uncorroborated testimony of an accomplice and that her conviction should be reversed and dismissed. We affirm.

The Vandiver home was burglarized on 8 March 1984. The family discovered the break-in when they returned home from an out-of-town trip. The evidence showed that there were pry marks on the back door of the residence and that numerous items of personal property were missing. In addition, Mrs. Vandiver's car had been burned.

The State's main witness, Jay Lasiter, testified that he and appellant went to the Vandiver home on the night of March 8, and that after he quieted down the family's dogs, appellant entered the residence. Lasiter further testified that, when appellant exited the house, she was carrying a garbage bag full of different items, including clothing. He stated that he, appellant and a person named "Buddy" went back to the Vandiver house, and while he again stayed outside, appellant and "Buddy" went inside, and

later came out with more property. Lasiter testified that, later that night, appellant asked him if he had any gasoline at his house. He told appellant he did, and she asked him to meet her later at the Vandiver's. Lasiter testified he saw appellant at the Vandiver's, where a car was on fire. Lasiter said that, on the following day, he and appellant decided to call the Vandiver's answering service and implicate someone else in the crimes.

Where the State relies on the testimony of an accomplice to support a conviction, that testimony must be corroborated by other evidence which tends to connect the accused with the commission of the offense, and it is not sufficient to show that the offense was committed and the circumstances of the offense. Ark. Stat. Ann. § 43-2116 (Repl. 1977). The test for determining whether the corroborating evidence is sufficient is if, taken independently of the accomplice's testimony, the evidence establishes the crime and tends to connect the accused with its commission. *Linell* v. *State*, 283 Ark. 162, 671 S.W.2d 741 (1984); *Walker* v. *State*, 13 Ark. App. 124, 680 S.W.2d 915 (1984). Here, the evidence clearly shows that a burglary was committed, but appellant contends that, outside of the testimony of Jay Lasiter, the State failed to connect her with the burglary.

The State's evidence connecting appellant with the crime centers on the testimony of Mrs. Vandiver and her fourteen-year-old son, Michael. Both testified that, while they were driving down a street in their neighborhood, about one month after the burglary, they saw appellant wearing a hat and jacket that belonged to Michael. They said these articles were in their house before the burglary. Michael testified that, when he asked the appellant where she had gotten the hat and jacket, she replied that she must have gotten them from Jay Lasiter. Appellant submits on appeal that, because there were inconsistencies in Mrs. Vandiver's and Michael Vandiver's descriptions of the hat and jacket, there was no substantial evidence that the items in appellant's possession were those stolen from the Vandivers, and therefore, there was no sufficient corroborating evidence connecting her with the crime.

Appellant acknowledges that it is proper to consider possession of stolen property by the accused in determining whether there is sufficient corroborating evidence tending to

connect the accused with the crime of burglary. *See Thacker* v. *State*, 253 Ark. 864, 489 S.W.2d 500 (1973). That rule, appellant argues, is not conclusive here because the possession of stolen property is not sufficient, standing alone, to corroborate the testimony of the accomplice, when the property is not sufficiently identified at trial. In support of her argument, she relies on *Scott* v. *State*, 63 Ark. 310, 38 S.W.2d 339 (1896) and *Olles* v. *State*, 260 Ark. 571, 542 S.W.2d 755 (1976). In *Scott*, except for the accomplice's testimony, the State was unable to connect the defendant with the stealing of some ladies' dresses, gowns and underwear. While two witnesses testified that Scott, one day after the crime, offered to sell them a dress and some ladies' underwear, there was no evidence identifying those clothes as part of the women's wear stolen earlier. The court, finding the witnesses' testimonies insufficient corroborating evidence, held accordingly that the accomplice's testimony was insufficient to connect Scott with the crime. The *Olles* decision turned on an entirely different series of events. There the accomplice testified that she, her uncle and Olles committed a burglary. The only circumstance connecting Olles with the crime was that some of the stolen merchandise was recovered from his and the accomplice's home. The supreme court held that the mere fact that some of the stolen goods were recovered from the dwelling shared by the accused and the accomplice, whose participation in the crime was admitted, was not sufficient corroboration, standing alone, even though it certainly would arouse a suspicion. 260 Ark. at 576.

The instant case is unlike either *Scott* or *Olles*. Mrs. Vandiver and her son testified the appellant was wearing a hat and jacket that belonged to Michael and that these clothes were missing since the burglary. No discrepancy appeared in their description of the hat worn by appellant although Michael described the jacket worn by appellant as a "red Ocean Pacific" jacket and his mother identified it as a "red Izod."[1] While Mrs. Vandiver and Michael gave slightly different descriptions of the stolen jacket, it is a settled rule that the resolution of inconsistencies in the evidence adduced at trial, and the credibility of

[1] The Vandivers both identified the hat as one purchased at a Hot Spring's store; their testimony differed only in that Mrs. Vandiver recalled it was the only one like it in the store while Michael believed others were available.

witnesses and the weight to be given their testimony, is wholly within the province of the jury. *Thomas* v. *State*, 266 Ark. 162, 583 S.W.2d 32 (1979).

The evidence submitted in corroboration of the accomplice's testimony does not have to be sufficient by itself to convict, but it must tend, to a substantial degree, to connect the defendant with the commission of the offense. *Coston* v. *State*, 10 Ark. App. 242, 663 S.W.2d 187 (1984). The jury was free to accept or reject Lasiter's story, *Jones* v. *State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984), and to determine that the clothing the appellant was wearing had been sufficiently identified as belonging to Michael Vandiver. On appeal, a jury's verdict will not be disturbed if it is supported by substantial evidence. *Tackett* v. *State*, 12 Ark. App. 57, 670 S.W.2d 824 (1984). We cannot conclude that the verdict of the jury was not supported by substantial evidence, and therefore, we affirm.

Affirmed.

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

Bobby WOODWARD *v.* STATE of Arkansas

CA CR 85-48 696 S.W.2d 759

Court of Appeals of Arkansas
Division I
Opinion delivered September 25, 1985
[Rehearing denied October 23, 1985.]

Hilburn, Bethune, Calhoon, Forster, Harper & Pruniski, Ltd., by: *John F. Forster, Jr.* and *Dorcy Kyle Corbin*, for appellant.

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

GEORGE K. CRACRAFT, Chief Judge. Bobby Woodward appeals from his conviction of conspiracy to commit burglary and theft of property for which he was sentenced to three years in the Department of Correction and fined $10,000. He advances five points for reversal in which we find no merit.

The charge against him grew out of a "sting" operation conducted by the Pulaski County Sheriff's Office. Issa Zacharia operated a business in Little Rock under the name of "JR's Gold and Silver Exchange." He was approached by Jerry Norman and asked to purchase some admittedly stolen goods. Zacharia did not purchase the items but reported the incident to appellant, a captain in the Sheriff's Department. Norman was known to the Sheriff's Department as a burglar who for some time had successfully eluded arrest. The sheriff authorized appellant to set up the operation in Zacharia's place of business, and installed video cameras to record purchases of stolen goods from Norman and any associates. The purchased goods were to be delivered to the sheriff's office and returned to the victims after Norman's arrest.

The State charged that Woodward, Zacharia, Conrad Cardova and others then conspired to prolong the operation and encouraged Norman to commit a number of burglaries and sell the stolen merchandise to them. Norman was shown to be so addicted to drugs that the monetary requirements of his habit were enormous. He burglarized homes at random to obtain the required funds for drugs and would apparently sell the stolen property for any price that was offered. There was testimony that over twenty such burglaries were committed during the period of the conspiracy and that the conspirators had indicated to Norman the type of goods they desired stolen. Norman stated that almost all of the goods stolen by him were purchased by the conspirators. During most of the purchases the cameras were not activated, no inventory of purchases was kept and the stolen goods not delivered to the sheriff's office. Most of the stolen merchandise sold to the sting operation by Norman was resold by Zacharia, Cardova and appellant and the receipts retained by them.

The appellant contends that the operation was a legitimate one set up for the purpose of documenting a case against Norman. He stated that it was continued beyond the initial sales by

Norman because other persons had been with Norman when he sold stolen goods at the Gold and Silver Exchange. He contends that they did not arrest Norman while they were investigating the participation of the other persons in the crimes. He contends that Zacharia, Cardova and Norman had entered into the conspiracy without his knowledge or participation. He maintains that when their crimes were discovered, the conspirators falsely involved him in order to obtain leniency for themselves. The jury returned a verdict of guilty. This appeal followed.

Zacharia testified for the State. In his testimony about the activity of the conspirators he discussed a conversation with the appellant regarding appellant's plan to run for sheriff of Faulkner County. He stated that appellant agreed to continue the operation in Pulaski County as long as it could last as it was very profitable and if elected sheriff he would set up a similar operation in Faulkner County in which Zacharia would participate as a deputy sheriff. The appellant contends that it was error for the trial court not to grant his motion for a mistrial as this evidence was irrelevant and highly prejudicial. He argues it dealt with a separate conspiracy and was not an act in furtherance of the conspiracy.

Zacharia also testified that several days after Norman's arrest there was a meeting at which Cordova, Al Simpson and the appellant were present. At this meeting there was a discussion about the disposition of some of the stolen property which was stored at Zacharia's home. He stated that as a result of that discussion the items were taken out of the house and put in plastic bags to be disposed of the next morning by Simpson. Simpson testified that he attended that meeting and that Cordova, appellant and Zacharia were present. He stated that he was told to remove the items and get rid of them. He did so by throwing them into a creek. "Zach and *all* of them that were there told me to dispose of them and get rid of them." The appellant contends that this testimony was not admissible under Unif. R. Evid. 801(d)(2)(v). He argues that the statements made regarding the continuance of the conspiracy and the establishment of a similar one in Faulkner County were "future plans" and were not acts in furtherance of the common object; that the statements made about the disposition of the stolen property occurred after the conspiracy had terminated, and were not in the furtherance of the

conspiracy, but a concerted effort to conceal the crime. We do not agree.

Unif. R. Evid. 801(d) in pertinent part is as follows:

> (d) Statements which are not hearsay.—A statement is not hearsay if:
>
> . . . .
>
> (2) Admission by a party opponent. The statement is offered against a party and (i) is his own statement in either his individual or representative capacity, (ii) a statement of which he has manifested his adoption or belief in its truth, . . . (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

These subsections have different applications. Rule 801(d)(2)(i) and (ii) deal with oral statements and nonverbal actions of the accused himself. Subsection (v) deals with otherwise hearsay statements of a co-conspirator declarant against the accused. Only the latter is required to be in furtherance of the conspiracy. Statements and nonverbal actions of a party which are offered against the individual declarant are not hearsay but non-hearsay admissions under Rule 801(d)(2)(i) or (ii).

This distinction is most clearly demonstrated in *United States* v. *Traylor*, 656 F.2d 1326 (1981). There the court held admissible those statements made by an accused to the witness as nonhearsay admissions even though not made in furtherance of the conspiracy. It rejected as inadmissible similar statements to the same witness by the appellant's co-conspirators outside his presence.

Zacharia testified that the appellant had told him that he wished to extend the existing operation as long as it was profitable and to establish a "similar" one in Faulkner County after he was elected sheriff. There were admissions against penal interest by the appellant as to his participation in the acts complained of in the charge and intent to continue them. They were admissible under Rule 801(d)(2)(i).

Simpson testified that "Zach and *all* of them that were there told me to dispose of them and get rid of them." If the statement was made by the appellant it would be an admission against

interest. Rule 801(d)(2)(i). If it was made by other persons in his presence it would, under the circumstances outlined, constitute a tacit or adopted one. Rule 801(d)(2)(ii).

In support of his objection to the statements of Zacharia and Simpson regarding disposition of the property made after the conspiracy ended, appellant relies on *Smith* v. *State*, 6 Ark. App. 228, 640 S.W.2d 805 (1982) and *Krulewitch* v. *United States*, 336 U.S. 440 (1949) which hold that statements by co-conspirators made after the conspiracy has ended are not admissible because the hearsay exception applies only to acts in furtherance of the conspiracy and "does not extend to concerted efforts to conceal the crime." This reliance is misplaced. In both cases the excluded statements were made by co-conspirator declarants and were not, as here, attributed to the accused. We find no error in the trial court's ruling.

During the cross-examination of Art Copeland he was asked if he had ever stated that Zacharia asked him to "back him up" on everything he might say. Copeland denied making such a statement. During examination, appellant was permitted without objection to state that Copeland had made such a statement to Woodward in the course of the investigation. He further stated that he had a tape recording of the conversation in which the statement was allegedly made by Copeland. Appellant contends that it was error for the trial court to refuse to admit the tape recording into evidence for the purpose of impeaching the witness. Even if the tape recording was admissible for some purpose, appellant has not pointed out how he was prejudiced by the ruling.

Woodward had already testified that the statement had been made to him by Copeland. Although from the context of the questions it is apparent that it was expected to contain the statement attributed to Copeland, we do not know what else might have been said in the conversation. The conversation took place during the investigation of the crimes. The record contains no offer to edit out those parts of the conversation which did not relate to the statement in issue. We find no prejudicial error in refusing to admit the recording of the entire conversation.

Appellant next contends that the trial court erred in refusing two requested instructions approved in *Devitt & Blackmar,*

Federal Jury Practice and Instructions. The first would have told the jury that the testimony of an informer who provides evidence for immunity from punishment must be examined with greater care than that of the other witnesses. The second would have told the jury that where the informer is also a narcotics addict, his testimony should be even more carefully examined because he might have an abnormal fear of imprisonment where his supply of drugs would not be available.

The trial court properly rejected the instructions for at least two reasons. First they contain comments on the evidence, a practice permitted in Federal courts but not in ours. Secondly, the offered instructions are not included in our Model Instructions on Criminal Law. The Court gave our approved instruction on credibility of witnesses. The purpose of the Model Instructions is to avoid confusing the jury. Even if an offered instruction contains a correct statement of the law it is not error for the trial court to refuse to give it where its subject is covered in an approved one. *Conley* v. *State*, 270 Ark. 886, 607 S.W.2d 328 (1980). Here the trial court gave our model instruction which told the jury that it might consider the evidence in the light of their own experience and take into consideration a witness's means of acquiring knowledge, interest in the outcome of the litigation and *any other fact or circumstance* tending to shed light on the truth or falsity of the witness's testimony. Furthermore, in closing argument defense counsel was permitted to argue that the testimony of an informer seeking leniency lacked credibility and to point out the effect of drug abuse on the mind and memory of the witness and other reasons why an addict's testimony might not be reliable.

Appellant finally contends that the evidence was not sufficient to sustain the conviction. He does not argue that the testimony of his co-conspirators did not show a conspiracy and overt acts in furtherance of it. He argues only that there was insufficient corroborating evidence tending to connect him with those crimes independent of the testimony of the co-conspirators.

Ark. Stat. Ann. § 43-2116 (Repl. 1977) provides that a felony conviction cannot be had upon the testimony of accomplices unless corroborated by other evidence tending to connect the defendant with the commission of the offense. The cor-

roborating evidence need not be sufficient to sustain the conviction but need only tend in some degree to connect the defendant with the crime independently of the testimony of the accomplice. *Costen* v. *State*, 10 Ark. App. 242, 663 S.W.2d 187 (1984).

Zacharia testified that he and appellant conspired to encourage Norman to commit numerous burglaries by offering to purchase all of the goods he might steal. It was stipulated that during the period in question a number of homes were burglarized and listed items stolen. Norman admitted on the witness stand and in extra-judicial statements to the police that he had committed the burglaries and sold all or almost all of the stolen goods to JR's Gold and Silver Exchange. Some was sold to Zacharia, some to appellant, and some to both of them.

According to Zacharia, he and appellant conspired to dispose of much of the stolen goods for their own profit by failing to activate the cameras or inventory the purchased property. Pursuant to that agreement much of the silver and gold was melted into ingots and sold in the precious metal market. Other merchandise was sold elsewhere and the proceeds divided. Suffice it to say the evidence of the accomplices was more than ample to sustain the conviction if the requirements of independent corroboration was met. The court instructed the jury that Norman and Zacharia were accomplices as a matter of law, and that their testimony must be corroborated.

Diane Locklear testified that she had frequented JR's Gold and Silver Exchange during the period of the conspiracy and became friends with appellant, Cordova and Zacharia. She stated that she knew that they were conducting a sting operation for the sheriff. She stated that on one occasion the appellant admitted to her that he had taken some stolen merchandise "off the top on the supposed sting operation that had been set up in that location."

Art Copeland testified that he also frequented the place during that period and had seen appellant, Zacharia and Cordova purchase merchandise from Norman. He stated that after he had learned that the officers were conducting a sting operation there, he expressed an interest in buying some of the goods brought in by Norman. He stated that appellant answered that "for the right price" he could purchase it.

There was evidence from other witnesses that during this period they observed the appellant and Zacharia melting gold in an outbuilding on appellant's property. There was evidence from the sheriff's office that video tapes were not made on most of the buys and there were discrepancies between the amount of goods reported stolen from the homes burglarized by Norman and that turned over by appellant to the sheriff.

Appellant argues that Locklear was unreliable because of an alleged involvement in prostitution. Her credibility was a question for the jury to resolve. He also argues that she was an accomplice because she had originally been indicted as a co-conspirator. That charge against her had been dismissed and we find nothing in the record tending to connect her with either the conspiracy or the crimes committed in furtherance of it. Appellant also argues that Simpson was an accomplice whose testimony should be corroborated. Although Simpson did help dispose of some of the stolen good after the conspiracy ended, he denied any involvement in the conspiracy and acts in furtherance of it. Ordinarily the question of whether a witness is an accomplice is a mixed question of fact and law and must be submitted to the jury where the evidence is in dispute. *Robinson* v. *State*, 11 Ark. App. 18, 665 S.W.2d 89 (1984). The trial court properly instructed the jury on this issue. From our review of the entire record we cannot conclude that the jury's verdict was not supported by substantial corroborative evidence tending to connect appellant to the crimes testified to by his co-conspirators and accomplices.

Affirmed.

MAYFIELD and GLAZE, JJ., agree.

David SWAN *v.* Dewey STILES, Director of Labor

E 84-158 696 S.W.2d 765

Court of Appeals of Arkansas
Division II
Opinion delivered September 25, 1985

Jan Dewoody Scussel, Legal Services of Arkansas, for appellant.

Allan Pruitt, for appellee.

JAMES R. COOPER, Judge. The central issue on appeal in this unemployment compensation case is whether there is substantial evidence to support the Board of Review's finding that the appellant employee was discharged from his job for provoking a fight with a co-worker. For the reasons enumerated below, we affirm.

The appellant applied for unemployment benefits several days after he was discharged for fighting on the job. The Employment Security Division denied his claim for benefits on a finding that he was disqualified under the provisions of Ark. Stat. Ann. Section 81-1106(b)(2) (Repl. 1976), which disqualifies a claimant from receiving benefits where he has been discharged for misconduct in connection with the work on account of willful violation of the employer's rules or customs pertaining to the safety of fellow employees. The Appeal Tribunal heard further evidence and affirmed the agency's finding that the appellant was fired for provoking a fight with a fellow worker. The Board of Review affirmed the tribunal's decision. From that decision, comes this appeal.

On appeal, the appellant contends first that there is no substantial evidence in the record supporting the finding that he was discharged for misconduct in connection with the work. He contends that he struck his co-worker in self-defense. Alternatively, the appellant contends that all the evidence introduced by the employer was hearsay which, according to his argument, cannot constitute substantial evidence. We find no merit to either argument.

Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support the conclu-

sion reached. *Victor Industries* v. *Daniels*, 1 Ark. App. 6, 611 S.W.2d 794 (1981). The function of this court is to determine whether substantial evidence is present in the record to support the decision made by the Board. Hearsay evidence can constitute substantial evidence in unemployment compensation cases. *Leardis Smith* v. *Everett*, 276 Ark. 430, 637 S.W.2d 537 (1982); *Farmer* v. *Everett*, 8 Ark. App. 23, 648 S.W.2d 513 (1983).

In the case at bar, the employer's evidence consisted of notarized statements signed by other employees stating that the appellant had provoked the fight, as well as oral testimony from the employer's bookkeeper (who admittedly had no first hand knowledge of the fight). She testified that the appellant had been cursing and threatening co-workers for several weeks before the fight and that the employer had cautioned the appellant that he would be discharged if his abusive conduct continued. We hold that this evidence constituted substantial evidence which supports the Board's decision.

The appellant also argues that the admission of hearsay in the record violated his right to confront and cross-examine adverse witnesses. In addressing that issue, this Court, in *Farmer* v. *Everett, supra*, specified two requirements which must be met before the admission of hearsay evidence will not violate a claimant's right to confront and cross-examine adverse witnesses: (1) a party must have an opportunity to know what evidence is being considered; and (2) a party must have the right to a rehearing for the purpose of giving that party the opportunity to subpoena and cross-examine adverse witnesses.

In the case at bar, the appellant knew what evidence was being considered. A statement signed by the appellant approximately thirty days prior to the Appeal Tribunal hearing acknowledged that the appellant knew the employer claimed to have fired him for fighting with a co-worker. The employer's bookkeeper testified before the Appeal Tribunal as to the reasons underlying the appellant's discharge, and it was she who offered the notarized statements into evidence. The appellant had the right to petition the Board to remand the matter to the Appeal Tribunal to allow him the opportunity to cross-examine opposing witnesses. Instead, the appellant obtained counsel and appealed the adverse decision to the Board. Thus, the issue raised before

this Court was never presented to the Board, although the appellant had the opportunity to do so.

Affirmed.

CLONINGER and CORBIN, JJ., agree.

GORDOS ARKANSAS, INC. *v.* Dewey STILES, Director of Labor, and Mary Louise WARDEN

E 84-182 696 S.W.2d 320

Court of Appeals of Arkansas
Division II
Opinion delivered September 25, 1985

Ramsey, Cox, Lile, Bridgforth, Gilbert, Harrelson & Starling, by: *John D. Davis*, for appellant.

George R. Wise, Jr., for appellee.

DONALD L. CORBIN, Judge. Appellee, Mary Louise Warden, was awarded benefits by the Board of Review which reversed a decision of the Appeal Tribunal on a finding that appellee had voluntarily left her last work with appellant Gordos Arkansas, Inc., due to illness, injury, or disability after making reasonable efforts to preserve her job rights. We reverse and remand.

The issue on appeal is whether there is substantial evidence to support the Board of Review's decision that appellee quit her job with appellant because of medical problems and that she made reasonable efforts to preserve her job rights.

Ark. Stat. Ann. § 81-1106(a) (Supp. 1985), provides:

> For all claims filed on or after July 1, 1973, if so found by the Director an individual shall be disqualified for benefits:
>
> . . . .
>
> Provided . . . if after making reasonable efforts to preserve his job rights, he left his last work because of his illness, injury, pregnancy or other disability.

For reversal of the Board's finding that appellee quit her job because of medical problems, appellant relies heavily upon appellee's written resignation which stated: "I'm moving to Wichita, Kansas, with my husband. There is no work here for him. I'm leaving April 28. This will be my last day at Gordos. Signed: Mary Warden, April 5, 1983." Appellee contended she quit her job because she hurt her back and had to move to Kansas to have back surgery. Appellant contends that our determination of this question depends on which of appellee's contradictory stories one believes; that is, did she quit to follow her husband to Kansas or did she quit to go to Kansas because she needed

surgery.

The evidence reveals that appellee received a compensable injury while employed by appellant on January 3, 1983, and was paid Workers' Compensation benefits. She was released by her physician to return to work on March 4, 1983. She gave her written resignation on April 5, 1983. Appellee did not show up for work on or after April 14, 1983, although she had stated in her resignation that April 28, 1983, would be her last day. On May 16, 1983, a physician in Kansas who had formerly treated appellee for a prior back condition examined her and on June 2, 1983, performed surgery on her back. Appellant paid Workers' Compensation benefits in connection with this surgery as it was related to her January 3, 1983, injury. There was a note entered in evidence from appellee's Arkansas physician, Dr. W.G. Swindell, which stated: "Mary L. Warden was seen in my office on April 18, 1983, for persistent low back pain and probable herniated nucleus pulposus and nerve root irritation on the left. Hospitalization with complete bedrest, analgesics and intense physical therapy was recommended, but Mrs. Warden chose to go to Wichita instead, and be hospitalized there. Thank you. Signed: W.G. Swindell, M.D."

From our review of the record, we believe there is substantial evidence to support the finding by the Board of Review that appellee left her employment with appellant because of her injury.

The next question to be decided is whether the Board's finding that appellee made reasonable efforts to preserve her job rights is supported by substantial evidence. We hold that it is not. Appellee Director of Labor concedes that appellee Mary Louise Warden took no active steps to preserve her job rights as required by Ark. Stat. Ann. § 81-1106(a), but contends that it would have been a futile gesture on appellee's part pursuant to our holding in *Oxford* v. *Daniels*, 2 Ark. App. 200, 618 S.W.2d 171 (1981).

We believe *Oxford, supra*, is distinguishable. There, Oxford had been discharged by his employer and drew unemployment benefits for 3½ months before accepting a different position as grinder machine operator at the company's request. Oxford was reluctant to accept this job because of his poor eyesight and the fact that he did not have a kneecap in one knee. Oxford quit after

three days because of what he described as aching all over and an inability to see well enough to perform the job properly. The personnel officer for the employer recognized Oxford's willingness to try a job that both he and Oxford suspected he could not do. In addition, the employer stated that it was the only job available within the company for Oxford. Under these facts, any attempt by Oxford to preserve his job rights would have been a futile gesture.

In the instant case there was no indication by appellant that there were no other jobs available which would be suitable to appellee. Appellee had in the past taken advantage of the company's leave policy. One such leave was for medical reasons. In fact, Karen Lugeanbeal, personnel director for appellant, testified that the company had a record of not turning down anyone's request for a leave of absence, especially if it was for a medical reason.

In *Oxford, supra*, the employer was aware that Oxford was unable to perform the assigned job and knew it did not have another job for him. In the instant case, appellee indicated that she chose to remain in Kansas and has not, to this day, requested her old job back nor asked if there was another job available with appellant compatible with her injury. We fail to find any excuse for appellee's failure to make reasonable efforts to preserve her job rights with appellant. Nor does the evidence support the conclusion that any attempt on her part to obtain a leave of absence would have been a futile gesture.

We are not unmindful of the policy announced in *Harmon* v. *Laney*, 239 Ark. 603, 393 S.W.2d 273 (1965), wherein it was stated: "Strict constructions which result in defeat of the intended purposes of the Act will not be sanctioned by this court." However, Ark. Stat. Ann. § 81-1106(a) clearly provides that an individual must make reasonable efforts to preserve his or her job rights in order to avoid disqualification for benefits. There is no evidence to support the Board's finding that appellee made reasonable efforts to preserve her job rights. Accordingly, we reverse and remand for the Board of Review to issue an order denying benefits to appellee because of her total failure to make reasonable efforts to preserve her job rights.

Reversed and remanded.

COOPER and GLAZE, JJ., agree.

Richard CHESHIRE *v.* STATE of Arkansas

CA CR 85-85 696 S.W.2d 322

Court of Appeals of Arkansas
Division I
Opinion delivered September 25, 1985

Bob Keeter, for appellant.

Steve Clark, Att'y Gen., by: *Mary Beth Sudduth*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. In July of 1984, appellant pled guilty to a charge of violating Ark. Stat. Ann. § 41-2304 (Repl. 1977), defrauding a secured creditor. Imposition of sentence was suspended and appellant was placed on probation for five years. In September of 1984, the state filed a petition for revocation of appellant's probation and a bench warrant was issued for his arrest. The petition alleged numerous violations of the probation conditions, including failure to keep the probation officer advised of appellant's changes of address.

On November 14, 1984, the appellant was arrested in Texas as a "fugitive from justice." On November 20, 1984, he was picked up in Texas by the Arkansas authorities and taken to the

Polk County, Arkansas, jail.

A hearing on the petition for revocation was originally scheduled for January 9, 1985, but at the state's request, the hearing was continued until January 16, 1985. On January 15, the appellant filed a motion to dismiss based on Ark. Stat. Ann. § 41-1209(2) (Repl. 1977), which requires revocation hearings to be held "within a reasonable period of time, not to exceed sixty days, after the defendant's arrest." At the hearing on January 16, the court denied the appellant's motion to dismiss, found that appellant had violated six conditions of his probation, and sentenced the appellant to five years imprisonment.

On appeal, the appellant argues that the trial court erred when it failed to grant his motion to dismiss since the revocation hearing was not held within sixty days after his arrest on November 14, 1984, as required by Ark. Stat. Ann. § 41-1209(2). In response, the state argues that the sixty-day limitation did not begin to run until November 20, 1984, the day appellant was returned to Arkansas. The state characterizes the six days after appellant's arrest in Texas on November 14 as an "excludable period of time" from the sixty-day limitation because for those six days appellant was unavailable for trial.

We agree with the state. The Arkansas Supreme Court has expressed its willingness to look to the provisions of A.R.Cr.P. Rule 28.3 for guidance in computing excludable periods of time from the sixty-day limitation required for revocation hearings. *See Lark* v. *State*, 276 Ark. 441, 637 S.W.2d 529 (1982). Rule 28.3 provides in part:

> The following periods shall be excluded in computing the time for trial:
>
> . . . .
>
> (e) The period of delay resulting from the absence or unavailability of the defendant. A defendant shall be considered absent whenever his whereabouts are unknown. A defendant shall also be considered unavailable whenever his whereabouts are known but his presence for the trial cannot be obtained or he resists being returned to the state for trial.

We think the court was correct in finding that appellant was unavailable for trial while he was in the custody of the Texas authorities as there is no evidence that the six-day delay before appellant was returned to Arkansas was caused by neglect on the part of the State of Arkansas. To the contrary, the record indicates that a fugitive bond was set by a court in Texas and that this procedure would not have been necessary if appellant had promptly waived extradition to Arkansas. Thus, it would appear that any delay in returning appellant to Arkansas was caused by the appellant. His hearing was held within sixty days of his return and we think the trial court correctly denied his motion to dismiss.

Affirmed.

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

STERLING STORES and The HOME INSURANCE COMPANY *v.* Kathy DEEN

CA 85-149 696 S.W.2d 784

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

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

Smith, Jernigan & Smith, by: *Robert D. Smith, III*, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Sterling Stores bring this appeal from a decision of the Workers' Compensation Commission authorizing a change from a physician initially selected by Kathy Deen. We find no error in the action of the Commission and affirm.

Appellee sustained a compensable injury on April 19, 1980 while employed by appellant. She was treated by physicians of her own selection until 1983. In September 1983 appellee petitioned the Commission for authority to change physicians on the ground that her selected physician refused to see or treat her further and submitted proof that further medical treatment was essential. She contended that the change was authorized under Ark. Stat. Ann. § 81-1311, as amended in 1981, which permits such a change from a selected physician on showing of a compelling reason or circumstance justifying the change. The appellants contend that as appellee's injury was sustained prior to the effective date of the 1981 amendment, she should not change from a physician initially selected by her under the law in effect on the date of injury.[1] The Commission resolved that issue in the following language:

> The first question which must be answered is whether this case is governed by Ark. Stat. Ann. § 81-1311 as amended by Act 253 of 1979 or § 81-1311 as amended by Act 290 of 1981. The answer to this question must be ascertained from a review of the decisions by the Arkansas Court of

[1] The effective date of the 1981 amendment was March 3, 1981. A discussion of the changes it made in the law is not necessary to our decision in this case. It suffices to say that under the law in effect prior to March 3, 1981, a change of physicians in this case might not be authorized. Under the law in effect after that date the action of the Commission would be correct.

> Appeals in *Popeye's Famous Fried Chicken* v. *Willis*, 7 Ark. App. 167, 646 S.W.2d 17 (1983); *Continental Grain Company* v. *Miller*, 9 Ark. App. 317, 659 S.W.2d 517 (1983); and *American Transportation Co.* v. *Payne*, 10 Ark. App. 56, 661 S.W.2d 418 (1983). After reviewing these cases, we are of the opinion that the *Popeye* decision was not overruled by either *Continental Grain Company* or *American Transportation Company* decision. Accordingly, we find Ark. Stat. Ann. § 81-1311 as amended by Act 290 of 1981 as the governing law.

Following our opinion in *Popeye's Famous Fried Chicken* v. *Willis*, 7 Ark. App. 167, 646 S.W.2d 17 (1983) the Commission found that the required compelling reason existed and authorized the change of physicians.

Appellants argue on appeal that the Commission erred in following *Willis*. They contend that our decision in *Willis* was an erroneous application of the law and has been reversed by implication in *Union Medical Center* v. *Brumley*, 4 Ark. App. 370, 631 S.W.2d 618 (1982); *Continental Grain Company* v. *Miller*, 9 Ark. App. 317, 659 S.W.2d 517 (1983); *Revere Copper and Brass, Inc.* v. *Talley*, 7 Ark. App. 234, 647 S.W.2d 477 (1983); *Artex Hydrophonics* v. *Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983); and *American Transportation Co.* v. *Payne*, 10 Ark. App. 56, 661 S.W.2d 418 (1983). Appellants request we expressly do so now. We conclude that our opinion in *Willis* was a sound one and reaffirm it.

In *Willis* the claimant sustained a compensable injury before the effective date of the 1981 amendment. She was treated by a physician of her own choice until April 10, 1981 (after the effective date of the 1981 amendment) when her doctor indicated that he had no further treatment to offer her and suggested to her attorney that she be referred to another surgeon. She then petitioned for a change of physicians. The Commission ruled that when the request to the Commission for authority to change physicians was made the 1981 Act was in effect and was not limited to prospective application and authorized the change. We affirmed and relying on *Aluminum Co. of America* v. *Neal*, 4 Ark. App. 11, 626 S.W.2d 620 (1982) and *State ex rel. Moose* v. *Kansas City & Memphis Railway & Bridge Co.*, 117 Ark. 606,

174 S.W. 248 (1914), we held that the rules of strict construction do not apply to remedial statutes which do not disturb vested rights or create new obligations but only supply a new or more appropriate remedy to enforce an existing right or obligation. Those statutes should be given a retrospective effect whenever it seems to be the intention of the legislature.

The appellants argue that our decision was wrong because the new act did create new rights and obligations. Appellants argue that before the effective date of the 1981 amendment the claimant could not obtain a change of physicians at the employer's expense unless she met five prerequisites contained in Rule 21 of the Workers' Compensation Commission, one of which was "the claimant is not seeking to change physicians from one of his own choice, previously selected by the claimant." Appellants further contend that subsequent to the 1981 amendment one may now make that change as a new right and as a new obligation.

We rejected that argument in *Willis*. There we pointed out that our workers' compensation law has contained a provision allowing the Commission to authorize a change of physicians since its inception. The manner and circumstances under which the change could be effected has been revised on several occasions.

Even during the effective period of the 1979 amendment there were conceivable circumstances under which the Commission might authorize a change of physicians from one initially selected by the employee. The prohibition against changing such physicians was not a statutory one. It was contained in a rule of the Commission from which it could deviate when compliance with it was impractical or impossible. *Rules of the Arkansas Workers' Compensation Commission* Rule 23; *Mad Butcher, Inc.* v. *Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982); *Continental Grain Company* v. *Miller, supra.* The facts of this case might well be such a situation in which a claimant's selected physician refused to further treat him and it is shown that further treatment is absolutely necessary, but unobtainable except at the employee's expense. The Commission could deviate from Rule 21. The 1981 amendment simply makes it easier for the Commission to afford an existing remedy where there is such a compelling

reason or circumstance justifying the change.

Nor do we find any inconsistency in our decisions subsequent to *Willis*. *Union Medical Center* v. *Brumley, supra*, and *Continental Grain Company* v. *Miller, supra*, are clearly distinguishable. In *Willis*, *Brumley* and *Miller* the injuries were sustained prior to the effective date of the 1981 Act. However, unlike *Willis*, in both *Brumley* and *Miller* the claimants sought to exercise their right to change physicians before that date. In all three cases we held the date of the injury to be immaterial and applied the law in effect on the date the changes were made. In *American Transportation Co.* v. *Payne, supra*, both the injury and application for change occurred after the 1981 Act was effective. We reversed because the Commission had not taken the emergency clause into account and had applied rules no longer in effect. In *Artex Hydrophonics* v. *Pippin, supra*, we considered the third appeal from a change of physicians made in 1977. We ruled that the law in effect in 1977 governed. The issue was not presented in *Revere Copper and Brass, Inc.* v. *Talley, supra*. In that case the issue was not what law governed the change of physicians but the effect an unauthorized change had on the admissibility of the physician's testimony.

It was our intent in those cases to hold that the date of the injury is immaterial. The 1981 amendment is not limited in application to those workers whose injuries are sustained after its effective date, but is limited to changes in physicians made after that date. Ordinarily, however, it cannot be retroactively applied to ratify a change which was unauthorized at the time such change was actually made.

Affirmed.

CLONINGER and MAYFIELD, JJ., agree.

TYSON FOODS, INC. *v.* Herman FATHERREE

CA 85-97 696 S.W.2d 782

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

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

Hubbard, Patton, Peek, Haltom & Roberts, by: *J. David Crisp* and *A. Paul Miller*, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Tyson Foods, Inc. brings this appeal contending that the Workers' Compensation Commission improperly determined the amount of attorney's fee to be awarded Herman Fatherree in these proceedings. The essential facts are largely undisputed. The appellee sustained a compensable injury to his back in November 1978. Appellant controverted all permanent disability in excess of 25% to the body as a whole. A final award was entered on September 4, 1981 finding him to be permanently and totally disabled and awarding the claimant's attorney a lump sum fee based on that portion of the benefits which had been controverted.

On March 2, 1983 the appellant unilaterally terminated payment of benefits and filed a motion to set the award aside as having been procured by fraud. After a hearing the administrative law judge ruled that the appellant had failed to show by a preponderance of the evidence that the award had been obtained by fraud, and assessed a 20% penalty on the installment of benefits accrued between the dates of termination and reinstatement pursuant to Ark. Stat. Ann. § 81-1319(f). It also allowed an attorney's fee calculated on the amount of benefits wrongfully withheld.

On appeal the full Commission affirmed the findings of the administrative law judge as to continued liability but determined that the attorney's fee should be calculated on all reinstated benefits. The appellant brings this appeal contending that the Commission erred by awarding the second maximum statutory attorney's fee which was calculated on some of the same controverted benefits as the first one. We find no error.

Ark. Stat. Ann. § 81-1332 (Repl. 1985) provides in pertinent part as follows:

> In all other cases, *whenever* the Commission finds that a claim has been controverted, in whole or in part, the

> Commission shall direct that fees for legal services be paid by the employer or carrier in addition to compensation awarded, and such fees shall be allowed only on the amount of compensation controverted and awarded, . . . In any case where attorney's fees are allowed by the Commission, the limitations expressed in the first sentence herein shall apply. In determining the amount of fees, the Commission shall take into consideration the nature, length and complexity of the services performed, and the benefits resulting therefrom to the compensation beneficiaries.

In *Aluminum Company of America* v. *Henning*, 260 Ark. 699, 543 S.W.2d 480 (1976) the court stated that the primary purpose of determining whether a claim is controverted is for the purpose of determining who is liable for the claimant's attorney's fees. It declared that making the employer liable for the attorney's fee serves a legitimate social purpose of discouraging oppressive delay, recognition of liability, deterring arbitrary or capricious denials of claims and assuring the ability of necessitous claimants to obtain adequate and competent legal representation. It further stated that if the fundamental purpose is to be achieved it must be considered that the real object is to place the burden of litigation expense upon the party who makes it necessary.

Appellant points out that § 81-1332 sets maximum fees which can be allowed by the Commission. It argues that as appellee's attorney had already been allowed the maximum fee provided, any additional sum should be in excess of that provided in the act. It is true that the holding of the Commission means that appellant will be required to pay attorney's fees calculated twice on some of the benefits awarded appellee. However, we agree with the Commission that these same benefits have been controverted and placed in jeopardy twice by appellant and appellee has been required to obtain the services of an attorney on both occasions. We find nothing in § 81-1332 indicating that there can be only one controversion for the purposes of that section. It specifically provides that *whenever* the Commission finds that the claim has been controverted it should allow attorney's fees on the controverted portion. The maximum fees provided in that section can only refer to each controversion. Certainly the legislature intended that a necessitous claimant have the ability to obtain

counsel in defense of an award as well as in the obtaining of it. Any other meaning ascribed to this section would defeat the stated purpose of the enactment.

This section provides that in determining the amount of fees the Commission shall take into consideration the nature, the length and complexity of the services performed and the benefits resulting therefrom to the compensation beneficiaries. Section 81-1331 provides that the fees allowed shall not exceed 30% of the first $1,000 awarded, 20% of the second $2,000 or 10% of all sums in excess of $3,000. The Commission determined that under the statute and *Norsworthy* v. *Georgia Pacific Corp.*, 249 Ark. 159, 458 S.W.2d 401 (1970) the reinstated award should be treated as additional compensation and computed at the rate of 10%. It further found that this voluminous record amply demonstrated the considerable amount of time, skill and effort devoted by the claimant's counsel. It further considered the results obtained for the claimant beneficiary in making its determination.

We cannot agree that the award of additional attorney's fees amounts to a penalty. The award of attorney's fee is not a penalty but an award of reasonable compensation for services necessarily rendered to compensation claimants based on consideration by the Commission of the various factors usually taken into consideration in determining reasonable attorney's fees. This is in keeping with the purpose of the act, not only to deter arbitrary and capricious denials, but to insure the ability of necessitous claimants to obtain adequate and competent legal representation.

We conclude that the Commission has followed the provisions of the section and that its determination that appellee's attorney was entitled to a maximum fee under the statute was based on a consideration of those criteria set out in the statute and ordinarily applicable in such cases.

Affirmed.

CLONINGER and MAYFIELD, JJ., agree.

Don BRYANT *v.* STATE of Arkansas

CA CR 85-67 696 S.W.2d 773

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

Hale, Lee, Young, Green, Ward & Morley, by: *Stephen E. Morley*, for appellant.

Steve Clark, Att'y Gen., by: *Connie Griffin*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. In this non-jury criminal case, the appellant was convicted of driving while intoxicated, second offense. He was fined $750.00 and sentenced to six months in jail, with all but seven days of the sentence suspended on the condition that the appellant complete a D.W.I. school course and commit no alcohol-related offenses within six months following his conviction. His driver's license was suspended for one year. From that decision, comes this appeal.

On September 9, 1984, the appellant was arrested by Arkansas State Trooper Larry Mitchell. Trooper Mitchell testified that, when he arrived at the scene of an accident, Trooper Gifford already had the appellant in his car. Trooper Mitchell testified that he put the appellant in his car and read him his *Miranda* rights at 11:06 A.M., after which time the appellant signed a waiver of those rights. The trooper testified that he then asked the appellant several questions at 11:16 A.M., which were answered as follows:

> Mr. Bryant, is the Blue Volkswagen in the ditch license plate number Lincoln, Robert, Charles 761, on highway 167, yours, he answered yes, it is; were you driving the vehicle when it went into the ditch, he answered, yes, I was; have you had anything to drink since driving off into the ditch, no, sir; how much have you had to drink . . . how much had you had to drink before the accident, he said, maybe half a pint.

Trooper Mitchell then testified that he transported the appellant to the Searcy Police Department where the appellant executed another waiver of rights form. He stated that the appellant told him that he understood those rights and then the appellant signed the form. The appellant agreed to take the breathalyzer test, and it was administered at 11:57 A.M., at which time his blood-alcohol level registered 0.28 percent. Trooper Mitchell testified that the appellant had nothing to drink for at least forty-five minutes prior to taking the test. He further stated that there was a fifth of whiskey in the car which was about half empty.

The appellant's first contention on appeal is that the

trial court erred in finding that he voluntarily, knowingly, and intelligently waived his *Miranda* rights. The appellant contends that the breathalyzer test results show that he was too intoxicated to have voluntarily, knowingly, and intelligently waived his rights against self-incrimination. While the State has the burden of proving, by a preponderance of the evidence, the voluntariness of a custodial confession, any conflict in the testimony of the witnesses is for the trial court, as factfinder, to resolve. *State* v. *Graham*, 277 Ark. 465, 642 S.W.2d 880 (1982). Although this Court is required to make an independent determination, based on the totality of the circumstances with all doubts resolved in favor of individual rights, of whether the accused voluntarily, knowingly, and intelligently waived his rights, we will not reverse the trial court unless its determination is clearly erroneous. *Id.* There is no question but that the appellant was entitled to be given his *Miranda* rights, *see Berkemer* v. *McCarty*, ___ U.S. ___, 104 S.Ct. 3148 (1984), and the appellant acknowledges that those rights were given him.

The question, then, is whether the trial court was correct in holding that the appellant was not too intoxicated to have voluntarily, knowingly, and intelligently waived his rights. The mere fact that he had been drinking at the time of his confession will not, of itself, invalidate his subsequent confession. Recent drinking does not make the confession inadmissible, but only goes to the weight to be accorded it. *Kennedy* v. *State*, 255 Ark. 163, 499 S.W.2d 842 (1973). " 'The test is whether he had sufficient mental capacity at the time of giving his statement to know what he was saying to have voluntarily intended it.' " *Id.* at 173 (quoting *Commonwealth* v. *Smith*, 447 Pa. 457, 291 A.2d 103 (1972)); *Johnson* v. *State*, 6 Ark. App. 342, 642 S.W.2d 324 (1982). " ' "[I]f it is shown that the accused was intoxicated to the degree of mania, or of being unable to understand the meaning of his statement, then the confession is inadmissible." ' " *Kennedy*, 255 Ark. at 174 (quoting *Longuest* v. *State*, 495 P.2d 575 (Wyo. 1972) (quoting *People* v. *Schombert*, 19 N.Y.2d 300, 226 N.E.2d 305, 279 N.Y.S.2d 515, (1967))).

In the case at bar Trooper Mitchell, who read the appellant his rights, testified that, although the appellant was very intoxicated, he was not in a stupor and that he responded

intelligently to questions. The trooper testified that, at the time of the arrest, the appellant had a very strong odor of alcohol about him; he was unsteady on his feet; and his speech was very slurred. However, the trooper testified that the appellant appeared to understand what was going on when he read him his rights; he was able to understand and follow the instructions he was given pursuant to his arrest; and that the appellant had no problems following the step-by-step procedure required of him by the officer conducting the breathalyzer test. While the appellant testified that he could only remember bits and pieces of the questioning, it was for the trial court to determine the credibility of the witnesses, and the court is not required to give the appellant's testimony greater weight than that of the police officer. *Altes* v. *State*, 286 Ark. 94, 689 S.W.2d 541 (1985).

In effect, the appellant is asking that this Court hold that a person whose blood-alcohol level is above a certain percentage is unable, as a matter of law, to voluntarily, knowingly, and intelligently waive his Fifth Amendment rights. We decline to do so. We have not found, nor has counsel cited to us, any state which has set such a mandatory cutoff. *See* Annot., 25 A.L.R.4th 419, Section 8[e] (1983). The courts look at all circumstances, including the defendant's blood-alcohol level, to determine if the accused was too intoxicated to waive his rights, noting that different individuals have differing tolerances and abilities to control the effects of alcohol. *Id.* In one case, the Arizona Supreme Court refused to hold an accused's confession involuntary merely because he had a blood-alcohol level of 0.46 percent, as there was other evidence which indicated that he knew what he was doing. *See Arredondo* v. *State*, 111 Ariz. 141, 526 P.2d 163 (1974). In the case at bar the trooper's testimony, as well as that of Officer Marvin Harris, who administered the breathalyzer test, amply supports the trial court's ruling that the appellant did voluntarily, knowingly, and intelligently waive his rights, and therefore, the confession was admissible.

The appellant next contends that the evidence was insufficient to sustain his conviction because there is no independent evidence that the offense of D.W.I. was committed. In criminal cases, we view the evidence in the light most favorable to the appellee, and where we find substantial evidence to support the verdict, we must affirm. *Fountain* v. *State*, 273 Ark. 457, 620

S.W.2d 936 (1981). In order for the appellant's conviction to stand, his out-of-court confession must be accompanied by other proof that the offense was committed. Ark. Stat. Ann. Section 43-2115 (Repl. 1977). This corroborating evidence need not be sufficient to sustain a conviction. *Sawyer* v. *State*, 284 Ark. 26, 678 S.W.2d 367 (1984).

Here the appellant admitted in court that the car was his and that he was driving the vehicle when it became stuck in the ditch. Trooper Mitchell testified that, when he arrived, the appellant was intoxicated. He further stated that he found a half-empty bottle of whiskey in the appellant's car. While the appellant testified at trial that he had done all his drinking, with the exception of a few drinks the night before, after the accident, the trial court was not required to believe his testimony. *Altes, supra.* In *Altes*, the defendant contended, as does the appellant here, that all his drinking was done subsequent to driving into the ditch and, unlike the case at bar, the defendant in *Altes* never made a confession to the police. In both *Altes*, and *Azbill* v. *State*, 285 Ark. 98, 685 S.W.2d 162 (1985), the Arkansas Supreme Court found that evidence that the defendant had driven the vehicle into the ditch and, when discovered by the police, was standing by the vehicle in an intoxicated condition, was sufficient to sustain a conviction for D.W.I. Likewise, we find the evidence in the case at bar sufficient to sustain the appellant's conviction, and we also find it sufficient to corroborate his out-of-court confession.

The appellant's last point on appeal is that the trial court erred in admitting a certified court copy of a prior conviction for D.W.I. In Sherwood Municipal Court which, according to counsel, stated that the appellant had "waived counsel". The appellant, however, in his opening brief, failed to abstract the copy of the prior conviction. He attempted to remedy this defect by providing a supplemental abstract of the copy in his reply brief. It is a settled rule that an appellant may not remedy deficiencies in his abstract in a reply brief. *Smith* v. *State*, 278 Ark. 462, 648 S.W.2d 792 (1983), *cert. denied* 464 U.S. 890, 104 S.Ct. 232 (1983); *Weston* v. *Ponder*, 263 Ark. 370, 565 S.W.2d 31 (1978). However, even if the supplemental abstract were part of the original brief, it would still be deficient because it fails to set forth the copy of the prior conviction alleged to have been

* this defect by providing a supplemental abstract of the certificate stating that the copy was "a true and accurate copy of the Order entered" in his reply brief. It is a settled rule that an appellant may not remedy deficiencies in his abstract in a reply brief. *Smith v. State,* 278 Ark. 462, 648 S.W.2d 792 (1983), *cert. denied* 464 U.S. 890, 104 S. Ct. 232 (1983); *Weston v. Ponder,* 263 Ark. 370, 565 S.W.2d 31 (1978). However, even if the supplemental abstract were part of the original brief, it would still be deficient because it fails to set forth the copy of the prior conviction alleged to have been

erroneously admitted. While we could affirm on this point alone, we feel that, upon examination of the record, the copy of the conviction is sufficient to show waiver of counsel because it is a certified part of the court record. *See Peters* v. *State*, 286 Ark. 421, 692 S.W.2d 243 (1985); *Williford* v. *State*, 284 Ark. 449, 683 S.W.2d 228 (1985).

We find no merit in any of the points raised for reversal, and therefore, we affirm.

Affirmed.

CORBIN and GLAZE, JJ., agree.

AETNA INSURANCE COMPANY *v.* Billy Joe DUNLAP, et al.

CA 85-100 696 S.W.2d 771

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

Friday, Eldredge & Clark, by: *Laura A. Hensley* and *C. Tab Turner*, for appellant.

John E. Matthews, for appellee, Dunlap.

Barber, McCaskill, Amsler, Jones & Hale, P.A., for appellee, Royal Ins. Co.

DONALD L. CORBIN, Judge. On August 21, 1974, claimant and appellee, Billy Joe Dunlap, suffered a compensable injury to his back while employed by appellee Coca-Cola Bottling Company. Appellee Royal Insurance was the Workers' Compensation insurance carrier and paid compensation to claimant until April 23, 1982, based upon a 20% disability rating by claimant's physician Dr. John Lohstoeter, an orthopedic surgeon. In 1980, appellant, Aetna Insurance Company, became the Workers' Compensation carrier for the employer, Coca-Cola Bottling Company. On May 7, 1982, claimant reported an incident that involved a pain to his back when he stepped on a support to put an eight-pound bag of bottle crowns into a filler at the Coca-Cola Bottling Company. Claimant was hospitalized in May 1982 by his physician, Dr. Lohstoeter, for testing purposes to ascertain the current status of his back.

The Administrative Law Judge ruled that the episode of May 7, 1982, was a natural and probable result of the first injury and not precipitated by an independent intervening cause, i.e., a recurrence of the 1974 injury, and placed the sole responsibility for compensation upon Royal. The Workers' Compensation Commission reversed the ALJ's decision, declining to categorize the 1982 episode as either a recurrence or an aggravation of a preexisting condition. The Commission applied the doctrine of apportionment ordering Royal and Aetna to each pay one-half of claimant's medical and related expenses together with maximum attorneys fees because of their total controversion of the claim. We reverse and remand.

Arkansas cases have followed the rule that all of the logical consequences flowing from an initial injury are the responsibility of the 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 original carrier

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. *Burks, Inc.* v. *Blanchard*, 259 Ark. 76, 531 S.W.2d 465 (1976), *Calion Lumber Co.* v. *Goff*, 14 Ark. App. 18, 684 S.W.2d 272 (1985), *Bearden Lumber Co.* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). These cases clearly indicate that application of the doctrine of apportionment requires a finding that there was a second episode resulting from an independent intervening cause. In the case at bar the Commission failed to make clear whether that prerequisite was satisfied. The Commission stated in its opinion:

> All of the Arkansas cases involving the recurrence-aggravation question have been examined in the light of the evidence in this case and it is frankly impossible to place this claimant's second back injury occurring on May 7, 1982, into one or the other of these categories with any logical certainty. Equally persuasive arguments can be and have been made by the parties in this case to characterize claimant's May 7, 1982, injury a recurrence of his earlier injury, resulting in exclusive liability for Royal. To classify claimant's 1982 injury would involve a high degree of arbitrariness and artificiality. Therefore, we decline to call it either.
>
> Instead, we choose to apply the doctrine of apportionment among successive employers, or insurance carriers, which rule has been sanctioned several times by the Arkansas Supreme Court. See, *e.g.*, *Employer's Casualty Co.* v. *United States Fidelity & Guarantee Co.*, 214 Ark. 40, 214 S.W.2d 774 (1948); *Tri State Insurance Company* v. *Employers Mutual Insurance Company*, 254 Ark. 944, 497 S.W.2d 39 (1973); *Browning's Restaurant* v. *Kuykendall*, 263 Ark. 374, 565 S.W.2d 33 (1978). This rule of apportionment is also endorsed and discussed in Larson, *Workmen's Compensation Law* § 95.31 (1984). This doctrine, essentially equitable in nature, may be applied ". . . whenever disability results from the cumulative effect of successive and repeated 'accidental injuries' suffered in the same employment, some of which occurred during the periods of coverage of each of two or more carriers." *Tri State Insurance Company* v. *Employers*

> *Mutual Liability Insurance Company, supra.* In the instant claim we find that claimant's disability has resulted from the cumulative effect of successive injuries suffered in the same employment and when different insurance carriers provided coverage.

The Commission then apportioned the compensation liability equally between Aetna and Royal.

Larson's treatise on Workmen's Compensation § 95.31, cited by the Commission, specifically states apportionment is proper "where a preexisting disease or anomaly is accelerated or aggravated by an industrial accident." In the case where an acceleration is found "the employer or insurer is liable for only the degree of acceleration or aggravation attributable to the accident." Larson, *supra.*

The ruling of the Commission makes it unclear whether an independent intervening injury was found. The Commission declined to determine whether there was a recurrence or an aggravation while at the same time applied the doctrine of apportionment on the basis of a finding that there were "successive injuries suffered in the same employment and when different insurance carriers provided coverage." Were this ruling affirmed the case law in this area would be confused. The Court of Appeals has already addressed this problem in *Bearden, supra.* In *Bearden* this Court held:

> We conclude that in all of our cases in which a second period of medical complications follows an acknowledged compensable injury we have applied the test set forth in *Williams*—that where the second complication is found to be a natural and probable result of the first injury, the employer remains liable. Only where it is found that the second episode has resulted from an independent intervening cause is that liability affected. While there may be some variance in the words used to describe the principle, there has been no departure from the basis test, i.e., whether there is a causal connection between the two episodes. (cites omitted)

In *Bearden* the Court went on to discuss the terminology used in the cases. The Court concluded that, although the causal relation

test was the only test, different terms were used in the cases to apply the test. However, in all cases the test is the same: Is the second episode a natural and probable result of the first injury or was it precipitated by an independent intervening cause? We think that the Commission's ruling confuses this issue and we therefore reverse and remand on this point for further findings of fact consistent with this holding.

The appellant argues that there is no substantial evidence to support the Full Commission's reversal of the Administrative Law Judge's finding that claimant did suffer a recurrence of his original injury. We need not address this issue because the case is being remanded to the Commission with orders to clarify its determination on this point.

We agree with the Commission's finding that the entire claim was controverted and that claimant's attorney is entitled to the maximum attorney's fee. However, the determination of which carrier or carriers will be responsible for the maximum attorney's fee will have to be made by the Commission upon remand. *See, Aluminum Co. of America* v. *Henning*, 260 Ark. 699, 543 S.W.2d 480 (1976).

Reversed and remanded.

COOPER, J., agrees.

GLAZE, J., concurs.

Aristal ATKINSON *v.* DIRECTOR OF LABOR

E 84-146 696 S.W.2d 777

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

B. Dewey Fitzhugh, for appellant.

Allan Pruitt, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Board of Review holding that the appellant was discharged for misconduct and therefore not entitled to receive unemployment compensation. The statute involved, Ark. Stat. Ann. § 81-1106(b)(2) (Repl. 1976), is Section 5(b)(2) of the Arkansas Employment Security Act and provides that a claimant shall be disqualified for benefits if he is discharged "for misconduct in connection with the work on account of dishonesty . . . ."

The decision of the Board issued on September 12, 1984, contained the following summary of the evidence before it:

> The claimant was discharged on March 20, 1984 for alleged theft of the employer's property and dishonesty. The employer-representative, Ronnie Kooer, testified that the claimant asked him to wrap a roll of carpet on March 20, 1984 without first presenting the required tickets. The employer-representative stated that he refused this request. According to Kooer's testimony, the claimant then had three explanations for the lack of written authorization. First, the claimant stated that the carpet was a gift from Mr. Tillman [the employer's vice-president]. Secondly, the claimant indicated that he purchased the carpet

from another business. Finally, the claimant denied these accounts and stated that he moved the carpet to its present location to discover who was stealing from the employer. The claimant testified that this roll of carpet was a gift from Mr. Tillman. Mr. Tillman denied this.

The employer-representative, John Shear, testified that other goods missing from the employer's place of business have been traced to the claimant's possession, i.e. one six foot roll of sundial vinyl, 4 cartons of tile and a roll of beige carpet. The claimant testified that he purchased these items over two and one-half years ago. The claimant stated twenty-five dollars was withheld from his paycheck every two weeks to pay for the goods. The employer-representative, Reva Sims, testified that there are no business records substantiating the claimant's statements. Furthermore, John Shear testified the cartons of tile have serial numbers on them indicating their date of manufacture as September 19, 1983. These same cartons were received by the employer on October 14, 1983 and the employer's business records indicate that they should still be in inventory.

On appeal, appellant's counsel first argues that there is no factual basis in the record to support the Board's statement that "the claimant stated that the carpet was a gift from Mr. Tillman." Counsel has overlooked this testimony of Ronnie Kooer on page 54 of the transcript: "Another story that he told me was that Mr. Tillman had given him the roll and no one else was suppose to know . . . ." Although the *appellant* testified that he purchased the carpet from his employer, the Board's summary of Ronnie Kooer's testimony is an accurate summary of the testimony given by that witness.

Appellant's second argument is that the Board improperly relied upon the evidence set out in its summary about other items missing from the employer's inventory and traced to the appellant's possession. It is the appellant's contention that since Mr. Tillman admitted that the finding of these other items had nothing to do with his decision to terminate appellant's employment, the Board's reliance upon this evidence injected a new issue into the case that the claimant had no opportunity to rebut.

Appellant says this is contrary to our decision in *Linscott* v. *Director of Labor*, 9 Ark. App. 103, 653 S.W.2d 150 (1983).

In *Linscott* the appellant's claim for unemployment benefits had been denied by the agency on the basis that he had been discharged for misconduct in connection with his work and was therefore disqualified for benefits under Section 5(b)(1) of the Employment Security Act. On appeal to the Appeal Tribunal this disqualification was affirmed. However, on appeal to the Board of Review the Board found that he had voluntarily quit his job without good cause connected with the work and the appellant was held disqualified under Section 5(a) of the Act. We held that the injection of the voluntary quit issue for the first time in the Board's decision "effectively denied appellant proper notice of the disputed issue" and we reversed and remanded for a new hearing.

However, the situation here is not like the situation in *Linscott*. The issue here is whether the appellant was discharged for "misconduct in connection with the work on account of dishonesty" under Section 5(b)(2) of the Act. This was the issue involved in the agency decision and the same issue has been involved throughout the whole appeal process. At the very first hearing before the Appeal Tribunal there was evidence concerning these other items missing from the employer's inventory and traced to appellant's possession. In keeping with our decision in *Jones* v. *Director of Labor*, 8 Ark. App. 234, 650 S.W.2d 601 (1983), the Board directed that additional evidence be taken by a referee of the Appeal Tribunal and again there was evidence introduced concerning these missing items traced to appellant's possession. Appellant's counsel was present at this hearing and cross-examined the employer's witnesses about this matter, and the appellant himself testified about it. Furthermore, prior to the second hearing, appellant's counsel had been furnished a copy of the transcript of the first hearing. Thus, it is clear that the evidence in question did not inject a new issue into the case that appellant had no opportunity to rebut.

On appeal to this court it is our duty to affirm the decision of the Board if its decision is supported by substantial evidence. *Harris* v. *Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978). We think there is substantial evidence to support the

Board's decision in this case.

Affirmed.

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

SANYO MFG. CORP. *v.* Minnie Lou FARRELL

CA 85-91 696 S.W.2d 779

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

Daggett, Van Dover, Donovan & Cahoon, by: *Robert J. Donovan*, for appellant.

Youngdahl & Larrison, by: *Diane A. Larrison*, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Workers' Compensation Commission. In September 1983 the claimant sustained a compensable injury to her back and, after being treated by doctors selected by the employer, the claimant requested a change of physicians to one of her own choice. The employer agreed to this request and the commission entered an order dated March 22, 1984, allowing a change to Dr. James Rodney Feild of Memphis, Tennessee.

After claimant had seen Dr. Feild on five or six occasions, he released her to go back to work. She testified that he did nothing for her except give her pain pills; that she told him she was losing the feeling in her legs but he said she should exercise more. She testified that she was not satisfied with his treatment and told him she would not be back.

When Dr. Feild released the claimant he wrote a letter to her employer stating there was no anatomical foundation for her continued disability and if she did not return to work in two weeks the company should consider permanently replacing her. He also enclosed a report containing his impression that she was malingering. The claimant returned to work in early May 1984 but testified that after a day and a half, her legs started hurting so badly she could not continue. She was examined by the company doctor who said she had not exercised the leg muscles enough and who advised her, as Dr. Feild had, to exercise more. Claimant then went to the company nurse for help and was told that she could not return to Dr. Feild because he had released her and that she would have to consult her own physician at her own expense.

On the advice of a friend, claimant saw a Dr. McCollum who referred her to Dr. Gary Kellett in Memphis. Dr. Kellett saw her on May 8, 1984, admitted her to a hospital, and after a body scan and a myelogram, diagnosed a bulging disc and treated her by injecting her back. Claimant had been pain free from that time

until the date of the hearing before the administrative law judge on June 19, 1984. She had not returned to work because Dr. Kellett had not released her to do so, but she was performing exercises he recommended and was scheduled to see him again in August 1984. The law judge held that the employer was responsible for the medical treatment the claimant was required to obtain on her own behalf. The full commission affirmed, adopting the opinion of the law judge as its own.

On appeal, the employer argues that the commission erred in interpreting the controlling statute, *see* Ark. Stat. Ann. § 81-1311 (Supp. 1985), to allow the claimant to change physicians a second time since the statute provides that where the employer selects a physician the claimant may petition for a change of physicians "one time only." Under the circumstances involved in this case, we do not agree.

The law judge's opinion pointed out that the first paragraph of section 81-1311, *supra*, requires that the employer shall promptly provide medical services for an injured employee and if this is not done within a reasonable time, the commission may direct that the injured employee obtain the services at the expense of the employer. The law judge's opinion then stated:

> The pivotal issue in this claim involves the employer's refusal to allow claimant to receive medical treatment from the doctor to whom she was granted a change of physicians by the consent order of March 22, 1984. When Sanyo refused to allow claimant to be examined by Dr. Feild, the rules for changing physicians ceased to apply since respondents at that time failed to provide medical treatment for the claimant. . . .
>
> Merely because Dr. Feild had released claimant to return to work does not mean that claimant did not need additional medical treatment. . . .
>
> . . . .
>
> . . . It is simply an untenable situation for an employer to deny a claimant ordered medical treatment and then state that she must follow the rules for changing physicians.

Neither party has cited a single case in its brief on appeal. The issue of the right to change physicians, however, has been involved in a number of workers' compensation cases. In *Emerson Electric Co.* v. *White*, 262 Ark. 376, 557 S.W.2d 189 (1977), the Arkansas Supreme Court said, "We have recognized the commission's discretionary authority to approve such changes retroactively," and cited *Southwestern Bell Tel. Co.* v. *Brown*, 256 Ark. 54, 505 S.W.2d 207 (1974), and *Caldwell* v. *Vestal*, 237 Ark. 142, 371 S.W.2d 836 (1963). In the *Caldwell* case the court pointed out that Ark. Stat. Ann. § 81-1311 (Repl. 1960), in effect at that time, provided that "the Commission may order a change of physicians at the expense of the employer when, in its discretion, such change is deemed necessary or desirable." But the court stated:

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

Through the years the statute has been changed. This court has recently pointed out that Act 290 of 1981 deleted the provision in Ark. Stat. Ann. § 81-1311 giving the commission discretion to order a change of physicians when it was deemed necessary or desirable and substituted a detailed procedure to be followed when an employee desires a change of physicians. *See American Transportation Co.* v. *Payne*, 10 Ark. App. 56, 661 S.W.2d 418 (1983), and *Continental Grain Co.* v. *Miller*, 9 Ark. App. 317, 659 S.W.2d 517 (1983).

Nevertheless, in *Moro, Inc.* v. *Davis*, 6 Ark. App. 92, 638 S.W.2d 694 (1982), we affirmed the commission in holding that the appellant's adjuster had led the appellee to believe, even though mistakenly, that he could be examined by a physician of his choice. We said this was within the fact-finding province of the

commission and "we are unable to say it erred or that it abused its discretion in the retroactive approval of the change." Although section 81-1311, in effect at that time, still contained the language giving the commission authority to order a change of physicians at the employer's expense "when, in its discretion, such change is deemed necessary or desirable," the court relied upon *Emerson Electric Co.* v. *White* as authority for its holding. As we have seen, *Emerson Electric* relied in part upon *Caldwell* v. *Vestal* which indicated that the commission had some inherent discretion to order a change of physicians in addition to the discretion expressly stated in the statute. In view of circumstances that can be imagined, we are not prepared to hold that the commission has no inherent discretion in this respect although it surely has been narrowed by legislative action through the years.

Regardless of the rationale for the holding in *Moro, Inc.* v. *Davis*, whether inherent discretion or waiver or estoppel, we think it is authority to support the reasoning set out in the law judge's opinion and adopted by the commission in the instant case. Certainly, for the appellant to refuse ordered medical treatment to the claimant and then seek to limit the claimant's treatment to the very doctor which it refused to allow her to see, is an untenable position. Although the appellant argues that the claimant did not want to go back to Dr. Feild, the claimant's testimony was: "Not if I didn't have to." In any event, she was told by a representative of her employer that she could not go back to see Dr. Feild. The commission found that she needed additional medical treatment and, since the employer failed to provide it, that the employer was responsible for the treatment the claimant had to obtain on her own behalf.

We are committed to a liberal construction of the Workers' Compensation Law and to the rule that it should be interpreted in favor of the claimant when there is doubt as to its meaning. *See Central Maloney, Inc.* v. *York*, 10 Ark. App. 254, 663 S.W.2d 196 (1984). We find no error in the commission's interpretation and application of the law in this case.

The appellant also argues that there is no substantial evidence to support the commission's award of temporary total disability from the date the claimant first saw Dr. Kellett on May 8, 1984, to continue through a date yet to be determined. We

think, however, that the evidence is clearly substantial to support that award also.

Affirmed.

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

John H. DYSON and Sybil J. DYSON *v.* FERNCLIFF PROPERTIES, INC.

CA 85-66 696 S.W.2d 767

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

Homer Tanner, for appellants.

Gruber Law Office, by: *Rita W. Gruber*, for appellee.

TOM GLAZE, Judge. This appeal ensues from appellants' unsuccessful action to cancel a deed. Appellants contend the trial court erred (1) in finding that they failed to present sufficient evidence that their signatures on the deed were forged, (2) in correcting the property description in the disputed deed, and (3) in not sequestering a witness from the courtroom.

The appellants owned a tract in Sherwood upon which they built a house. They later sold their son and daughter-in-law a portion of the tract and, on 19 August 1980, sold the remainder of the tract, including their house, to Ray Wolf Company, Inc. (Wolf Company). Wolf Company paid the appellants $125,000 in cash and gave them a $50,000 or $55,000 promissory note for

the balance of the purchase price. The note was secured by a second mortgage that described only that part of the tract upon which the house was located. The Citizens National Bank at Jacksonville held a first mortgage on the same portion to secure the $125,000 it loaned Wolf Company for the purchase of the entire tract. The remaining, unencumbered, portion of the tract sold Wolf Company is the focus of this litigation.

This controversy evolved from two deeds prepared in Judge Milas Hale's office. Both deeds were dated 20 August 1981. One deed transferred title to the unencumbered property from Wolf Company to appellants; the second deed, containing the alleged forgeries, conveyed the same property from the appellants to Ferncliff, Inc. (Ferncliff).[1] At this point, we note that Ray Wolf was president of Wolf Company and secretary/treasurer of Ferncliff. While appellants and Ray Wolf agree that the first deed was prepared and executed, they are in total disagreement concerning the second. It is undisputed that appellant John Dyson took the first deed to his attorney, who corrected the property description. That correction deed was executed by Ray Wolf on behalf of the Wolf Company on 28 August 1981 and recorded on 17 September 1981. The second or alleged forged deed, dated 20 August 1981, was not recorded until 27 January 1982. John Dyson testified that he first discovered the disputed deed when he checked his property taxes in March 1983. He and his wife, Sybil, promptly filed this suit to set the deed aside.

The parties agree that appellants had the burden of proving that their signatures on the Ferncliff deed were forged. They disagree, however, on the quantum of proof required. Appellants contend the forgery need only be established by a preponderance of the evidence, while appellee asserts the proof must be clear and convincing. On this point, we hold appellants are correct.

In determining the required degree of proof, the cases distinguish between when it is contended there has been fraud or duress in obtaining a deed, and when forgery is alleged. As the court clearly stated in *Davidson* v. *Bell*, 247 Ark. 705, 710, 447

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[1] The trial court found that Ferncliff, Inc. was actually Ferncliff Properties, Inc. and reformed the deed to reflect this correction.

S.W.2d 338, 340 (1969):

> [w]here it is contended that a deed was obtained by duress or fraud . . . the law requires that the proof be clear, cogent and convincing before the deed can be set aside. Here, it is simply asserted . . . that the deed was a forgery, and the quantum of proof necessary to sustain such an allegation is a preponderance of the evidence. *Coulter* v. *Clemons*, 237 Ark. 227, 372 S.W.2d 396 (1963).

See also McCarty v. *Blaylock*, 248 Ark. 645, 648, 453 S.W.2d 35, 37 (1970) (deed found not to be a forgery where "proof heavily preponderates" in favor of party claiming not a forgery); *Kennedy* v. *Couillard*, 237 Ark. 353, 372 S.W.2d 825 (1963) (party did not sustain burden of proving, by a preponderance of the evidence, that her signature on a deed was a forgery); *Temple, Adm'r* v. *Smith, et al.*, 222 Ark. 834, 262 S.W.2d 898 (1953) (burden on party to prove forgery of deed by a preponderance of the evidence); *Fuller* v. *Norwood*, 267 Ark. 900, 592 S.W.2d 452 (Ark. App. 1979) (parties alleging forgery of signatures on contract must sustain burden of proof by a preponderance of the evidence).

■ Although the appellants' burden here was to show the forgeries by a preponderance of the evidence rather than by clear and convincing proof, we believe the record supports the chancellor's decision, upholding the disputed document. Appellants insist they never signed the Ferncliff deed nor gave any consideration for such a deed. While appellants argue the failure of consideration alone would invalidate any conveyance from them to Ferncliff, our courts have held no consideration is required since a deed constitutes a present grant rather than a mere promise to be performed in the future. *Parkey* v. *Baker*, 254 Ark. 283, 492 S.W.2d 891 (1973); *Goodwin* v. *Lofton*, 10 Ark. App. 205, 662 S.W.2d 215 (1984). Appellants also presented testimony by Judge Hale who stated he could not recall talking with appellants about the deed or seeing them sign it. Judge Hale further testified, however, that Mr. Wolf and Mr. Dyson were doing a lot of trading or at least talking about trading back and forth, and he did not remember what they finally came up with. He said that the person who notarized the deed was not an employee in his office. In fact, the record reflects that the disputed

document bore the signature of Ray Wolf's sister-in-law as the notary.

The appellee countered appellants' testimony with evidence from which it could be inferred by the chancellor that the appellants did sign the Ferncliff deed. In this respect, Ray Wolf testified he saw appellant John Dyson sign the deed in Judge Hale's office and that, a day or so later, Mr. Dyson told him his wife had also signed it. Wolf testified that the appellants were long-time friends, and because he was having marital problems with his wife and financial difficulties with the Citizens National Bank, he deeded the unencumbered portion of his property to appellants, who in turn deeded this same property to Ferncliff, a firm in which he owned stock and was an officer. This transaction, he said, kept Citizens Bank from "clouding the property" and from "attaching it." He indicated these two conveyances would serve to protect his and the appellants' interests. Apparently, his intent was to show the appellants as record title owners when, in fact, Ferncliff—a company in which Wolf had an ownership interest—held title by an unrecorded deed.[2] Although appellants argue appellee should not be allowed to benefit from such a scheme, the established law is that the parties may be bound to such an agreement. *See Murphy* v. *Murphy*, 165 Ark. 246, 262 S.W. 677 (1924) (wherein the court held a deed executed to defraud creditors is good between the parties); *see also McCune* v. *Brown*, 8 Ark. App. 51, 648 S.W.2d 811 (1983).

Other evidence was presented from which the chancellor could find the appellants executed the disputed deed. For example, the appellants admitted at trial that the signatures were very similar to their own. The chancellor had other signatures by the appellants to compare with those on the Ferncliff deed. From our *de novo* review, we must agree that remarkable similarities exist when comparing them, and we can readily see how the chancellor could have concluded the signatures on the deed were genuine. *Cf. McCarty* v. *Blaylock, supra*, at 248 (party alleging forgery admitted, and the court agreed, that signature bore close

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[2] Eventually, when Wolf Company defaulted on its note, the Citizens Bank foreclosed its secured interest in the house owned by Wolf Company and the indebtedness was fully satisfied upon the sale of the house.

resemblance to alleged forged one). We believe such a conclusion is reasonable, especially, as here, where neither the notary public nor a handwriting expert were called as witnesses to challenge the genuineness of the appellant's signatures. Although appellants denied signing the deeds, it is settled law that the testimony of an interested party may not be taken as uncontradicted because his testimony is contradicted as a matter of law. *Tenwick* v. *Byrd*, 9 Ark. App. 340, 659 S.W.2d 950 (1983).

In addition, the trial court also could have inferred that appellants' actions subsequent to August 1981 were inconsistent with their now-avowed ownership of the disputed tract. They paid no taxes on the land and did not list it as an asset on two financial statements appellant John Dyson said he had prepared. Appellants spent no money on the property; nor had they checked their tax liability concerning the property for one and one half years. Based upon our *de novo* review of the record, we find the chancellor's decision that appellants failed to meet their burden of proof is supported by the evidence. At the least, we are unable to say that he was clearly erroneous. *Integon Life Ins. Corp.* v. *Vandegrift*, 11 Ark. App. 270, 669 S.W.2d 492 (1984).

The second point for reversal is that the chancellor erred in correcting the legal description. Both deeds prepared in Judge Hale's office contained the same legal description. However, the deed description conveying the property from Wolf Company to the appellants was later corrected by the appellant's attorney. This legal description was accepted by both parties as the correct one. Thus, we cannot say the chancellor clearly erred in finding that the improper description on the disputed deed was the result of a mutual mistake between the parties. *See Turner* v. *Pennington*, 7 Ark. App. 205, 646 S.W.2d 28 (1983).

Finally, appellants allege the trial court erred in failing to exclude, upon their request, witness Ray Wolf. Uniform Rule of Evidence 615 provides that, at the request of a party, the court shall order the exclusion of witnesses so that they cannot hear the testimony of other witnesses. The sequestration or exclusion of witnesses is employed to expose inconsistencies in testimony and to prevent the possibility of one witness molding his or her testimony to that given by other witnesses at trial. *Fite* v. *Friends of Mayflower, Inc.*, 13 Ark. App. 213, 682 S.W.2d 457 (1985).

The Rule, however, provides certain exceptions. It does not authorize the removal of (1) a party who is a natural person or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

In the instant case, Ray Wolf was the secretary-treasurer of appellee, Ferncliff. The court found, and we agree, that in spite of the fact that the stock of Ferncliff had been purchased in February 1983 by First State Bank of Sherwood and Ray Wolf was no longer active in the operation of the corporation, he was still listed on record as secretary-treasurer of the corporation, and should not be excluded under Rule 615 of the Uniform Rules of Evidence. Besides, because Wolf was intricately involved in all the transactions between the parties in this action, the trial court could have easily permitted his in-court presence as essential to the presentation of the appellee's case, especially since the First State Bank did not participate in this litigation.

Affirmed.

COOPER and CORBIN, JJ., agree.

COMBINED INSURANCE COMPANY *v.* Doris WHITAKER

CA 85-154 697 S.W.2d 120

Court of Appeals of Arkansas
Division II
Opinion delivered October 9, 1985

Hardin, Jesson & Dawson, for appellant.

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

JAMES R. COOPER, Judge. The sole issue on appeal in this workers' compensation case is whether the Commission erred in determining that the appellee was entitled to a hearing on the merits of her claim for benefits attributable to her back injury. The appellant contends that the Commission erred because the benefits sought are barred by the doctrines of res judicata, laches, waiver, estoppel, and the statute of limitations.

We decline to decide the issue because the appellant has failed to cite any legal authority to support its contentions and has failed to assert any compelling reasons why we should adopt the position espoused by the appellant. *Gray, Director* v. *Ragland, Director*, 277 Ark. 232, 640 S.W.2d 788 (1982); *Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977); *Arnold* v. *Arnold*, 261 Ark. 734, 553 S.W.2d 251 (1977); *Hill* v. *Farmers Union Mutual Ins. Co.*, 15 Ark. App. 222, 691 S.W.2d 196 (1985); *Hall* v. *State*, 15 Ark. App. 309, 692 S.W.2d 769 (1985). As we said in *Hill*,

> . . . we do not consider such an assignment of error on appeal unless it is apparent without further research that it is well taken. *Haynes* v. *Farm Bureau Mut. Ins. Co. of Ark., Inc.* 11 Ark. App. 289, 669 S.W.2d 511 (1984).

We note that the appellee indicates that she believes that the questions of res judicata, laches, waiver, estoppel and the statute of limitations will be open on remand to the administrative law judge. Those are the precise issues decided by the Commission in the case at bar, and we affirm the Commission's decision. Those issues have been decided by this opinion, and will not be open on remand.

Affirmed.

CORBIN and GLAZE, JJ., agree.

Lance Lee EGGLESTON *v.* STATE of Arkansas

CA CR 85-124 697 S.W.2d 121

Court of Appeals of Arkansas
Opinion delivered October 9, 1985

Lass & Swain, P.A., by: *Ike Allen Laws, Jr.* and *Timothy W. Murdoch*, for appellant.

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

LAWSON CLONINGER, Judge. Appellant was found guilty by the court, sitting as factfinder, of defrauding a secured creditor in violation of Ark. Stat. Ann. § 41-2304 (Repl. 1977). The court assessed punishment at three (3) years suspended imposition of sentence, payment of a $300.00 fine and court costs and an additional $200.00 to be paid to the Victim Relief Fund. Appellant's main argument on appeal is that the court's verdict of guilty is erroneous because the State failed to prove that he acted with the requisite culpable mental state. We agree with appellant and reverse his conviction.

At trial, the evidence established that appellant had been employed as an instructor at South Central Career College from January until August of 1984. During this time, South Central agreed to purchase an automobile for appellant's personal use because appellant had been unable to get one financed otherwise, due to a poor credit history. The automobile was financed with Twin City Bank. Title to the automobile was vested in South Central but the school deducted the amount of the payments from appellant's paycheck and appellant was responsible for all insurance, taxes and licensing fees on the automobile.

Sometime in the latter part of August of 1984, appellant left the employ of South Central because he was involved in the formation of a new school called Micro Tech Institute. On August 21, appellant discussed the matter of the automobile with Fred Ellis, the current owner of South Central. Mr. Ellis testified that appellant asked for two days to get the title to the automobile taken care of, and when Mr. Ellis agreed to this, appellant told him that his accountant would contact Mr. Ellis about the matter. On August 22, Mr. Ellis did receive a telephone call from appellant's accountant and they discussed the automobile problem, but nothing was resolved.

Mr. Ellis left the country on August 23, but he testified that while he was away his staff at the school attempted to contact appellant. When Mr. Ellis returned to Little Rock, he was informed by his staff that they had not been able to locate appellant and that the title to the automobile had not been taken care of. Shortly thereafter, Mr. Ellis had a warrant sworn out for appellant's arrest. He testified that he took this action because appellant had not transferred the title after saying that he would;

because efforts to contact appellant had been unsuccessful; and because appellant had allowed his insurance on the automobile to lapse. Twin City Bank apparently was not involved in the prosecution of this case and no one representing the bank testified at the trial.

Jim McAuley, a certified public accountant, testified that sometime in June or July of 1984, he participated in the formation of Micro Tech Institute with appellant. Mr. McAuley stated that appellant was very concerned about the new school taking over the payments and getting title to the automobile. He said appellant exhibited intentions of paying off the automobile or taking care of the financing.

Paul Johnson, the attorney who incorporated Micro Tech, testified that he also discussed the automobile with appellant and that appellant was concerned about paying it off. He stated that he talked to Mr. Ellis long before appellant was arrested, and informed him that appellant had possession of the automobile and planned to make the payments. According to Mr. Johnson, Mr. Ellis agreed to this then, but later told Mr. Johnson that he would only give them a bill of sale on the automobile if the note was paid off and that otherwise, he would not cooperate.

Mr. Ellis admitted having one conversation with Mr. Johnson but denied being told about the plan to have the new school take over the payments on the automobile. He also denied that Mr. Johnson requested a bill of sale from him.

The trial court found that there was no evidence that appellant intended ultimately to defeat the claims of his creditors. The court also found that the evidence indicated that appellant was having contact with persons at South Central. However, the court found appellant guilty, making the following statements:

> [T]he Court finds that the defendant was treating the property and his business in such a manner that he was acting to hinder the enforcement of a security interest. Now, there is not any evidence that Twin City Bank actually was undertaking to seize this car, either pursuant to a contract of peaceful repossession or any rights that the Twin City Bank, the security holder, had. But, it strikes me that the reason for enacting of this statute was to fix a

> greater burden in view of the threat of criminal prosecution or sanctions of criminal prosecution upon someone holding secured property, that there is an affirmative duty to keep someone advised.

Appellant contends on appeal that the trial court erred in finding that he had an affirmative duty to keep South Central advised. He points out that this duty is not set out in the statute. Furthermore, appellant argues that the State failed to prove any action or inaction on his part which resulted in any disposition of the property. Appellant argues that the State failed to prove that he acted with the requisite culpable mental state or with purposeful intent as is required by Ark. Stat. Ann. § 41-2304. Appellant maintains that the effect of the trial court's ruling is to make the offense he was convicted of a strict liability crime for which intent need not be proven.

The State contends that appellant took two actions to hinder the enforcement of a security interest: (1) he failed to take care of the matter in the two days agreed upon by South Central and (2) he allowed the insurance on the automobile to lapse. The State does not specifically address appellant's contention that it failed to prove his culpable mental state.

We agree with appellant's argument that the State failed to prove that he acted with the requisite culpable mental state, and therefore his conviction cannot stand. Ark. Stat. Ann. § 41-2304 provides in pertinent part:

> A person commits the offense of defrauding secured creditors if he destroys, removes, cancels, encumbers, transfers or otherwise disposes of property subject to a security interest *with [the] purpose to hinder enforcement of that interest*. (Emphasis added).

Thus, the State was required to prove that appellant acted with the purpose to hinder enforcement of a security interest.

Ark. Stat. Ann. § 41-203(1) (Repl. 1977) defines "purposely" as follows: "A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result." We do not find proof in the record that appellant took any action with respect to the automobile in question with the conscious object to

hinder the enforcement of a security interest. There was no testimony from any official at Twin City Bank, which was the true security holder in this case. Although there was testimony that appellant could not be located and that he allowed the insurance to lapse on his car, these circumstances alone do not establish appellant's intent to hinder the enforcement of a security interest. The evidence indicates that the only notice of cancellation from the insurance company was sent to South Central because title to the car was in the school's name. We note that the trial court also was not convinced that appellant acted with the requisite intent, as it found that he had no intent to ultimately defeat the claim of any secured party and that he was in contact with the officials at South Central.

We have examined the evidence in the light most favorable to the State, *Lunon* v. *State*, 264 Ark. 188, 569 S.W.2d 663 (1978), but we think it inadequate to support appellant's conviction. South Central Career College was not a secured creditor; its only relationship with appellant was contractual. Although appellant was extremely careless in the conduct of his business affairs, there was no action or inaction by him which resulted in a disposition of the automobile or the purposeful hindering of the enforcement of a security interest.

Reversed and dismissed.

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

Jeffery Steele FORGY *v.* STATE of Arkansas

CA CR 85-93 697 S.W.2d 126

Court of Appeals of Arkansas
Division I
Opinion delivered October 16, 1985

Richard E. Holiman, for appellant.

Steve Clark, Att'y Gen., by: *Mary Beth Sudduth*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Chief Judge. Jeffery Steele Forgy appeals from his conviction of aggravated robbery for which he was sentenced to ten years in the Arkansas Department of Correction. He contends the trial court erred in refusing to suppress all evidence of identification and in refusing to dismiss the charge because of unreasonable delay in execution of the arrest warrant. We find no merit in these contentions.

On September 17, 1982 Eddie Brickell, a pharmacist employed by Price Pharmacy, reported a robbery at the store. He testified that a man had entered the store and forced another employee, Jerry Webb, into the back of the store before demanding that Brickell fill a pillow case with prescription drugs. The assailant then fled through the back door of the store. Brickell testified that the man was in the store for about fifteen minutes, the lighting was good, and that he had been within four feet of the

assailant during the robbery. He gave a description of the assailant to the police and subsequently identified the appellant from a photo spread of six photographs. Police officers testified that Jerry Webb also identified the appellant from the same photo spread. During the trial Brickell positively identified the appellant and Webb stated there was "a 95% possibility that appellant was the robber."

Appellant first contends that the trial court erred in failing to suppress the prior identification of the appellant by Brickell and Webb. He claims the identification was the result of an unduly prejudicial, defective identification procedure and was impermissibly suggestive. Generally a witness may testify to a previous identification and relate when and where the identification took place. A police officer or other person who was present and familiar with the circumstances may also testify concerning the identification.

John Clark, an investigator for the Jacksonville Police Department, testified that he prepared a photo lineup containing six photographs which he gave to Officer Moore to use in his investigation. Officer Moore testified that the lineup was composed of six photographs. Each photograph was taped behind a cutout 1½ inches by 2 inches in size. There was no police identification on the photographs. He stated that appellant's photograph had been located in the middle of the bottom row. Moore testified that he exhibited the photo lineup to Brickell and Webb. Both witnesses made a positive identification of the appellant as the robber. The six photographs used in that identification were introduced into evidence.

Brickell testified that when the photo lineup was shown him he was told that the officers might have a suspect and was asked if he could identify any one of the photographs. He further testified that his identification of the appellant was positive and based on his observations made during the time of the robbery and without suggestion by the police. The trial court overruled the motion to suppress the identification testimony and we find no error.

It is for the trial court to determine if there are sufficient aspects of reliability surrounding an identification to permit its use as evidence, and then it is for the jury to determine

what weight the identification testimony should be given. *Wilson* v. *State*, 282 Ark. 551, 669 S.W.2d 889 (1984). The suppression of an in-court identification is not warranted unless the pretrial identification procedure was so suggestive as to create a substantial likelihood of irreparable misidentification.

In *Bell* v. *State*, 6 Ark. App. 388, 644 S.W.2d 601 (1982) we declared that the factors to be considered in testing the reliability of lineup identification included the opportunity of the witness to view the criminal at the time of the crime; the witness's degree of attention; the accuracy of prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. The evidence shows that both witnesses had ample opportunity to view the appellant at the time of the crime. Both witnesses were able to give a detailed description of the robber to the police immediately after the robbery and there is nothing in the record to show that their description was inaccurate. Both witnesses positively identified the appellant as the robber in a photo lineup within six weeks of the robbery with no suggestion or encouragement from the police to do so.

The appellant's argument that the officers failed to illustrate the placement of the photographs and that a photograph was missing is not supported by the record. Officer Moore explained exactly how the lineup was composed and the care that was taken to make the photographs appear to be the same size and with no identification information showing. Although there was some indication that one of the photographs used in the photo spread was not introduced, the testimony of Officer Moore was that there were six photographs in the photo spread. Six photographs were introduced into evidence.

Appellant argues that the officer's statement to Brickell before he viewed the lineup was improper. The witness denied that the officer made any suggestion or influenced him in any way. He was simply told that the police had a suspect and asked if he could identify anyone in the lineup. In *Freeman* v. *State*, 6 Ark. App. 240, 640 S.W.2d 456 (1982) the court declared that merely telling a witness that a suspect is in the lineup is not absolutely impermissible. The court recognized that the witness must realize that he would not be asked to view a lineup if a suspect was not

present. What the witness is told may be only one factor to consider in reviewing the total surrounding circumstances.

On review this court views the totality of the circumstances to ascertain the reliability of identification witnesses' testimony. *Whitfield* v. *State*, 8 Ark. App. 329, 652 S.W.2d 42 (1983). Viewing the totality of the circumstances surrounding the pretrial lineup in light of the factors set out in *Bell* we conclude that the decision of the trial court is not clearly erroneous and should be affirmed.

The appellant also contends that the witnesses' in-court identification should have been suppressed because it was prejudicially tainted by pretrial occurrences. We have found nothing which tainted the pretrial identification and the suppression of an in-court identification is not warranted unless the pretrial one was so suggestive as to create a substantial likelihood of irreparable misidentification.

Both eye witnesses to the robbery were able to identify the appellant in court based on the observation of him during the robbery. Both stated that they were not influenced by their earlier identification and their in-court identification was based on their observations at the time of the robbery.

The robbery occurred on September 17, 1982. A warrant for appellant's arrest was issued on October 26, 1982. The appellant was not arrested until March 14, 1984. Two days before the trial the appellant moved that the warrant be quashed and the charge dismissed because the delay in bringing him to trial had denied him due process. The trial court denied the motion.

Aggravated robbery is a class "Y" felony for which the statute of limitations is six years. Ordinarily where an indictment is returned within the period of limitations due process considerations do not arise. The statute of limitations, however, defines only the outer limits of prosecution beyond which there is an irrebuttable presumption that a defendant's right to a fair trial has been prejudiced. Within the guidelines of the statute of limitations the due process clause still has a limited role to play in protecting against oppressive delay which prejudices a defendant's rights. These rights are discussed in our recent opinion of *Young* v. *State*, 14 Ark. App. 122, 685 S.W.2d

823 (1985). In *Young* we held that the due process considerations do not arise until prejudice resulting from the delay is proven and it further appears that the State intentionally delayed the proceedings to gain some tactical advantage over the accused. *Scott* v. *State*, 263 Ark. 669, 566 S.W.2d 737 (1978); *Bliss and Bliss* v. *State*, 282 Ark. 315, 668 S.W.2d 936 (1984). In *Young* we declared that mere delay is not sufficient grounds for aborting a criminal prosecution. The accused has the burden of first showing prejudice resulting from loss of witnesses, physical evidence or dimming of memory, and how that loss is prejudicial to him. If the defendant establishes such prejudice, the burden is then upon the prosecutor to give a satisfactory reason for the delay.

In *Young* and the cases cited within it, the court dealt with delay in obtaining an indictment rather than the execution of a warrant issued on probable cause. However, the due process considerations are the same in either case and the courts have applied the same principles to both situations. *U.S.* v. *Ewell*, 383 U.S. 116 (1966); *U.S.* v. *Scully*, 415 F.2d 680 (1969). Accommodating the administration of justice and the accused's right to a fair trial necessarily requires a delicate balancing of the reason for the delay against the resulting prejudice based on the circumstances of each case. *U.S.* v. *Marion*, 404 U.S. 307 (1971).

In the present case, the appellant denied having committed the robbery and testified that due to the passage of time he would be unable to establish his whereabouts on the day of the crime. This was a sufficient showing of prejudice to shift the burden to the State to explain the delay. The officers testified that at the time the identification was made and the warrant was issued they had no address for the appellant. They had attempted to locate the appellant by other means including the questioning of witnesses to the crime and a woman who knew the appellant. The officer stated that the woman told him that her husband and the appellant had left town without leaving any address. The officer testified that examining the telephone books had failed to disclose the whereabouts of the person they sought.

The appellant testified that he was in the Little Rock area during 1982 and 1983 but had no telephone listed in his name until late 1983. The listing would not appear in a telephone book

until some time the following year. His only relative with a telephone had a different last name. He stated that he had moved a number of times during that period, living with friends, and had no utilities connected in his own name. During this period he had no steady job and could think of no one who saw him daily during that period. There is no evidence that the State delayed the proceedings to gain a tactical advantage. We cannot conclude that the State did not satisfactorily explain the delay.

Affirmed.

CLONINGER and MAYFIELD, JJ., agree.

Charles VAN PATTEN *v.* STATE of Arkansas

CA CR 85-23 697 S.W.2d 919

Court of Appeals of Arkansas
En Banc
Opinion delivered October 16, 1985

Hale, Lee, Young, Green, Ward & Morley, by: *Randall W. Morley*, for appellant.

Steve Clark, Att'y Gen., by: *Joel O. Huggins*, Asst. Att'y Gen., for appellee.

LAWSON CLONINGER, Judge. Appellant, Charles Van Patten, was convicted of driving while intoxicated in violation of Ark. Stat. Ann. § 75-2503 (Supp. 1985). The court fined him $150.00 plus costs, sentenced him to twenty-four (24) hours in jail, suspended his driver's license for ninety (90) days, and ordered him to complete an alcoholic rehabilitation program. On appeal, appellant argues that the police stopped him without sufficient reasonable cause and thus the trial court should have excluded all evidence of the DWI. We agree with appellant and reverse his conviction.

The events leading up to the charges being brought against appellant occurred on the evening of December 18, 1983. Kevin Tindle, a Little Rock policeman, testified that at approximately 11:34 p.m. he received a call regarding a loud party disturbance at Mara Lynn Apartments. While enroute to investigate the disturbance, Officer Tindle received a second call which advised him that the person creating the disturbance had left the apartments in a brown Jeep. As Officer Tindle approached the intersection of Shackleford and Mara Lynn, he observed a brown and tan Jeep approaching the same intersection. Tindle said that the driver of the vehicle was not committing any traffic violations, but that he stopped the vehicle anyway, based on the information he had received from the calls. The officer testified that the driver of the Jeep, the appellant, smelled of alcohol and staggered when he stepped out of the Jeep. Officer Tindle transported appellant to the detention center and administered a breathalyzer test, the

results of which were .15%.

Appellant argues that Officer Tindle did not have reasonable cause to stop him because he was not committing any traffic violations and the call about the loud party was not specific enough to give Officer Tindle a reasonable basis for stopping him. The State argues that the stop of appellant was reasonable because the officer had reason to suspect that a misdemeanor possibly involving injury to persons and property had been committed and because of the location of the Jeep and the time of night.

The Fourth Amendment of the Constitution protects individuals by forbidding all unreasonable searches and seizures. Appellant was protected by the Fourth Amendment as he drove down the street, so the issue is whether, under all of the circumstances, appellant's right to personal security was violated by an unreasonable seizure. The test is to balance the nature and quality of the intrusion on personal security (the seizure) against the importance of the governmental interests alleged to justify the intrusion. *United States* v. *Hensley*, 496 U.S. ___, 83 L.Ed.2d 604 (1985).

Arkansas law recognizes that where felonies or crimes involving a threat to public safety are concerned, the government's interest in solving the crime and promptly detaining the suspect outweighs the individual's right to be free of a brief stop and detention. A.R.Cr.P. Rule 3.1 reads in pertinent part:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct.

In *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 284, *cert. denied*, 459 U.S. 882 (1982), the police received a radio dispatch describing an armed and extremely dangerous suspect who had committed armed robbery and murder. The suspect's vehicle was

described as a maroon, late model Ford Thunderbird with a white license plate with dark blue or black lettering. Soon thereafter, an officer observed a vehicle matching that description with a white Oklahoma license plate with dark letters. The Arkansas Supreme Court held that the stop was reasonable because the car matched the description; it was not likely that another vehicle of the description broadcasted was in the area at that time; and the crimes had just recently been committed in a neighboring county. The court, in discussing Rule 3.1, stated that "the justification for the investigative stop depends upon whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating the person or vehicle may be involved in criminal activity." *Id.* at 80.

In the case at bar, we do not think Officer Tindle had specific, particular or articulable reasons to suspect that a felony or a misdemeanor involving danger of injury to persons or property had been committed. The radio dispatch that he received was anonymous and it gave extremely general information about a "loud party" and a "brown Jeep." The officer did not investigate or confirm the complaint before stopping appellant, so he had no reason to suspect that a misdemeanor involving personal or property damage had been committed by the occupant.

Thus, under the totality of the circumstances, we think Officer Tindle's stop of appellant was unreasonable under A.R.Cr.P. Rule 3.1; that it violated appellant's Fourth Amendment rights; and that the evidence of the DWI should have been excluded.

Reversed and dismissed.

COOPER and MAYFIELD, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. I respectfully dissent from the majority opinion because, in my opinion, it fails to follow Arkansas law as set out in *Baxter* v. *State*, 274 Ark. 539, 626 S.W.2d 935 (1982). In *Baxter*, the Arkansas Supreme Court affirmed our unpublished opinion issued September 9, 1981. In *Baxter*, a general report of an armed robbery was broadcast over police radios. An officer went to check out a city park, located approximately one-fourth mile from the scene of the robbery. He

observed a vehicle in the park. He stopped the vehicle and later discovered evidence which led to the appellant's conviction. In *Baxter*, the officer testified that he had no reason to stop the subject except to seek information, and that he asked for Baxter's driver's license in case other officers wished to contact him later as a witness.

The Supreme Court noted that cases "regarding the police authority to make investigatory stops based upon reasonable suspicion that a vehicle or a person is involved in criminal activity are inapplicable to the stop at issue here." 274 Ark. at 542 [citations omitted]. The Court then said:

> Involved here is the question of the extent of permissible interruption a citizen must bear to accommodate a law enforcement officer who is investigating a crime. The practical necessities of law enforcement and the obvious fact that any person in society may approach any other person for purposes of requesting information make it clear the police have the authority to approach civilians.

274 Ark. at 543. The Court went on to say:

> There is nothing in the Constitution which prevents the police from addressing questions to any individual. *See Terry* v. *Ohio, supra.* However the approach of a citizen pursuant to a policeman's investigative law enforcement function must be reasonable under the existent circumstances and requires a weighing of the government's interest for the intrusion against the individuals right to privacy and personal freedom. To be considered are the manner and intensity of the interference, the gravity of the crime involved, and the circumstances attending the encounter. [citation omitted.]

Id. The Court then cited Rule 2.2 of the Ark. R. Crim. P., Ark. Stat. Ann. Tit. 43, App. (Repl. 1977), which basically provides that a police officer may request anyone to furnish information or to cooperate in the investigation of a crime, and may even require the person to go to a police station.

Turning to the case at bar, the police received a report of what was variously described as a "disturbance" or a "loud party disturbance". A vehicle similar to that driven by the appellant

was observed within a block or two of the scene after an additional report had been received that the person responsible for the disturbance had just left the scene. It is true that, at the time of the stop, the officer did not know the nature of the disturbance; he did not know whether it was simply a loud party, a family quarrel, a fight, or any other type crime. The majority opinion only cites Rule 3.1 of the Rules of Criminal Procedure, assuming that the appellant was suspected of being the person responsible for the "disturbance", and then holds that, since there was no information in the officer's possession that crimes against property or persons had occurred, Rule 3.1 would not allow the stop.

Part of the reason for the majority's confusion is the fact that the Supreme Court, in *Baxter*, mentioned the seriousness of the crime. Yet the Court did not rely on Rule 3.1, obviously because there was absolutely no indication that Baxter had anything to do with the crime. The case was affirmable only under Rule 2.2, and I think we should reach the same result. At least in this case there was an articulable reason to believe that Van Patten, or whoever the operator of the Jeep turned out to be, did truly have knowledge of whatever criminal activity had occurred. In *Baxter*, the Supreme Court upheld the stop, search, and arrest, of a person who, at best, was a mere passer-by.

I would affirm.

MELVIN MAYFIELD, Judge, dissenting. I dissent from the majority's decision and in order to put this case in proper perspective, I first quote the entire argument made for the State by the Attorney General.

> Appellant appeals his conviction of driving while intoxicated arguing the trial court erred in finding the investigatory stop of appellant was supported by a reasonable suspicion. Appellant does not argue there was a lack of probable cause for his arrest for driving while intoxicated following the initial stop. Appellee submits the stop of appellant was valid under both the Fourth Amendment and Rule 3.1 of the Arkansas Rules of Criminal Procedure because it was based in specific, particular and articulable reasons indicating appellant had been involved in criminal activity. *Terry* v. *Ohio*, 392 U.S. 1 (1968); A.R.Cr.P. Rule 3.1; *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 284 (1982).

The analysis of this issue under the Fourth Amendment and Rule 3.1 is overlapping in most part. Rule 3.1 is a codification of those interests protected under the Fourth Amendment as that Amendment was interpreted by the Supreme Court in *Terry*. Rule 3.1 deals only with the validity of the initial stop which was but one aspect of the stop and frisk issue in *Terry*. Since Rule 3.1 tracks the Fourth Amendment protections in part relevant to the facts in this case, the issue here can and should be resolved on the basis of Rule 3.1. Resolution of the issue thus depends initially on whether disorderly conduct is a misdemeanor involving danger of injury to persons or property and if so, secondly on whether the policeman had a reasonable suspicion when he stopped appellant.

Disorderly conduct, defined at Ark. Stat. Ann. § 41-2908 (Repl. 1977), can clearly be a misdemeanor involving the danger of injury to persons or property. § 41-2908(1)(a) defines disorderly conduct as purposely causing public inconvenience, annoyance or alarm by fighting or by violent, threatening behavior. This section of disorderly conduct is clearly concerned with preventing injury to persons. § 41-2908(1)(c) involves danger of injury to persons, as well and § 41-2908(1)(h) involves danger of injury to property. Furthermore, as precedents show, those persons convicted of disorderly conduct have often injured others. *See, e.g. Bousquet* v. *State*, 261 Ark. 263, 548 S.W.2d 125 (1977); *Farr* v. *State*, 6 Ark. App. 14, 636 S.W.2d 884 (1982).

Because of this danger of injury to either persons or property, disorderly conduct falls within that group of misdemeanors identified in Rule 3.1.

Since disorderly conduct is covered by Rule 3.1 the next issue is whether the policeman here had specific, particular and articulable reasons supporting his investigatory stop of appellant. Rule 2.1, defining reasonable suspicion, the commentary to Rule 2.1, and case law give a clear picture of what is required before an investigatory stop will be deemed valid. In essence there must be an objective manifestation (i.e., specific, particular and ar-

ticulable reasons) that the person stopped is, has been, or is about to be engaged in criminal activity. Such is the case here. The policeman, while on patrol, was sent to investigate suspected disorderly conduct at a party in western Little Rock at 11:34 p.m. While on his way, he received a second radio broadcast that the suspect creating the disturbance had left in a brown jeep and was traveling east. The policeman met a brown jeep at an intersection east of the scene of the disturbance. The policeman stopped the jeep at that intersection. The intersection was in close proximity to the scene of the disturbance.

The specific and particular facts relied upon by the police officer were: 1) the radio broadcast informing him the suspect causing the disturbance had left in a brown jeep, 2) the nearness of a brown jeep and its relative location to the scene of the disturbance and 3) the time of night. Any one of these facts alone may not have been enough to support a reasonable suspicion; when combined, however, there is clearly a basis in fact for the stopping of appellant. The stop was valid because supported by reasonable suspicion. (Citations to transcript omitted.)

To the above I would point out that reasonable suspicion is defined by A.R.Cr.P. Rule 2.1 as follows:

"Reasonable suspicion" means a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.

The Commentary to Rule 2.1 states in part: "The purpose of the rule is to allow brief detention in circumstances not affording reasonable cause to arrest but giving rise to a 'reasonable suspicion' that criminal conduct is afoot." In *Adams* v. *Williams*, 407 U.S. 143, 145-46 (1972), the Supreme Court of the United States said:

The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a

> crime to occur or criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at that time.

I would affirm on the basis argued by the Attorney General. I also think it would be proper to affirm for the reasons set out in the dissenting opinion of Judge Cooper.

METROPOLITAN PROPERTY AND LIABILITY INSURANCE COMPANY *v.* Loyd V. STANCEL and Doris L. STANCEL

CA 84-440 697 S.W.2d 923

Court of Appeals of Arkansas
Division II
Opinion delivered October 16, 1985

Butler, Hicky, Hicky & Routon, Ltd., for appellant.

B. Michael Easley, for appellee.

DONALD L. CORBIN, Judge. Appellees, Loyd V. Stancel and Doris L. Stancel, were issued a homeowners insurance policy by appellant, Metropolitan Property and Liability Insurance Company, which was in force on June 15, 1982, providing coverage against loss by fire for appellees' dwelling in the amount of $90,000, personal property in the amount of $45,000 and additional expenses in the amount of $22,500. It was stipulated at trial that the insured dwelling and contents were totally destroyed by fire. Appellant denied coverage based upon misrepresentation in the application for insurance and appellees filed suit for $136,000 ($90,000 for dwelling coverage, $45,000 for personal property coverage and additional expenses in the amount of $1,000), 12% penalty, attorneys' fees and 10% per annum interest from the date of claim.

The jury rendered a verdict in favor of appellees in the amount of $136,000. The trial court then awarded the 12% statutory penalty, attorneys' fees of $26,250 and prejudgment interest on $135,000 of the verdict amount from the date of loss at the rate of 6% per annum. We affirm as modified.

Appellant, in its first point for reversal, alleges that the trial

court erred in refusing, as a matter of law, to reduce the jury verdict by $100, which represents the deductible amount pursuant to the insurance policy in question under coverages A and C.

The loss of insured real property and personal property is involved here. *Thurston Nat'l Ins. Co.* v. *Dowling*, 259 Ark. 597, 535 S.W.2d 63 (1976), clearly dictates the result to be reached under the facts of the instant case as it relates to the loss of the real property. In *Thurston, supra*, appellant Thurston National Insurance Company issued a fire insurance policy to appellee George W. Dowling which covered a dwelling house owned by appellee. The face amount of the policy was $8,000, and it contained a $50 deductible provision. The house was totally destroyed by fire and suit was filed by appellee to recover the sum of $8,000, plus statutory penalty, interest and attorneys' fees. Appellant admitted liability to the extent of $7,950 by reason of the fire loss, but denied that it was liable to appellee for penalty, interest and attorneys' fees for the reason that appellee had at all times demanded the sum of $8,000. The trial court entered summary judgment in favor of appellee, holding that the $50 deductible provision in appellant's policy of insurance was void as being contrary to and in violation of the Arkansas Valued Policy Law. The court, under the provisions of Ark. Stat. Ann. § 66-3238 (Repl. 1980) awarded penalty, interest and attorneys' fees.

Justice Elsijane T. Roy, writing for a majority in *Thurston, supra*, noted that appellant's position was that the full amount of the policy was $7,950 after being reduced by the $50 deductible and that the deductible provision, therefore, diminished the actual amount of recovery to an amount less than "the full amount stated in the policy." This is basically the same argument raised by appellant in the instant case. Ark. Stat. Ann. § 66-3901 (Repl. 1980), commonly referred to as the Valued Policy Law, provides:

> A fire insurance policy, in case of a total loss by fire of the property insured, shall be held and considered to be liquidated demand and against the company taking such risk, *for the full amount stated in said policy*, or the full amount upon which the company charges, collects or receives a premium; provided, the provisions of this section shall not apply to personal property. (emphasis supplied)

Justice Roy, in reliance on this provision and other case law, affirmed the trial judge, stating, "Our cases hold that when a total loss is involved a clause which diminishes recovery to less than the full amount stated in the policy is void." The rule in *Thurston* is dispositive when applied to the facts of the instant case concerning the loss of real property. It is not clear whether *Thurston, supra*, applies only to loss of real property or to loss of personal property as well. The Valued Policy Law was the basis for the rule in *Thurston* and that statute, as cited earlier, specifically excludes personal property from its coverage. Neither party has cited a case which extends the rule in *Thurston* to personal property. There may be valid policy reasons for extending that rule to cover loss of personal property when it is coupled with a loss of real property. In this case, however, there are other grounds on which we may decide this issue.

The policy, which included the deductible provision, was introduced into evidence. Appellant did not plead the deductible as a setoff, but did argue to the jury that it was entitled to a setoff. In its written order denying appellant's motion for Judgment N.O.V., the trial court stated as follows:

> [T]he policy was introduced into evidence with the declarations, the portion of the policy showing the $100.00 deductible provision, and same was available for consideration by the jury . . . Defendant argued in its closing argument that it was entitled to credit for the $100.00 deductible against the amount claimed by Plaintiffs. Also, the Court must consider that the case was presented to the jury on a general verdict requiring only one verdict and no request was made of the jury to itemize or set out its specific award as to each element of coverage. Further, the Plaintiffs proved additional living expenses in an amount approximating $7,400.00, but only requested that the jury return a verdict of $136,000.00. This would have given the jury ample opportunity to consider the $100.00 deductible, but still grant the $136,000.00 judgment as requested by Plaintiffs.

The case went to the jury on a general verdict, and appellant made no post-trial effort to determine whether the jury considered the deductible amount. It is evident that the jury

considered the contract provision on the deductible, and we believe there is substantial evidence to support its award of $136,000.

It appears from the record that appellant waived for purposes of appeal the issue of reduction of the verdict by $100 by its failure to make a motion for a directed verdict, stating specific grounds therefor, either at the close of appellees' evidence or at the conclusion of the case. *Sanson* v. *Pullum*, 273 Ark. 325, 619 S.W.2d 641 (1981); *Dodson Creek, Inc.* v. *Fred Walton Rlty.*, 2 Ark. App. 128, 620 S.W.2d 947 (1981). Accordingly, we find no error in the trial court's refusal to reduce the jury verdict by the amount of the deductible. The matter was properly submitted to the jury for its determination and there is substantial evidence to support its award.

In its second point for reversal, appellant alleges that the trial court erred in awarding prejudgment interest. Appellant asserts that the damages sustained by appellees could not be ascertained at the time of the loss. The trial court found that $135,000 of the $136,000 of damages was capable of being ascertained at the date of the loss and awarded prejudgment interest on $135,000.

In *Toney* v. *Haskins*, 7 Ark. App. 98, 644 S.W.2d 622 (1983), we held that if there is a method of determination in both time and amount of the value of the property at the time of the injury then prejudgment interest should be allowed. In the case at bar, the principal sum demanded in appellee's complaint, i.e., real estate and its contents, was readily calculable as of the date of loss and, therefore, subject to prejudgment interest under *Lovell* v. *Marianna Fed. S&L Assn.*, 267 Ark. 164, 589 S.W.2d 577 (1979), and *Toney, supra.* The trial court here apparently did not award prejudgment interest on the $1,000 attributable to additional living expenses because these expenses were not capable of determination in both time and amount at the time of loss. The court properly awarded prejudgment interest on $135,000 which represented the face amount of the policy coverage on the home ($90,000) and its contents ($45,000).

Appellant also argues, in the alternative, that the trial court erred in calculating prejudgment interest from the date of loss and that the trial court should have awarded prejudgment

interest calculated from sixty (60) days after proof of loss was received by appellant. In their original complaint appellees prayed for "interest from date of claim at 10% per annum" and in their amended complaint appellees prayed for "statutory penalty, attorneys' fees, interest, and costs" generally. Appellees concede that, under the terms of the policy, prejudgment interest should be calculated from October 27, 1982 (60 days after proof of loss was received by appellant) to May 22, 1984 (the date of judgment). That amount is $12,715.52, a reduction of $2,974.11 from the trial court's award for prejudgment interest.

Appellant asserts that appellees should not be awarded penalty, interest and attorneys' fees under Ark. Stat. Ann. § 66-3268 because appellees did not recover the exact amount prayed for in their complaint. We find this argument to be without merit. Appellees did not pray for interest from date of loss in their original complaint nor in their amended complaint.

The judgment of the trial court is affirmed with a modification of the award of prejudgment interest to show a reduction of $2,974.11 (the difference between interest calculated from the date of loss and sixty (60) days after proof of loss was received by appellant).

Affirmed as modified.

COOPER and GLAZE, JJ., agree.

Carrie ROSE, Widow of William L. ROSE, Jr., Deceased Employee *v.* ARKANSAS STATE POLICE, and PUBLIC EMPLOYEE CLAIMS DIVISION

CA 85-155 697 S.W.2d 927

Court of Appeals of Arkansas
Division II
Opinion delivered October 16, 1985
[Rehearing denied November 13, 1985.]

Noyl Houston, for appellant.

Jerry G. James, Public Employee Claims Division, for appellee.

DONALD L. CORBIN, Judge. The facts of this case are not in dispute. William Rose, an Arkansas State Trooper, was killed in the line of duty on December 28, 1982. Appellant, his widow, was paid a $50,000 benefit under the Public Safety Officers' Death Benefits Act, 42 U.S.C. § 3796 (1982). She also received an award of $10,000 pursuant to Ark. Stat. Ann. § 12-2348 (Repl. 1979)[1] and an additional award of $5,000 pursuant to Ark. Stat. Ann. § 42-427 (Repl. 1977). Appellee, Public Employee Claims Division, Arkansas Insurance Department, acknowledges that the claim for death benefits is compensable under the Workers' Compensation Act but contends that it is entitled to a credit against its liability to the extent of the three death benefits

[1] This was amended by Act 839 of 1985 which increased benefits available up to $100,000.

totaling $65,000 received by the widow. The Commission reversed the decision of the Administrative Law Judge who refused to credit the $65,000 against workers' compensation benefits. The Commission relied on Ark. Stat. Ann. § 12-3605(G) (Supp. 1985), which provides:

> (G) In the event that any public employee who is entitled to receive workers' compensation benefits under the provisions of this Act, as a result of injury, disability or death, and such injuries, disabilities, or death gives rise to an entitlement of benefits under a State or Federal program or under an Act of Congress providing benefits for public safety officers serving a public agency in an official capacity, with or without compensation, as a law enforcement officer or as a firefighter or in any other capacity, the state workers' compensation funds shall be entitled to a credit against its liability for payment of workers' compensation benefits to the extent of the benefits received under any State or Federal program or Act of Congress.

The Commission granted appellee a credit of $65,000 against death benefits under the Arkansas Workers' Compensation Act. We affirm.

Appellant, as her first assignment of error, alleges that the Full Commission erred in holding that Act 929 of 1981, Ark. Stat. Ann. § 12-3605(G), was not superseded by the Public Safety Officers' Death Benefits Act under the Supremacy Clause, U.S. Const. art. VI, § 2. Appellant relies on the following pertinent provision of the Public Safety Officers' Death Benefits Act:

> (a) In any case in which the Administration determines, . . . , that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty, the Administration shall pay a benefit of $50,000.00 . . . to the surviving spouse of such officer; (and)
>
> (e) the benefit payable under this subchapter shall be in addition to any other benefit that may be due from any other source . . .

This section, together with the Supremacy Clause, appellant argues, circumvents the limiting effects of Ark. Stat. Ann. § 12-3605(G).

It is axiomatic that under the terms of the United States Constitution, certain powers are entrusted to the federal government alone, while others are reserved to the states, and still others may be exercised concurrently by both the federal and state governments. The 10th Amendment to the United States Constitution provides:

> *Rights reserved to states or people.* — The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

U.S. Const. amend. X.

The constitutionality of an offset between federal benefits and state benefits was recognized in *Richardson* v. *Belcher*, 404 U.S. 78 (1971). Mr. Justice Stewart, in upholding Section 224 of the Social Security Act, 42 U.S.C. § 424a (1982), which requires a reduction in social security benefits to reflect workers' compensation benefits, noted that:

> The original purpose of state workmen's compensation laws was to satisfy a need inadequately met by private insurance or tort claim awards. Congress could rationally conclude that this need should continue to be met primarily by the States, and that a federal program that began to duplicate the efforts of the States might lead to the gradual weakening or atrophy of the state programs.

Id. at 84.

Congress has not shown a clear-cut manifestation of an intent to exercise supremacy over a state's right to legislate workers' compensation benefits by the passage of the Public Safety Officers' Death Benefits Act. We fail to see a supremacy clause argument. This is especially true when similar cases dealing with federal-state setoffs have been upheld constitutionally.

Finally, appellant alleges that the Full Commission erred in construing Act 929 of 1981 to require crediting of benefits paid by Arkansas Claims Commission and Arkansas State Police against appellee's liability to appellant. Appellant received a $10,000 benefit from the Arkansas Claims Commission pursuant to Ark.

Stat. Ann. § 12-2348, and $5,000 from the Arkansas State Police pursuant to Ark. Stat. Ann. § 42-427, following a determination that Trooper Rose lost his life in the line of duty.

"The controlling consideration in the interpretation of a workmen's compensation statute is that the act must be liberally construed with all doubts resolved in favor of the claimant, which is necessary to effect the beneficient and humane purposes of the Act," *Mohawk Rubber Co.* v. *Buford*, 259 Ark. 614, 535 S.W.2d 819 (1976). However, we can not avoid the crystal clear language of Ark. Stat. Ann. § 12-3605(G) which mandates the crediting of "benefits received under any State or Federal Program or any Act of Congress" against workers' compensation benefits. It is obvious from a review of cases from other states that this is not an unknown or unheard-of proposition. *Nooe* v. *Baltimore*, 28 Md. App. 348, 345 A.2d 134 (1974), (applied Maryland statute which discharged city's obligation under workers' compensation law where employee received benefits, in excess of those due under workers' compensation law, from the employer under a city ordinance); *Coletta* v. *State*, 106 R.I. 764, 263 A.2d 681 (1970), (held that statute authorized the state to credit payments received from the federal government against benefits due under workers' compensation law); *State* v. *Industrial Commission*, 160 Ohio St. 443, 117 N.E.2d 22 (1954), (held that the Ohio General Assembly had power to enact Workers' Compensation Act and to determine under what terms and conditions employees are eligible to participate). Legislation in other states providing for offset of workers' compensation benefits against benefits available under other state or federal programs has been strictly construed. In *Contois* v. *State*, 95 R.I. 296, 186 A.2d 741 (1962), Roland Contois's widow and minor children applied for workers' compensation benefits in Rhode Island after Roland Contois died while on active duty in the Rhode Island National Guard. The Rhode Island Workers' Compensation Commission sought to offset workers' compensation benefits with benefits accruing under a federal act.

R.I. Gen. Laws § 28-31-11 (1968 Reenactment) provides:

> Where an injured member of the national guard or the Rhode Island state guard receives pay, subsistence, hospitalization, or other benefits from the United States as the

> result of such injury, such payments shall not affect his right to receive compensation under chapters 29 to 38, inclusive, of this title. When the payments received from the United States are less than he would have been entitled to receive under said chapters, then he shall be entitled to receive all the benefits to which he would have been entitled under said chapters less the benefits actually received from the United States.

The Rhode Island Supreme Court held that since provision § 28-31-11 is silent as to death benefits, the legislature did not intend that it should be applicable in such a situation.

A majority of American jurisdictions provide some form of setoff in the area of wage-loss legislation. 4 Larson, Law of Workmen's Compensation § 97.20. The Arkansas General Assembly has the authority to legislate offsetting of benefits and it has chosen to do so with the enactment of Ark. Stat. Ann. § 12-3605(G). Budgetary management is an increasingly burdensome task for the members of the legislature. The goal may very well be to avoid "double-dipping," i.e., receiving benefits from more than one source for the same death or injury. For whatever reason, our Constitution does not empower this Court to second-guess our legislators who are charged with the awesome responsibility of spreading the public dollar over endless programs for the public welfare. If the legislature does not intend for Ark. Stat. Ann. § 12-3605(G) to be applicable in cases such as the one at bar, then it needs to deal directly with the issue. The power to do so is entirely within the legislature's province. We find no error.

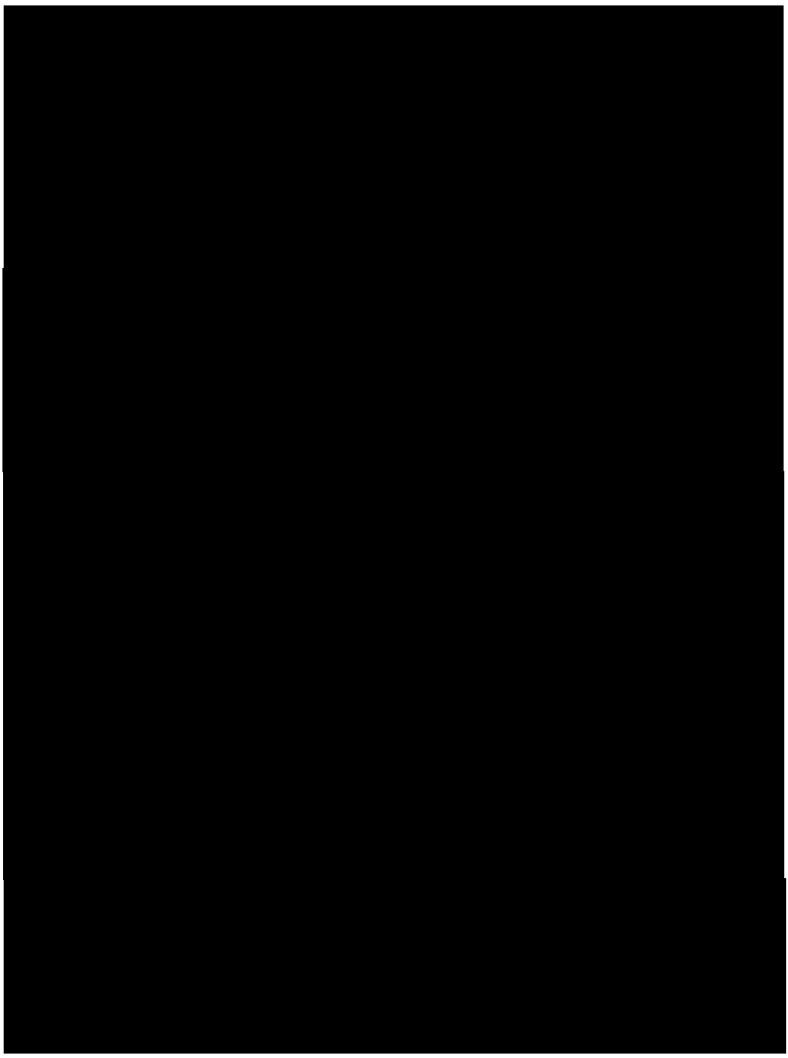
Affirmed.

COOPER and GLAZE, JJ., agree.

ELECTRO-AIR *v.* Betty VILLINES

CA 85-158 697 S.W.2d 932

Court of Appeals of Arkansas
Division I
Opinion delivered October 16, 1985
[Supplemental opinion on Rehearing delivered
December 11, 1985]



Harkey, Walmsley, Belew & Blankenship, by: *Bill H. Walmsley*, for appellant.

Pinson & Reeves, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from the Workers' Compensation Commission. The employee sprained her ankle as the result of a fall in her employer's parking lot. From this injury, which was stipulated as compensable, the employee developed a rare condition known as reflex sympathetic dystrophy.

According to the evidence, this condition was first described by doctors during the Civil War in patients who had received trauma to an extremity and suffered pain which was completely out of proportion in its severity to the degree of the trauma received. It begins as a burning or stinging pain and progresses to a constant, unrelenting cutting pain. It spreads to the entire extremity and is intensified by movement. The skin is extremely tender, especially around joints, and the pain is so excruciating that patients sometimes request amputation and consider suicide. As the condition progresses, demineralization of the bone leads to severe osteoporosis and eventually the extremity becomes non-functional because of the severity of pain caused by movement. As a result of the condition, patients commonly develop psychological problems such as depression and anxiety.

The employee in this case developed this condition in her right leg. In addition, she suffered pain, swelling, stiffness, sweating and loss of hair on her other extremities. Characteristically the condition has been confined to the extremity trauma-

tized and the employee's doctors had no explanation for her extensive symptoms although they accepted them as genuine and did not feel she was malingering.

The employee's doctors, Dr. Charles A. Ledbetter, an orthopedist, and Dr. Warren C. Boop, Jr., a neurologist, agreed she had reached maximum healing by July 2, 1982, and that her condition would progressively worsen. She then began treatments with Dr. Donald Butts, a psychiatrist, for management of the psychological side effects of her condition and petitioned the commission for a change of physicians. The administrative law judge held that her healing period ended July 2, 1982; that she had a 20% permanent partial disability to her right foot; that she was entitled to a change of physicians; that she was currently totally disabled as a result of her compensable injury and that the employer had controverted all permanent disability benefits in excess of the 20% scheduled injury to the right foot. The commission affirmed, but modified the law judge's decision to reflect the change of physician effective as of the date of the law judge's opinion. The employer challenges each of these holdings on appeal.

First, appellant argues that the appellee was not entitled to a change of physician to Dr. Donald Butts at the appellant's expense because the appellee attempted to obtain a retroactive approval of a change of physician. In support of this argument, appellant relies on *American Transportation Company* v. *Payne*, 10 Ark. App. 56, 661 S.W.2d 418 (1983), in which we held that the commission did not have the authority to retroactively approve a change of physicians. Appellant contends the commission has violated the intent of that ruling even though it attempted to comply by holding the change of physician effective only after the date of the law judge's opinion. Appellant maintains that to change physicians when the employer has selected the original physician, the claimant must follow a detailed procedure set out in the statute and that failure to do so negates the employer's responsibility.

The record discloses, however, that it was appellant who failed to comply with the mandates of the statute. Ark. Stat. Ann. § 81-1311 (Supp. 1983) provides in pertinent part:

After being notified of an injury, the employer or insurance

> carrier shall deliver to the employee, in person or by certified or registered mail, return receipt requested, a copy of a notice, approved or prescribed by the Commission, which explains the employee's rights and responsibilities concerning change of physician. If after notice of injury the employee is not furnished a copy of the aforesaid notice, the change of physician rules do not apply.

The record contains a copy of the A-29 form furnished the appellee and the motion to submit additional evidence accompanying the form states, "A copy of Commission Form A-29 and Section 11 were provided to the claimant by correspondence *addressed to the claimant's attorney, Ken Reeves*, dated January 21, 1982." Furthermore, on the line on the form itself which discloses the method of delivery to the claimant, whether personally delivered or sent by registered or certified mail return receipt requested, the words "registered or certified" and "return receipt requested" have been struck through leaving the information that "A copy of this notice has been sent by mail, to Mr. Ken Reeves, 502 N. Walnut, Harrison, AR 72601 for Mrs. Betty Villines, Compton, Arkansas 72625." It is therefore clear that the statutory requirements were not met and that the change of physician rules did not apply.

In addition, we believe the commission erred in characterizing the treatment by Dr. Butts as a change of physicians rather than a referral. In its opinion the commission stated:

> There is some indication that Dr. Ledbetter, who was treating claimant, wished to have claimant examined by Dr. Butts. However, the record also indicates that claimant was initially referred to Dr. Butts by her attorney. Therefore, we believe claimant's treatment by Dr. Butts should be characterized as a change of physicians rather than as a referral.

Dr. Ledbetter stated in his deposition that he had referred the appellee to Dr. Butts who provided her with psychological treatment and profiling as well. We think it immaterial that appellee's attorney also recommended Dr. Butts. We believe the record is clear that this was a referral and that the commission, although it improperly labeled it as a change of physicians, correctly approved the referral.

Next, appellant argues that the appellee was not entitled to a change of physician to Dr. Butts because he lacked the expertise and experience to treat the appellee's condition and that such treatment is not reasonable and necessary. We do not agree. The record shows that Dr. Ledbetter and Dr. Boop both testified that by July 2,1982, the appellee had improved physically as much as she ever would and that her psychological reaction to the ominous prognosis for her physical condition was now her primary problem. We think the commission could find that as a psychiatrist, Dr. Butts is competent to treat the mental and emotional side effects of appellee's condition, and as a medical doctor he is competent to recognize any deterioration in her physical condition which would necessitate treatment by a medical doctor.

Next, appellant argues that the commission erred by giving weight to, and considering, the findings of the administrative law judge concerning the credibility of Dr. Butts and the appellee. Appellant argues that it is impermissible for the commission to *rely* on the law judge's findings in this regard rather than make its own independent findings. The opinion of the commission states that it reviewed the record de novo and that it *agrees* with the opinion of the law judge—not that it *relies* on it. In view of the decisions set out in the concurring opinion in *City of Fayetteville* v. *Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984), it is difficult to understand why the commission does not simply state that it "finds from a preponderance of the evidence that the findings of fact made by the law judge are correct and they are, therefore, adopted by the commission." Regardless, the commission had this case under consideration a substantial period of time and we find nothing to support a finding that it did not thoroughly review the record and arrive at its own determination of the facts.

Appellant's next argument is that the commission erred in finding the appellee to be currently totally disabled after finding her healing period had ended and that she had sustained 20% permanent disability to the right foot. Appellant submits that this holding goes far beyond the limits of the concept of current total disability as set out in *Mad Butcher, Inc.* v. *Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982), and *Sunbeam Corp.* v. *Bates*, 271 Ark. 385, 609 S.W.2d 102 (1980), and that it effectively overrules *Anchor Construction Co.* v. *Rice*, 252 Ark.

460, 479 S.W.2d 573 (1972), and repeals Ark. Stat. Ann. § 81-1313. We discussed the concept of current total disability in *Bemberg Iron Works* v. *Martin*, 12 Ark. App. 128, 671 S.W.2d 768 (1984), where we said that a claimant's benefits for a scheduled injury were not limited to the benefits provided by Ark. Stat. Ann. § 81-1313(c) (Repl. 1976) when the scheduled injury renders the claimant totally disabled. We also stated that the fact that the total disability may not last forever is not harmful to the employer or the insurance carrier. The cases in which current total disability is awarded are those in which the commission is not quite ready to admit that a claimant will never be able to return to work. In the present case, the commission must think there is a possibility that the appellee may learn to manage her persistent pain and once again return to the job market as a productive worker. Furthermore, when viewed in the light most favorable to the findings of the commission as we are required to do, *Jones* v. *Scheduled Skyways, Inc.*, 1 Ark. App. 44, 612 S.W.2d 333 (1981), we think the evidence is clearly sufficient to support a finding that appellee is currently totally disabled.

Finally, appellant argues that the commission erred when it found the appellant had controverted all weekly benefits beyond 20% to the foot. Appellant insists that it has paid over $16,000.00 for medical bills and benefits voluntarily and that the commission's holding that it had controverted the right of the appellee to receive all permanent benefits in excess of the 20% was error. But the record discloses that appellant contested this award from the beginning, and has consistently maintained that appellee's healing period has ended and that her award should be based on the scheduled injury to the foot and nothing more. An award of attorney's fees based on controversion is a fact decision which we do not reverse unless it is not supported by substantial evidence or there has been a gross abuse of discretion. *See New Hampshire Ins. Co.* v. *Logan*, 13 Ark. App. 116, 680 S.W.2d 720 (1984). We think the record supports the commission's decision on this point.

Affirmed.

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

Supplemental Opinion on Rehearing
En Banc
December 11, 1985

MELVIN MAYFIELD, Judge. The appellant has filed a petition for rehearing pointing out that the record shows that at the hearing before the administrative law judge it was stipulated that appellant had paid weekly benefits for a period of 92 3/7 weeks. Using that stipulation, the appellant argued in its brief that at the time of the hearing before the law judge it had paid weekly benefits from date of injury, apparently without missing a week, and as a result of those voluntary payments it had paid 17 1/7 weeks more than was required for the healing period and a 20% permanent partial disability to appellee's right foot. Thus, the appellant contended in its brief that the law judge and the commission had erred in finding it had controverted payment for those 17 1/7 weeks.

Our original opinion correctly stated that the record disclosed that appellant had consistently maintained that appellee's award for disability should be based on the scheduled injury to her foot and nothing more. However, it may be that we erred in affirming the commission's finding that compensation for these 17 1/7 weeks was controverted.

Therefore, we remand for that single issue to be resolved. The commission should determine if compensation for any or all of this period of 17 1/7 weeks was voluntarily paid. In determining that fact, the commission should keep in mind the rule that issues cannot be raised for the first time on appeal to this court. *Ashcraft* v. *Quimby*, 2 Ark. App. 332, 621 S.W.2d 230 (1981). So, unless relief from the effect of controversion for these 17 1/7 weeks was raised before the commission, no relief in that

regard should be granted even if the payments were voluntarily made.

The petition for rehearing is granted and this matter is remanded for the limited purpose stated.

Albert Neil WOMACK *v.* Judy R. WOMACK

CA 84-403 697 S.W.2d 930

Court of Appeals of Arkansas
Division I
Opinion delivered October 16, 1985

Hoover, Jacobs & Storey, by: *O. H. Storey, III*, for appellant.

Rice, Batton, Pierce & Swift, P.A., by: *Ben E. Rice*, for appellee.

MELVIN MAYFIELD, Judge. This case involves an award of alimony. The appellee was granted a decree of separate maintenance in September of 1981. At that time there were two minor children. The parties had entered into a written property settlement agreement shortly before the separate maintenance decree was granted. The agreement contained provisions whereby the appellant husband was to pay the appellee wife the sum of $200.00 per month child support and $400.00 per month alimony. When each child reached age 18 the child support was to reduce by $100.00 and the alimony was to increase by $100.00. The agreement provided that it was a "full and final and complete settlement" of all property rights "to be settled for separate maintenance purposes," that it could be incorporated in any decree of legal separation, and "in the event it is converted to a divorce action, the same terms would be incorporated in a divorce decree."

Three years later the appellee filed a suit for divorce on the grounds of personal indignities and three years separation. Appellant filed an answer and counterclaim alleging that since the entry of the separate maintenance decree he had been injured in an automobile accident and was now totally and permanently disabled and unable to pay the alimony as provided in the settlement agreement. He also alleged that the appellee was able bodied and held a responsible and lucrative job.

At trial, appellant testified in support of the physical and financial condition alleged in his answer and counterclaim, but the trial judge stated he was holding that the property settlement was an enforceable agreement. The court granted appellee a divorce and incorporated the property settlement agreement and made it a part of the decree. In this appeal, the appellant argues that the trial judge erred in thinking he was bound by the terms of the agreement. On the other hand, the appellee argues that the trial court was correct in thinking that the agreement was an independent contract that could not be modified.

The briefs are largely devoted to a discussion of when a property settlement agreement is an independent contract that cannot be modified by the court. However, we do not think that this is the real issue in the case. We agree with the appellant's contention that we are not concerned with the modification of an

agreement in this case, but with the authority of the court to make an *initial* award of alimony when a divorce decree is entered. Therefore, we deal with that issue only.

In *Pryor* v. *Pryor*, 88 Ark. 302, 114 S.W. 700 (1908), the court said: "The court is not, in the first instance, bound by the agreement of the parties concerning the amount of alimony to be allowed to the wife." The court explained the matter in this way: "This is so because the court is moved to action by principles of justice and equity, and is not bound to follow the agreement of the parties against what appears to be the justice of the case."

In *Bachus* v. *Bachus*, 216 Ark. 802, 227 S.W.2d 439 (1950), the court said:

> The parties to a divorce action may agree upon the alimony or maintenance to be paid. Although the court is not bound by the litigants' contract, nevertheless if the court approves the settlement and awards support money upon that basis there is then no power to modify the decree at a later date.

The language quoted above from the *Pryor* case was also quoted with approval in *Holmes* v. *Holmes*, 186 Ark. 251, 53 S.W.2d 226 (1932), and the language quoted above from *Bachus* was quoted with approval in *Armstrong* v. *Armstrong*, 248 Ark. 835, 454 S.W.2d 660 (1970). *See also McCue* v. *McCue*, 210 Ark. 826, 197 S.W.2d 938 (1946).

It is true, of course, that the court had awarded alimony in the separate maintenance decree, but we do not think that the refusal to follow that allowance in the divorce decree would constitute a modification of the separate maintenance decree. In *Smith* v. *Smith*, 236 Ark. 141, 365 S.W.2d 247 (1963), the court had awarded the wife alimony in a separate maintenance decree entered by the Chancery Court of Nevada County. Later, the Chancery Court of Miller County granted the husband a divorce and that decree made no provision for the payment of alimony. After the entry of the divorce decree, the wife filed a petition in the Nevada Chancery Court seeking to punish the husband for his failure to make the maintenance payments in accordance with that court's decree. The court refused to hold him in contempt saying there was no further liability to make those payments because of the divorce decree entered by the Miller Chancery

Court. The Supreme Court rejected the wife's plea of *res judicata* and affirmed the Nevada Chancery Court's decision. *See also Myers* v. *Myers*, 226 Ark. 632, 294 S.W.2d 67 (1956).

The early case of *Pryor* v. *Pryor, supra*, pointed out that a statute in effect at that time provided that "when a decree (for divorce) shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case may be reasonable." That same provision is in our current statute (although it provides that alimony may also be awarded to the husband). *See* Ark. Stat. Ann. § 34-1211(A) (Supp. 1985). *Boyles* v. *Boyles*, 268 Ark. 120, 594 S.W.2d 17 (1980), sets out some of the considerations involved in deciding the alimony issue under this statute. *But see Russell* v. *Russell*, 275 Ark. 193, 628 S.W.2d 315 (1982) (holding that marital misconduct is not, as a general principle, a permissible consideration in the determination of the alimony award).

In the instant case, although the divorce decree states that the court finds the property settlement agreement to be fair and equitable, it is apparent that the chancellor thought he was bound by the agreement as to alimony and gave no consideration to the question of whether, from the evidence, alimony should be allowed and, if so, in what amount. While the usual practice in appeals from chancery is to end the controversy by rendering judgment in this court on our de novo review of the record, under all the circumstances in this case and considering the time that has elapsed since the trial before the chancellor, we think it best to exercise our discretionary authority to remand. *See Pickens* v. *Stroud*, 9 Ark. App. 96, 653 S.W.2d 146 (1983).

Reversed and remanded for further proceedings consistent with this opinion.

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

John MADDOX *v.* ST. PAUL SCHOOL DISTRICT

CA 85-137 697 S.W.2d 130

Court of Appeals of Arkansas
Division II
Opinion delivered October 16, 1985

Cearley, Mitchell & Roachell, by: *Marcia Barnes*, for appellant.

TOM GLAZE, Judge. This is an appeal from the circuit court's dismissal of appellant's complaint, which alleged that appellee had breached appellant's teaching contract for the 1982-3 school

year by deducting $722 from appellant's final paycheck.

On June 30, 1982, appellant and appellee entered into a teacher's contract, whereby appellant agreed to teach physical education and health and to coach basketball and baseball. The contract covered a time period of "9 Months of school; 200 Days of school; 10 Calendar months; From August 2, 1982, to May 31, 1983." In return, appellee agreed to pay appellant annual compensation of $16,055.00 in eleven installments. Appellant reported to work from August 2, 1982 through May 17, 1983. The last day of school was May 17, 1983. On June 14, 1983, appellant received his final check from appellee, from which appellee had deducted $722.00 for the nine working days, between May 17th and May 31st, appellant did not report to work. Appellant sent appellee a letter dated June 22, 1983, demanding payment of this amount, and after receiving no response, filed this suit.

The trial court found that it was undisputed that the contract under which appellant was teaching was for the period of August 2, 1982 through May 31, 1983. The judge acknowledged that there were other time provisions in the contract, *i.e.*, nine months of school, two hundred days, and ten calendar months, but found that, while appellant's interpretation of the contract that he did not have to report to work after May 17th, the last day of school, was understandable, he failed to show by a preponderance of the evidence that he was excused from reporting to school until May 31st.

Appellant contends the trial court wrongly construed the contract to require appellant's presence until May 31, 1983. Of course, we cannot overturn the findings of a circuit judge sitting as a jury unless we find them to be clearly erroneous or clearly against the preponderance of the evidence. *Izard County Board of Educators* v. *Violet Hill School District*, 10 Ark. App. 286, 663 S.W.2d 207 (1984). Here, we hold the trial court's finding that the appellant was required to report to work through May 31st is clearly erroneous. Therefore, we reverse.

Traditional contract principles apply to teacher employment contracts. *Gillespie* v. *Board of Education of North Little Rock*, 528 F.Supp. 433 (D.C. Ark. 1981), *aff'd* 692 F.2d 529 (8th Cir. 1982). It is a well-settled rule that any ambiguity in a contract must be construed against the party who drafted it.

Williams v. *Cotten*, 9 Ark. App. 304, 658 S.W.2d 421 (1983); *Barrett* v. *Land Mart of America, Inc.*, 3 Ark. App. 70, 621 S.W.2d 889 (1981). The time provisions in appellant's contract are ambiguous, setting forth four different time provisions, 9 months of school, 200 days of school, 10 calendar months, and from August 2, 1982 through May 31, 1983, none of which cover an identical period of time. The appellee prepared appellant's contract, which was a standard form used with all the district's teachers. The trial court was therefore required to construe the contract against appellee and in favor of Maddox. As noted earlier, the judge indicated in his finding he understood how appellant could interpret the contract as he did, but then construed the ambiguous time provisions in appellee's favor. In doing so, the trial court arbitrarily chose the provision "From August 2, 1982 through May 31, 1983" as controlling.

Now, we turn to the evidence that we believe underscores the trial court's error. Here, appellee prepared and issued to all its teachers a standard form contract, which reflected a time period ending May 31st. In fact, the only date that varied in these contracts was the beginning date—teachers who had 180-day contracts were to begin on August 10th, while appellant and other teachers who had 200-day contracts were required to begin on August 2nd. Danny Patrick, the school superintendent, testified that the May 31st date gave the school extra time within a teacher's contract to make up missed, but required, days in the school term without holding the teachers beyond their contract deadline. He admitted that the teachers under a 180-day contract were free to leave after the last day of school, which, in this instance, was May 17, 1983. Deborah Snell, a former teacher for appellee, and appellant both testified that Patrick told the teachers at a meeting prior to the end of school that, once they turned in their paperwork after the last day of school, they were free to leave. While Patrick attempted to distinguish at trial between a nine-month teacher and a ten-month teacher, appellant's contract, like those of all the other teachers (with exception of Glen McCutchen, the football coach and junior high principal), was for nine months of school and ten calendar months. Although Patrick testified the appellant was expected to be at school for the full 200 days, he admitted that the only other teachers who had identical time provisions in their contracts, the

vocational teachers, were not required to report for work after school was out. No other teacher was docked any pay, nor is there any provision in the contract allowing for such a deduction.

Patrick testified that, as superintendent, he had expected appellant to be at school after May 17th. He testified that appellant knew he had to get his permission to be absent after May 17th and that appellant's duties were to handle the paperwork for his sports. However, Patrick admitted that he had not told appellant that year that he was supposed to be at school after the last day. Appellant testified, and Patrick did not deny it, that he had turned in all his paperwork by the last day of school. Furthermore, Patrick admitted that at no time after the last day of school did he contact appellant to find out why he was not showing up. Patrick's conduct, as agent for appellee, indicated that appellee intended the operative-time term in teachers' contracts to be the months of school, not the days of school or the time frame from August 2nd (or 10th) until May 31st. In construing a contract, the court will look to the conduct of the parties to determine what they intended. *Welch* v. *Cooper*, 11 Ark. App. 263, 670 S.W.2d 454 (1984). Even when the contract is ambiguous, the parties will be bound to the construction which they have placed on it. *Organized Security Life* v. *Munyon*, 247 Ark. 449, 446 S.W.2d 233 (1969).

Appellee's action, in docking pay from appellant's paycheck only, and not from those of other teachers with identical time provisions in their contract, was arbitrary. Construing the contract in appellant's favor, as must be done, we conclude that appellant established by a clear preponderance of the evidence that appellee wrongfully withheld the sum of $722.00 from appellant's last paycheck. Therefore, we reverse the trial court and remand with directions to enter a judgment accordingly.

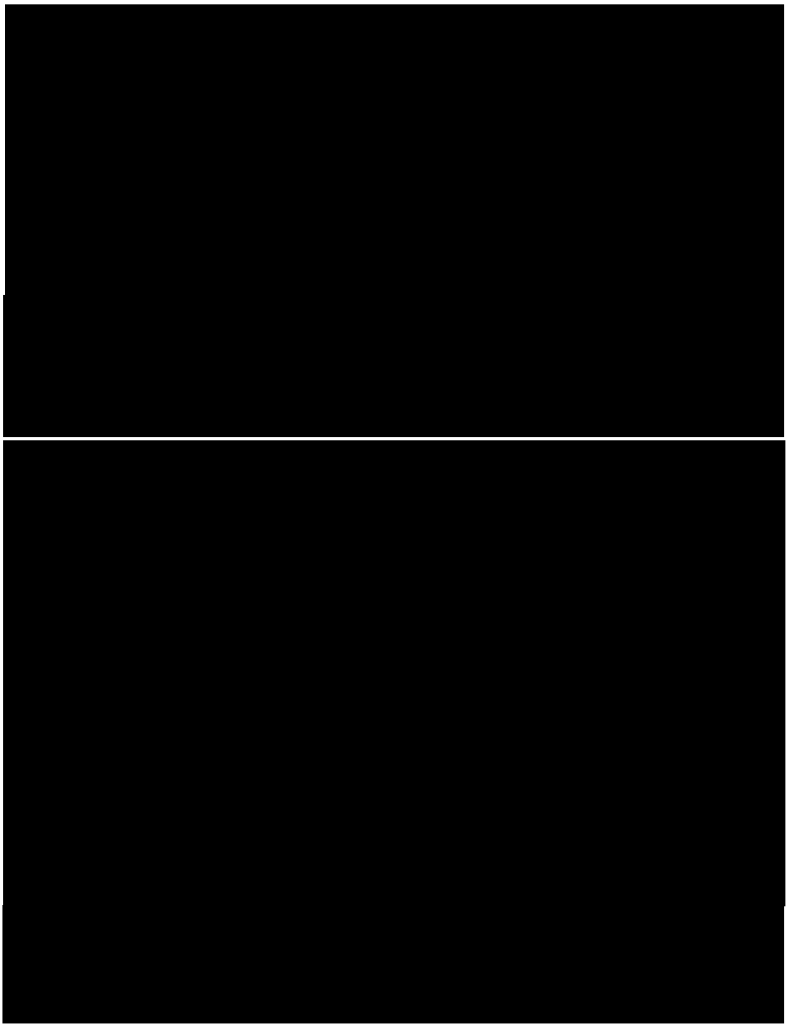
Reversed and remanded.

COOPER and CORBIN, JJ., agree.

UNION NATIONAL BANK OF LITTLE ROCK, ARKANSAS *v.* FIRST STATE BANK & TRUST COMPANY OF CONWAY, ARKANSAS

CA 85-35 697 S.W.2d 940

Court of Appeals of Arkansas
Division II
Opinion delivered October 23, 1985



Smith, Smith & Duke, by: *Wm. David Duke*, for appellant.

Clark & Adkisson, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Union National Bank of Little Rock appeals from an order of the chancery court holding that the lien of its second mortgage is junior to advances made by the first mortgagee even though the advances were optional, made after the second mortgage was recorded and were for purposes wholly unrelated to the primary obligations secured by the first mortgage. Upon our review of the record we find no error.

The facts necessary to a determination of the issue presented disclose that on May 4, 1981 Ray and Doris Jean Khoury executed a series of notes to First State Bank & Trust Company of Conway for the purpose of purchasing a home. The notes were secured by a first mortgage on the residence. The mortgage contained two clauses dealing with the debts to be secured. The first clause was typewritten and was as follows:

> This sale and conveyance is on the condition that, whereas, Mortgagors are justly indebted unto Mortgagee in the sum of Forty-Eight Thousand Thirty-five and 55/100 Dollars ($48,035.55) evidenced by a promissory note signed by the parties of the first part dated May 4, 1981 payable to the order of Mortgagee, bearing interest as stipulated therein, and due in installments over a period ending May 4, 1985, and in the further sum on $15,000.00 as evidenced by a note of even date herewith for said sum, bearing interest as herein set forth and due on September 4, 1981, and agrees to advance the additional sum of $11,964.45 as requested by Mortgagors to be repaid not later than September 4, 1981.

The priority of the notes described in this clause is not in issue. Immediately following that typewritten provision a clause in the printed mortgage form provided:

> In addition to securing the payment of the above described indebtedness, this instrument shall also secure the payment of any and all renewals of said obligation, or any portion thereof, together with any and all additional amounts that Mortgagors now owe or may hereafter owe unto the Mortgagee, whether as principal or surety, at any time between this date and the satisfaction of record of the lien of this instrument, including any and all future advances *and/or loans* that may be made by Mortgagee to Mortgagors, or either of them regardless of whether Mortgagee is now obligated to make such future advances or hereafter becomes obligated to make such future advances, further *regardless of whether or not this instrument is specifically referred to in the evidence of indebtedness* executed by Mortgagors with regard to such future advances, and further *regardless of whether or not such future advances may be for purposes related or unrelated to the purpose for which the original indebtedness secured hereby is loaned.* This mortgage shall not release or affect any other mortgage executed by Mortgagors, or either of them, unto the Mortgagee. [Emphasis supplied]

The priority of additional advances by First State Bank to the Khourys under this provision presents the issue on this appeal.

On November 3, 1981 the Khourys executed a second mortgage in favor of Union National Bank. While both mortgages were still in force First State Bank made an additional loan in the amount of $11,000 for the purchase of an Oldsmobile automobile. A security interest on the automobile was taken as collateral for the note. In March 1982 the First State Bank advanced the Khourys an additional $5,000 for the purchase of a Pontiac automobile for which it also took a security interest. On August 18, 1982 the First State Bank made an additional loan of $7,500 which was secured by a security interest on automotive repair equipment used in Khourys' business. None of the three notes referred to the May 4, 1981 mortgage as security.

The Khourys defaulted on the notes secured by both the first and second mortgages and upon the automobile and equipment notes. In the foreclosure order the chancery court declared that the lien of First State Bank's first mortgage extended to all of the notes executed by Khoury to First State Bank including the automobile and equipment notes.

The appellant contends that this ruling of the chancellor was in error for several reasons. It first argues that as the original note to First State Bank was made for the purchase of a home the future advance clause could not extend the lien to secure notes executed for the unrelated purposes of purchasing automobiles and business equipment. They rely on the well-settled rule that a mortgage given to secure a specific debt will not be extended to cover debts subsequently incurred unless they are of the same class or so related to the primary debt secured that the assent of the mortgagor will be inferred. The purpose for such a requirement is to prevent the extension of a lien by the use of general terms to debts which the debtor did not contemplate. *Bank of Searcy* v. *Kroh*, 195 Ark. 785, 114 S.W.2d 26 (1938); *Security Bank* v. *First National Bank*, 263 Ark. 525, 565 S.W.2d 623 (1978); *Hendrickson* v. *Farmers Bank & Trust Co.*, 189 Ark. 423, 73 S.W.2d 725 (1934).

This argument would be more persuasive in the absence of the quoted provision of the mortgage in which the Khourys expressly agreed that the lien of the deed of trust extends to all future advances made to them by First State Bank whether or not the note made reference to the first mortgage or the debt was

related or unrelated to the purpose of the original indebtedness secured. The rule of law set out in *Hendrickson* is designed to protect the borrower against the unwarranted extension of the lien for debts which the parties might not have intended. We are cited no cases which even suggest that the borrower might not waive the protection of that rule by express agreement as was done here.

Appellant argues that in construing future advances clauses the intention of the parties governs and is to be determined by considering all the circumstances surrounding the execution of the mortgage. Where the intention of the parties is expressed in unambiguous terms the court does not construe the clause but enforces it as written.

Nor do we find any inconsistencies between the two quoted clauses. The first one recites those specific debts and notes which are initially secured by the mortgage. The second one starts with the words "in addition to securing the payment of the above described indebtedness." The second clause is not inconsistent with the first but merely extends and broadens it. Nor do we find merit in the argument that the second quoted provision was in "fine print." The print was no different from any of the other printed portion of the mortgage in issue. We conclude that this argument was answered in *Benton State Bank* v. *Reed*, 240 Ark. 704, 401 S.W.2d 738 (1966). There the court saw no significance in the fact that the instrument contained some typewritten provisions and stated that to hold otherwise would declare that the printed portion of a mortgage carried no weight at all.

The record discloses that at the time the notes and mortgage in favor of Union National Bank were executed that bank was aware that the First State Bank held a first mortgage on the property; made no inquiry of that bank as to the balance due on the notes, and failed to give notice to First State Bank of the execution of the second mortgage. Under these circumstances we conclude that the case is controlled by *Alston* v. *Bitley*, 252 Ark. 79, 477 S.W.2d 446 (1972) where the court declared that a prior recorded mortgage securing optional future advances is superior to an intervening encumbrance if the first mortgagee does not have knowledge or actual notice, as distinguished from mere record notice, of the intervening lien.

We conclude that the express language of the mortgage extended the lien of First State Bank's first mortgage to all of the advances whether related or unrelated to the primary purpose. We further conclude that as First State Bank had no actual notice of the taking of the second mortgage the chancellor was correct in concluding that the first mortgage lien attached to those future advances and was superior to the intervening encumbrances.

Nor do we find merit in the contention that the chancellor erred in excluding the testimony of Khoury regarding his intent at the time the unrelated notes were executed. As the intention of the parties was expressly stated in a written instrument in clear and unambiguous terms, it was the function of the court to enforce it as written. The chancellor was correct in holding that the express agreement could not be varied by parol evidence.

Affirmed.

MAYFIELD and CLONINGER, JJ., agree.

Rosetta RIVERS *v.* Dewey STILES, Director of Labor

E 84-162 697 S.W.2d 938

Court of Appeals of Arkansas
Division II
Opinion delivered October 23, 1985

Marilyn Rauch, of *Central Arkansas Legal Services*, for appellant.

George Wise, Jr., for appellee.

JAMES R. COOPER, Judge. In this unemployment compensation case, the appellant was denied benefits by the Appeal Tribunal under Ark. Stat. Ann. Section 81-1106 (Supp. 1983) on a finding that she voluntarily quit her last work without good cause connected with the work. The Board of Review, which adopted the Appeal Tribunal's decision, found that the appellant had failed to demonstrate that her marital difficulties qualified as "a personal emergency of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification." On appeal, the appellant contends that the Board's decision is not supported by substantial evidence. We agree with the appellant, and reverse.

Section 81-1106(a) provides, in pertinent part:

> [A]n individual shall be disqualified for benefits: . . . If he voluntarily and without good cause connected with the work, left his last work . . . Provided no individual shall be disqualified under this subsection if, *after making reasonable efforts to preserve his job rights, he left his last work due to a personal emergency of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification.* . . (emphasis added).

At the hearing before the Appeal Tribunal, the appellant, who was the only witness to testify, stated that she had been physically abused by her husband. She testified that the abuse had continued for some time, but that it had gotten worse in the five or six months prior to her quitting her job, and that, about a week before she quit, he had threatened her with a knife and a Coke bottle. She further testified that she and her husband argued on July 11, 1984, the night before she quit, that she called the police, and her husband threw her out of the house. She sought temporary shelter with a friend, but she was only able to stay there for a few days. She testified that she had been forced to leave town on a number of occasions prior to the incident on July 11 in order to allow her husband time to cool down. She also testified that her employer, who was not present at the hearing, had given her a four-day leave of absence in May, 1984, to try to work out her difficulties, requesting that she return at the end of that time to see if things improved. She did return after that leave of absence, but her marital condition continued to deteriorate. The appellant testified that the police had informed her that they could not help her and that she was unable to afford a lawyer to help her obtain a divorce. She also stated that she had tried unsuccessfully to find an apartment or house in Camden which she could afford on her own.

The Board found that such marital difficulties did not constitute a "personal emergency" as contemplated by the Act. We are aware that this Court must affirm the Board's decision if it is supported by substantial evidence. *Woods* v. *Employment Security Division*, 269 Ark. 613, 599 S.W.2d 435 (Ark. App. 1980). In the case at bar, we cannot find substantial evidence to support the Board's decision. While the appellant's testimony, though she was the only witness, cannot be taken as uncontradicted or undisputed, it cannot be arbitrarily disregarded; there

must be some basis for disbelieving it. *Timms* v. *Everett*, 6 Ark. App. 163, 639 S.W.2d 368 (1982).

The appellant's testimony clearly shows that her physical safety was jeopardized by being in close proximity to her husband; he had threatened her repeatedly, and she had been forced out of her home. It is equally clear that she believed, reasonably it appears, that the police would not help her and that she could not afford legal assistance. She had been unable to find another place to live in Camden which was within her financial means. Threats of physical abuse and ejection from one's home, sufficient to cause the appellant to seek shelter with others, clearly constitute a "personal emergency" under the Act.

While we have not previously decided whether this type of "domestic situation" can constitute a "personal emergency" sufficient to prevent disqualification from unemployment compensation benefits, other states have, in construing similar provisions, determined that such situations, when they jeopardize the well-being of the claimant, constitute such an emergency. *See Bacon* v. *Board of Review*, ___ Pa. Commw. ___, 491 A.2d 944 (1985). We agree with the reasoning in that case and hold that the Board erred in its finding that the appellant's situation did not constitute "a personal emergency of such nature that it would be contrary to good conscience to impose a disqualification."

However, that determination does not necessarily qualify the appellant for benefits. Not only must her situation constitute a "personal emergency," she must have also made "reasonable efforts to preserve her job rights." Ark. Stat. Ann. Section 81-1106(a). The Board did not address this issue, nor did the Appeal Tribunal. Because those agencies decided the case on the ground there was a lack of a compelling "personal emergency," it was not necessary for them to address this second point.

Therefore, since we find that there is no substantial evidence to support the Board's finding that the appellant's domestic situation did not constitute such a "personal emergency" as contemplated under the Act, we reverse; but, since the appellant must also demonstrate that she made reasonable efforts to preserve her job rights, we remand to the Board for further proceedings in accordance with this opinion.

Reversed and remanded.

CLONINGER and CORBIN, JJ., agree.

DYKE INDUSTRIES, INC., d/b/a DYKE BROTHERS *v.* Mike WALDROP

CA 85-15 697 S.W.2d 936

Court of Appeals of Arkansas
Division I
Opinion delivered October 23, 1985

Warner & Smith, for appellant.

No response.

LAWSON CLONINGER, Judge. The sole issue in this single-brief appeal is whether an accord and satisfaction had been reached in a contract dispute. We hold that the evidence fails to support the trial court's finding of accord and satisfaction, and we reverse and remand this matter.

Appellant, Dyke Industries, Inc., supplied appellee, Mike Waldrop, with materials for a house appellee was building for his sister, Brenda Wilson. For several years appellee had done business with appellant and had maintained an open account. During construction, Wilson made payments on her brother's account; these were delivered to appellant's office by appellee.

On February 8, 1984, Wilson mailed a check to appellant in the amount of $2,699.51 and added a notation stating "Customer No. 1525—Wilson Job—Paid in Full." Before cashing the check, appellant notified appellee by three letters that the account was not paid in full. The balance outstanding, as of June 20, 1983, was $1,218.34. Appellant was informed by Wilson that she had written a check dated July 8, 1983, to her brother in the amount of $1,218.34. This payment was never received by appellant, and at trial appellee denied that he had ever received the check from his sister.

Appellee did not dispute the amount appellant claimed was owed but insisted that he had neither received nor cashed the check. Appellant filed suit against appellee for $1,347.90, a figure representing the total amount owed, plus interest and costs. The trial court held that because the check of February 8, 1984, bore the notation "Paid in Full," an accord and satisfaction had been reached and appellee owned no money. From the judgment for appellee, this appeal arises.

An accord and satisfaction generally involves a set-

tlement in which one party agrees to pay and the other to receive a different consideration or a sum less than the amount to which the latter is or considers himself entitled. *Jewell* v. *General Air Cond. Corp.*, 226 Ark. 304, 289 S.W.2d 881 (1956). Before there can be an accord and satisfaction, there must be a disputed amount involved and a consent to accept less than that amount in settlement of the whole. *Widmer* v. *Gibble Oil Co.*, 243 Ark. 735, 421 S.W.2d 886 (1967). Acceptance by a creditor of a check offered by the debtor in full payment of a disputed claim is an accord and satisfaction of the claim. *Pillow* v. *Thermogas Co. of Walnut Ridge*, 6 Ark. App. 402, 644 S.W.2d 292 (1982).

At trial, appellee acknowledged that he had "no reason to doubt" that the amount appellant claimed was owing on the account was accurate. Hence, there was no dispute concerning the amount of the debt. In *Widmer* v. *Gibble Oil Co., supra*, the Arkansas Supreme Court held that a check bearing the notation "full payment of all accounts to date" which was cashed by the creditor did not constitute an accord and satisfaction in the absence of evidence that the debtor denied that he actually owed the full amount demanded. The court quoted with approval the following passage from 6 Corbin on Contracts, § 1277:

> It is not enough for the debtor merely to write on a voucher or on his check such words as "in full payment" or "to balance account," where there has been no such dispute or antecedent discussion as to give reasonable notice to the creditor that the check is being tendered as full satisfaction.

In the instant case, appellant had no notice from appellee or his sister, through either dispute or discussion, that the February 8, 1984, payment would be final.

Appellee asserted at trial that he didn't owe the balance because he had not paid any of the bills throughout the period of construction. Yet there was evidence that his sister had written him a check on July 8, 1983, for the amount owed as of June 20, 1983. Moreover, payments were made on appellee's open account, for which appellee was ultimately responsible. The third party's assumption that she had paid the account in full could not absolve appellee of liability when he did not dispute the claim.

Under Rule 52(a), A.R.C.P., we do not set aside findings of fact unless they are clearly erroneous, *i.e.*, clearly against the preponderance of the evidence. Due regard is given the opportunity of the trial court to judge the credibility of the witnesses. Despite our deference to the trial court on questions of witness credibility, in view of appellee's own admission of an absence of dispute, we hold that the finding by the trial court that there was an accord and satisfaction absolving appellee of his debt is clearly against the preponderance of the evidence.

Reversed and remanded for proceedings not inconsistent with this opinion.

GLAZE and COOPER, JJ., agree.

Debra FAULKNER *v.* STATE of Arkansas

CA CR 85-98 697 S.W.2d 537

Court of Appeals
Division I
Opinion delivered October 23, 1985

John W. Achor, for appellant.

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

TOM GLAZE, Judge. On January 28, 1985, appellant was convicted, by the trial court sitting as a jury, of forgery in the second degree and sentenced to three years in the Department of Correction with one year suspended. On appeal, appellant contends that there was insufficient evidence on which to base the conviction, alleging that the State had failed to prove she acted with an intent to defraud. We affirm the conviction.

Forgery in the second degree is committed when a person forges a written instrument that is a check. *Mayes* v. *State*, 264 Ark. 283, 571 S.W.2d 420 (1978); *Gonce* v. *State*, 11 Ark. App. 278, 669 S.W.2d 490 (1984); Ark. Stat. Ann. § 41-

2302(3)(a) (Repl. 1977). A person forges a written instrument if, among other things, with purpose to defraud, he alters, possesses, or utters any written instrument that purports to be, or is calculated to become, or to represent if completed, the act of a person who did not authorize the act. Ark. Stat. Ann. § 41-2302(1) (Repl. 1977). "Utter," as used in § 41-2302(i), includes the delivery or attempted delivery of a written instrument. *Mayes*, 264 Ark. at 290.

It was undisputed that, on July 10, 1984, appellant deposited a General Motors Acceptance Corporation check payable to Albert Tate into an account for Mr. Tate at an office of First South Federal Savings and Loan (First South) located in Little Rock. It was also undisputed that the check was purportedly endorsed by Albert Tate, that Mr. Tate did not authorize the signature or the act, and that the check had been altered upwards in amount, from five dollars to five thousand dollars. The only issue in conflict was appellant's knowledge of the alteration and her intent to defraud.

Lou Ann Ford, a teller at a First South office in North Little Rock, testified that, on July 6, 1984, a woman identifying herself as Betty Faubert came into that office to open an account in the name of Albert Tate or Betty Faubert. Admitting she had not made any previous identification regarding the identity of this woman, Ms. Ford made an in-court identification of appellant as the woman who had called herself Betty Faubert.

Cathy Gregory, a teller at the First South office in Little Rock, testified that, on July 10, 1984, appellant came into the bank to deposit the check in question, telling her that she did not have an account number but that the check was to be deposited to Albert Tate's account. Ms. Gregory stated that, when she told appellant she could find no account number for Mr. Tate, appellant said the account might be under the name of Betty Faubert. She said appellant did not identify herself as Betty Faubert. After searching unsuccessfully under that name, Ms. Gregory testified she then told appellant she would need an account number to make the deposit. She said appellant told her that she would go and see if she could find it, that Mr. Tate was out of town. Ms. Gregory testified that appellant came back in about fifteen minutes with a deposit slip already typed out for

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16 ARKANSAS APPELLATE REPORTS at page 131

Detach at perforation, moisten the back, and paste over the fourth line from th bottom of page 131 of *Faulkner v. State:*

tion. *Ellis v. State,* 279 Ark. 430, 652 S.W.2d 35 (1983)

Albert Tate with the account number on it. Ms. Gregory testified she then deposited the check.

Appellant admitted that she had taken the check in question to First South and had given it to Ms. Gregory for deposit. However, appellant testified that Ms. Gregory's version of what happened was not correct. According to appellant, she got the check and deposit slip from her boss, Roy Duckett, in an envelope. She testified that he drove her to the bank. Appellant stated she did not know that the check had been altered or that it was in the amount of five thousand dollars. She also testified that she did not give the names of either Albert Tate or Betty Faubert, nor did she know that the account was in the name of either Betty Faubert or Albert Tate. Appellant said when she gave Ms. Gregory the check, Ms. Gregory told her there was no account number. She said she went out to tell Mr. Duckett what the teller had said and he told her that the account number should be in the envelope. Appellant stated she then took the envelope back in and told Ms. Gregory, "he said it was in the envelope," whereupon the teller took the envelope, deposited the check, and gave appellant a receipt. She stated that this did not take fifteen minutes, and she also testified that she had never been in the First South branch in North Little Rock.

The trial judge found that appellant was not the person who opened the account for Mr. Tate on July 6, 1984, as he indicated he was not at all impressed by Ms. Ford's in-court identification of something that had occurred six months earlier. However, the trial court found Ms. Gregory's version of what happened on July 10, 1984, to be true. The judge stated that, although he believed Roy Duckett was the one principally responsible, appellant's statement to Ms. Gregory that Mr. Tate was out of town, coupled with the extensive alteration of the check she presented, showed appellant's complicity beyond a reasonable doubt.

In a criminal case, we are required to view evidence on appeal in the light most favorable to the appellee and affirm the trial court if there is substantial evidence to support the conviction. *Ellis* v. *State*, 279 Ark. 430, 652 S.W.2d 35 (1979). 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 another; it must

force the mind to pass beyond a suspicion or conjecture. *Jones* v. *State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984). Circumstantial evidence is sufficient evidence if it excludes every reasonable hypothesis consistent with innocence; however, whether it does so is basically a question for the finder of fact. *Id.*

The State contends that Ms. Ford's testimony, when coupled with Ms. Gregory's testimony and the obvious nature of the check's alteration, is sufficient evidence to support appellant's conviction. We must reject part of the State's contention because the trial court specifically held that he did not find Ms. Ford's identification of appellant as the woman who opened the account credible, and we are bound by his determination of credibility. *See Ellis*, 279 Ark. at 432; *Jones*, 11 Ark. App. at 136. Nonetheless, we conclude that the statements of Ms. Gregory (whose testimony the trial court found credible), showing that appellant had talked as if she knew Mr. Tate and had requested his account, and the obvious alteration of the check warrant an inference that appellant intended to defraud Mr. Tate of five dollars and General Motors Acceptance Corporation of $4,995.00.

The trial court obviously did not find appellant's explanation of her possession of the altered check credible. As we said earlier, this was the prerogative of the trial court. The drawing of reasonable inferences from the testimony is for the trial judge as fact-finder, not this court. *Core* v. *State*, 265 Ark. 409, 578 S.W.2d 581 (1979). Our supreme court has held that:

> Possession of a forged instrument by one who offers or seeks to utter it without any reasonable explanation of the manner in which he acquired it warrants an inference that the possessor committed the forgery or was a guilty accessory to its commission. *State* v. *Phillips*, 127 Mont. 381, 264 P.2d 1009 (1953).

Mayes, 264 Ark. at 291. The reasonableness and sufficiency of appellant's explanation is a matter to be determined by the fact-finder. In so doing, the trial judge had the right to accept such portions of the testimony as he believed to be true and reject those he believed to be false. *Core*, 265 Ark. at 414.

There being sufficient evidence to support the conviction, we affirm.

Affirmed.

COOPER and CLONINGER, JJ., agree.

L.D. PERRY, Employee *v.* MAR-BAX SHIRT COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Carrier

CA 84-303 698 S.W.2d 302

Court of Appeals of Arkansas
En Banc
Opinion delivered October 30, 1985
[Rehearing denied December 4, 1985.]

Frederick S. "Rick" Spencer, for appellant.

Penix, Penix, Mixon & Lusby, for appellee.

GEORGE K. CRACRAFT, Chief Judge. This is the second appeal of this workers' compensation case. In an unpublished opinion dated October 26, 1982 we remanded the case to the Arkansas Workers' Compensation Commission for clarification of evidentiary matters and for further review of the record to determine what effect, if any, the evidence as clarified had on the legal issues presented by the parties. In complying with the mandate the Commission found that the appellant had sustained permanent partial disability to the body as a whole. It further found that some portion of the total disability was apportionable to a preexisting disability resulting from arthritis. The Commission found that the degree of additional disability suffered by the claimant as a result of his compensable injury on May 30, 1980, "blending both physical impairment and wage loss factors together" amounted to 25% to the body as a whole. Appellant brings this second appeal contending that the Commission erred in not finding him to be totally disabled under the "Odd Lot Rule" and in the alternative that there was no basis for apportionment. We find merit only in his second argument.

Appellant sustained a compensable injury to his back on May 30, 1980 while moving a piece of heavy machinery. He was treated by his physician and returned to work on August 10, 1980. On September 18, 1980 he left his employment with appellee stating that he had accepted employment at higher pay in a mill in Mississippi. The appellee heard nothing further from appellant until his attorney contacted the company in January 1982.

The employer testified that appellant was a good worker and performed his duties satisfactorily and without complaint for twelve years. There was testimony that had appellant complained about his work or asked, appellee would have assigned him lighter duties. It was stated that appellant gave two reasons for quitting his employment—the mill in Mississippi would pay him almost twice the wages he was then receiving and the machinery in appellee's mill was getting on his nerves to such an extent that he felt a change was necessary. Appellant testified that before the injury he had experienced no difficulty with his back and was able to perform heavy work. After the injury he began having problems with his nerves and reached a point where he could not sleep at night. He stated that he tried to return to work after the injury but could not because of the pain. His daughter corroborated that testimony.

The appellant was fifty-three years of age and had a second grade education. He had worked most of his life as an unskilled laborer in the lumber industry and in appellee's shirt factory. He stated that because of his injury he could no longer hunt and fish, garden or properly do his household chores and spent most of his time lying on a couch. He stated that at the time of his job related injury at appellee's mill he had been "moonlighting" and holding down more than one job.

Dr. Douglas Stevens, a clinical psychologist, opined that appellant could not even perform light duties. Dr. Stevens stated that he was not a candidate for any work without rehabilitation to build his work tolerance and overcome emotional overlay.

Appellant's treating physician released him to return to work. Appellant was treated by Dr. Ledbetter and Richard M. Logue, both orthopedic surgeons. Both testified that his healing period had ended. Dr. Ledbetter rated the appellant's permanent partial disability as 15% to the body as a whole which he determined to be a combined rating of the job related injury and preexisting arthritis but was unable to separate the two. Dr. Logue determined his permanent partial disability to the extent of 20 to 30% overall. He attributed from 10% to 15% of his disability to the job related injury since he was working before the injury without complaint, and 10% to 15% to his preexisting arthritis.

The appellant contends that there is no substantial evidence to support a finding that appellant was not totally and permanently disabled. Our courts have long recognized that the wage loss factor, i.e., the extent "to which a compensable injury has affected claimant's ability to earn a livelihood" rather than the functional or anatomical loss, is generally controlling in workers' compensation determinations which are made on the basis of medical evidence, age, education, experience and other matters reasonably expected to affect the claimant's earning power. *Rooney & Travelers Ins. Co.* v. *Charles*, 262 Ark. 695, 560 S.W.2d 797 (1978); *Glass* v. *Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961).

Although the testimony of Dr. Stevens and the appellant might warrant a finding of total disability the extent of our inquiry on appeal is to determine if the finding of the Commission is supported by substantial evidence and we will affirm if reasonable minds could reach the conclusion the Commission reached. *Bankston* v. *Prime West Corporation*, 271 Ark. 727, 610 S.W.2d 586 (Ark. App. 1981).

It is clear from the opinion of the Commission that it considered the wage loss factor set forth in *Glass* v. *Edens, supra.* Although the Commission's knowledge and experience is not evidence, once it has before it firm medical and lay evidence of physical impairment and functional limitations it has the advantage of its own superior knowledge of industrial demands, limitations and requirements and can apply its knowledge and experience in weighing the medical evidence of functional limitations together with other evidence of the manner in which the functional disability will affect the ability of the injured employee to obtain a job and thereby arrive at a reasonably accurate conclusion as to the extent of permanent partial disability as related to the body as a whole. *Rooney & Travelers Ins. Co.* v. *Charles, supra; Bearden Lumber Co.* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). From our review of the record viewed in the light of these principles, we cannot say that reasonable minds could not reach the Commission's conclusion.

The appellant next contends the Commission erred in apportioning the total disability between the preexisting disease and the disability attributable to the job related injury. All parties

concede that the Commission was correct in concluding that the provisions of Ark. Stat. Ann. § 81-1313(f)(2) (Repl. 1976), which was in effect at the time of the injury, governs the rules of apportionment.

In a series of cases we have held that the question of whether apportionment is proper does not depend upon whether the preexisting disability was work related or otherwise a compensable disability under the act. The rule has been established, however, that the prior impairment, although not actually a compensable disability, must have been of a physical quality sufficient to produce independently some degree of *disability* before the accident and continued to do so after it. *Harrison Furniture Co.* v. *Chrobak*, 2 Ark. App. 364, 620 S.W.2d 955 (1981); *Chicago Mill & Lbr. Co.* v. *Greer*, 270 Ark. 672, 606 S.W.2d 72 (1980); *McDaniel* v. *Hilyard Drilling Co.*, 233 Ark. 142, 343 S.W.2d 416 (1961).

It was made clear that disability or impairment within the contemplation of the Workers' Compensation Act means loss of earning capacity. *Harrison Furniture Co.* v. *Chrobak, supra,* and *Osage Oil Co.* v. *Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985).

Appellee contends that there is substantial evidence to support the Commission's finding that this was a proper case for apportionment. We do not agree.

Appellee relies on testimony that appellant had injured his back in 1960 and that Dr. Ledbetter made a notation in his report of December 8, 1980 that the earlier injury "was very resistant to treatment." Appellant was asked if the symptoms suffered after the most recent injury were the same as those suffered in the earlier injury. He stated that they were but "didn't just keep hanging with me." This testimony is corroborative of the finding of a preexisting condition but does support a finding of the required diminished earning capacity.

The record discloses that the appellant had been engaged in hard manual labor all of his life and had performed such labor at appellee's mill for twelve years preceding the job related injury. He had returned to work six weeks after the 1960 injury. There was no evidence that he had had any difficulty with his back since

the 1960 injury or that the resulting arthritis had since affected his ability to earn. According to the appellee's personnel manager appellant was a good worker and he was aware of no complaints. The appellant testified that he had suffered no difficulty from the arthritis prior to the accident and in fact was then holding down two jobs involving hard manual labor. He had terminated his employment at the appellee's mill, not because of physical impairment, but to engage in heavier work at higher wages.

Although our standard of review of workers' compensation cases is that they shall be affirmed if there is any substantial evidence to support the finding, we have also held that whether evidence is substantial in nature is a question of law. *Cummings* v. *United Motor Exchange*, 236 Ark. 735, 368 S.W.2d 82 (1963). In this case we find no substantial evidence to support a finding that the preexisting arthritis was independently producing any degree of disability resulting in diminished earning capacity prior to the job related accident.

The Commission made no finding on the total percentage of disability to the body as a whole resulting from combined anatomical rating and wage loss factors. It merely declared that only 25% of his present disability is attributable to the second injury. The finding of the Commission that appellant was not totally and permanently disabled is affirmed. The case is remanded with directions that the Commission determine appellant's total percentage of disability to the body as a whole and enter its award accordingly.

Reversed and remanded.

Hazel W. WOMACK *v.* Arleigh WOMACK

CA 84-441 698 S.W.2d 306

Court of Appeals of Arkansas
Division II
Opinion delivered October 30, 1985

Ramsey, Cox, Lile, Bridgforth, Gilbert, Harrelson & Starling, by: *Kinberly W. Tucker*, for appellant.

Mullis, Davis & Chadwick, by: *Bart Mullis*, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Hazel W. Womack appeals from a decree of divorce in which the trial court held that under the circumstances of the case the military retirement pension of Arleigh Womack was not marital property subject to division. She contends that the trial court erred in that ruling. We agree.

In 1955 appellee entered military service. In 1957 he married appellant. In 1975 appellee retired from the Navy and began receiving military retirement benefits at the rate of $795.00 per month. The parties were divorced in August 1984. The chancellor ruled that since the decision in *Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984) military retirement benefits payable in the future may be considered marital property and subject to division under Ark. Stat. Ann. § 34-1214 (Supp. 1985). He further found that the appellee's rights under the military pension plan vested in 1955 on entering the service and concluded that under § 34-1213(b)(5) (Supp. 1985) the benefits were excluded because they represented a mere increase in the value of property acquired by appellee prior to the marriage.

We agree with the chancellor's conclusion that *Day* and its progeny have established that military retirement benefits may constitute marital property subject to division on divorce but do not agree with his conclusion that the benefits based on appellee's military service after the marriage represented increases in value of his separate property acquired prior to the marriage.

The chancellor's finding that the appellee acquired a vested right in military retirement upon entering active military service in 1955 is clearly erroneous. It was undisputed that under military pension regulations the right to receive retirement benefits did not vest until after the serviceman had completed twenty years service. Had the appellee left the Navy before completing twenty years active duty he would have been entitled to no benefits.

The question of the status of pension benefits based in part on pre-marital contributions or service was addressed in *Marshall* v. *Marshall*, 285 Ark. 426, 688 S.W.2d 279 (1985). There the husband had retired after thirty-five years employment at Reynolds Aluminum but had been married to the wife for only the last ten of those years. The chancellor held that all of the

retirement benefits were marital property subject to division on divorce. The Supreme Court reversed and declared that those benefits based on contributions or service prior to the marriage were separate property of the recipient and those based on contributions or service during the marriage were marital property. The Supreme Court modified the decree to award the wife her proportionate share of benefits based on the husband's contributions or service during the marriage. Here retirement benefits based on the two years service of the husband prior to the marriage are his separate property. Those benefits based on the remaining eighteen years are not mere increase in value of separate property, but are marital property subject to division.

The appellee contends in the alternative that the chancellor was right for the wrong reason. Appellee relies on *Paulsen* v. *Paulsen*, 269 Ark. 523, 601 S.W.2d 873 (1980) in which the court declared that future installments of military retirement benefits, currently being paid but not transferable, are not marital property under the statute. We agree with the chancellor that *Paulsen* was effectively overruled by the Supreme Court in its decisions in *Day* v. *Day, supra*, *Marshall* v. *Marshall, supra,* and *Gentry* v. *Gentry*, 282 Ark. 413, 668 S.W.2d 947 (1984).

In a series of cases referred to in *Day*, our court had previously dealt with pension plans which provided benefits in installments but gave the beneficiary no right to lump sum payment, had no loan or surrender value, and were not transferable. Based on the concept that installments of pension benefits payable in the future were more akin to mere "expectancies" the court in those cases declared that retirement benefits not yet due and payable were not property subject to division on divorce. In *Paulsen* this view was applied to military retirement benefits currently being paid but which terminated at death, had no loan or surrender value and were not transferable.

In *Day* the court recognized that in prior cases it had failed to recognize the new concept of marital property created by Act 705 of 1979. It held that although the beneficiary could not withdraw any amount from the fund which had no loan or surrender value and could not be transferred, the fund was a valuable property right subject to division. In listing the cases in which the court had

failed to recognize the new concept it specifically listed *Paulsen.*

In *Gentry* v. *Gentry*, *supra*, the court stated:

> Until recently we were of the view that pension benefits vested but not yet due and payable were not subject to distribution in a divorce. *Sweeney* v. *Sweeney*, 267 Ark. 595, 593 S.W.2d 21 (1980) (Construing our earlier statute.) The same view was taken when we, construing Act 705 of 1979, considered a military pension which the husband was receiving. *Paulsen* v. *Paulsen*, 269 Ark. 523, 601 S.W.2d 873 (1980).
>
> That view was changed in *Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984) . . . .

In *Marshall* v. *Marshall, supra*, the court again recognized that *Day* had overruled the previous decisions and held that pension plan benefits vested but not yet due and payable constituted marital property and as such should be divided under the statute unless the court found the division to be inequitable.

Appellant further contends that the present case is distinguishable from *Day, Gentry*, and *Marshall* because the military pension was a non-contributory one. In *Day* the court cited with approval *Re: Marriage of Brown*, 15 Cal.3d 838, 126 Cal. Rptr. 633 (1976) in which the California Court was addressing a non-contributory pension plan. The plan in *Re: Marriage of Brown*, like the military pension plan, was not based on contributions of funds but on years of service to the corporation.

In *Marshall* the court stated:

> *Brown* is annotated in 94 ALR 3d 176, where we find in those jurisdictions recognizing retirement benefits as marital property, there appears to be no question that benefits based on contribution *or* services not made during the marriage constitute the separate property of the recipient. [Emphasis supplied]

From these cases it becomes clear that vested retirement benefits not yet due and payable are marital property subject to division on divorce when based on contributions made or services rendered during the marriage. As the appellee's pension was not only vested but was being paid at the time of the

divorce, it was subject to division as marital property, subject to the limitations set out in *Marshall* and the alternatives mentioned in *Day*. In *Day* the court emphasized that it did not intend to lay down an inflexible rule regarding division of pension benefits. In appropriate cases the chancellor might balance the equities by awarding the wife alimony commensurate with the husband's ability to pay, taking into account his pension right.

On *de novo* review of a fully developed chancery record where we can plainly see where the equities lie, this court may enter the order here that the chancellor should have entered. However, the decree appealed from contained a lengthy and detailed settlement of all property rights, including property in lieu of alimony. As the scheme of disposition of marital rights may have been influenced by the chancellor's view that appellee would receive the $795.00 monthly installment free of any claims of the appellant, the interests of justice would better be served by reversing all that portion of the decree dealing with alimony and property division to enable the chancellor on remand to reconsider the entire disposition of marital rights in light of the views expressed in this opinion.

Reversed and remanded.

MAYFIELD and CORBIN, JJ., agree.

Michael Robert VAN SICKLE *v.* STATE of Arkansas

CA CR 85-102 698 S.W.2d 308

Court of Appeals of Arkansas
Division I
Opinion delivered October 30, 1985

Donald R. Huffman, Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Jerome T. Kearney*, Asst. Att'y Gen., for appellee.

LAWSON CLONINGER, Judge. Appellant was charged with two counts of battery in the second degree, Ark. Stat. Ann. § 41-1602 (1)(d)(iii) (Supp. 1985). The charges arose from incidents involving the two minor children of appellant's girl friend. The two charges were severed for trial and the jury returned a guilty verdict for the battery of Jamie Holmes, age 4. At the judgment and commitment hearing, appellant pled guilty to the second degree battery of the other child, John Holmes. Appellant was sentenced to five years for the second degree battery of Jamie and four years, with two years suspended, for the second degree battery of John, the sentences to run consecutively.

Appellant contends that during his trial on the charge relating to Jamie, the trial court abused its discretion when it permitted a photograph of the bruises on John's buttocks and thighs to be admitted into evidence. Appellant further states that this evidence of a prior act was highly prejudicial and was not outweighed by its probative value. We disagree, and finding no abuse of discretion, affirm.

While in appellant's care, Jamie Holmes sustained first and second degree burns to his ankles and the tops of his feet. At first appellant explained that Jamie was accidentally burned by hot water in the bathtub. Appellant later confessed to Detective Barnes of the Rogers Police Department that he had placed Jamie in a tub of hot water and held him there as punishment for playing in the mud. At trial appellant refuted his confession,

retold the accident story, and claimed that he loved his girl friend's children and would not intentionally harm them. At that point the State began to question appellant about a spanking he had given Jamie's younger brother, John. Appellant admitted spanking John, and stated that he did not know he had bruised him until he had been shown a picture. The trial court then admitted into evidence, over appellant's objection, a picture of John that showed severe bruises covering his buttocks and thighs.

We hold that the trial court was justified in finding that the evidence regarding the injuries suffered by John was admissible. Ark. Stat. Ann. § 28-1001, Rule 404(b) (Repl. 1979), provides:

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

In *Limber* v. *State*, 264 Ark. 479, 572 S.W.2d 402 (1978), the Arkansas Supreme Court held that evidence of the abuse of another child in the household is relevant and admissible under Rule 404(b) to show whether there existed an intent to abuse and the absence of mistake or accident.

Granted, the picture of John is shocking and prejudicial. However, the danger of unfair prejudice created by a photograph must substantially outweigh its probative value before we will exclude it. *Williams* v. *State*, 267 Ark. 527, 593 S.W.2d 8 (1979). The photograph in question clearly shows that this was not a routine spanking as appellant implies. The jury could conclude that John had been severely beaten, and this fact is highly probative of the issue of appellant's intent and lack of mistake or accident. Even inflammatory photographs are admissible if they tend to shed light on any issue. *Perry* v. *State*, 255 Ark. 378, 500 S.W.2d 387 (1973). The introduction of photographic evidence is a matter within the discretion of the trial judge and we will not reverse a trial court's ruling with respect to relevance absent an abuse of discretion. *Stevens* v. *State*, 15 Ark. App. 357, 693 S.W.2d 64 (1985). We find no abuse of discretion in this case.

Affirmed.

GLAZE and COOPER, JJ., agree.

Pat HIGGS, Administratrix of the Estate of Karen D. DALLAS, on behalf of the Estate, and FIRST NATIONAL BANK OF ARKANSAS as Guardian of Shane DALLAS, a Minor *v.* James D. HODGES

CA 85-12 697 S.W.2d 943

Court of Appeals of Arkansas
Division II
Opinion delivered October 30, 1985

The McMath Law Firm, P.A., by: *James Bruce McMath*, for appellants.

Huckabay, Munson, Rowlett & Tulley, P.A., by: *James D. Hodges*, for appellee.

DONALD L. CORBIN, Judge. Appellants, Pat Higgs, Administratrix of the estate of Karen D. Dallas, deceased, and First National Bank of Arkansas, Guardian of Shane Dallas, a minor, brought a wrongful death action in the Circuit Court of Pulaski County against appellee, James D. Hodges. The Pulaski County Circuit Court jury returned a verdict in favor of appellee. We reverse and remand.

On February 26, 1982, Karen D. Dallas was driving west on Interstate 40, having just entered the interstate from the entrance ramp of Arkansas State Highway 161. Upon entering Interstate 40, the decedent apparently lost control of her vehicle on an icy overpass. Appellee, also driving west on Interstate 40, had been following the decedent. When the decedent lost control of her vehicle appellee's vehicle ran into her. The decedent died from the injuries sustained as a result of this collision.

Appellants contend that during the trial of this wrongful death suit, the trial court erred in permitting appellee to elicit from the investigating state trooper his conclusion that appellee was not driving too fast under the conditions and that appellants' decedent was driving too fast for the conditions. They rely upon the following reasons: (1) The trooper lacked the expertise necessary to form such an opinion; (2) He lacked the information upon which to form such an opinion; and (3) The question of

whether either party was traveling too fast under the conditions was a question for the jury to determine based upon the facts and evidence before them. Appellants argue, therefore, that the state trooper should not have been permitted to testify concerning his opinions on these ultimate questions absent some indication that his opinions were based upon information that went beyond the experience and understanding of the average juror.

Whether a witness qualifies as an expert is a matter to be decided by the trial court and, in the absence of abuse of discretion, we will not reverse the trial court's decision. *Beck* v. *State*, 12 Ark. App. 341, 676 S.W.2d 740 (1985). Appellants allege as their first point that the trooper lacked the expertise necessary to form an opinion on whether appellee or the decedent was driving too fast. The record shows that the state trooper was qualified as an expert due to his training and experience. He did observe the impact area, the debris, the position of the vehicles, and the general conditions. We find no abuse of discretion by the trial court in recognizing the trooper as an expert. Therefore, we find that appellants' first point is without merit.

Appellants, as their second point for reversal, allege that the trooper lacked the information necessary to form an opinion as to the speed of the vehicles involved in the accident. However, this court has held that the strength or lack of strength of the evidence on which the expert's opinion was based goes to the weight and credibility, rather than admissibility, of the testimony. *Arkansas State Highway Commission* v. *Schell*, 13 Ark. App. 293, 683 S.W.2d 618 (1985). Appellants produced an expert to discredit the state trooper's opinion testimony. Appellants cross-examined the state trooper as to the factual basis for his opinion that the decedent was driving too fast under the conditions and appellee was not. The apparent lack of evidence on which to form the opinion, therefore, went to the weight accorded the opinion testimony by the jury, and not its admissibility.

We reverse the decision of the trial court pursuant to the third point raised by appellants, i.e., that the state trooper should not have been permitted to testify concerning his opinion on the speed issue absent some indication that his opinion was based on information that went beyond the experience and understanding of the average juror. The question before the jury

was whether the appellee was driving negligently when he collided with the decedent's car. This court has dealt with a similar case in which a state policeman was permitted to testify as an expert in accident investigation and reconstruction, *Ethridge* v. *State*, 9 Ark. App. 111, 654 S.W.2d 595 (1983). In *Ethridge* the ultimate issue before the court was whether the appellant recklessly caused the death of the policeman, and the law provides that one acts recklessly when there is a gross deviation from the standard of care that a reasonable person would observe in the same situation. *Id.* at 115. This Court reversed the trial court's decision because it found that the expert opinion was inadmissible under Ark. Unif. R. Evidence 702 and 403. Chief Judge Mayfield, speaking for the court, held:

> [G]iven the same information used by the expert, the jury could answer the [question] as well as he could, and it is the jury's duty to determine the standard of care of a reasonable person, not the duty of an expert; also, under evidence rule 403 the probative value of [the expert opinion] given in evidence by a member of the Arkansas State Police is substantially outweighed by the danger of unfair prejudice.

Id. at 118. We find that the opinion testimony admitted by the trial court in the case at bar is inadmissible for the same reasons as those given in *Ethridge. See also Gramling* v. *Jennings*, 274 Ark. 346, 625 S.W.2d 463 (1981). The state trooper here testified that the only basis for his conclusion that the decedent was speeding was the fact that she lost control of her car. Given the same information, the jury could arrive at a conclusion concerning whether the automobiles involved in the wreck were traveling too fast under the conditions as well as the trooper could. Rule 403 also prohibits the admission of this expert opinion. Even though the credibility of the trooper's testimony was discredited by appellants' expert witness, the fact that a state trooper said appellee wasn't driving too fast and the decedent was driving too fast tends to have too much weight with a jury. A state trooper's testimony concerning speed of a car involved in an accident is given a high degree of credibility by the average person. The probative value of the opinion testimony in this case is outweighed by the danger of unfair prejudice. For these reasons we reverse and remand the decision of the trial court.

Reversed and remanded.

CRACRAFT, C.J., agrees.

MAYFIELD, J., concurs.

MELVIN MAYFIELD, Judge, concurring. I want to comment on the appellant's point that the state trooper did not have the expertise necessary to form an opinion on whether appellee or the decedent was driving too fast.

In my view, the trooper's opinion on that matter was immaterial in the trial of this case. The appellee had alleged that the decedent was negligent. AMI 301 provides that the trial judge shall instruct the jury that negligence is "the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence in this case." Thus, the trooper should not have been allowed to tell the jury it was his conclusion that the decedent was "driving too fast for conditions." It might be permissible for him to give his opinion of the rate of speed the decedent was traveling at the point of collision; or how many feet it would take to stop her vehicle after applying the brakes; or what effect the application of brakes would have on an icy highway. But whether the decedent was "driving too fast for conditions" is the ultimate question in this case. It simply asks whether the decedent was doing what a reasonably careful person would do under similar circumstances.

The vice of letting the jury know the trooper's conclusion is fully explained in the majority opinion and the *Gramling* and *Ethridge* cases cited therein. I thoroughly agree with the majority opinion and the reversal of this case.

P.T. "Pete" PINCKNEY, et al. *v.* MASS MERCHANDISERS, INC.

CA 85-75 698 S.W.2d 310

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

Wright, Lindsey & Jennings, for appellant.

Rose Law Firm, A Professional Association, for appellee.

JAMES R. COOPER, Judge. This is an appeal from an order of the Boone County Circuit Court denying the appellant's motion to set aside an order which found the appellants in contempt of court, imposed a civil fine in the amount of $5,000.00, and ordered the appellant's answers to the complaint of the appellee stricken. We affirm.

The appellee filed a complaint against the appellants in July 1982, alleging that it had suffered damages occasioned by the appellants' breach of contract. The prayer for relief sought damages, possession of certain computer hardware and software, and an injunction prohibiting the appellants from disposing of the software. The next day, the circuit judge issued an *ex parte* order allowing the appellee to repossess the computer equipment from the appellants. The order expressly provided that the appellants' failure or refusal to surrender the equipment would be punishable as contempt.

The appellants filed a motion to dismiss the complaint, alleging that the court had no personal jurisdiction over them, and the motion also requested that the court stay its repossession order. The circuit judge denied the motion to dismiss, and allowed the appellants 10 days to answer the complaint. The appellants filed separate answers, but refused to allow the appellee to take possession of the equipment. In April 1983, the circuit court again issued an order authorizing the repossession, expressly providing that failure to allow the repossession would be punishable as contempt.

The appellee attempted to secure possession of the equipment, but the appellants prevented the repossession. The appellee then filed a motion seeking to have the appellants held in contempt. The appellants countered by filing a motion to transfer the case to chancery court on the grounds that the complaint was actually an action for an accounting, traditionally heard in equity, and that the appellees were really seeking equitable relief. The motion also contained language which inferred that the appellants still contested the court's personal jurisdiction over them. Before the circuit court acted on the motion to transfer, a consent order was entered in which the appellants agreed to deliver the computer equipment to the appellee. The consent order also contained the warning that failure to deliver the

equipment would be punishable as contempt. The appellants never obtained a ruling on their motion to transfer.

Again the appellants refused to deliver the equipment. The appellee again filed a motion seeking to have the appellants held in contempt, to strike their answers, and to enter default judgments against them. The appellants were given notice of a hearing which was scheduled on the motion and on April 26, 1984, after the appellants failed to appear, the court found the appellants in contempt and ordered their answers stricken, which precluded them from contesting liability. The court awarded the appellee $1,271.25 in costs and expenses, and imposed a civil fine in the amount of $36,910.00 on the appellants.

The appellants then filed a motion to set aside the contempt order and partial judgment. The motion was based, *inter alia*, on the grounds that the court lacked personal jurisdiction over the appellants. The court held a hearing on the motion, with the parties represented by counsel, and reduced the fine to $5,000.00 because the equipment had finally been delivered. The court refused to set aside the finding of contempt and the partial judgment, and stated that "all other sanctions" previously imposed (including the striking of the appellants answers) were to remain in force. From that decision, comes this appeal.

The appellants' first argument on appeal is that the circuit court lacked subject matter jurisdiction over them because the complaint sought injunctive relief and an accounting. Therefore, say the appellants, the original repossession order was void and they could not be validly held in contempt of the void order. We disagree with the appellants' argument. First, the complaint does not pray for an accounting. The term "accounting" merely appears in the complaint as part of a quotation of the terms of the contract entered into between the parties. Second, circuit courts are not wholly without jurisdiction to grant injunctions.

Under the Arkansas Constitution, circuit courts are the reservoir of unassigned judicial power; they have original jurisdiction in all cases where jurisdiction is not expressly vested in another court. *Russell* v. *Cockrill, Judge*, 211 Ark. 123, 199 S.W.2d 584 (1947). The correct way to determine the circuit court's jurisdiction is to first determine what class of cases are expressly entrusted to the jurisdiction of other tribunals, with the

great residuum belonging concurrently or exclusively to the circuit court. *State* v. *Devers*, 34 Ark. 188 (1879). In order to successfully attack the circuit court's jurisdiction, it must be shown that another court has been granted exclusive jurisdiction of the subject matter. *Russell, supra.* Counsel has not cited, nor has our research discovered, an Arkansas case construing Ark. Stat. Ann. Section 22-404 (Repl. 1962), which grants the chancery court original jurisdiction in "all matters in equity," to mean that injunctive relief is solely within the jurisdiction of the chancery court. The mere allegation of an equitable principle in the complaint, unsupported by factual allegations, is insufficient to give courts of equity exclusive jurisdiction over the subject matter. *See Duncan* v. *Baxter*, 222 Ark. 955, 264 S.W.2d 395 (1954). Since the circuit court was not wholly without jurisdiction, we find no merit to this argument.

The circuit court's refusal to set aside the finding of contempt is appealable because it is a final disposition of the contempt matter pending between the appellants and the court. The proper procedure for review of contempt citations is by appeal. *Frolic Footwear* v. *State*, 284 Ark. 487, 683 S.W.2d 611 (1985).

The appellants argue that the circuit judge abused his discretion in denying their motion to set aside the contempt order because their actions, which they allege were taken on the advice of Tennessee counsel, did not constitute willful conduct. We disagree. We hold that the trial judge's finding of contempt is not against the preponderance of the evidence and that he did not abuse his discretion in refusing to set aside his earlier order. Our review of a finding of contempt is limited to examining the findings of the trial court, and overruling those findings only if they are against the preponderance of the evidence. *Ex Parte Johnston*, 221 Ark. 77, 251 S.W.2d 1012 (1952).

We affirm the trial court's decision, and we remand for further proceedings on the remaining question of damages.

Affirmed and remanded.

CORBIN, J., agrees.

GLAZE, J., concurs.

TOM GLAZE, Judge, concurring. I concur. Our Court's recitation concerning the basis on which the circuit court could issue an injunction, I believe, is best supported by the supreme court's decision in *Daley* v. *Digby*, 272 Ark. 267, 613 S.W.2d 589 (1981). Here, as in *Daley*, the chancery court clearly had no exclusive jurisdiction of this cause so, once the circuit court acquired jurisdiction of this contract action, it could also issue any necessary injunctive relief. In all other respects, I agree with the majority opinion.

STATE OF ARKANSAS SECOND INJURY FUND
v. Harold GIRTMAN

CA 85-106 698 S.W.2d 514

Court of Appeals of Arkansas
En Banc
Opinion delivered November 6, 1985

Steve Clark, Att'y Gen., by: *Rick D. Hogan*, Asst. Att'y Gen., for appellants.

No brief filed for appellee Girtman.

Robert D. Stroud, for appellee Banquet Foods Corporation.

DONALD L. CORBIN, Judge. This is an appeal by appellant State of Arkansas, Second Injury Fund, from a Workers' Compensation Commission decision holding that appellee Harold Girtman had a prior wage loss disability as a result of an on-the-job injury sustained in 1979 while employed by appellee Banquet Foods. The Commission affirmed the Administrative Law Judge's award holding appellant liable for wage loss disability, if

any, to be determined at a future date and holding appellee Banquet Foods responsible for the payment of the 40% anatomical rating of disability for the second injury of June 17, 1981. We reverse and remand.

Appellee Girtman did not file a workers' compensation claim with appellee Banquet Foods following his injury of 1979. He remained off work for six months and underwent surgery to his low back area. The Veteran's Administration paid for his medical expenses and he was paid weekly indemnity benefits under his health and accident policy. Appellee was released to return to work without any restrictions or limitations by his surgeon. Appellee resumed his employment with appellee Banquet Foods performing light duty and returned to full duty as a fork lift operator three or four months later. This was the same job he performed with appellee Banquet Foods prior to his injury and he was subsequently paid the same wages. Appellee was not rated with an anatomical impairment rating as a result of his first injury and surgery. He testified that his back was doing "good" prior to his second injury of June 17, 1981. Appellee Girtman also testified that he was able to cut firewood on weekends following his first injury. He stated that he could perform all of his work-related duties as before, except lifting. This statement was qualified by appellee who stated that most of his duties consisted of driving the fork lift and he very seldom had to lift.

Appellee Girtman's second injury occurred on June 17, 1981. There is no dispute by any of the parties as to its compensability. Surgery was subsequently performed on his lower back by Dr. I. Leighton Millard. Appellee returned to work in September 1982. On November 11, 1982, Dr. Millard rated appellee Girtman with a 10% pre-existing anatomical impairment from the 1979 injury and subsequent surgery and a 40% anatomical impairment from the June 17, 1981, injury. Appellee has not worked since July 1983 and stated at the hearing that he continued to have a lot of pain, was stiff, unable to lift objects and took medication for pain.

Appellant contends that the Commission erred in finding appellee Girtman had a prior disability or impairment pursuant to Ark. Stat. Ann. § 81-1313(i) (Supp. 1985). In this regard, appellant argues that there is no evidence to support the Commis-

sion's decision that appellee Girtman was continuing to suffer from permanent disability before and after the second injury. The Commission held that appellee Girtman had suffered a wage loss disability as a result of the first injury. It further found that the 10% medical impairment appellee received after the first back surgery would have made him handicapped if he had attempted to find other employment. Appellant Second Injury Fund notes in its brief that there are very few, if any, Arkansas workers who are completely free of any degree of medical or anatomical impairment to every part of their body. It argues that to adopt appellees' contention and the decision of the Commission would warrant Second Injury Fund exposure in virtually every Workers' Compensation case, bankrupt the Fund, and not serve to encourage the employment of truly handicapped workers.

On appeal, this Court is required to review the evidence in the light most favorable to the Commission's decision and to uphold that decision if it is supported by substantial evidence. Ark. Stat. Ann. § 81-1325 (Supp. 1985). Even when a preponderance of the evidence might indicate a contrary result, we affirm if reasonable minds could reach the Commission's conclusion. Questions of credibility and the weight and sufficiency of the evidence are matters for determination by the Commission. The Commission is better equipped by specialization and experience to analyze and translate evidence into findings than we are. *Bemberg Iron Works* v. *Martin*, 12 Ark. App. 128, 671 S.W.2d 768 (1984).

Ark. Stat. Ann. § 81-1313(i)(1) (Supp. 1985), provides in pertinent part as follows:

> The Second Injury Fund established herein is a special fund designed to insure that an employer employing a handicapped worker will not, in the event such worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred while the worker was in his employment. The employee is to be fully protected in that the Second Injury Fund pays the worker the difference between the employer's liability and the balance of his disability or impairment which results from all disabilities or impairments combined . . . .
>
> Commencing January 1, 1981, all cases of permanent

> disability or impairment where there has been previous disability or impairment shall be compensated as herein provided . . . .

In its opinion, the Commission correctly relied upon *Craighead Memorial Hospital* v. *Honeycutt*, 5 Ark. App. 90, 633 S.W.2d 53 (1982), for the proposition that while a prior condition need not have been a compensable injury, it must be independently producing some degree of disability before the second injury and continue to operate as a disability after the second injury in order for it to constitute a previous disability or impairment. We hold that while the Commission cited the correct test in determining whether the Second Injury Fund was liable, there is no evidence that appellee Girtman's first back injury was, in itself, independently producing any disability prior to and following his second back injury. Although not controlling, it is clear from the evidence that appellee Girtman was not rated with any disability following his first injury. He had no limitations or restrictions placed upon him. The physician who performed the second operation rated appellee Girtman's anatomical disability at 10% some three years after the first injury. Appellee Girtman was able to return to full duty performing the same work at the same wage after the first injury. Appellee Girtman testified that his back did well after the first injury and that he was still able to cut firewood. The Commission's statement in its opinion that "[T]he 10% medical impairment rating pertaining to the first back injury most likely would have been a handicap if claimant had attempted to obtain another job or if his employer and co-workers had not been sympathetic," is not supported by the evidence. We believe the Commission engaged in speculation here. There is no evidence that appellee Girtman had ever been turned down for similar employment nor any evidence that his earning capacity had been reduced by virtue of the first injury in 1979.

"Disability" is defined at Ark. Stat. Ann. § 81-1302(e) (Repl. 1976), as meaning incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury. "Impairment" means loss of earning capacity due to a non-work related condition. *Osage Oil Co.* v. *Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985). It is clear that appellee Girtman's injury of

1979 was not a disability or impairment and that, therefore, appellant Second Injury Fund has no liability under the law. This cause is remanded to the Commission with directions to enter an order consistent with this opinion.

Reversed and remanded.

Elmer SMITH *v.* UNITEMP DRY KILNS, INC.

CA 85-14 698 S.W.2d 313

Court of Appeals of Arkansas
Division I
Opinion delivered November 6, 1985

Jim Pedigo, for appellant.

John Robert Graves, for appellee.

TOM GLAZE, Judge. This is an appeal by Elmer Smith from a judgment against him issued by the trial court, sitting as factfinder, and in favor of Unitemp Dry Kilns, Inc., for the sum of $4,042.27. The parties' dispute arose from appellant's plans to build a produce stand and a small minimart. Appellee later brought this suit for engineering costs and blueprints it furnished for appellant's proposed construction. Appellant raises three points, contending the trial court erred in finding: (1) a contract existed between the parties for appellee's services; (2) appellee was due the sum of $4,800.00 from appellant, when the contract conditioned payment upon appellee's delivery of fully completed design blueprints; and (3) there was sufficient evidence to show appellant was indebted to appellee on the contract of September 30, 1981, in the amount of $4,800.00. We find no merit in any of these points and, therefore, affirm.

We first consider appellant's argument that no enforceable contract existed between the parties. The essential elements of a contract are (a) competent parties, (b) legal consideration, (c) mutual obligations, (d) subject matter, and (e) mutual assent. *Hunt* v. *McIlroy Bank Trust*, 2 Ark. App. 87, 616 S.W.2d 759 (1981). Appellant contends that the last two elements are missing

in this case—*i.e.*, specific subject matter and mutual assent (or meeting of the minds). We must disagree.

Appellant argues that the parties' purported agreement, reduced to a letter dated September 30, 1981, lacked specificity of subject matter, as it merely required appellee to perform "certain design services" for appellant, and that, because it lacked a specific subject matter, there was no meeting of the minds. Our Court has defined "meeting of the minds" as "an agreement reached by the parties to a contract and expressed therein, [cit. omit.] or as the equivalent of mutual assent or mutual obligation, [cit. omit.]." *Rice* v. *McKinley*, 267 Ark. 659, 660-1, 590 S.W.2d 305, 307 (Ark. App. 1979). Because the parties' September 30, 1981, letter-agreement was based upon certain specifics contained in an earlier written proposal dated June 26, 1981, we also note the settled rule that, where the agreement of the parties is embraced in two or more instruments, both or all of the instruments must be considered together. *Integon Life Insurance Corp.* v. *Vandegrift*, 11 Ark. App. 270, 669 S.W.2d 492 (1984).

From our review of the parties' June 26th proposal and September 30th letter, we have no doubt that the appellant and appellee reached a meeting of the minds concerning specific and detailed subject matters. Appellee was to provide the design drawings enumerated in the June 26th proposal, and appellant was to pay appellee $4,800.00 for those drawings. Appellant admitted that he was to pay appellee $4,800.00 ten days after the signing of the September 30th letter-agreement. Both appellant and appellee signified their acceptance by signing the letter of September 30th. We find no error in the trial court's determination that the parties entered into a valid contract.

In appellant's second point on appeal, he alleges that the trial court erred in finding that payment of the $4,800.00 was not conditioned upon appellee's delivery of fully completed design blueprints. However, the contract, as accepted by appellant on October 6, 1981, provides that "[i]t is understood and agreed that . . . for all practical purposes the design work has been completed." Furthermore, Arthur Dillard, secretary of appellee and the one who signed and negotiated the contract on its behalf, testified that the *agreement was for work already completed.* In

addition, Dillard testified that the plans, though not fully complete, were "virtually," or "ninety-nine percent," complete. He stated that the plans could not be made anymore complete until appellant secured the approval of the state health department. Appellant admitted that this approval had not yet been secured. Appellant further testified that he preferred not to complete the building at the present time because the interest rates had not come down to a reasonable level.

In *Doup* v. *Almand*, 212 Ark. 687, 690, 207 S.W.2d 601, 603 (1948), our supreme court held that, when a person " 'prepared plans and specifications for a building pursuant to an unconditional order or direction of the owner, he is entitled to recover for his services whether or not the plans are used if they substantially comply with the employer's instructions.' " (quoting 6 C.J.S. Architects, § 14, (now § 31)). The supreme court has further held that,

> [i]t is elementary that there is no breach of a contract where performance is prevented, or rendered impossible, by the conduct of the other party. [cit. omit.] It is also generally recognized that a defective performance is excused . . . where it is due to the acts of the owner or his representative, unless the contractor has not offered a substantial compliance with the contract. [cits. omit.]

Harris v. *Holder*, 217 Ark. 434, 439, 230 S.W.2d 645, 648 (1950). We find no error in the trial court's holding, as appellee had substantially complied with the contract and appellant's actions prevented any further performance by the appellee.

Appellant finally contends that there is insufficient evidence to prove that appellant owed appellee $4,800.00. However, as we mentioned earlier, appellant admitted that he understood he was to pay appellee $4,800.00 within ten days of signing the letter of September 30th. That letter, and Dillard's testimony, indicated that the parties contemplated that the payment was for the plans as they were at that time. Therefore, the trial court was not in error in holding appellant was to pay appellee $4,800.00 under the terms of the September 30th letter.

There being no merit to any of appellant's points of error, the judgment is affirmed.

Affirmed.

COOPER and CLONINGER, JJ., agree.

Thomas A. STEWART *v.* Ruby P. STEWART

CA 85-16 698 S.W.2d 516

Court of Appeals of Arkansas
Division II
Opinion delivered November 13, 1985
[Supplemental Opinion on Rehearing delivered
December 18, 1985]

Terry R. Ballard, for appellant.

Patten & Brown, for appellee.

GEORGE K. CRACRAFT, Judge. Thomas A. Stewart appeals from a decree of the chancery court of Grant County ordering a sale in partition of property owned with Ruby P. Stewart as an estate by the entirety. We agree that the chancellor erred in ordering partition in this case. The narrow issue presented by this appeal can only be brought into focus by a recitation of the events leading up to the appeal.

The parties were married in this state and maintained their marital domicile here for a number of years. After the marriage they acquired title to a 20 acre tract of land in Grant County, Arkansas, as tenants by the entirety. During the first week in September 1976 the appellee went to Springfield, Missouri, for the sole purpose of obtaining medical treatment for seizures. While there she stayed in the home of an uncle and was referred to a physician in Rice County, Kansas. She arrived in Kansas on or

about September 10, 1976 and undertook the desired medical treatment. While in Kansas appellee resided with family and friends.

On November 10, 1976 appellee filed suit for divorce in the Kansas court and service was had on the appellant by restricted mail pursuant to K.S.A. § 60-307(a) (1983). Service on a non-resident defendant in a divorce action under that section establishes jurisdiction *in rem* and not *in personam*. *Lillis* v. *Lillis*, 1 Kan.App.2d 165, 563 P.2d 492 (1977). Appellant did not appear, answer or otherwise plead in that action.

The parties thereafter briefly reconciled and the appellee returned to Arkansas and remained "a month or two" until marital problems redeveloped and she began having seizures again. She returned to Kansas for further medical treatment. In January 1977 she returned to Arkansas and resided in the marital home until early April 1977 when she again returned to Kansas. On April 4, 1977, a decree of divorce was granted to the appellee by the Kansas court which provided that "the proceeds from the sale of the 20 acre tract of Arkansas land which is in the process of being sold should be equally divided." A short time after the decree was entered the appellee again returned to Arkansas, remarried and has subsequently resided continuously in this state.

On March 14, 1984, the appellee brought this action for partition pursuant to Ark. Stat. Ann. § 34-1801 (Supp. 1983) which permits partition of lands held by the entirety where the owners have been divorced and neither occupies the land as a homestead. Appellee introduced an authenticated copy of the Kansas decree. There was no evidence that either party resided on the property or maintained it as a homestead. The appellant answered admitting the ownership by the entireties but denying all other allegations of the complaint. By a proper motion appellant placed the validity of the Kansas divorce in issue.

The chancellor, relying on *Rogers* v. *Rogers*, 271 Ark. 762, 611 S.W.2d 178 (1981) ordered partition. *Rogers* holds that while a foreign divorce decree cannot dissolve an estate by the entirety to Arkansas land, a chancellor, under certain circumstances, may do so in a partition action and proceed with the division. Both the doctrine announced in *Rogers* and the applica-

tion of the pertinent portions of Ark. Stat. Ann. § 34-1801 (Supp. 1983) require that the tenants by the entirety be *validly* divorced. The sole issue presented is whether the Kansas divorce was a valid one subject to full faith and credit in our court. We conclude that it was not.

Subject matter jurisdiction for divorce in Arkansas can be based on less than domiciliary status. Actual presence for the required period of time is all that is required. Ark. Stat. Ann. § 34-1208.1 (Repl. 1962). Although Arkansas courts acquire subject matter jurisdiction in such cases based on actual presence within this state, Kansas requires that jurisdiction be based on domiciliary status.

The applicable Kansas statute conferring subject matter jurisdiction in divorce actions is K.S.A. § 60-1603(a) (1983) which requires that a plaintiff filing an action for divorce be "an *actual* resident of the state for sixty (60) days next preceding the filing of the petition for divorce." The Kansas courts have declared that for the purpose of divorce jurisdiction the word "resident" is substantially the equivalent of "domicile" and the words "actual resident" in that statute mean bona fide residence, i.e., having an intent to permanently reside in Kansas. *Perry* v. *Perry*, 5 Kan.App.2d 636, 623 P.2d 513 (1981).

Whether or not the Kansas court had subject matter jurisdiction must be determined by the law of that state and if the appellee did not have actual residence, as the courts of Kansas have defined that term, the court of Rice County had no subject matter jurisdiction to grant a valid divorce. The jurisdiction of that court may be impeached in a court in Arkansas because the appellant did not appear in Kansas to contest the issue of domicile. *Cooper* v. *Cooper*, 225 Ark. 626, 284 S.W.2d 617 (1955); *Anderson* v. *Anderson*, 223 Ark. 571, 267 S.W.2d 316 (1954).

It is well settled that in order to effect a change of domicile from one place or state to another, there must be an actual abandonment of the first domicile, coupled with the intention not to return to it and there must also be a new domicile acquired by actual residence in another place or jurisdiction, coupled with the intent of making the last acquired residence a permanent home. *Phillips* v. *Sherrod Estate*, 248 Ark. 605, 453

S.W.2d 60 (1970); *Gooch* v. *Gooch*, 10 Ark. App. 432, 664 S.W.2d 900 (1984). This rule has also been adopted by the courts of Kansas. *Perry* v. *Perry, supra.* In both Arkansas and Kansas the burden of proving a change of domicile is on the person who asserts it. *Hart* v. *Hart*, 223 Ark. 376, 265 S.W.2d 950 (1954); *Perry* v. *Perry, supra.*

In the trial in the Arkansas court, in addition to the facts already recited, the appellee testified as follows:

> Q. Was your intention in going to Kansas to see the physician or was it to establish a residence and live in Kansas?
>
> A. No, I went there to see the doctor.
>
> Q. So your intention was not to establish a residence in Kansas?
>
> A. No . . . .
>
> Q. All right, and at the time you were there, you were just there to see a physician, if I understand your testimony correctly.
>
> A. That is right.

On the evidence presented we must conclude that a finding that the appellee had established a domicile in the State of Kansas is clearly erroneous. Although the evidence establishes that she was not continuously in that state for sixty days before the commencement of the action, no particular time is required for the establishment of a domicile. Appellee's presence in Kansas for a period as short as twenty-four hours, when accompanied with the requisite intent, could establish that status. By her own admission the appellee never had the requisite intent to establish a new permanent residence in Kansas. As the appellee has not proved that she became a domiciliary of the State of Kansas, the Kansas court lacked subject matter jurisdiction to grant a valid divorce, without which the chancery court of Grant County had no statutory authority to order partition of an estate by the entirety.

Reversed and dismissed.

CORBIN and MAYFIELD, JJ., agree.

Supplemental Opinion on Rehearing
December 18, 1985

CA 85-16 698 S.W.2d 519

GEORGE K. CRACRAFT, Chief Judge. The appellant petitions this court to rehear and reconsider its opinion of November 13, 1985, holding that the trial court lacked jurisdiction to order the sale in partition of the properties owned by the parties as tenants by the entirety. All of the arguments advanced in that petition were fully presented and considered by the court and found to be without merit. We do not reconsider them on a petition for rehearing pursuant to Rules of the Supreme Court and Court of Appeals Rule 20(g). In our original opinion we ordered the case reversed and dismissed. In the alternative the appellant asked that the cause be remanded rather than dismissed because there are "undelivered funds in the registry of the court which should be transferred to the purchaser if the partition sale is declared invalid." He also states that the purchaser's funds were paid to satisfy the mortgagee and the mortgaged debt should be transferred to the purchaser or the third party purchase be declared defective. The appellant states that an order of dismissal leaves no cause pending in the trial court which would authorize any further action by it.

There is nothing in the abstract, argument or request for relief presented to this court which indicates that a sale was had under the partition decree or that there were any proceedings subsequent to the date of the decree appealed from.

Our opinion of November 13, 1985 is reconsidered and supplemented for the limited purpose of permitting the chancellor to enter further orders with regard to any proceedings had

subsequent to the reversed decree which are not inconsistent with our opinion.

The cause is reversed and remanded with those directions.

STATE OF ARKANSAS, SECOND INJURY FUND
v. MID-STATE CONSTRUCTION CO., et al.

CA 85-105 698 S.W.2d 804

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

Steve Clark, Att'y Gen., by: *David S. Mitchell*, Asst. Att'y Gen., for appellant.

Chester C. Lowe, Jr., for appellees.

Donald Frazier, for appellee Ray Davis, Jr.

JAMES R. COOPER, Judge. The issues on appeal in this workers' compensation case are whether the Commission erred in reinstating the appellant, Second Injury Fund, as a party to the proceedings before the administrative law judge and whether the Commission erred in directing the administrative law judge to allocate liability between the appellant and the appellee insurance carrier. We reverse and remand so that the appellant will be afforded the opportunity to present evidence to the administrative law judge on the threshold question of liability and the applicability of Ark. Stat. Ann. Section 81-1313(i) (Supp. 1983).

The appellee Ray Davis, the claimant, sustained a lumbar spine injury in June 1981, while employed by the appellee Mid-State Construction Company (hereinafter Mid-State). At a hearing before the administrative law judge, at which Davis, Mid-State, and Mid-State's insurance carrier were present, the administrative law judge joined the Second Injury Fund on his own motion (after all of the parties declined to do so). Since the appellant was not represented, the administrative law judge treated the proceeding as a preliminary hearing to obtain the testimony of the parties present; the law judge reserved final determination on the merits until the Second Injury Fund had an opportunity to read the transcript and depose any witnesses.

The administrative law judge issued an interim order in August, 1983, dismissing the appellant from the proceedings because of the parties' refusal to join the Second Injury Fund under Commission Rule 24. Counsel for Mid-State responded with a letter to the administrative law judge which objected to the

dismissal and proposed several alternatives to the dismissal order. The administrative law judge subsequently issued his opinion and order finding, *inter alia*, that:

> 5. At the time of his June 4, 1981 compensable injury, the claimant was not suffering from a disability in the compensation sense as . . . contemplated by Ark. Stat. Ann. Section 81-1313(i) (Supp. 1983).
>
> 6. Claimant's present degree of disability is solely attributable to his June 4, 1981 injury . . . .
>
> 9. For reasons mentioned in this order and in the Interim Order of August 8, 1983, the second injury is not a party respondent here.

The administrative law judge concluded that "were the second injury fund a party to this claim, it would escape liability based upon the medical reports and claimant's insistence that neither his 1959 neck injury nor the loss of vision in his right eye affected his earning capacity as of the date of his June, 1981 compensable injury."

Mid-State and its insurer appealed to the full Commission, contending, *inter alia*, that the administrative law judge erred in making the findings quoted above. The Commission found that the claimant had a preexisting disability at the time of his lumbar spine injury, and said:

> From our de novo review of the record in this case, we hold that these preexisting conditions together constitute a previous disability or impairment within the meaning of the statute.

The Commission then reinstated the Second Injury Fund as a party and remanded the case for further proceedings, directing the administrative law judge to "allocate the compensation liability among the parties hereto in accordance with Ark. Stat. Ann. Section 81-1313(i), giving the Second Injury Fund credit for the amount of claimant's disability or impairment which preexisted his compensable injury." [citation omitted] Then, finally, the Commission's order states:

> The Second Injury Fund is hereby reinstated as a party and shall be given a reasonable time to adduce evidence going

> to any issue in this case *affecting its liability before its liability is determined.* [emphasis added]

On appeal to this Court, the Second Injury Fund contends that the Commission erred in reinstating the Fund as a party because the appellees waived their right to join the Fund by refusing to move to do so at the hearing before the administrative law judge. We disagree, but we note that the insurance carrier and the employer are the parties who benefit from Second Injury Fund involvement in appropriate cases and it should be their responsibility to join the Fund where their defense is based on the theory that an initial injury is contributing to the total amount of disability following the second injury. Although the Arkansas Rules of Civil Procedure are not binding in workers' compensation cases, Ark. Stat. Ann. Section 81-1327(a) (Supp. 1985), ARCP Rule 20 would seem to provide appropriate guidance in Second Injury Fund cases.

As to the case at bar, from a reading of the Commission's opinion, quoted above, we cannot tell what the Commission intended. Although the Commission seems to have finally decided that the appellant's preexisting conditions did constitute an impairment or disability under the statute, the Commission then remanded the case to the administrative law judge for a hearing which, according to the language of the order, left open the question of the Fund's liability. If the Commission did not intend to leave open the question of the Fund's liability, it was wrong; the Fund has not had the opportunity to appear and defend. If the Commission did not intend to foreclose arguments concerning the threshold issue of liability, it was right and, on remand, the Fund can adduce whatever evidence it deems necessary to litigate that issue before the administrative law judge.

The issue of whether the appellee is permanently and totally disabled must of necessity remain open. The appellee urges that this Court affirm the Commission's decision that he is permanently and totally disabled, and we understand his desire that we do so. We cannot, for the Second Injury Fund, a necessary party to this litigation, has not been afforded the opportunity to participate in the litigation of that issue. To affirm the Commission's finding of permanent and total disability would be to hold the Second Injury Fund liable in whatever percentage found to be

appropriate by the Commission without due process.

We affirm the Commission's decision to reinstate the Second Injury Fund as a party, but we reverse and remand to the Commission so that the matter may be remanded to the administrative law judge for a hearing on the issues of liability, apportionment, and the claimant's degree of disability.

Affirmed in part, reversed and remanded in part.

CORBIN and MAYFIELD, JJ., concur.

GLAZE, J., dissents.

MELVIN MAYFIELD, Judge, concurring. I reluctantly agree with the result reached by the majority opinion. However, I think the basic error occurred in this matter when the law judge, at the first hearing, took evidence without the Second Injury Fund being present and having the opportunity to cross-examine the witnesses. "The right to confront and cross-examine witnesses is a fundamental aspect of procedural due process, and such right applies not only in criminal proceedings, but also in noncriminal proceedings, including administrative or quasi-judicial proceedings." 16A Am. Jur. 2d *Constitutional Law* § 849 (1979).

In this case, the issue of the Second Injury Fund's liability did not arise "in a way which could not have been reasonably foreseen" as referred to in the Workers' Compensation Commission Rule 24(b). Here, the possibility of the Fund's liability was apparent to the law judge, the employee, and the employer and its carrier at the start of the hearing before the law judge and before any testimony was taken at that hearing. The law judge's desire to take the testimony of the claimant who was present, treating the hearing as a preliminary one, and then notifying the Fund that it had been made a party, is understandable in regard to the saving of time, effort, and expense. But, the Second Injury Fund's liability obviously was an issue of fact and the United States Supreme Court has said: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970). When the law judge decided to join the Fund, I believe due process required that he recess the hearing until the Fund could be present to cross-examine the claimant who was ultimately held to be entitled to

recover from the Fund. Also I agree with the Fund's argument that "cross-examination of witnesses whose testimony has been made weeks or months earlier is much less effective than when allowed in conjunction with direct examination."

When the full commission reversed the law judge's holding that the Second Injury Fund had no liability, the Fund filed a motion for reconsideration with the commission, pointing out that the "most fundamental due process right of the Second Injury Fund" had been ignored by awarding benefits against the Fund based on a record where it had no opportunity to appear and defend. In my view, the Fund was not required to disclose or proffer what evidence, if any, it had to refute the commission's factual determination. It had already been denied its fundamental due process right to cross-examine the claimant at the time the claimant gave his direct testimony.

As a practical matter, the result reached by the majority opinion is probably the best result that can be reached at this time. However, I fully agree that it is the employer or its carrier's responsibility to join the Fund where they contend, as in this case, that their liability is limited by the application of Ark. Stat. Ann. § 81-1313(i) (Supp. 1985). Except for the fact that this is the first case in which this point has been involved, I would vote to reverse the commission's decision and hold that the entire liability in this case should be assessed against the employer and its carrier.

CORBIN, J., joins in this concurrence.

TOM GLAZE, Judge, dissenting. I respectfully dissent. The Second Injury Fund has not, as yet, indicated what evidence it possesses that could in any way change the Commission's decision in this cause. This is not a case where the Fund never received notice of its potential liability. The Fund, of necessity, was required to, and did, evaluate appellee's (Ray Davis') claim when the administrative law judge first brought the Fund into this cause. In fact, the Fund argued Davis' claim did not give rise to Fund liability.

In addition to arguing the applicability of the second injury statute, the Fund had the opportunity to disclose or proffer, if you will, any evidence it had that might refute the facts in the record. The Fund had every opportunity to preserve below its argument

that it should not be made a party and alternatively, to offer evidence, if it had any, that claimant's 1981 injury failed to give rise to Fund liability. We are allowing this case to be tried piecemeal by remanding it to the Commission (and administrative law judge once again) to take further evidence when there is every indication such additional hearing(s) will only bring more delay. The final decision in this case has been delayed too long already. By this decision, we set precedent for such delays in future cases.

I would affirm the Commission's decision and remand this case, solely to determine the Fund's extent of liability—not its liability as the majority has decided.

Marvin MAPLES, Sr. *v.* STATE of Arkansas

CA CR 85-94 698 S.W.2d 807

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

William R. Simpson, Jr., Public Defender, and *Jerry Sallings*, Deputy Public Defender, by: *Arthur L. Allen*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Connie Griffin*, Asst. Att'y Gen., for appellee.

LAWSON CLONINGER, Judge. The appellant, Marvin Maples, Sr., was charged with criminal attempt to commit first degree murder. The victim was appellant's ex-wife, Elaine

Maples. Appellant was convicted by a jury of the lesser included offense of aggravated assault and sentenced to fifteen years in prison.

Appellant contends that there is no substantial evidence to support the jury's verdict. He also contends that the jury's verdict is inconsistent, and that the trial court erred in permitting the State to present character evidence that the victim was a truthful person when appellant had challenged only credibility and not character. We hold that the trial court erred in admitting evidence of Elaine Maples' character and we reverse and remand for a new trial.

In his first point for reversal, appellant contends that there was insufficient evidence to support the jury's verdict.

Although we are reversing the judgment in this case on an evidentiary issue, and remanding for a new trial, we must first review appellant's challenge to the sufficiency of the evidence. In doing so, we disregard other possible trial errors. In *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), the Arkansas Supreme Court, relying upon *Burks* v. *United States*, 437 U.S. 1, 98 S.Ct. 2141 (1978), stated:

> Were we not to make such a review [review the sufficiency issue first], the alternative is to avoid the sufficiency argument by remanding for retrial on the other grounds. But unless the reasons for a new trial are defeated by reviewing the sufficiency first, including the inadmissible evidence, generally the review should be granted. That is what *Burks* requires.

The Arkansas Supreme Court, in *Harris*, explained its reasoning in this manner:

> Because of unfortuitous errors by the trial court and the defendant's right to object to those errors, the defendant should not be precluded from a review of the sufficiency or, in the alternative, forced to gamble entirely on the sufficiency issue by electing to forego all other objections. For an appellate court to avoid the argument by reversing on other grounds would ignore the protection intended by the double jeopardy clause as interpreted in *Burks*.

In resolving the issue of sufficiency of the evidence in a criminal case, we review the evidence in the light most favorable to the appellee and affirm if there is any substantial evidence to support the verdict. Substantial evidence is evidence that is of sufficient force and character that it will compel a reasonable mind to reach a conclusion one way or the other, but it must force the mind to pass beyond suspicion or conjecture. *Honea* v. *State*, 15 Ark. App. 382, 695 S.W.2d 391 (1985).

Most of the evidence in this case was in the form of testimony from the victim, Elaine Maples. She stated that on the evening of February 4, 1984, she and appellant were on their way from Perryville to Little Rock to go dancing. On the way they pulled off on a dirt road near Ferndale, in Pulaski County, and Mrs. Maples left the car momentarily. When she returned, appellant tried to kiss her and she refused. Appellant then drove "up into the mountains," stopped the car again, locked the doors, and climbed on top of her. When she resisted appellant's advances he began slapping her and calling her names. Appellant then pulled out a knife, put it to Mrs. Maples' throat and threatened to "cut her up into little pieces and chunk her into the lake." He later pulled out two guns and told her he was going to blow her head off. After several similar threats, he put the guns away, drove back down to the highway and drove Mrs. Maples back to Perryville.

We find that this evidence is of sufficient force and character to constitute sufficient evidence to support the conviction of appellant for aggravated assault.

Appellant's second point for reversal is closely related to the first. He argues that it was impossible for the jury to find all the elements of aggravated assault after rejecting the charge of attempted murder in the first degree. He contends that this results in there being insufficient evidence to support the jury's verdict. Appellant cites no authority for his position and his argument is not convincing. See *Davis* v. *State*, 12 Ark. App. 79, 670 S.W.2d 472 (1984).

In order for the jury to convict appellant for attempted first degree murder, it would have had to find that he acted with a premeditated and deliberated purpose to cause the death of Mrs. Maples. Ark. Stat. Ann. § 41-1502 (Repl. 1977). Aggravated assault, Ark. Stat. Ann. § 41-1604 (Repl. 1977), is committed

when a person purposely engages in conduct that creates a substantial danger of death or serious physical injury under circumstances manifesting extreme indifference to the value of human life. It was permissible for the jury to reject the more serious charge, which would require a finding of the higher degree of culpability than was required of the lesser included offense, and to find appellant guilty of the lesser offense.

In his third argument, appellant urges that the trial judge erred when, over defense objection, he permitted the State to present a character witness to bolster Mrs. Maples' character. Appellant argues that permitting Sheriff Byrd of Perry County to testify as to the reputation of Elaine Maples for truthfulness and honesty before her character had been attacked by the defense was improper. The State maintains that Elaine Maples' character had been attacked during opening statement and on cross examination.

The credibility of any witness, including a defendant, is always an issue, but the character of a witness may only be brought into issue in accordance with the rules of evidence. Uniform Rules of Evidence, Rule 608(a)(2) states that "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." In Arkansas there is no ironclad rule of law as to what constitutes an attack on the character of the witness. E. Cleary, *McCormick on Evidence*, § 49 (3d ed. 1984), states that even a "slashing cross examination" may constitute an attack on the character of the witness. He concludes:

> A more sensible view is the notion that the judge should consider in each case whether the particular impeachment for inconsistency and the conflict in testimony, or either of them, amounts in net effect to an attack on character for truth and should exercise his discretion accordingly to admit or exclude the character support.

In *Collins* v. *State*, 11 Ark. App. 282, 669 S.W.2d 505 (1984), we agreed with this view, and adopted the position that this matter should be left to the trial court's discretion. In *Collins*, the appellant testified that the eleven-year-old victim of carnal abuse was lying. He said everything she said was a lie and that her grandmother put her up to it. In that case, this court held that the

matter was properly left to the trial judge's discretion.

Examination of the record in the instant case, however, does not reveal any attack on Elaine Maples' character for truthfulness. Appellee points us to the appellant's opening statement and portions of the cross examination of Mrs. Maples as indicating an attack on her character. In his opening statement, appellant's attorney said, "However, Marvin [the appellant] disagrees with what Mrs. Maples said because it didn't happen that way." On cross examination, appellant also asked the victim if she knew who owned the vehicle that appellant had in his possession. The extent of the questioning, as argued by appellee, is as follows:

> Q. Are you saying that under oath, you don't know who owned it?
>
> Mrs. Maples: All I know is it—Marvin told me he paid cash for it.
>
> Q. You don't know anything about one of his girlfriends owning the car?
>
> Mrs. Maples: (Indicates no.).

Although appellant's cross examination of Mrs. Maples might be described as vigorous, we do not believe it was the type of "slashing cross examination" contemplated in *McCormick, supra*, and *Collins* v. *State, supra*. It is our view that the trial judge exceeded the bounds of his discretion. Since the jury's decision necessarily rested on whether they found Mrs. Maples to be a credible witness, we conclude that this error is significant and warrants a new trial. Appellee, the State, concedes that its entire case rested on the truthfulness of the victim.

In his reply brief, appellant points out that appellee cited unabstracted material in its brief. In its brief, appellee, the State, argues that "during his opening statement, appellant questioned the victim's version of the story, indicating that she would not be truthful." Appellant then requests that we strike and disregard appellee's statement or consider the entire text. Appellant cites *Merrit* v. *Merrit*, 263 Ark. 432, 565 S.W.2d 603 (1978), as authority. In that case the trial court's ruling was affirmed because the abstract of the record was flagrantly deficient. It must be noted here that we will not strike arguments for minor

violations of Rule 9 of the Rules of the Supreme Court and Court of Appeals of the State of Arkansas, and that we always have the freedom to review and consider the entire record. We have considered the entire record as to the point objected to, and in view of our disposition of this case, the violation is not prejudicial.

Reversed and remanded.

MAYFIELD, J., dissents.

COOPER, J., concurs.

JAMES R. COOPER, Judge, concurring. I write this concurring opinion solely for the purpose of emphasizing that, although I am required, by the Arkansas Supreme Court's decision in *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), to agree that this Court must consider the sufficiency of the evidence, even where trial error is alleged, I am still firmly convinced that *Burks* v. *United States*, 437 U.S. 1 (1978), does not require us to do so. *See Harris* v. *State*, 12 Ark. App. 181, 672 S.W.2d 905 (1984) (Supplemental Opinion on Denial of Rehearing).

I concur.

MELVIN MAYFIELD, Judge, dissenting. The majority opinion cites *Collins* v. *State*, 11 Ark. App. 282, 669 S.W.2d 505 (1984), as holding that whether there has been an attack on a witness' character for truthfulness should be left to the trial court's discretion. While agreeing with that holding, the majority thinks the trial judge "exceeded the bounds of his discretion" in this case. I must dissent.

In his opening statement, appellant's attorney told the jury that "it didn't happen" like Mrs. Maples said. Then, when Mrs. Maples testified, the appellant's attorney said to her: "Are you saying, under oath, you don't know who owned it?" I submit that under these circumstances the judge knew better than this court whether the attorney's manner and demeanor and the tone and emphasis of his question constituted an attack on Mrs. Maples' character for truthfulness.

The Arkansas Supreme Court has said:

> The trial judge, in all of these evidentiary matters, must be afforded broad latitude. He, alone, has heard and

> seen all the evidence and he, alone, is in the best position to decide what evidence would aid the jury and what would only confuse the issues. And, unless we can say he was clearly wrong, we will not substitute our judgment for his.

Firestone Tire & Rubber Co. v. *Little*, 276 Ark. 511, 521, 639 S.W.2d 726 (1982).

I have no vantage point that allows me to say the trial court was clearly wrong. I would affirm.

NATIONAL SECURITY FIRE & CASUALTY COMPANY *v.* Maxine WILLIAMS

CA 85-58 698 S.W.2d 811

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

McMillan, Turner & McCorkle, by: *Edward W. McCorkle*, for appellant.

Dowd, Harrelson & Moore, by: *C. Wayne Dowd*, for appellee.

DONALD L. CORBIN, Judge. Appellant, National Security Fire & Casualty Company, appeals from the denial of its motion for directed verdict. Appellee, Maxine Williams, brought suit upon a fire insurance policy issued by appellant to her covering a dwelling owned by appellee and used as rental property. The policy was in the sum of $5,000 and a premium of $85 had been paid by appellee to appellant. The dwelling burned to the ground on or about July 26, 1983. As a defense appellant claimed the policy suspended coverage under a provision which provided:

> Conditions Suspending or Restricting Insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring:

(a) while the hazard is increased by any means within the control or knowledge of the insured; or

(b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days.

Appellant moved for a directed verdict at the close of the case on the basis that the proof unequivocally established that the property was vacant or unoccupied beyond a period of sixty consecutive days. Appellee responded by stating that the facts were in dispute as to whether or not the house had been reoccupied which presented a jury question. The trial court denied the motion finding that appellee had presented a sufficient question of fact which should be submitted to the jury for its determination. The jury returned a verdict for appellee in the amount of $5,000 from which appellant appeals. We affirm.

Appellee testified that the last tenant who occupied the dwelling prior to the Campbells was William Pyle. She stated that Pyle rented it from October of 1982 until he moved out. His furniture stayed in the house until the last of April or May of 1983. Appellee testified that Pyle was behind in his rent and had not paid any rent after November of 1982. Appellee's son went by the property some time in May and noticed that Pyle's furniture was still there. Appellee testified that she was contacted by Dora Campbell on the 24th or 25th of July, 1983. Campbell wanted to rent the property. Appellee agreed that Dora Campbell could go ahead and move her furniture in and start the rent the first of August, 1983. Appellee stated that she intended for the house to be occupied by the Campbells on the 25th of July, 1983.

Sue Bustin, the mother of Dora Campbell, testified that her daughter began moving in on July 25, 1983. A partial truck load consisting of a refrigerator, clothes and a few end tables was placed in the house. She stated that her daughter planned to finish moving and spend the night of the 25th in the house. The witness testified that she was certain Pyle began moving his furniture out on the 20th day of May. On May 21, she went to the property and found everything gone from the house. Sue Bustin drove to the property on July 26 and saw it burn to the ground. After returning to her home, she stated that she had a letter in the mail from appellee Maxine Williams which was postmarked July 25, 1983.

The letter informed Sue Bustin that Maxine Williams would rather not rent the house to the Campbells and asked her to tell the Campbells that she had changed her mind about renting it. Sue Bustin testified further that approximately one week after the fire appellee Maxine Williams came to her house and asked her not to mention the letter because it would keep her from drawing her insurance.

Appellee Maxine Williams testified in rebuttal that she did write the letter to Sue Bustin but denied that she told her after the fire not to mention the letter. She stated further that at the time the Campbells were moving in she had not cancelled her agreement.

Dora Campbell testified that she heard from her mother that the Pyles were moving their furniture out approximately a month or two before she started moving in. She called appellee on the 25th of July and received permission to move in immediately with rent to begin on August 1. She stated that she moved about three or four boxes of clothes and some end tables into the house on July 25. She had planned to finish moving in the following day after she returned from Hope, Arkansas. She testified that she would have spent the night in the house on the 25th if she had finished moving in and the electricity had been turned on. She had called the power company on July 25, 1983, and was informed they would be out the first thing in the morning on the 26th to turn the power on. Dora Campbell cleaned up the house on the 25th and hauled off some trash. Her husband, Bruno Campbell, testified to essentially the same facts.

Witnesses on behalf of Arkansas Power and Light Company testified that the last active date for billing purposes for power usage at the premises was January 7, 1983. Their records indicated that the meter was inactive after that date and power cut off for nonpayment of the bill. They had received a phone call from Dora Campbell on July 25 concerning the connection of electricity and power was to be connected on July 26. The power company received word of the fire and the work order was cancelled for July 26, 1983.

Appellant argues in its first assignment of error that the trial court erred in failing to grant its motion for a directed verdict. It contends that there were simply no facts in dispute that

were established by any credible evidence. Appellant states in its brief that there are two critical points concerning whether or not the property was vacant or unoccupied for sixty consecutive days. The first question to be resolved was when did the Pyle family move out and the second question to be answered was whether or not the Campbell family reoccupied the property on July 25, 1983. Both parties cite *Duckworth* v. *Peoples Indemnity Ins. Co.*, 235 Ark. 67, 357 S.W.2d 26 (1962), for the correct definitions of the terms "vacant" and "unoccupied". The Supreme Court there approved the trial court's recitation of "vacant" as meaning without inanimate objects. "Unoccupied" was defined as meaning without animate occupants. Furthermore, the Court agreed that a dwelling is "occupied" when it is in actual use by human beings, who are living in it as a place of habitation, and is "unoccupied" when it has ceased to be a customary place of habitation or abode, and no one is living or residing in it. "If, however, a dwelling is left without an occupant for an unreasonable length of time, it should be deemed unoccupied irrespective of the intention of the occupant." *Id.* at 69.

In *Farmers Fire Insurance Company* v. *Farris*, 224 Ark. 736, 276 S.W.2d 44 (1955), the Supreme Court addressed the question of whether or not the appellant was entitled to an instructed verdict on the theory that under all of the evidence the insured buildings had been "vacant or unoccupied" more than ten days at the time of the fire. The Court there held that under the facts, a question of fact was made for the jury as to whether the appellant insurance company had sustained its burden of proving that the buildings had been "vacant or unoccupied" for more than ten days before the fire and affirmed the trial court's action in refusing appellant's request for an instructed verdict. It was noted in the decision that the meaning of the words "vacant or unoccupied" was a question of law and that whether the buildings had that status at a given time was a question of fact. The Court quoted with approval the following language from other jurisdictions as follows:

> And where the undisputed facts as naturally interpreted show vacancy and unoccupancy, and consequent increase of risk, it becomes the duty of the court to declare a verdict for the insurer. *Moore v. Phoenix F. Ins. Co.*, 64 N. H. 140, 10 Am. St. Rep. 384, 6 Atl. 27.

> *But ordinarily the question, whether a building is vacant or unoccupied at the time a loss occurs, is one of fact for the jury. Schuermann v. Dwelling House Ins. Co.; Gash v. Home Ins. Co.; Phoenix Ins. Co. v. Tucker;* and *German-American Ins. Co. v. Buckstaff, supra; State v. Tuttgerding*, 8 Ohio Dec. Reprint, 72. (emphasis ours)

In determining on appeal the correctness of the trial court's action concerning a motion for directed verdict by either party, we view the evidence that is most favorable to the party against whom the verdict is sought and give it the highest probative value, taking into account all reasonable inferences deducible from it. The motion should be granted only if the evidence so viewed would be so insubstantial as to require a jury verdict for the party to be set aside. *Green* v. *Gowen*, 279 Ark. 382, 652 S.W.2d 624 (1983), citing *Pritchard* v. *Times Southwest Broadcasting, Inc.*, 277 Ark. 458, 642 S.W.2d 877 (1982).

In viewing the evidence in this light, we find that the trial court properly denied appellant's motion for directed verdict. The facts were clearly in dispute as to whether appellant had sustained its burden of proof as to whether or not the property was reoccupied by the Campbells on July 25, 1983. Accordingly, we find no merit to appellant's first assignment of error.

Appellant also contends that the trial court erred in failing to submit the case to the jury on interrogatories. In this regard it concedes that pursuant to ARCP Rule 49(a), which provides in pertinent part as follows:

> The court may require a jury to return only a general verdict which pronounces generally upon all the issues, or the court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. . . .,

the requiring of interrogatories is discretionary with the court. Appellant argues that it was only required to prove that either the property was vacant or unoccupied and not both and that the terms are not synonymous pursuant to the Supreme Court's holding in *Duckworth, supra.* Therefore, appellant contends, the only way to determine that the jury understood the clause in the

insurance policy was to submit the case on interrogatories. We do not agree. After reviewing both the instructions and appellant's proposed two interrogatories, we fail to see how the trial court abused its discretion in refusing to submit the interrogatories to the jury. Also, appellant has not specifically pointed out how the trial court abused its discretion in failing to submit its interrogatories, and we find no merit to this argument.

Affirmed.

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

STATE TREASURER, SECOND INJURY FUND, et al.
v. Dewey COLEMAN

CA 85-136 699 S.W.2d 401

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

Steve Clark, Att'y Gen., by: *Rick D. Hogan*, Asst. Att'y Gen., for appellant.

Byrd, Cobb, Norwood, Lait, Dix & Babaoglu, by: *Kathleen L. Caldwell*, for appellee, Dewey Coleman.

Boswell, Tucker & Smith, by: *W. Lee Tucker*, for appellee Hardwick Airmasters.

DONALD L. CORBIN, Judge. This is an appeal by the Second Injury Fund (SIF) from a Workers' Compensation Commission decision that appellee Dewey Coleman had suffered a "previous disability", in addition to his compensable injury incurred while working for appellee Hardwick Airmasters, and that SIF was required to pay for that degree of disability arising from Coleman's first injury. SIF contends on appeal that Coleman's first injury was not acting to independently produce some degree of permanent disability both before and after the date of the last injury and that because the employer, Hardwick Airmasters, had no knowledge of the prior injury, the SIF could not be liable for Coleman's prior conditions. We reverse and remand.

Appellee Coleman's first back injury occurred on August 3, 1981, while working for Brown and Root, Inc. There is no medical report in the record of this injury. He had no history of back pain prior to this time. After this injury Coleman visited the doctor on September 9, 30, October 4, and November 11 of 1981 for back problems. He was operated on in December of 1981, and, with the exception of a slip on the ice in January of 1982, had no further problems with his back until he injured it on September 13, 1982. On March 4, 1982, a Joint Petition Order was entered on a workers' compensation claim, awarding Coleman $12,000, plus outstanding medical bills, to settle his claim against Brown and Root. There was no mention of any degree of permanent disability in either the order or petition. The only report in the record by the surgeon, Dr. DeSaussure, after the first surgery and prior to the second injury, gave no degree of permanent disability, noted that Coleman was doing extremely well, and stated that he could be able to return to work in a couple of months to a job which required the lifting of 200 or more pounds. Coleman testified that he was given no physical restrictions upon being released for work after the first operation. After the first surgery for the second injury, Dr. DeSaussure rated his permanent partial disability from the first injury at 15% and increased it by 10% as a result of the second injury. Dr. Thomas, who performed the third

operation, the second for the second injury, gave Coleman a permanent partial disability rating of 10% as a result of the first injury and an additional 15% as a result of the second.

Appellee Coleman did not return to work for Brown and Root after the first accident, having been laid-off, and applied for work with appellee Hardwick Airmasters in May of 1982. He did not list his employment with Brown and Root on the employment application, nor did he list his previous injury or the joint petition settlement. Coleman testified that he told the superintendent for Hardwick, Jim Musgrave, about his back injury, and that he did not have any physical limitations because of it, and said Musgrave told him to put down he had no restrictions. Coleman testified that he was in great physical shape before the second injury on September 13, 1982. He stated that he carried 20-foot pipe on his shoulder all day long. He testified that he felt fully recovered from the 1981 injury, and that he was not limited or restricted in any respect from performing his job at Hardwick Airmasters. He also testified that he was not taking any medication prior to the September 1982 injury, and often worked on Saturdays to get overtime pay. Finally, he stated that he was having no back or leg problems prior to the September 1982 injury. He further testified, as did a co-worker, that it was common knowledge that he had had back surgery. While Musgrave testified that he did not know about Coleman's previous back injury at any time prior to his subsequent injury and that he would not have hired him had he known, he also conceded that he had not looked at the application until after he had hired Coleman and Coleman had started to work. Musgrave did testify that he had observed the scar on Coleman's back, but Coleman told him that this had occurred when he was shot while in Vietnam. It is uncontroverted that Coleman had no trouble prior to his second injury in handling the workload at Hardwick Airmasters.

While the *Shippers* defense was raised at the second hearing before the Administrative Law Judge, he ruled that the issue was *res judicata* because the employer had stipulated in a previous hearing that the injury was compensable, but that even if it were not *res judicata*, the employer and SIF had failed to prove all three elements of the *Shippers* defense. This ruling was not appealed to the Full Commission, nor has it been appealed to our Court.

The Workers' Compensation Act provides for payments by SIF when a subsequently injured employee has a "previous disability or impairment." Ark. Stat. Ann. § 81-1313(i)(1) (Supp. 1985) provides in part:

> *Second Injury.* (1) The Second Injury Fund established herein is a special fund designed to insure that an employer employing a handicapped worker will not, in the event such worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred while the worker was in his employment. The employee is to be fully protected in that the Second Injury Fund pays the worker the difference between the employer's liability and the balance of his disability or impairment which results from all disabilities or impairments combined. It is intended that latent conditions, which are not known to the employee or employer, not be considered previous disabilities or impairments which would give rise to a claim against the Second Injury Fund.
>
> Commencing January 1, 1981, all cases of permanent disability or impairment where there has been previous disability or impairment shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a permanent partial disability or impairment, whether from compensable injury or otherwise, receives a subsequent compensable injury resulting in additional permanent partial disability or impairment so that the degree or percentage of disability or impairment caused by the combined disabilities or impairments is greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of combined disabilities or impairments, the employer at the time of the last injury shall be liable only for the degree or percentage of disability or impairment which would have resulted from the last injury had there been no pre-existing disability or impairment. After the compensation liability of the employer for the last injury, considered alone, which shall be no greater than the actual anatomical impairment resulting from said last injury, has been determined by an

> administrative law judge or the Commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by the administrative law judge or the Commission and the degree or percentage of disability or impairment which existed prior to the last injury plus the disability or impairment resulting from the combined disability shall be determined and compensation for that balance, if any, shall be paid out of a special fund known as a Second Injury Fund provided for in Section 47 (Ark. Stats. 81-1348).
>
> . . .

The first two sentences of Ark. Stat. Ann. § 81-1313(i)(1) expressly state the purposes of the SIF statute to limit the employer's liability and simultaneously "fully protect" an already handicapped employee where he is subsequently injured on the job.

The Arkansas Supreme Court has directed this is a "special" fund and its solvency demands all its provisions be strictly complied with to further its limited and restricted purpose.

> "This fund, called the 'Second Injury Fund', is a limited and restricted fund . . . While Workmen's Compensation Acts are generally to be liberally construed the solvency of this special 'Second Injury Fund' requires that the provisions and requirements thereof be fully and strictly complied with. . . To hold otherwise would open this special fund to the point of insolvency and provide no benefit to those who do comply with its provisions and who are entitled to benefits thereunder."

Arkansas Workmen's Compensation Commission v. *Sandy*, 217 Ark. 821, 233 S.W.2d 382 (1950) (quoting from the opinion of the Commission).

Webster's Third World New International Dictionary defines handicapped as ". . . a physical disability that limits the capacity to work." Disability has been defined under the Workers' Compensation Act as the "incapacity because of injury to earn, in the same or any other employment, the wages which

the employee was receiving at the time of the injury." Ark. Stat. Ann. § 81-1302(e) (Repl. 1976).

A person can be disabled if the injury has caused a physical loss or an inability to earn as much as he was earning when he was hurt. *Bragg* v. *Evans-St. Clair, Inc.*, 15 Ark. App. 53, 688 S.W.2d 956 (1985); *Terrell* v. *Austin Bridge Co.*, 10 Ark. App. 1, 660 S.W.2d 941 (1983). An injury must be more than an anatomical disability, but must be a disability in the "compensation sense" to be a previous disability, as defined in § 81-1302(e), requiring apportionment under the Workers' Compensation Act. *Cooper Industrial Products* v. *Worth*, 256 Ark. 394, 508 S.W.2d 59 (1974); *Henderson State University* v. *Haynie*, 269 Ark. 721, 600 S.W.2d 454 (Ark. App. 1980).

Appellant argues that the Commission erred in finding that Coleman had a prior disability or impairment pursuant to Ark. Stat. Ann. § 81-1313(i)(1), which rendered him a handicapped worker prior to his compensable injury on September 13, 1982. We have previously held in *Craighead Memorial Hospital* v. *Honeycutt*, 5 Ark. App. 90, 633 S.W.2d 53 (1982), and *Harrison Furniture* v. *Chrobak*, 2 Ark. App. 364, 620 S.W.2d 955 (1981), that while an impairment did not have to be job-related for apportionment to apply, it did have to be independently causing disability prior to the second injury and must have continued to cause disability after the second injury. Whether a person is "disabled" according to the statute is determined by his loss of wage earning capacity. Furthermore, in *Osage Oil Co.* v. *Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985), we held that "impairment" as used in Ark. Stat. Ann. § 81-1313(i)(1) means loss of earning capacity due to a non-work related condition.

In *Osage Oil* we rejected the contention that the SIF was liable even when the claimant had previously suffered only an anatomical impairment of some type, holding that the purpose of the Act is to encourage the employment of handicapped workers by providing that in the event of injury to those workers the employer will not have to pay for any more disability than actually occurred in his employment and not to provide employers with a windfall or subsidy. We reaffirm that position.

On appeal, this Court is required to review the evidence in the light most favorable to the Commission's decision

and to uphold that decision if it is supported by substantial evidence. Even when a preponderance of the evidence might indicate a contrary result, we affirm if reasonable minds could reach the Commission's conclusion. Questions of credibility and the weight and sufficiency of the evidence are matters for determination by the Commission. The Commission is better equipped by specialization and experience to analyze and translate evidence into findings than we are. *Bemberg Iron Works* v. *Martin*, 12 Ark. App. 128, 671 S.W.2d 768 (1984).

When guided by the above rules of law, we hold that there is no substantial evidence in the instant case to support the Commission's finding as there is no evidence that Coleman had a reduction of earning capacity. In order to be apportionable under the statute, the condition must have been independently causing a disability prior to the second injury and continue to do so after the second injury. *Id.* The condition must be "of a 'physical quality capable of supporting an award if the other elements of compensability were present.' " *Id.* at 324. We believe that it is clear appellee Coleman's injury of 1981 was not a disability or impairment and that, therefore, appellant SIF has no liability under the law. Since we reverse and remand on this point, we need not address appellant's second assignment of error.

Reversed and remanded for an entry of an order consistent with this opinion.

Reversed and remanded.

MAYFIELD, J., concurs.

GLAZE, J., dissents.

MELVIN MAYFIELD, Judge, concurring. I want to concur in this case in order to emphasize a point that I think is important. While it is true that two doctors gave the appellee anatomical disability ratings resulting from his first injury, no witness, including the appellee, testified that the first injury was causing the appellee any loss of earning capacity at the time he sustained the second injury. Also, the fact that the owner of the business where appellee was employed at the time of his second injury testified he would not have hired appellee had he known of his first injury is not substantial evidence that appellee's first injury was causing him any loss of earning capacity.

As we said in *Osage Oil Co.* v. *Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985), the purpose of Ark. Stat. Ann. § 81-1313(i) (Supp. 1985) is to encourage the employment of handicapped workers by providing that in the event of injury to those workers the employer will not have to pay for any more disability than actually incurred in his employment; *see Chicago Mill & Lumber Co.* v. *Greer*, 270 Ark. 672, 606 S.W.2d 72 (1980), and 2 Larson, *The Law of Workman's Compensation* § 59.31(a) (Rel. 32-2/81), but the purpose is not to give a windfall or subsidy to those employers.

In the instant case, I am in complete agreement with the following statement in the Second Injury Fund's brief:

> There are very few, if any, Arkansas workers who are completely free of *any* degree of medical or anatomical impairment to every part of their body. Thus, to adopt Appellee's contention and the decision of the Commission would warrant SIF exposure in virtually every Worker's Compensation case, bankrupt the SIF, and not serve to encourage the employment of truly handicapped workers.

TOM GLAZE, Judge, dissenting. I respectfully dissent. Although the majority claims it reviewed the evidence in the light most favorable to the Commission's decision, I suggest it actually gives no credence or weight to that evidence which supports the Commission's findings.

The Court holds no substantial evidence exists to support the Commission's finding, that Coleman's first injury independently produced some degree of permanent disability both before and after his last injury. It further concludes, I believe inaccurately, that there is no evidence that Coleman sustained a loss of earning capacity due to his first injury incurred while at Brown and Root, Inc.

By joint petition, Coleman settled his first injury claim with Brown and Root, Inc. for the sum of $12,000.00 plus medical expenses. While no specified anatomical loss was assigned Coleman in this petition (or the Commission's order approving it), two doctors, DeSaussure and Thomas, later gave Coleman a partial permanent disability rating which they related to his first injury. These ratings were assigned after the doctors treated and

evaluated him for his second injury, sustained at Hardwick Airmasters (Hardwick). Specifically, Dr. DeSaussure rated Coleman's partial permanent disability from the first injury at 15%, and increased it by 10% as a result of the second injury. Dr. Thomas, who performed surgery on Coleman, gave Coleman a partial permanent disability rating of 10% as a result of the first injury, and an additional 15% as a result of the second.

In this cause, Hardwick's owner testified he would not have hired Coleman if he had known of Coleman's preexisting condition. *See State of Arkansas, Second Injury Fund* v. *Girtman*, 16 Ark. App. 155, 698 S.W.2d 514 (1985) (wherein this Court reversed the Commission's decision that the Fund was liable, finding that there was no evidence that Girtman had ever been turned down for similar employment nor any evidence that his earning capacity had been reduced by his first injury). One must completely ignore Hardwick's testimony, and the medical evidence that establishes the permanency and compensability of Coleman's first injury, in order to hold—as did the majority—that Coleman did not suffer a loss of earning capacity or a disability or impairment required under Ark. Stat. Ann. § 81-1313(i)(1) (Supp. 1985). In sum, Coleman, after and as a result of his first injury, received compensation and medical benefits, and a partial permanent rating from two doctors—all of which caused Hardwick to say it would not have hired him if it had known of his earlier condition. Because I believe substantial evidence supports the Commission's finding, I would affirm.

The Fund raises a second issue on appeal: In order for the Fund to be held liable, must both the employer and employee have known of the prior disability or impairment? The Fund contends that under Ark. Stat. Ann. § 81-1313(i) (Supp. 1985), any conditions not known by the employer are latent conditions for which the Fund is not liable. Section 81-1313(i), in pertinent part, provides:

> It is intended that latent conditions, which are not known to the employee *or* employer, not be considered previous disabilities or impairments which would give rise to a claim against the Second Injury Fund. (Emphasis added.)

The Fund argues that, unless this is read as requiring both the employee *and* employer to know of the disability, the purpose

of the Second Injury Fund is not effectuated. I disagree, but since the majority fails to reach or address this point, I will give only a condensed version of the reasons for my disagreement.

The General Assembly, in § 81-1313(i), clearly stated that latent conditions should not be known by the employer *or* employee. In its ordinary sense, the word, 'or,' is a disjunctive particle that marks an alternative, generally corresponding to 'either,' as 'either this or that'; it is a connective that marks an alternative. *See Beasley* v. *Parnell*, 177 Ark. 912, 9 S.W.2d 10 (1928). The court in *Beasley* also remarked that when words have a settled, legal meaning, it is dangerous to conjecture that they were used in other than their legal signification. *Id.* at 917-18, 9 S.W.2d at 12. While "and" and "or" can be controvertible, it is well settled that such a substitution may not be made "unless the whole context of the statute requires, plainly and beyond question, that it be done in order to give effect to the intention of the Legislature." *Id.* at 917, 9 S.W.2d at 12.

Next, there are good reasons to suggest that the use of "or" in § 81-1313(i) effectuates the intent of the General Assembly. From my research, I am aware of only one state—in the absence of a statute requiring it—that requires actual employer knowledge of the employee's previous condition. *See McCoy* v. *Perlite Concrete Co.*, 53 A.D.2d 749 (1976); *Greco* v. *Greco Electric Co.*, 52 A.D.2d 1011, 383 N.Y.S.2d 684 (1976). Larson criticizes the New York rule as follows:

> The New York rule is defensible only if it is assumed that the exclusive purpose of the second injury principle is to encourage the hiring of the handicapped. This is, of course, the central purpose—but the principle also embraces the idea of achieving this result in a way that works hardship on neither the employer nor the employee. If one did not care about incidental hardship to the employee, one could do the hire-the-handicapped job by merely using an apportionment statute. And if one cares about the element of hardship to the employer, one could argue *the employer ought to be relieved of the cost of the preexisting condition, whether he knew of it or not, purely on the ground that the cost of this impairment, not having arisen out of this employment, should not in fairness fall upon this*

> *employer.*
>
> A more down-to-earth reason for disapproving the New York rule is that, as we have seen, it involves one of those distinctions that consume far more litigation time and cost than the policy at stake is worth.

2A Larson, Larson's Workmen's Compensation Law, § 59.33(e) (1981) (emphasis supplied).

The Fund was established "to insure that an employer employing a handicapped worker will not, in the event such worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred while the worker is in his employment. . . ." § 81-1313(i), *supra.* As is noted by Larson, the employer should be relieved of the cost of the employee's preexisting condition, regardless of whether or not the employer had knowledge of it. In sum, I would construe § 81-1313(i) just as it reads, requiring knowledge of the preexisting condition on the part of either the employee *or* employer, but not both.

Because I agree with the Commission, that the Fund is liable in this cause, I would affirm.

Gregory Eugene VANN *v.* STATE of Arkansas

CA CR 85-96 698 S.W.2d 814

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

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

Steve Clark, Att'y Gen., by: *Jerome T. Kearney*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from the revocation of a suspended sentence. On January 18, 1979, the appellant pleaded guilty to aggravated robbery and kidnapping and was sentenced to serve ten years, with five years suspended, in the Arkansas Department of Correction. On October 29, 1979, he was paroled from the penitentiary, but at a revocation hearing on January 4, 1985, the "five years remaining on his suspended sentence" was revoked and he was sentenced to serve five years in the Department of Correction.

The appellant contends that the trial court did not have the authority to revoke his suspended sentence because the suspended portion had expired. This argument is based upon *Matthews* v. *State*, 265 Ark. 298, 578 S.W.2d 30 (1979). In that case a defendant had been sentenced to five years imprisonment with the last four years suspended. The opinion states that under Ark. Stat. Ann. § 41-1206(3) (Repl. 1977) the suspended portion of a sentence to imprisonment commences to run upon the release of the prisoner from confinement. Although section 41-1206(3) was not applied in *Matthews* because it was not in force at the time of the pronouncement of sentence in that case, the court's interpretation is in accord with the Commentary to the section

and we think it should be applied to the case at bar.

In this case the appellant was paroled from the penitentiary on October 29, 1979. Therefore, under the opinion in *Matthews*, the appellant's five-year suspended period of imprisonment commenced to run on October 29, 1979, and the court had no authority to revoke that suspension on January 4,1985, more than five years later.

The state argues that Ark. Stat. Ann. § 41-1208(5) (Repl. 1977) permitted revocation even though the suspended portion of the sentence had expired. That statute provides:

> The court may revoke a suspension or probation subsequent to the expiration of the period of suspension or probation, provided defendant is arrested for violation of suspension or probation, or a warrant is issued for his arrest for violation of suspension or probation, before expiration of the period.

The state's position is that the appellant was arrested on June 11, 1984, and since this was within five years of his October 28, 1979, release from imprisonment; the expiration of the five-year suspended portion of his sentence had not run and the court had the authority to revoke his suspended sentence.

The problem with this contention is that there is no evidence to support a finding that appellant's arrest on June 11, 1984, was for violation of his suspension or probation. To the contrary, the only evidence in the record pertaining to the reason for appellant's arrest is from Harlan Sweeten, a detective for the police department of the City of Fort Smith. Mr. Sweeten testified that he arrested appellant on June 11, 1984, on outstanding warrants issued on charges unrelated to the grounds upon which appellant's suspended sentence was revoked. The appellant made bond by giving a bondsman a diamond ring as collateral, but he was arrested again the next day on the charge of theft of the ring. This charge was the basis of the revocation of his suspended sentence, but no warrant was ever issued for his arrest for violation of his suspended sentence and the evidence is clear that he was not arrested for any such violation.

A clearly established distinction has been made between arrest for violation of the conditions of a suspended

sentence and arrest for other charges in determining whether a revocation hearing under Ark. Stat. Ann. § 41-1209(2) (Repl. 1977) has been held within 60 days of arrest. In *Walker* v. *State*, 262 Ark. 215, 555 S.W.2d 228 (1977), the Arkansas Supreme Court held, in regard to the defendant's contention that he was not given a revocation hearing within 60 days of his arrest, that his arrest was for theft of property and not for revocation and, therefore, the 60-day limitation for the revocation hearing as provided in section 41-1209(2), *supra*, did not apply.

In *Reynolds* v. *State*, 282 Ark. 98, 666 S.W.2d 396 (1984), the court again made the same distinction. In that case the court said in regard to the 60-day limitation: "That provision relates to an arrest for violation of the conditions of a suspended sentence and not an arrest on another charge."

We think it is obvious that these holdings as to the 60-day limitation for a revocation hearing provided by section 41-1209(2) must also be applied to section 41-1208(5) in determining whether a defendant has been arrested for violation of the conditions of a suspended or probated sentence before the expiration of the period of the suspension or probation.

Reversed and dismissed.

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

Gerland Lee GASS, a/k/a Gerl GASS
v. STATE of Arkansas

CA CR 85-95 699 S.W.2d 408

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

Crawford, Hays & Crawford, by: *Robert H. Crawford*; and *Henry & Mooney*, by: *John R. Henry*, for appellant.

Steve Clark, Att'y Gen., by: *Connie Griffin*, Asst. Att'y Gen., for appellee.

PER CURIAM. The appellant has appealed his conviction of conspiracy to deliver a controlled substance for which he was sentenced to a term of 30 years in the Department of Correction and a fine of $15,000. Appellant's brief does not comply with Rule 9(b) and (d) of the Rules of the Supreme Court and the Court of Appeals.

Rule 9(b) requires that a brief begin with a concise statement of the case sufficient to enable us to read the abstract with an understanding of the nature of the case, general factual situation and action taken by the court. Appellant's statement of the case does none of these things. Rule 9(d) requires that the abstract of the record contain a condensation of those material parts of the record and testimony which are necessary to an

understanding by the court of all questions presented for decision and provides that abstracts not in the first person shall not be accepted.

All of appellant's arguments are based on the refusal of the trial court to grant his motion to suppress the evidence. The abstract does not contain the motion to suppress or the court's ruling on that motion. It consists of selected and unconnected, verbatim questions and answers but does not contain most of the evidence on which his arguments are based. It gives us no understanding of the facts or the sequence of events on which his arguments are based.

Appellant's brief is so flagrantly deficient that it causes an unreasonable and unjust delay in the disposition of the case. However, in view of the sentence imposed this court finds that it would be unjustly harsh to affirm the case for this noncompliance.

Pursuant to Rule 9(e)(2) appellant's attorney will be allowed twenty (20) days to reprint the brief to conform to Rule 9(b) and (d) at his own expense. Appellee will be allowed fifteen (15) days thereafter to revise or supplement its brief.

Thomas FRY *v.* DIRECTOR OF LABOR

E 85-11 698 S.W.2d 816

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

Paul Johnson, for appellant.

Allan Pruitt, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a denial of unemployment benefits. The appellant was employed by a Little Rock company as a truck driver in October of 1982 and he resigned on August 13, 1984. Appellant applied for unemployment compensation on the basis that he had been forced to resign because of the harassment of his family by his employer. Finding that appellant had left his job without good cause connected with the work, the agency denied benefits. That decision was appealed to the Appeal Tribunal.

At the hearing before the tribunal, the appellant testified that when he was in town the company wouldn't give him the messages his wife left when she called and, when he was out of state, the company would not give her a phone number where she could get in touch with him. He said sometimes "they" would tell

him his wife called when she had not and sometimes "they" would tell him she said things she had not said. He testified that he finally got tired of all the harassment and "just quit."

The employer's general manager testified that appellant was aware when he was hired that he would be required to spend a lot of time out of town; that appellant had always been one of the top money-makers in the company; and that appellant's wife was the one who did the harassing. Another employee testified that appellant "had been having family problems" at the time he quit work.

The appeals referee affirmed the agency's denial of benefits and appellant appealed to the Board of Review. His petition for appeal asked that the case be remanded to the Appeal Tribunal for the presentation of additional evidence. This additional evidence was identified as documents from the Equal Employment Opportunity Commission (EEOC) and a letter from a doctor. The petition stated this additional evidence was material because "when I quit I was sick with my nerves from working for 2 wks without any time off." The petition also stated that appellant had reported his employer to the EEOC and the Department of Transportation and, because of this, lies were told at the Appeal Tribunal hearing to prevent him from drawing unemployment benefits.

The reason appellant gave for not offering this additional evidence at the hearing was "because I did not have the letters to prove it." Submitted to the Board of Review, apparently with the petition for appeal, was additional evidence, in the form of a statement from appellant's doctor and some documents from the Equal Employment Opportunity Commission. The doctor's statement said nothing about appellant's nerves and the EEOC documents gave appellant the right to sue his employer for racial and age discrimination but stated the evidence indicated there was no reasonable cause to believe such discrimination had occurred.

The Board of Review notified appellant by letter that his appeal had been placed on the docket but that "pursuant to the Arkansas Court of Appeals decision in *Mark Smith* v. *Everett*, 6 Ark. App. 337, 642 S.W.2d 320 (1982), the Board of Review is without jurisdiction to accept additional evidence in appeals

pending before it. Therefore, no further evidence can be submitted." After due consideration, the board made a finding that appellant voluntarily left his last work without good cause in connection with the work, and the decision of the Appeal Tribunal was affirmed.

On appeal to this court, the appellant's only contention is that the Board of Review erred in refusing to accept any evidence other than that which was previously submitted before the Appeal Tribunal. We do not agree.

In *Mark Smith* v. *Everett, supra*, we stated:

> As a part of this decision, we further hold that the Board does not have the jurisdiction to accept additional evidence in appeals pending before it.

However, in *Jones* v. *Director of Labor*, 8 Ark. App. 234, 650 S.W.2d 601 (1983), we circumscribed that statement as follows:

> We may have made an unhappy choice of words when we said in that case that the board "does not have the jurisdiction to accept additional evidence in appeals pending before it." We recognize that Ark. Stat. Ann. § 81-1107(d)(3) (Repl. 1976) provides the board, on appeal, may decide upon the evidence previously submitted or on such additional evidence *as it may direct to be taken* and that § 81-1107(d)(7) (Supp. 1981) provides the Court of Appeals, on appeal from the board, *may order* additional evidence to be taken before the board.

And we added in *Jones* that the phrase "may order additional evidence to be taken before the board" means additional evidence directed to be taken at some hearing, conducted by the board or someone designated by the board, at which witnesses could appear and opportunity for cross-examination could be afforded.

In *Maybelline Co.* v. *Stiles, Director of Labor*, 10 Ark. App. 169, 661 S.W.2d 462 (1983), the claimant had been discharged for violation of company rules, i.e., leaving her duty station without permission. A hearing had been held at which the claimant testified that when the line was down (not operating for maintenance or repair), employees were permitted to leave without permission. She testified she had only gone to the toilet

while the line was down and that it was still down when she returned. After a determination that the claimant was eligible for benefits, the employer appealed to the Board of Review and submitted additional evidence to show that the line had not been down on the day in question. The board affirmed the decision of the referee and did not consider the additional evidence, citing *Mark Smith* v. *Everett, supra.* On appeal to this court, the employer argued that the board erred by failing to order a new hearing to receive the new evidence. We affirmed the decision of the board, stating on this point:

> Although it is within the discretion of the Board of Review to direct that additional evidence be taken, Ark. Stat. Ann. § 81-1107(d)(3) (Supp. 1983), nothing in the law requires a second hearing so long as each side has notice of and a fair *opportunity* to rebut the evidence of the other party.

In the instant case, the Board of Review was correct when it informed appellant it could not accept additional evidence "in appeals" pending before it. Of course, the board could have ordered another hearing for the taking of additional evidence, but this is within the board's discretion. We find no abuse of that discretion in this case because (1) the additional evidence described in appellant's petition for appeal to the Board of Review concerned reasons for quitting his job that were not even mentioned in his testimony at the hearing before the Appeal Tribunal, (2) the board was given no valid explanation of why he had not testified that when he quit work he was "sick with his nerves" from working for two weeks without any time off, and that the company employees were lying because he had reported the company to the EEOC and the Department of Transportation, and (3) the documentary evidence submitted to the board could only lend cumulative support to evidence the appellant failed to give before the Appeal Tribunal.

Affirmed.

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

MASONITE CORPORATION and WAUSAU INSURANCE COMPANIES *v.* Albert MITCHELL and STATE TREASURER, SECOND INJURY FUND

CA 85-248 699 S.W.2d 409

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

Anderson & Kilpatrick, by: *Joseph E. Kilpatrick, Jr.*, for appellant.

David L. Pake, for appellee, Second Injury Fund.

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

GEORGE K. CRACRAFT, Judge. The Masonite Corporation appeals from a determination of the Arkansas Workers' Compensation Commission that the permanent total disability sustained by Albert Mitchell was not subject to apportionment pursuant to Ark. Stat. Ann. § 81-1313(i) (Supp. 1985) and in awarding an attorney's fee. We find no error.

In a hearing before the Commission Mitchell claimed that he was totally and permanently disabled as a result of a scheduled injury for which he was awarded an anatomical disability rating of 75% to the right arm below the elbow. He contended that because of other wage loss factors, particularly congenital mental retardation, he was totally disabled. The employer conceded that the anatomical disability coupled with the mental deficiency resulted in permanent total disability but contended that the Second Injury Fund should be liable for that portion of the

disability which exceeded the anatomical rating under Ark. Stat. Ann. § 81-1313(i). The Second Injury Fund contended that Mitchell was not totally and permanently disabled and, in the alternative, his mental retardation was not such an "impairment or disability" as would give rise to Second Injury Fund liability.

The Commission found that Mitchell was totally and permanently disabled but agreed with the Second Injury Fund that the congenital mental retardation was not such an impairment as would authorize apportionment. The Commission further found that the position taken by the employer was a controversion of all benefits in excess of that attributable to the anatomical rating and awarded an attorney's fee in the maximum amount allowable under the statute. This appeal followed.

The facts are not in dispute. Mitchell sustained a traumatic amputation of three fingers on his right hand in a job related accident. He was given an anatomical rating of 75% disability to his right arm. Dr. Douglas Stevens testified that Mitchell had an I.Q. of 50 and was moderately retarded. He stated that the appellee had always been a marginal worker with only the physical capacity to do unskilled manual labor and never possessed the capacity to work in any other employment. He stated that this injury made it impossible for Mitchell to return to the field in which he had been trained; rehabilitation was not indicated; the prior impairment was intellectual rather than physical and had been with him since childhood. Dr. Stevens concluded that the mental impairment coupled with his anatomical disability had effectively removed Mitchell from the job market in any employment. Masonite does not contend that this evidence does not support a finding of permanent total disability under the rule announced in *Glass* v. *Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961). It argues only that the Commission erred in holding that congenital retardation is not "a previous disability or impairment" which gives rise to a claim against the Second Injury Fund under the statute. This argument has previously been rejected in *Rooney & Travelers Ins. Co.* v. *Charles*, 262 Ark. 695, 560 S.W.2d 797 (1978) (decided under earlier apportionment statutes) and our recent opinion in *Osage Oil Company* v. *Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985).

The facts in *Charles* are similar to those in the case at bar.

There the claimant had an I.Q. of 50 as a result of congenital mental retardation. Because of this he had entered the job market as an unskilled manual laborer; and never worked in any other employment, and was working in that capacity at the time of an injury for which he was given an anatomical disability rating of 20% to the body as a whole. The Commission found that his anatomical disability coupled with his intellectual impairment resulted in permanent total disability. On appeal the employer argued that the congenital mental deficiency was not a proper work loss factor to be considered in determining total disability under *Edens*, but was a prior disability for which apportionment was indicated under then existing statutes. The Supreme Court declared that it was proper to consider congenital mental retardation as a work loss factor in determining permanent disability under *Edens* but it was not apportionable because such retardation had not been independently producing some degree of disability before the accident and had not continued to operate as a source of disability thereafter.

In *Charles* our court recognized that our compensation law defines disability as "incapacity because of injury to earn in the same or any other employment the wages the employee was receiving at the time of injury." Ark. Stat. Ann. § 81-1302(e) (Repl. 1976). It reasoned that mental retardation existing at the time a worker initially enters the job market cannot constitute disability in the compensation sense because compensation entitlement is based on previous earning capacity and measured by loss of that capacity.

The appellant argues that *Charles* is no longer applicable. It contends that at the time it was decided the apportionment statutes used only the word "prior disability" and made no provision for a "prior impairment." It asserts that by adding "or impairment" after the word "disability" in § 4 of Act 290 of 1981 the legislature intended to make the fund liable whether or not the prior impairment was causing loss of earning capacity prior to the injury. That argument was rejected in *Osage Oil Company* v. *Rogers, supra*, where we held that the inclusion of the word "impairment" was intended only to make it clear that the first impairment did not have to be one which would be compensable under the act but rather, the definition included non-work-related ones. The test was, and is, whether or not the

prior impairment was effectively producing disability in the compensation sense (diminished earning capacity) before the accident and continued to do so afterwards.

Here, as in *Charles*, the worker entered the labor market as an unskilled manual laborer. He was following that employment without diminished earning capacity at the time of his work-related injury. There is no evidence that appellee could not have continued in the same or similar employment at the same wages he had always earned had it not been for the injury to his arm. We find no error in the Commission's conclusion that on these facts there was no Second Injury Fund liability.

Appellant next contends that the Commission erred in awarding maximum attorney fees. Ark. Stat. Ann. § 81-1332 (Supp. 1985) authorizes the Workers' Compensation Commission to order an employer or insurance company to pay legal fees of a claimant but limits such fees to the amount of compensation controverted and awarded. The employer argues that because it stipulated that Mitchell was totally disabled, its prayer that all benefits in excess of the anatomical rating be the obligation of the Second Injury Fund was not a controversion. The question of whether a claim is controverted is one of fact to be determined from the circumstances of each particular case and the Commission's finding will not be disturbed if there is substantial evidence to support it. *New Hampshire Ins. Co.* v. *Logan*, 13 Ark. App. 116, 680 S.W.2d 720 (1984). The Commission found that where the combined action of the employer and Second Injury Fund are considered, the claimant's right to benefits had been placed in jeopardy. If Mitchell had not hired an attorney, and the employer had prevailed in its contention that its liability was limited to claimant's impairment pursuant to § 81-1313(i), and the Fund had prevailed in its contention that Mitchell was not permanently and totally disabled, Mitchell's compensation award would have been limited to his scheduled disability. We conclude that there was substantial evidence to support the Commission's finding that the employer had controverted all the benefits in excess of the anatomical rating. *New Hampshire Ins. Co.* v. *Logan, supra.*

The appellant next contends that the Commission abused its discretion in awarding the maximum allowable fee in the absence of evidence of the reasonable value of the services

performed. Ark. Stat. Ann. § 81-1332 provides that in all cases where the Commission finds that a claim has been controverted it shall direct the fees for legal services be paid in addition to compensation, but such fees are limited to the amount of compensation controverted and subsequently awarded. It further provides that in determining the amount of fees the Commission shall take into consideration the nature, length and complexity of the services performed and the benefits resulting therefrom to the compensation beneficiary.

We agree that this section does not authorize the arbitrary allowance of maximum fees in every case. It specifically sets out those factors which are to be considered in arriving at a reasonable attorney's fee. The Commission has discretion in allowing attorneys' fees and may consider its own knowledge and experience in such matters. It is in a position to determine from the conduct of the hearing and the state of its own record, the nature and extent of the services and the benefits resulting to the beneficiary. Although there was no testimony as to the extent and value of the services of the attorney, the employer has not demonstrated to us from the record that the attorney in this case was not entitled to the fee allowed him, or that it was not based on the consideration of those criteria set out in the statute. We find no abuse of discretion.

Affirmed.

CORBIN and COOPER, JJ., agree.

CROOKHAM & VESSELS, INC. *v.* LARRY MOYER TRUCKING, INC.

CA 85-61 699 S.W.2d 414

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

Friday, Eldredge & Clark, by: *William M. Griffin, III*, for appellant.

Lincoln & Orsini, by: *David A. Orsini*, for appellee.

JAMES R. COOPER, Judge. This is an appeal of a decision by the Pulaski County Circuit Court awarding the appellee damages in the amount of $16,093.39, $12,095.00 of which was awarded by the jury for services rendered in connection with "extra ditching" and $3,998.39 of which represented contract costs awarded by the judge, plus prejudgment interest on that portion of the judgment representing contract costs. The appellant contends the court erred in (1) failing to direct a verdict in its favor, as the appellee failed to show (a) any consideration for the alleged promise to pay extra for the ditching, (b) any waiver of the contract provisions requiring written approval of extras and determination of the quantity of work by the engineers, Garver & Garver, Inc., or (c) sufficient evidence to allow the jury to determine damages without resorting to sheer speculation; (2) failing to instruct the jury that they must find a definite agreement to pay for the alleged extra work; and (3) giving an improper jury instruction on damages. The appellee contends on

cross-appeal that the court erred in failing to award it prejudgment interest on the portion of damages relating to the costs of the "extra ditching." The portion of the judgment representing the contract costs has not been appealed. Because we find merit in the appellant's contention that the trial court should have directed a verdict in its favor, on the basis that the appellee failed to show any consideration for the alleged agreement to pay him extra for the ditching, we need not reach the other points raised in the appeal and cross-appeal.

The appellant was the general contractor on a project to build an extension of a railroad for the Little Rock Port Authority. The appellee entered into a subcontract agreement with the appellant in January 1982 to do the excavation and dirt work on the project, which provided that the appellee would perform the work according to the plans and specifications provided by Garver & Garver, Inc. The problem in this case arose when the water would not drain out of the ditches the appellee constructed because the culverts through which they were to drain were clogged off of the jobsite. This caused the ditches to collapse, requiring the appellee to repeatedly have to redig the ditches. Larry Moyer, owner of the appellee, testified that, because of this problem, which began shortly after he started working, he told the appellant's representative, Alan McElhaney, that he would not continue to work without extra pay for redigging the ditches. He stated that McElhaney agreed to this.

The Port Authority's Invitation to Bid required each bidder to make an inspection of the jobsite, stating,

> Each Bidder should visit the site of the proposed work and fully acquaint himself with the existing conditions there relating to construction and labor, and should fully inform himself as to the facilities involved, and the difficulties and restrictions attending the performance of the Contract. . . .The Contractor by the execution of the Contract shall not be relieved of any obligation under it due to his failure to receive or examine any form or legal instrument or to visit the site and acquaint himself with the conditions there existing and the Owner will be justified in rejecting any claim based on facts regarding which he should have been on notice as a result thereof.

Moyer testified that the contract required him to make this inspection, that he did do so, and that there was nothing stopping him from inspecting the culverts. He also admitted that he was required under the contract's plans and specification to build the drainage ditches to meet the specifications and be up to grade at the time the project closed. Moyer acknowledged that that was precisely what he accomplished.

Under Arkansas law, there must be additional consideration when the parties to a contract enter into an additional contract. *Buchanan* v. *Thomas*, 230 Ark. 31, 320 S.W.2d 650 (1959); *Feldman* v. *Fox*, 112 Ark. 223, 164 S.W. 766 (1914). In *Buchanan*, the subcontractor sent a bid by wire to the contractor which, apparently through the error of the telegraph company, was transmitted as about twenty-five percent lower than the subcontractor's intended bid. Based on this lower bid, the contractor submitted his bid to the owner and informed the subcontractor that he intended to hold him to the lower bid. The subcontractor performed the work and alleged at trial that it was only done after the contractor agreed to pay him half of the difference between the two bids. The court found that the subcontractor had already contracted to do the work for the lower price, found there was no consideration for the oral modification of the contract, citing *Feldman*, and held that the subcontractor was not entitled to extra compensation. In *Feldman*, the court, in holding no consideration existed for a contract raising the price of crops that the seller was already obligated to sell to the buyer, stated:

> If no benefit is received by the obligee except what he was entitled to under the original contract, and the other party to the contract parts with nothing except what he was already bound for, there is no consideration for the additional contract concerning the subject matter of the original one. *Thompson* v. *Robinson*, 34 Ark. 44; 1 Brandt on Suretyship and Guaranty, §387; 1 Page on Contracts, §312.
>
> "Mere performance of an existing contract or a part thereof," says Mr. Page in the section cited above, "is of itself no consideration for a new promise to the party performing. * * * If, without legal justification, one party

> to a contract breaks it, or threatens to break it, and to induce performance on his part the adversary party promises to pay more than was provided for by the original contract, there is in principle no consideration for such promise, as the party who threatens to break the contract does, when he finally performs it, no more than he was bound in law to do."

112 Ark. at 226.

Here, the contract admittedly required the appellee to dig the ditches so that he met the specifications at the time the project was approved, and it is undisputed that that is what the appellee did. Where the work performed is covered under the terms of the contract, as here, there can be no recovery for it as extra work. *Baton Rouge Contracting Co.* v. *West Hatchie Drainage District of Tippah County*, 304 F. Supp. 580, 585 (N.D. Miss. 1969) (where contractor is able to complete a drainage canal in accordance with specifications, although plagued by slide-ins, he is not entitled to extra compensation for the extra work occasioned by the slide-ins). Here, as in *Baton Rouge*, the appellee had the duty to acquaint himself before bidding with the conditions, nature, and extent of the work to be performed, and the condition of the culverts in question could have been taken into account. In Arkansas, it is settled that "[i]nconvenience or the cost of compliance with the contract or other like thing cannot excuse a party from the performance of an absolute and unqualified undertaking to do that which is possible and lawful." *Polzin* v. *Beene*, 126 Ark. 46, 50, 189 S.W. 654, 655 (1916); *Hurley* v. *Horton*, 213 Ark. 564, 211 S.W. 2d 655 (1948). *Accord, Baton Rouge*, 304 F. Supp. at 585 ("Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation because unforeseen difficulties are encountered."). Here, the appellee did no more than was required by its contract; the unforseen clogged culverts merely made it more difficult. The appellant has received no additional consideration for its alleged promise to pay extra, having gotten no more than it bargained for in the first place. Therefore, the jury verdict in the amount of $12,095.00 for the "extra ditching" must be overturned.

There has been no appeal of the award of $3,998.39 for

costs under the contract. While a single, inseparable verdict may not be divided, we have the power to divide two causes of action in a circuit court judgment, so long as we are not dividing a single jury verdict. *Westinghouse Credit Corp.* v. *First National Bank of Green Forest*, 241 Ark. 287, 407 S.W.2d 388 (1966). *See also McVay* v. *Cowger*, 276 Ark. 385, 635 S.W.2d 249 (1982); *Welter* v. *Curry*, 260 Ark. 287, 539 S.W.2d 264 (1976). Here, we are striking the jury's *entire* verdict, dealing with appellee's claim for expenses for "extra work," and upholding the directed verdict entered for the contract costs. We are dealing with two verdicts, each of which encompasses a separate cause of action, in one judgment. Therefore, we can, and do, modify the judgment by deleting the jury's award and affirming the award of $3,998.39 for contract costs and the prejudgment interest thereon.

Affirmed as modified.

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

Cephus MENARD *v.* STATE of Arkansas

CA CR 85-86 699 S.W.2d 412

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

Acchione & King, by: *Harold King*, for appellant.

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

JAMES R. COOPER, Judge. The sole issue on appeal in this criminal case is whether the appellant was too intoxicated to form the *mens rea* necessary to commit the crimes of third degree escape and refusal to submit to a chemical test for intoxication. We affirm the lower court and hold that the common law defense of voluntary intoxication is no defense to the above stated crimes, because they do not require specific criminal intent.

An Arkansas state trooper observed the appellant driving in an erratic manner on April 27, 1984. The trooper promptly arrested the appellant for DWI, it being obvious from further observations that the appellant was highly intoxicated. While the

trooper was taking inventory of the appellant's car, the appellant managed to escape from the patrol car. He was quickly apprehended attempting to crawl away from the patrol car. The appellant tried to escape enroute to the county jail, disembarking from the patrol car while it was in motion. The arresting officer eventually delivered the appellant to the county jail, where another officer obtained the appellant's signature on a statement of rights form. The officer was not able to obtain a satisfactory breath sample from the appellant, however, because the appellant feigned blowing into the breathalyzer.

The appellant was convicted of DWI, refusal to submit to the breath test, and third degree escape. Although the appellant concedes the DWI conviction, he argues on appeal that he was too intoxicated to be capable of forming "the necessary intent to plan an escape or to refuse the test." We find no merit in the appellant's contentions because neither of the statutory violations require a specific criminal intent; the escape and refusal to take the breath test need not have been planned.

Arkansas Statutes Annotated § 41-2812(1) (Repl. 1977) provides that "[a] person commits the offense of third degree escape if he escapes from custody." Under Ark. Stat. Ann. § 75-1045(d) (Repl. 1979), a person may be guilty of refusing to submit to a chemical test for intoxication, such as the breathalyzer test, if the judge determines that the arresting officer had reasonable cause to believe the person arrested had been driving while intoxicated "and the person *refused to submit* to the test." (Emphasis added.) It is obvious that the above quoted statutes do not specify the culpable mental state required to be established by the prosecution. Therefore, according to Ark. Stat. Ann. § 41-204(2) (Repl. 1977), culpability is established if the accused acts purposely, knowingly *or* recklessly. *Coleman* v. *State*, 12 Ark. App. 214, 671 S.W. 2d 221 (1984). It follows that specific intent is not a necessary element of these crimes; the *mens rea* may be satisfied by proof that the accused acted recklessly or knowingly, as well as by proof that the accused acted purposely.

The common law defense of voluntary intoxication was reinstated in Arkansas after the legislature amended Ark. Stat. Ann. § 41-207 (Repl. 1977) to remove self-induced intoxication as a statutory defense. *Varnedare* v. *State*, 264 Ark. 596,

573 S.W.2d 57 (1978). At common law, voluntary intoxication was available as a defense only to those crimes which required specific intent. *Bowen* v. *State*, 268 Ark. 1088, 598 S.W.2d 447 (Ark. App. 1980). A crime with "knowingly" as the requisite mental state does not require a specific intent, so that self-induced intoxication is not a defense. *Bowen, supra.* Voluntary intoxication is likewise no defense to a crime with a lesser *mens rea*, such as "recklessly," because specific intent is not required. We now hold that since a conviction of third degree escape or refusal to submit to a chemical test can be based on any of three culpable mental states, by operation of Ark. Stat. Ann. § 41-204(2) (Repl. 1977), these crimes are general intent crimes for which voluntary intoxication is no defense.

Affirmed.

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

David M. DACUS *v.* STATE of Arkansas

CA CR 85-99 699 S.W.2d 417

Court of Appeals of Arkansas
Division II
Opinion delivered November 27, 1985
[Rehearing denied January 15, 1986.]

Hubert W. Alexander, for appellant.

Steve Clark, Att'y Gen., by: *Jack Gillean*, Asst. Att'y Gen., for appellee.

LAWSON CLONINGER, Judge. Appellant David M. Dacus was convicted of driving while intoxicated (first offense) in violation of Ark. Stat. Ann. § 75-2503 (Supp. 1985). The trial court fined appellant $150.00 plus costs, sentenced him to twenty-four hours in jail, suspended his driver's license for ninety days, and ordered him to participate in an alcohol abuse program. For his appeal appellant argues that the police stopped him without sufficient reasonable cause and thus the court should have excluded the results of his breathalyzer test. We find the trial court's actions to be proper and affirm.

On May 7, 1984, at about 2:40 a.m., two Jacksonville police officers observed a small car stopped in the middle of a lane on Main Street. The officers testified that they considered this to be a traffic hazard since the car was stopped about 100 feet beyond an "S" curve, and another car coming through the curve might not be able to stop before colliding with the stopped car. One of the officers stated that she saw what appeared to be people running around the car. As the officers approached the car it took off at a high rate of speed, squealing its tires. The officers followed the car for a few blocks and stopped it after it had turned right on Harris Road. When the officers approached appellant, who had been driving the car, they detected a strong odor of alcohol. Officer Harper then read appellant his *Miranda* rights and gave him a field sobriety test. Appellant staggered when asked to walk heel to toe. When asked to stand with his arms at his sides and with his eyes closed, appellant swayed and his eyes fluttered. Appellant was then placed under arrest and was given a breathalyzer test, the results of which were .11%.

Appellant argues that according to the implied consent statute, Ark. Stat. Ann. § 75-1045(a)(1) and (3), (Supp. 1985), a police officer must have reasonable suspicion that a driver is intoxicated at the time he is stopped before he can be required to submit to a breathalyzer test. It is appellant's contention that since the officers admitted that they had no reason to believe that appellant was intoxicated at the time they made the stop, the subsequent breathalyzer test was inadmissible. We disagree.

In a case we recently decided, we analyzed a similar argument under the provisions of A.R.Cr.P. Rule 3.1, *Van Patten* v. *State*, 16 Ark. App. 83, 697 S.W.2d 919 (1985). There we held that if a stop was unreasonable according to Rule 3.1, then the subsequent evidence of DWI, including the breathalyzer test, should be excluded. Rule 3.1 reads in pertinent part:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct.

Stopping a car outside of a business or residential district, whether attended or unattended, on the paved or main traveled part of the road is a violation of Ark. Stat. Ann. § 75-647 (Repl. 1979). The officers testified that the reason they stopped appellant was that his parked car created a traffic hazard. We think, under the totality of the circumstances, the officers had specific, particular, and articulable reasons to suspect that a misdemeanor involving danger of injury to persons or property was being committed by the appellant. *Leopold* v. *State*, 15 Ark. App. 292, 692 S.W.2d 780 (1985).

Thus, under the totality of the circumstances, we think that the officers' stop of appellant was reasonable under A.R.Cr.P. 3.1, and the evidence of the DWI was properly admitted.

Affirmed.

GLAZE and MAYFIELD, JJ., agree.

Larry D. HENDERSON *v.* STATE of Arkansas

CA CR 85-116 699 S.W.2d 419

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

Dale Varner, for appellant.

Steve Clark, Att'y Gen., by: *Connie Griffin*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Judge. Appellant appeals his conviction for possession of a firearm by a convicted felon, for which he was sentenced to a three-year term in the Arkansas Department of Correction. He contends that the trial court erred in denying his motion to suppress the evidence, claiming that the warrantless search of his briefcase was both unreasonable and beyond the scope of the inventory procedure.

On the afternoon of July 4, 1984, a park ranger saw appellant in his vehicle parked on the side of a road in the park's campground sewage disposal area. Appellant appeared to be passed out, and his vehicle's engine was running. The ranger called the sheriff's office, and a deputy sheriff arrived to investigate. The officer awoke appellant and ran a check on his vehicle and driver's licenses. He then gave appellant a field sobriety test, which he failed. Appellant then was arrested for being in actual control of a vehicle while intoxicated.

The deputy sheriff locked the car and asked the park ranger to stay with it while the deputy transported appellant to the sheriff's office. Pursuant to sheriff department policy, the officer returned to inventory the car before impounding it. He testified that he had to remove the car because it was in an area where campers disposed of the contents of their septic tanks.

The officer found an unlocked, unlatched, closed briefcase in the middle of the back seat. He flipped open the briefcase and found a Model 13 Smith and Wesson .357 pistol, two fully loaded speed loaders, and a bag of marijuana.[1] In its order overruling

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[1] The officer found other items in the car and its trunk, but neither the relevance of those items nor the legality of their seizure is argued in this appeal.

appellant's motion to suppress, the trial court, citing *Colyer* v. *State*, 9 Ark. App. 1, 652 S.W.2d 645 (1983), found that the search of the unlocked briefcase, in plain view of anyone entering the car, was no more than an inventorying of the vehicle, in keeping with the sheriff office's policy.

Citing *Robbins* v. *California*, 453 U.S. 420 (1981) and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), appellant contends on appeal that the warrantless search of his briefcase was unreasonable because of the expectation of privacy one has in containers such as briefcases.[2] However, in both *Robbins* and *Sanders*, investigatory, not inventory, searches were conducted, and the government was attempting to justify the searches of the containers under the vehicle exception to the warrant requirement. As the court stated in *United States* v. *Rabenberg*, 766 F.2d 355 (8th Cir. 1985), inventory searches do not rest upon findings of probable cause and, in light of their non-investigatory nature, do not implicate the warrant requirement.

In *South Dakota* v. *Opperman*, 428 U.S. 364 (1976), the Court noted inventory procedures developed in response to three distinct needs on the part of police departments: 1) the protection of the owner's property while it remains in police custody, 2) the protection of the police against claims or disputes over lost or stolen property, and 3) the protection of the police from potential danger. When conducted pursuant to standard procedure, and where aimed at securing or protecting the owner's property, the Court has consistently sustained inventory searches as exceptions to the search warrant requirement. *Illinois* v. *Lafayette*, 462 U.S. 640 (1983); *Opperman, supra.*

The *Lafayette* case involved an inventory search of a purse-type shoulder bag carried by the defendant when he was arrested for disturbing the peace. While the facts in *Lafayette* did not involve an automobile, the Court thoroughly discussed the principles associated with inventory searches as set forth in *Opperman*, and further considered whether the Fourth Amendment requires that such a search must be achieved in what the Court termed "a less intrusive manner." We note that Lafayette's

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[2] In his argument, appellant concedes the inventory was initially warranted and valid.

search was not done immediately at the time and place of his arrest, but instead was performed later at the police station. According to standard inventory procedure, an officer examined the contents of the defendant's bag and found ten amphetamine pills. The officer conceded the bag could have been placed and sealed in a container or locker for protection purposes. The state court held the inventory invalid, distinguishing *Opperman* on the basis that there is a greater privacy interest in a purse-type shoulder bag than in an automobile, and that the state's legitimate interests could have been met in a less intrusive manner, by sealing the bag within a plastic bag or box and placing it in a locker. The Supreme Court disagreed, and upheld the inventory as reasonable, stating the reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative "less intrusive" means. The Court further concluded:

> Even if less intrusive means existed of protecting some particular types of property, it would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit.

Lafayette, 462 U.S. at 648, 103 S.Ct. at 2611, 77 L.Ed. 2d at 72.

The Eighth Circuit Court of Appeals has had a series of inventory cases, the most recent of which was *Rabenberg, supra.* There, the appellants contended the officer's opening of a suitcase, and two gift-wrapped packages contained therein, exceeded the legitimate scope of an inventory search, and that the police department's policy requiring inventory searches merely was used by police as a pretext for an improper investigatory search.[3] The court upheld the inventory, finding that it was necessary for

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[3] Appellants' suitcase was mistakenly picked up at the airport by a young boy who took it home where he and his uncle opened it, and found a loaded pistol and two gift-wrapped packages. The uncle called the police, and an officer later inspected one of the packages, which was partially opened, discovering what he suspected to be narcotics. The officer replaced the package in the suitcase and took the case to the police station where its contents were thoroughly inventoried. The packages were then rewrapped, replaced in the suitcase, and the suitcase was returned to the airport. Appellants subsequently picked it up and were arrested.

the officer to open the package so that he might protect all persons concerned from claims of theft and from dangerous instrumentalities. The court said:

> [E]ven though an inventorying policy might not always justify opening of a sealed package, *see, United States* v. *Bloomfield*, 594 F.2d 1200 (8th Cir. 1979), we cannot say that this search was unreasonable, given the peculiar circumstances.

Rabenberg, 766 F.2d at 357.

The *Bloomfield* case, cited in *Rabenberg*, involved an inventory search which the Eighth Circuit held invalid. Bloomfield was found unconscious in his car which was blocking traffic. He was taken to the hospital, and his automobile was inventoried by the police and later towed from the public highway. In inventorying, the officers opened a knapsack which was zipper-closed and tied with string. Inside, they found 10,360 dosage units of lysergic acid diethylamide (LSD), 23 grams of phencyclidine (PCP) and $1,300.00 cash. The court, limiting its holding to the facts before it, concluded the knapsack should have been inventoried as a unit because it was sealed tightly and there was no danger of anything slipping out. In so holding, the court recognized that there was no reason to believe the knapsack posed any danger to the police, and that inventorying the knapsack as a unit both protected Bloomfield's property, and, at the same time, protected the police against claims or disputes over lost or stolen property. The court added, in important part, that if a container which is to be inventoried is not closed securely so that the articles within could possibly fall out, it may be wiser to itemize the articles. *See United States* v. *Neumann*, 585 F.2d 355 (8th Cir. 1978) (The court upheld an inventory search of a box with a lid which, when removed by the officer, revealed demerol pills); *see also United States* v. *Laing*, 708 F.2d 1568 (11th Cir.), *cert. denied*, 464 U.S. 896 (1983) (The court sustained inventory search of defendant's automobile's trunk and unsecured Yahtzee gamebox which contained methaqualone tablets); *Hamby* v. *Commonwealth*, 222 Va. 257, 279 S.E.2d 163 (1981) (The court upheld as reasonable the opening of a zippered-closed, but unlocked, briefcase found in a car during an inventory search).

Our Court's decision in *Colyer, supra*, appears to be consis-

tent with the foregoing authority. In *Colyer*, the validity of the initial intrusion or inventory itself was in issue, but the Court also held its scope was reasonable as well. Among other things, the officer inspected a paper bag found in the defendant's vehicle, and discovered it contained plastic bags of marijuana. This Court rejected Colyer's contention that the officer merely should have stapled the paper bag for safekeeping and, instead, concluded that the officer—in keeping with his duty to safeguard the bag's contents—was not unreasonable in taking action to inventory its contents.

Under the rationale contained in each of the decisions considered and discussed above, we believe the inventory search—under the facts before us—is constitutionally authorized. Here, the appellant's briefcase was both unlocked and unlatched. We hold the employing of a less intrusive means of inventorying the unlatched briefcase was unnecessary, and that the opening of it was designed not only to safeguard appellant's property but also to protect the police officer against disputes or claims over lost or stolen property. Therefore, we affirm.

Affirmed.

COOPER, J., concurs.

JAMES R. COOPER, Judge, concurring. I agree with the majority opinion that the contents of the briefcase, since it was unlatched and unlocked, were properly inventoried, as "[i]f a container which is to be inventoried is not securely closed so that the articles within could possibly fall out, it may be wiser for the police to itemize the articles." *United States* v. *Bloomfield*, 594 F.2d 1200, 1203 (8th Cir. 1978); *See also United States* v. *Neumann*, 585 F.2d 355 (8th Cir. 1978). Inventorying articles in a closed but unlatched and unlocked, and therefore not "securely closed", briefcase thus protects the police against later unwarranted allegations of theft or loss, a legitimate reason for the taking of an inventory. *South Dakota* v. *Opperman*, 428 U.S. 364 (1976).

While I concur in the result reached by the majority on the particular facts of this case, I feel compelled to quarrel with the use of the word search in conjunction with the term "inventory" which is found in many of the cases discussing inventory issues. A

search is defined as:

> [a]n examination of a man's house or other buildings or premises, or of his vehicle, aircraft, etc., with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged. [citation omitted.] A prying into hidden places for that which is concealed and it is not a search for that which is open to view. Probing or exploration for something that is concealed or hidden from searcher; an invasion, a quest with some sort of force, either actual or constructive. [citation omitted.] Visual observation which infringes upon a person's reasonable expectation of privacy constitutes a "search" in the constitutional sense. [citation omitted.]

Black's Law Dictionary 1211 (5th ed. 1979). The constitutional safeguards of probable cause and search warrants, which apply to searches as described above, do not apply to inventories. *Opperman*, 428 U.S. at 370 n. 5. To use the two terms together implies that an investigation for evidence, under the guise of an "inventory search," is allowable without a search warrant. Any investigative examination of the contents of an automobile, whether or not they are in "securely closed" containers, requires a finding of probable cause and, absent exigent circumstances, a search warrant. *See id.*

Inventories are routine, *non-investigatory*, procedures which are allowed to (1) protect the owner's property, (2) protect the police against claims or disputes over lost or stolen property, or (3) protect the police from potential danger. *Id.* at 369. Combining the two terms leads to confusion over what is and is not permissible.

Aubrey PITTMAN *v.* WYGAL TRUCKING PLANT and SOUTHWESTERN NATIONAL INSURANCE COMPANY

CA 85-266 700 S.W.2d 59

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

Guy Jones, Jr., P.A., for appellant.

Barber, McCaskill, Amsler, Jones & Hale, P.A., for appellees.

TOM GLAZE, Judge. Aubrey Pittman appeals from a decision of the full Commission which reversed the administrative law judge's award of benefits. The Commission held that appellant failed to prove by a preponderance of the evidence that complaints he developed several weeks after the accident arose out of his employment. For reversal, appellant contends that (1) the Commission erroneously applied the legal standard of absolute certainty under the guise of "reasonable medical certainty," and (2) the Commission's denial of benefits is not supported by substantial evidence. We reverse and remand.

Appellant, a fifty-nine-year-old truck driver, was injured on March 14, 1984, while driving through Arizona. A strong gust of wind blew his rig over on its left side. Appellant was struck on his left side by the body of the cab, and on his right side by his second driver, who was sitting in the passenger seat. Appellant was unconscious from between three to ten minutes. Upon regaining consciousness, he experienced severe pain in his right arm and leg. He was admitted to Flagstaff Medical Center on the day of the accident, and discharged March 16, 1984, with a diagnosis of cervical strain, cerebral concussion, and arthritis of the cervical spine.

Appellant returned to Arkansas and remained off work for three weeks. He had no problems during this period. Shortly after his return to work, he began having "blank-out spells." After making three cross-country trips, he was laid off because, according to the employer, insurance would not cover him. Following this layoff, appellant worked at a cemetery for about eight weeks, but he left when he felt he could no longer perform the work. He has not worked since.

Appellant did not consult a physician about his "blank-out spells" until September 1984. At that time, he complained of sudden confusion, disorientation, numbness of the right side of his face and right hand, and pain on the right side of his neck, radiating to his head. A CT scan detected that appellant's left ventricular system was larger than his right. An EEG showed mildly abnormal findings in the bifrontal and temporal regions, more prominent on the left. A cerebral arteriogram revealed an abnormal condition which resembled an aneurysm or a diverticulum of the right internal carotid artery at the point where the

artery enters the skull.

Before the administrative law judge, appellant contended he was temporarily, totally disabled as a result of the March 14th accident. Appellee contended that the condition was either preexisting or not causally related to the accident.

As his first point for reversal, appellant contends that the Commission erroneously applied the legal standard of absolute certainly under the guise of "reasonable medical certainty." The only medical testimony presented in this case is that of Dr. Robert Dickins, a neurosurgeon, who first saw appellant on October 2, 1984, over six months after the March 14th accident. The following are pertinent excerpts from Dr. Dickins' testimony regarding the cause of appellant's post-accident complaints:

> So it is possible that the things that he described to me were caused or related to the accident.
>
> * * *
>
> I would have to say that it is possible they were not related.
>
> * * *
>
> I am at somewhat of a disadvantage in making any absolute statement in that regard [*i.e.*, the degree of medical certainty that appellant's symptoms are related to the accident] because I have been uncertain as to the origin of the symptoms he has had.
>
> * * *
>
> Well, it's certainly possible and probable that his symptoms are related to the injury. But if you ask me if there is any other possible explanation I would have to say yes. . . .
>
> * * *
>
> Based on the history that's given to me, I would say that there's a probability that a majority of the symptoms he's describing to me are related to the accident.

The Commission described Dr. Dickins' opinion, that appellant's symptoms may be related to the accident, as a "best guess" and stated that guesswork was not an "appropriate basis" for

decision making. In reaching this conclusion, the Commission relied heavily on two medical malpractice cases, *Norland* v. *Washington General Hospital*, 461 F.2d 694 (8th Cir. 1972) and *Fitzgerald* v. *Manning*, 679 F.2d 341 (4th Cir. 1982). In *Norland*, the court held that, while the words "probable" and "possible" should not be determinative of the competency of a doctor's testimony, the testimony should be "such in nature. . .as to judicially impress that the opinion expressed represents his professional judgment as to the most likely one among the possible causes." 461 F.2d at 697. In *Fitzgerald*, the court held that medical opinions "must be stated in terms of a 'reasonable degree of medical certainty.' " 679 F.2d at 350.

The *Norland* and *Fitzgerald* holdings clearly differ from the long-established medical standard required in workers' compensation cases in Arkansas. Our decisions simply have not required physicians to express opinions in terms of either a "most likely possibility" or "a reasonable degree of medical certainty."

In *Kearby* v. *Yarbrough Brothers Gin Co.*, 248 Ark. 1096, 455 S.W.2d 912 (1970), the supreme court upheld the Commission's award of benefits based upon a doctor's statement that there "could be" a connection between Kearby's work and his fatal heart attack. In support of its decision, the supreme court favorably quoted the following language from *Atkinson* v. *United States Fidelity & Guaranty Co.*, (Texas) 235 S.W.2d 509, 513 (1950):

> It is urged that because Dr. Longoria at one point testified that, 'it is a possibility that the origin (of the disease) was incited through strain and stress and exposure,' this case comes within the rule that something more than a showing of mere 'possibility' is necessary to establish a finding of causal connection. [cite. omit.] In determining whether or not a showing of mere possibility and no more has been made, all of the pertinent evidence on the point must be considered. *The fact that an expert medical witness, in speaking of cause and effect uses such expressions as 'might cause', 'could cause', 'could possibly cause', or phrases similar thereto does not preclude a jury finding of causal connection, provided there be other supplementary evidence supporting the conclusion.*

> Causal connection is generally a matter of inference, and possibilities may often play a proper and important part in the argument which establishes the existence of such relationship. (Emphasis supplied.)

In *Exxon Corporation* v. *Fleming*, 253 Ark. 798, 489 S.W.2d 766 (1973), the supreme court affirmed the Commission's finding of a causal connection between Fleming's injury and his subsequent death. There the treating doctor, who testified Fleming's injury and death were work-related, admitted his opinion was based upon "possibilities" rather than "probabilities." Citing *Kearby, supra*, the court held that the use of expressions or phrases similar to "could cause," "might cause" or "could be" would not bar a finding of causal connection, provided that there was other evidence supporting the conclusion. *See also Bradley County* v. *Adams*, 243 Ark. 487, 420 S.W.2d 900 (1967) and *Crain Burton Ford Co.* v. *Rogers*, 12 Ark. App. 246, 674 S.W.2d 944 (1984).

Appellees cite *Ocoma Foods* v. *Grogan*, 253 Ark. 1111, 491 S.W.2d 65 (1973) and *Lybrand* v. *Arkansas Oak Flooring Co.*, 266 Ark. 946, 588 S.W.2d 449 (Ark. App. 1979) in support of their argument that the Commission's decision here should be affirmed. Our study of both cases reflects these decisions were based upon or are consistent with the supreme court's earlier holdings in *Kearby* and *Exxon Corp.* In *Grogan*, for instance, the court acknowledged it had approved some Commission awards when the supporting medical evidence included such terms as "possible", "might" and "could cause." Nevertheless, citing both *Kearby* and *Exxon Corp.*, it held Grogan was not entitled to benefits when her doctor said it was "possible" her work aggravated her existing back condition because there was *no* evidence that her injury was job connected. The instant case is distinguishable from *Lybrand* because the court there concluded none of the medical evidence reflected that Lybrand's stroke was caused by his work.

Appellee argues that even if the Commission's legal analysis was entirely incorrect, we should affirm the Commission's decision because the Commission was acting entirely within its discretion to rule that Dr. Dickins' testimony had no probative value on the issue of causation. We cannot agree.

Again, the Commission used the wrong legal standard when deciding that Dr. Dickins' testimony must be given in terms of reasonable medical certainty before it could be said the appellant had met his burden of proof on the causation issue.

We would be violating the function of the Commission if we were to assume its findings and holding would have been the same if it had examined and weighed the evidence under the correct standard or rule set out in *Kearby, supra*, and the other cases discussed above. For that reason, we must reverse and remand this cause to permit the Commission to reconsider the evidence and to decide this cause consistent with the controlling legal principles established by Arkansas case law.

Reversed and remanded.

CLONINGER and MAYFIELD, JJ., agree.

Wanda Jolene CUZICK and Joyce Ann PATRICK *v.* Fern LESLY

CA 85-165 700 S.W.2d 63

Court of Appeals of Arkansas
Division I
Opinion delivered December 4, 1985

Niblock Law Firm, by: *Walter R. Niblock*, for appellants.

William A. Storey, for appellee.

JAMES R. COOPER, Judge. The appellee's husband died on December 31, 1981, leaving a will which bequeathed all of his real and personal property to his children by a previous marriage, two of whom are the appellants in the case at bar. Two days after the funeral, the decedent's children and their spouses gathered at the appellee's residence for the purpose of reading the deceased's will and disposing of the assets of the estate. All the family assumed that title to the couples' residence was owned individually by the deceased. The decedent's son, who was the acting administrator of the estate, accompanied by one or two in-laws, went to an attorney's office to draft the documents necessary to transfer title to the residence to the names of the decedent's children. The attorney discovered that the property had been purchased by the decedent and the appellee as husband and wife, as tenants by the entirety. Thus, unbeknownst to the appellee, she was the sole owner of the residence upon her husband's death. Therefore, it was necessary for the appellee to quitclaim her interest in the property before title could be vested in the children.

The appellee was brought immediately to the attorney's office, where she signed the quitclaim deed to the property with the understanding that the house was hers as long as she lived. The appellee continued to live in the house until she moved into another house where she had been working as a housekeeper and maid. Apparently because of a need for additional income, the

appellee attempted to rent her former residence to an individual. The appellants objected to this and asserted their rights as the fee owners of the residence. Consequently, the appellee filed this action to cancel her quitclaim deed, alleging that the appellants induced her to execute the quitclaim deed.

After a trial on the merits, the chancellor found, *inter alia*, that the quitclaim deed was obtained from the appellee without consideration and without donative intent. The chancellor then set aside the quitclaim deed and vested title to the residence in the appellee. From that decision comes this appeal.

The appellants argue that the chancellor erred in cancelling the deed merely because it was not supported by consideration. This contention would have merit if there were no fraud, duress, or undue influence because, under such conditions, consideration is not necessary to sustain the validity of a deed under Arkansas law. *Goodwin* v. *Loftin*, 10 Ark. App. 205, 662 S.W.2d 215 (1984); *see also Ferguson* v. *Haynes*, 224 Ark. 342, 273 S.W.2d 23 (1954). In the case at bar, the chancellor found that none "of the children intended to deliberately do Mrs. Lesly [the appellee] wrong." Assuming the chancellor meant that there was an absence of fraud, undue influence, or duress, the deed need not have been supported by consideration in order to be valid.

However, the chancellor did not specifically find that the appellee was free from fraud, duress, or undue influence when she executed the quitclaim deed. Immediately after finding that the appellee "did not voluntarily and freely execute this deed," the chancellor set the deed aside, apparently relying on his determination that "nothing at all was made clear to her as to why she needed to go down to Mr. Everett's [the attorney who prepared the quitclaim deed] office." In other words, the chancellor found that the appellee was unintentionally deceived by the appellants' failure to fully clarify why the appellee's signature was necessary to transfer the property to the appellants. For this reason, we think the chancellor's holding is tantamount to a finding of constructive fraud.

We note that the appellants did attempt to educate the appellee as to her rights to the land. But considering the appellee's mental and physical condition at the time, as well as the other circumstances surrounding the title transfer, it is entirely under-

standable that the appellants' efforts proved unsuccessful. The appellee was over seventy years old at the time, and she suffered from cataracts as well as other infirmities. There was also evidence that she was in a somewhat addled state of mind, apparently grief-stricken over the recent death of her husband. Moreover, she was surrounded by her husband's children, and all parties appeared anxious to give effect to the last will and testament of the husband, even though the devise to the children was legally invalid.

The appellants were guilty of no moral wrong, but an act done or omitted may be construed as fraud by the court because of its detrimental effect, thereby justifying the setting aside of the deed or contract, irrespective of moral guilt. *Stewart* v. *Clark*, 195 Ark. 943, 115 S.W.2d 887 (1938). Intentional deceit is not an essential element of constructive fraud. *Id.* But, where an unintentional deception does in fact occur, as in the case before us, yielding a manifestly unjust result, the court of equity may step in and remedy the constructive fraud.

Although we review chancery cases *de novo*, we will not set aside the chancellor's findings of fact unless they are clearly erroneous or against the preponderance of the evidence. *Rose* v. *Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984); Ark. R. Civ. P. Rule 52(a). We agree with the chancellor that the appellee's free will was compromised, perhaps unintentionally, by the act or omissions of the appellants, which requires the setting aside of the deed.

Affirmed.

CLONINGER and GLAZE, JJ., agree.

Roy Lee TIGGS *v.* STATE of Arkansas

CA CR 85-61 700 S.W.2d 65

Court of Appeals of Arkansas
Division II
Opinion delivered December 4, 1985

Joe O'Bryan, for appellant.

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

TOM GLAZE, Judge. Roy Lee Tiggs appeals his conviction for theft of property. For reversal, he contends that (1) he was prejudiced by the jury's consideration of his failure to testify, (2) his confession should have been excluded as involuntary, and (3) the trial court should not have admitted evidence that he directed police to stolen merchandise without holding an evidentiary hearing as to voluntariness. We affirm.

During the weekend of November 11-13, 1983, Proctor Tire Service in Hazen was burglarized and fifty-six tires were stolen. Tire tracks left at the scene were made by a type of tire used only on U-Haul trucks. Police learned that appellant had rented a U-Haul truck on November 11, which he later reported stolen in Little Rock on November 14. On November 22, 1983, appellant was taken into custody at about 1:00 a.m. and was administered a polygraph examination at 8:50 a.m. That same day, between 4:30 and 5:00 p.m., appellant gave a confession to the police officers but refused to sign any written statement. At a subsequent time, not revealed in the record, appellant took police officers to a location in Little Rock where twenty-four of the tires stolen from Proctor were recovered.

At a *Denno* hearing, the trial judge ruled that appellant had understood his rights and intelligently and voluntarily waived them prior to having given his oral statement. Trial was held on January 16, 1985.

Appellant's first point for reversal is that he was prejudiced by the jury's consideration of his failure to testify. After the jury retired, it returned, asking, among other things, why appellant was not called to testify. Appellant's counsel, the prosecutor, and the trial judge met in chambers to discuss responses to the questions. Although appellant's counsel moved for a mistrial, he, the prosecutor and the judge agreed that the judge should re-read AMI Criminal, 111, which provides that a defendant has an absolute constitutional right not to testify and that failure to testify should not be considered by the jury in arriving at its verdict.

Appellant does not contend that either the court or the State improperly raised the question of his failure to testify. Ordinarily, a proper admonition by the trial judge to the jury cures prejudice, *King* v. *State*, 9 Ark. App. 295, 658 S.W.2d 434 (1983), and here, we believe the court's re-reading of AMI Criminal, 111 rectified any error or prejudice, if any existed. We find no abuse of discretion by the trial judge in refusing to grant appellant's motion for mistrial.

Appellant's second point for reversal is that his confession should have been excluded as involuntary, and that the State failed to call a material witness by not producing the polygraph examiner. Appellant contends the confession was involuntary because of (1) the duration of interrogation, (2) the use of the polygraph over a long period of time, and (3) appellant's refusal to sign the confession. On appeal, we do not set aside the trial judge's finding of voluntariness unless it is clearly against the preponderance of the evidence. *Jackson* v. *State*, 284 Ark. 478, 683 S.W.2d 606 (1985). Factors considered in determining the question of voluntariness include the age or youth of the accused, lack of education, low intelligence, lack of advice as to constitutional rights, length of detention, repeated and prolonged questioning, and the use of physical punishment. *Id.* Of those factors enumerated in *Jackson*, appellant argues only his length of detention and prolonged interrogation. The police arrested appellant and took him to the police station at about 1:00 a.m., on November 22, 1983. That same morning, at 8:50 a.m., appellant was given a polygraph test that lasted approximately six hours. Between 4:30 and 5:00 p.m., a state police investigator had appellant sign a waiver of rights form, before questioning appellant, and then obtained his confession. We find little to distinguish the facts in this cause from those in *Cessor* v. *State*, 282 Ark. 330, 668 S.W.2d 525 (1984) wherein the court determined Cessor understood and waived his rights. Cessor was given a polygraph test and subsequently gave his confession. Cessor had been incarcerated less than twenty-four hours, and from the circumstances under which he confessed, the court held the trial judge correctly found Cessor's statement admissible.

Here, appellant had been detained a total of approximately sixteen hours. During that period, he was tested for about six hours, and then gave his confession during a thirty-minute

period of questioning. Under these facts, we find that the trial judge's ruling, that the confession was voluntary and admissible, was correct.

Concerning appellant's argument that the State's failure to call the polygraph examiner as a material witness was error, we must note that the record fails to show the appellant objected to this at either the *Denno* hearing or the trial. Because appellant failed to make a timely objection, we cannot consider the issue for the first time on appeal. *Smith* v. *State*, 10 Ark. App. 390, 664 S.W.2d 505 (1984). Even if appellant had objected, we are inclined to agree with the State's argument that the examiner was not a material witness because he was not present when appellant gave his statement.

Finally, appellant contends that the trial court should not have admitted evidence that he directed police to stolen merchandise. Appellant contends that this evidence violated his constitutional privilege against self-incrimination, and that an evidentiary hearing regarding voluntariness should have been conducted by the trial court. We disagree. The fifth amendment protections do not extend to demonstrative, physical tests, but are intended to immunize the defendant from providing the State with evidence of a testimonial or communicative nature. *Weatherford* v. *State*, 286 Ark. 376, 692 S.W.2d 605 (1985). Here, the challenged evidence was not testimonial; instead, the police officer testified only that appellant showed the officers where the stolen tires were located.

Because we find the trial court did not err, we affirm.

Affirmed.

CLONINGER and MAYFIELD, JJ., agree.

ARKANSAS IRON AND METAL COMPANY, et al. *v.*
FIRST NATIONAL BANK OF ROGERS, ARKANSAS

CA 85-103 701 S.W.2d 380

Court of Appeals of Arkansas
Division I
Opinion delivered December 11, 1985

Taylor & Watson, by: *W.H. Taylor* and *Jeff Watson*, for appellant.

Kelley & Luffman, by: *Eugene T. Kelley*, for appellee.

DONALD L. CORBIN, Judge. This is an appeal from a judgment entered jointly and severally against appellants Arkansas Iron and Metal Company and Wilma F. Yaffee in the amount of $538,301.84 plus interest and costs. Appellant Wybash Corporation also appeals from an *in rem* judgment of foreclosure entered against it. Appellants contend for reversal that (1) the court erred in refusing to grant a continuance, (2) the court erred in failing to direct a verdict for appellant Wybash Corporation, and (3) the court erred in failing to direct a verdict for appellants Arkansas Iron and Metal Company and Wilma F. Yaffee. We affirm.

This action was instituted by appellee's filing of a complaint in equity and petition for receiver. Appellant Arkansas Iron and Metal Company subsequently filed for relief under the United States Bankruptcy Code. Appellant Yaffee answered appellee's complaint, denying that any collateral and security claimed by appellee was significantly impaired and affirmatively pleading that the appointment of a receiver was not necessary nor an appropriate remedy. Appellant Wybash Corporation also answered, affirmatively pleading that the mortgage held by appellee upon property owned by Wybash Corporation was granted to

appellee without consideration. Its answer further alleged that it received nothing from appellee in connection with the mortgage and that the granting of the mortgage to appellee without consideration was *ultra vires* as to Wybash Corporation and without any legal effect. Thereafter, appellant Arkansas Iron and Metal Company's petition in bankruptcy was dismissed and the trial court issued an order naming appellee as receiver of appellant Arkansas Iron and Metal Company. A hearing was conducted and the issues addressed were whether appellee should be allowed to accelerate the total indebtedness due it and whether appellee should be allowed to foreclose its interest in certain personal and real properties. Judgment favorable to appellee was entered upon a finding that appellee's property and security was significantly impaired and that appellants Yaffee and Arkansas Iron and Metal Company were in default and appellants appeal.

Appellant Yaffee was president of and owned 100% of the corporate stock in appellant Arkansas Iron and Metal Company and Yaffee and her three children worked in this scrap metal business. Stock in appellant Wybash Corporation was owned by appellant Yaffee and her three children. Appellant Yaffee held 62.5% of its stock while each of her children held 12.5%.

In its decree, the chancellor found that on or about July 16, 1981, appellant Yaffee, d/b/a Arkansas Iron and Metal Company, executed and delivered a promissory note to appellee in the amount of $300,000. In order to secure the note, appellants Yaffee and Arkansas Iron and Metal Company executed security agreements. To further secure payment of the indebtedness, appellant Yaffee executed, acknowledged and delivered a mortgage covering real property in Benton County, Arkansas. Appellant Wybash Corporation, to further secure the payment of the note, executed, acknowledged and delivered its mortgage on real property also located in Benton County, Arkansas. On or about October 19, 1981, appellant Yaffee, d/b/a Arkansas Iron and Metal Company, executed and delivered her promissory note to appellee in the amount of $75,000. The note was secured by certain mortgages on real property and was executed by appellants Yaffee and Wybash Corporation. It was also secured by personal property, including accounts receivable, inventory and equipment of appellant Arkansas Iron and Metal Company. On March 4, 1982, appellant Yaffee executed and delivered another

promissory note to appellee in the amount of $50,000. A promissory note was executed by appellant Yaffee, d/b/a Arkansas Iron and Metal Company, on August 25, 1982, in the amount of $50,000. The note was secured by appellant Yaffee's security agreement on accounts receivable, inventory and equipment of Arkansas Iron and Metal Company. On or about June 8, 1983, appellant Yaffee executed and delivered her promissory note to appellee in the amount of $10,069. This note was secured by appellant Yaffee's assignment of her interest in a 1981 Cadillac. The vehicle was surrendered to appellee in full satisfaction of the debt. Another promissory note was executed by appellant Yaffee, d/b/a Arkansas Iron and Metal Company to appellee in the amount of $10,000. It was secured by accounts receivable, inventory and equipment of Arkansas Iron and Metal Company. On March 31, 1983, appellant Yaffee executed her personal guarantee to appellee, guaranteeing all notes in the name of Arkansas Iron and Metal Company. On that same date, appellant Yaffee and Yaffee, d/b/a Arkansas Iron and Metal Company, executed an agreement for the assumption of indebtedness whereby Arkansas Iron and Metal Company assumed the indebtedness of the promissory note dated July 16, 1981, in the amount of $300,000; the promissory note dated October 19, 1981, in the amount of $75,000; the promissory note dated August 25,1982, in the amount of $50,000; the promissory note dated March 4, 1982, in the amount of $50,000; and the promissory note dated November 5, 1982, in the amount of $10,000.

The chancellor further found that appellee's property and security was significantly impaired and that appellants Yaffee and Arkansas Iron and Metal Company had failed to make payments and were in default.

■ In their first assignment of error, appellants contend that the trial court erred in refusing to grant a continuance because First National Bank of Fayetteville, Arkansas, was an indispensable party under ARCP Rule 19. It is well settled that a trial court is vested with broad discretion in determining whether to grant a continuance and that its determination will not be overturned by this Court unless that discretion has been manifestly abused. *Odaware* v. *Robertson Aerial-AG, Inc.*, 13 Ark. App. 285, 683 S.W.2d 624 (1985). In denying appellants' motion for a continuance, the trial court found that appellants were

entitled to raise the issue at that point but that it was unnecessary for a minority stockholder to be named a party in a mortgage foreclosure.

ARCP Rule 19, which deals with compulsory joinder of parties, provides in pertinent part as follows:

> (a) Persons To Be Joined If Feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or, (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter, impair or impede his ability to protect that interest, or, (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. If he has not been joined, the court shall order that he be made a party. If he should join as a plaintiff, but refuses to do so, he may be made a defendant; or, in a proper case, an involuntary plaintiff.
>
> (b) Determination By Court Whenever Joinder Not Feasible. If a person as described in subdivision (a) (1) - (2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

The Reporter's Notes to Rule 19 state that subsection (a) concerns itself with the question of who is a "necessary" party while 19 (b) deals with whether a necessary party is an "indispensable" party. It is further stated in the Reporter's Notes that this rule abolishes the rigid distinctions between necessary and

indispensable parties and instead places the emphasis upon the practical effects a judgment might have upon an absent party. For other cases construing ARCP Rule 19, *see Loyd* v. *Keathley*, 284 Ark. 391, 682 S.W.2d 739 (1985); *Cox* v. *Stayton*, 273 Ark. 298, 619 S.W.2d 617 (1981); *Toney* v. *Haskins*, 271 Ark. 190, 608 S.W.2d 28 (Ark. App. 1980).

Appellants contend that the First National Bank of Fayetteville, Arkansas, meets the definition set out by ARCP Rule 19 and was an indispensable party to this action. They contend that if First National Bank is absent, complete relief cannot be afforded among those parties present as the Yaffee children owned an equitable interest in 37.5% of appellant Wybash Corporation. Further, it is argued that First National Bank of Fayetteville must claim an interest relating to the subject matter of the action based upon appellants' Exhibits 1 and 2. Appellants' Exhibits 1 and 2 reflect that the First National Bank of Fayetteville agreed to act as trustee over a trust set up for the use and benefit of the Yaffee children. A portion of the corpus of the trust was composed of each of the children's ownership of 12.5% of the stock in appellant Wybash Corporation. Also, it is contended that disposition of the action without the bank present impaired and impeded the bank's ability to protect its interests. Finally, appellants argue that the failure to join First National Bank of Fayetteville left appellant Yaffee at a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the bank's interest. In this regard, appellant Wybash Corporation contends that, in view of the *in rem* judgment entered against it, appellant Yaffee was in the untenable position of facing litigation from her own children by the Trust Department of the First National Bank of Fayetteville.

We agree with the trial court's conclusion that it was unnecessary for First National Bank of Fayetteville, trustee for minority shareholders in appellant Wybash Corporation, to be named a party in this cause of action. It is axiomatic that a shareholder is not a proper party, much less a necessary or indispensable party, in a suit to foreclose a corporate mortgage. As stated in the chapter concerning mortgages and deeds of trust in 7 W. Fletcher, *Cyclopedia Of The Law Of Private Corporations* § 3247 (rev. vol. 1978), the stockholders of the mortgagor are not necessary defendants in suits to foreclose corporate

mortgages. Reference can also be made to 19 C.J.S. *Corporations* § 1203 (1940), which provides in part as follows:

> Stockholders of a corporation, which is still a going concern, not only need not be joined as defendants in a suit brought to foreclose a mortgage executed by the corporation, but as a rule will not even be permitted to defend in their individual capacity.

A corporation is a legal entity which, being distinct from its members, owns the corporate property and owes the corporate debts, is the creditor to sue *or the debtor to be sued*, has perpetual existence, and can act only through its duly constituted organs, primarily its board of directors. H. Henn, *Laws Of Corporations And Other Business Enterprises* § 78 (3d ed. 1983) (emphasis ours). As stated in *Red Bud Realty Co.* v. *South*, 96 Ark. 281, 291, 131 S.W. 340, 344 (1910), "A stockholder does not acquire any estate in the property of a corporation by virtue of his stock; the full legal and equitable title thereto is in the corporation, . . ." It is also worthy of note that ARCP Rule 4(d)(5) provides that service of a summons and complaint upon a domestic corporation is accomplished by delivering it to an officer. Accordingly, we hold that the trial court did not abuse its discretion in refusing to grant appellants' motion for a continuance on the basis that First National Bank of Fayetteville was an indispensable party. Appellant Wybash Corporation was a party to this action and was the proper party to be sued, not its shareholders or their trustee.

Appellants' second argument on appeal concerns the trial court's failure to direct a verdict for appellant Wybash Corporation. They argued below that there was no evidence that appellant Wybash Corporation received any consideration for the execution of two mortgages and moved for a directed verdict at the end of appellee's case. Ark. Stat. Ann. § 64-801 (Repl. 1980), provides in pertinent part:

> Mortgage of corporate assets—Corporate borrowings.—In authorizing—
>
> (a) the procurement of corporate loans, the creation of obligations under which the corporation is to be primarily or secondarily liable, and the issuance of corporate notes,

bonds and other obligations, and

(b) the mortgage and pledge of all or any part of the corporate assets (including after-acquired property) as security for any obligation(s) so incurred,

the board of directors shall not be required to procure any consent from, or authorization by, the shareholders, except in the instance of the increase of bonded indebtedness of the corporation. . . .

The Arkansas Supreme Court in *Quattlebaum and CBM* v. *Gray*, 252 Ark. 610, 480 S.W.2d 339 (1972), held that in order for a note to be valid, consideration does not have to move to a party promising, but may move from a promisor to a third person, and consideration may consist of a loan to a third person. In *Quattlebaum*, the appellant also raised the issue of "failure of consideration". The Court found this defense was without merit. It quoted from *Rockafellow* v. *Peay*, 40 Ark. 69, 73 (1882), wherein it was stated:

> "It is not necessary to the validity of Gordon N. Peay's note and mortgage that he should have derived any benefit from the transactions out of which they arose. It is sufficient that a valuable consideration moved from the plaintiff to his brother. The consideration for the execution of the first mortgage was a loan of $4,000 to John C. Peay."

See also Hays v. *McGuirt*, 186 Ark. 702, 55 S.W.2d 76 (1932).

The resolution of this issue turns on whether appellant Yaffee was empowered to execute mortgages on behalf of appellant Wybash Corporation. In denying appellants' motion for directed verdict, the trial court properly relied upon a resolution of appellant Wybash Corporation which gave apparent authority to its president, appellant Wilma Yaffee, to negotiate and procure loans from appellee, to give security for any liabilities of the corporation by pledge, assignment or lien, and to execute instruments for those purposes. There were other issues raised in this regard by appellants but we cannot consider them as they are raised for the first time on appeal. We find no merit to this assignment of error.

For their final point for reversal, appellants contend

that the trial court erred in failing to direct a verdict for appellants on the issue of accord and satisfaction because appellee failed to comply with the trial court's liquidation order of June 11, 1984. As appellee readily points out, accord and satisfaction is an affirmative defense and must be specifically pled. ARCP Rule 8(c). In the case at bar the record reflects that accord and satisfaction was not pled by appellants. It was raised by appellants for the first time at trial when they moved for a directed verdict. In any event, this argument is without merit as the mere receipt of property by a receiver under a court order does not constitute accord and satisfaction nor can it be considered a compulsory disposition of collateral under the Uniform Commercial Code. We agree with appellee that Ark. Stat. Ann. § 85-9-505(2) (Add. 1961), which appellants rely upon, does not apply to the facts of this case. It is clear from the Committee Comments following § 85-9-101 that this article, covering secured transactions, does not apply to real property or the creation of a real estate mortgage. This article instead provides for the regulation of security interests in personal property and fixtures.

For the reasons stated above we affirm the decision of the trial court.

Affirmed.

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

Teresa CHANDLER (SPEED) *v.* James BAKER

CA 85-239 700 S.W.2d 378

Court of Appeals of Arkansas
Division II
Opinion delivered December 11, 1985

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

Henry J. Swift, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the circuit court, sitting without a jury, which held that appellee, James Baker, was not the father of appellant's children, Stanley and Ebony. We affirm.

Without detailing the evidence introduced, we think it sufficient to say that appellant testified that appellee was the father of the children; that there was some evidence to corroborate that possibility; and that appellee admitted a sexual relationship with appellant but testified that this relationship had ended more than a year before her first child was born.

Pursuant to an order of the court, appellant, appellee, and the two children were given blood tests to determine the likelihood of appellee's being the father. Through arrangements made by the Child Support Enforcement Unit, blood samples were drawn in Blytheville, Arkansas, and sent to the National Paternity

Laboratories, Inc., in Dayton, Ohio, for testing. The lab report stated that the test results indicated that appellee could not be excluded as a possible father of the children, and it was calculated that the likelihood he was Stanley's father was 190 to 1, and for Ebony the likelihood was 101 to 1.

When this lab report was offered into evidence by appellant, the appellee objected unless the expert making the blood test was present for cross-examination. Appellant declined the option to seek a continuance so that the witness could be present and the court reserved ruling on the report's admissibility until briefs were filed after trial. After considering the briefs, the court ruled the report inadmissible and found for the appellee on the basis that appellant had failed to meet her burden of proof. The appellant argues that under Ark. Stat. Ann. § 34-705.1 (Supp. 1985), the report was admissible. That statute, which is the first section of Act 127 of 1955, as amended in 1981 and 1983, provides as follows:

> Whenever it shall be relevant to the prosecution or the defense in an illegitimacy action, the trial court may direct that the defendant, complainant and child submit to one (1) or more blood tests or other scientific examinations or tests, to determine whether or not the defendant can be excluded as being the father of the child, and to establish the probability of paternity if the test does not exclude the father [defendant]. The results of the tests shall be receivable in evidence. The tests shall be made by a duly qualified physician, or physicians, or by another duly qualified person, or persons, not to exceed three (3), to be appointed by the court. The costs of the test shall be taxed as other costs in the case or, in the court's discretion, may be taxed against the county. Such experts shall be subject to cross-examination by both parties after the court has caused them to disclose their findings.

We do not agree with appellant's argument that this statute makes the results of the tests admissible and that it simply *permits* the persons who performed the tests to be cross-examined after the court has caused them to disclose their findings. To the contrary, the statute clearly states that these experts *shall be subject* to cross-examination. Thus, we think the trial court was

correct in ruling that the lab report was not admissible since the persons who performed the blood tests at the laboratory in Dayton, Ohio, were not available for cross-examination.

We also note that this statute may not even apply *in this case* since the appellant's abstract does not indicate that the persons (or person) who made the tests were *appointed by the court.* Furthermore, we are not unmindful of the fact that the second section of the 1955 Act was amended by the 1985 General Assembly to provide that a written report of the test results by a duly qualified expert performing the tests, certified by an affidavit duly subscribed and sworn to by him before a notary public, may be introduced in illegitimacy actions without calling such expert as a witness; and if either party desires to question the expert, the party shall have him subpoenaed within a reasonable time prior to trial. *See* Ark. Stat. Ann. § 34-705.2 (Supp. 1985). However, at the time this present case was tried, that section applied only to the State Medical Examiner, *see* Ark. Stat. Ann. § 34-705.2 (Repl. 1962).

Appellant also contends the report of the test results should have been admitted because Unif. R. Evid. 803(24) provides that a statement having sufficient circumstantial guarantees of trustworthiness is admissible, even if hearsay, if the statement meets the criteria set out in the rule. There are at least two answers to this argument. In the first place, the criteria set out obviously grants the trial court broad discretion in determining whether such a statement should be admitted, and we cannot say that discretion was imprudently exercised in this case. Also, as we have already said, Ark. Stat. Ann. § 34-705.1, *supra*, expressly states that after the tests have been received into evidence, the persons performing them *shall be subject* to cross-examination, and *Winston* v. *Robinson*, 270 Ark. 996, 606 S.W.2d 757 (1980), held that the Uniform Rules of Evidence did not repeal the provisions of Ark. Stat. Ann. § 34-705.1. So, we cannot agree that the Uniform Rules of Evidence required the court to admit the lab report into evidence.

Appellant's next argument is that the trial court erred by placing an incorrect burden of proof on her. This suit is a civil proceeding and it was the appellant's burden to prove her case by a preponderance of the evidence. *McFadden* v. *Griffith*,

278 Ark. 460, 647 S.W.2d 432 (1983). A preponderance of the evidence means the greater weight of the evidence—the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. *See* Arkansas Model Jury Instruction 202. Appellant's argument that the trial court applied the wrong burden of proof is based upon the judge's remarks made at the conclusion of the trial of this case. The judge stated:

> [E]ven though the scales were heavily tipped in favor of the plaintiff at the time she rested, which I suppose is always the case in every case. . . . Considering all the facts and circumstances, there leaves a question as to the burden of proof and the Court is of the opinion at this stage that the plaintiff has not met the burden. The lab report test concerning the paternity is, in the mind of the court, essential to this case.

After the briefs were filed on the question of the admissibility of the report on the blood tests, the court held the report inadmissible and found that the appellant had not met her burden of proving appellee the father of her children.

We see nothing in the remarks of the court, or in the findings of fact set out in his opinion letter to the attorneys, or in the judgment entered of record to indicate that the court considered the appellant's burden of proof to be anything other than by a preponderance of the evidence. In fact, the judge's remark about tipping the scales is certainly in keeping with the concept of determining the weight of the evidence, which is the very essence of what the preponderance of the evidence means. However, under the provisions of ARCP 52(a), our problem is to determine whether the trial judge's finding of fact was *clearly* against the preponderance of the evidence. After a careful review of the evidence, we cannot find that it was.

Affirmed.

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

Ted MONAGHAN *v.* Conley J. DAVIS

CA 85-65 700 S.W.2d 375

Court of Appeals of Arkansas
Division I
Opinion delivered December 11, 1985

Joe H. Hardegree, for appellant.

Orvin W. Foster, for appellee.

MELVIN MAYFIELD, Judge. Appellant, Ted Monaghan, appeals a decision of the Polk County Chancery Court holding that appellee, Conley Joe Davis, had thirty days from the date of the letter opinion in which to exercise an option to repurchase certain land that he had previously owned.

There is evidence that Davis was in financial difficulty. The first mortgage on 78 acres which he owned had been foreclosed and the property had been ordered sold by the chancery court. Davis approached a friend, Ray Goodner, about lending him enough money to pay off the mortgage. Goodner was unable to lend him any money but put Davis in touch with appellant Monaghan. Monaghan agreed to give Davis $35,000 for the property and a watch Davis owned.

Monaghan also agreed to give Ray Goodner an option to purchase the property and Goodner made an oral agreement to reconvey it to Davis. There was a dispute as to whether the term of

Goodner's option to purchase was six or twelve months, but it was agreed that the repurchase price was $40,000.

Davis executed and delivered to Monaghan a warranty deed. The option agreement was prepared by Monaghan's attorney and signed by Monaghan but was retained in the attorney's file rather than being delivered to Goodner. About a year later, Monaghan refused to convey the land and Davis filed suit to enforce the option.

On appeal to this court, Monaghan first cites ARCP Rule 17(a) and argues that the trial court erred in denying his motion to dismiss for lack of the joinder of Goodner who, it is alleged, was the real party in interest. The trial court held that Goodner was merely a conduit, that he had no interest in the property, and that he merely allowed the option to be placed in his name because Monaghan knew him and did not know Davis.

We think it is clear that the option to repurchase was made for the benefit of Davis. It is also clear that contracts made for the benefit of a party are actionable by that party. *Howell* v. *Worth James Const. Co.*, 259 Ark. 627, 535 S.W.2d 826 (1976); *Baker* v. *Bank of Northeast Ark.*, 271 Ark. 948, 611 S.W.2d 783 (Ark. App. 1981). However, the Reporter's Notes to Rule 17 state that it is generally held that the "real party" in interest is the person who can discharge the claim upon which the action is brought and not necessarily the party who is "ultimately entitled to the benefit of the recovery." Long before the adoption of the Arkansas Rules of Civil Procedure, we had a statute providing that actions must be prosecuted in the name of the real party in interest. *See* Ark. Stat. Ann. § 27-801 (Repl. 1962). That statute was involved in *House* v. *Long*, 244 Ark. 718, 426 S.W.2d 814 (1968), which is cited in support of the above statement from the Reporter's Notes, and the case is relied upon by appellant for the argument that Goodner is the real party in interest since the option to repurchase was in his name. It is indicated by the Reporter's Notes that federal courts generally interpret the real party in interest requirement as did *House* v. *Long*.

House v. *Long* also holds that one of the primary purposes of a real party in interest statute is to prevent defendants from being harassed by different suits arising from the same cause. That is also the purpose of Rule 17(a) of the Federal Rules of Civil

Procedure. In *Pace* v. *General Electric Company*, 55 F.R.D. 215 (W.D. Pa. 1972), the court said the rationale of the rule was to protect a defendant from a multiplicity of suits, to allow a defendant to present all his defenses, and to protect a defendant from multiple liability. But the opinion adds that "since the rule is made for the protection of the defendant, he may waive it by his inaction," and quotes from 6 Wright & Miller, *Federal Practice and Procedure* § 1554 (1971), where in a discussion of the proper method of raising the real party in interest issue, it is stated:

> Regardless of what vehicle is used for presenting the objection, it should be done with reasonable promptness. Otherwise, the court may conclude that the point has been waived by the delay and exercise its discretion to deny motions on the ground of potential prejudice.

In the instant case, the first time any point was raised about a real party in interest issue was in appellant's opening statement after each party had announced ready for trial. At that time the case had been pending for months, and the complaint had always contained the specific allegation that the option to repurchase had been granted to Goodner. Even though Goodner's involvement was clear from the day the suit was filed, the appellant waited until the trial started to complain that Davis was not the real party in interest. Under these circumstances, we think the appellant waived this issue by his delay in raising it. *See Hefley* v. *Jones*, 687 F.2d 1383 (10th Cir. 1982) (holding trial court acted within its discretion in refusing to allow a defendant to amend, 16 days prior to trial, to make the real party in interest a party to the suit). This is also in keeping with the application of our former real party in interest statute, Ark. Stat. Ann. § 27-801 (Repl. 1962). *See Farm Bureau Mut. Cas. Ins. Co.* v. *Robinson*, 262 Ark. 850, 562 S.W.2d 53 (1978) (holding an attempt to raise a defect of parties issue by motion for directed verdict at the end of the trial came too late); and *Morris* v. *Varnell*, 222 Ark. 294, 258 S.W.2d 889 (1953) (holding an objection during the trial came too late).

When this issue was raised in the instant case, the trial judge stated that he thought the matter should have been the subject of a motion to dismiss but reserved ruling until later. At the conclusion of the evidence, he held that Davis was the real

party in interest. However, we believe he reached the right result and we affirm if the court was correct for any reason. *Guthrie* v. *Tyson Foods*, 285 Ark. 95, 685 S.W.2d 164 (1985); *Moose* v. *Gregory*, 267 Ark. 86, 590 S.W.2d 662 (1979); *Morgan* v. *Downs*, 245 Ark. 328, 432 S.W.2d 454 (1968); and *Mayhew* v. *Loveless*, 1 Ark. App. 69, 613 S.W.2d 118 (1981).

We hold that Davis was a third party beneficiary of the option to repurchase agreement. He was a proper party to bring suit on that agreement. If Goodner should have been a party because the option was in his name, this point was waived by the appellant's failure to raise the issue before the trial started.

Appellant's next four arguments challenge the decision of the court in holding that the deed, which was absolute on its face, was actually a mortgage, and in granting appellee thirty days from the date of the letter opinion in which to exercise the option to repurchase. In explaining his decision, the trial court observed that although appellant had insisted that the transaction was a sale, appellee testified he thought he was merely giving appellant security for a loan and was unaware that the document was a warranty deed; that a copy of the option to purchase, in which appellant agreed to convey the property to Goodner, was in the record and contained the appellant's signature; and that it would go against the conscience of the court to enforce the transaction against appellee. Although he did not identify it as such, we think the real basis of the court's decision was that the deed actually constituted an equitable mortgage.

It is a well settled principle of equity jurisprudence in this state that where, at the time of sale, a vendor of land is indebted to the purchaser and continues to be indebted to him after the sale with the right to call for a reconveyance upon payment of the debt, a deed absolute on its face will be construed by a court of equity as a mortgage. Evidence, written or oral, is admissible to show the real character of the transaction. *DeLoney* v. *Dillard*, 183 Ark. 1053, 40 S.W.2d 772 (1931). The question whether a deed to realty, absolute on its face, when construed together with a separate agreement or option to repurchase by the grantor amounts to a mortgage or is a conditional sale, depends on the intention of the parties in the light of all attendant circumstances. *Ehrlich* v. *Castleberry*, 227 Ark. 426, 299 S.W.2d 38

(1957). It is unquestionably within the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of land, with a reservation to the vendor of a right to repurchase the property at a fixed price and at a specific time. If such transaction is security for a debt, then it is a mortgage—otherwise, it is a sale. *Carter* v. *Zachary*, 243 Ark. 104, 418 S.W.2d 787 (1967) (quoting from *Newport* v. *Chandler*, 206 Ark. 974, 178 S.W.2d 240 (1944)).

The foreclosure of a mortgage is ordinarily necessary in order to cut off the mortgagor's equity of redemption and to transfer absolute title to the mortgaged property, even in the case of absolute deeds intended as mortgages. 59 C.J.S. *Mortgages* § 486 (1949). *See also Baugh v. Taylor*, 184 Ark. 545, 42 S.W.2d 992 (1931), where the court stated:

> The clause in the option contract making time of the essence thereof had the effect, perhaps, of waiving the right of redemption conferred by the statute, but did not dispose of the equity of redemption which antedates any statutory right of redemption. This equity can be disposed of only by foreclosure or a conveyance or by laches.

In the instant case, a finding that the deed coupled with the option constituted an equitable mortgage is not clearly against the preponderance of the evidence, and the chancellor did not commit error by granting the appellee thirty days in which to redeem his property.

Affirmed.

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

Michael H. MORTON *v.* HAMPTON SCHOOL DISTRICT NO. 1

CA 85-13 700 S.W.2d 373

Court of Appeals of Arkansas
Division II
Opinion delivered December 11, 1985

Roberts, Harrell, Lindsey & Foster, P.A., by: *Allen P. Roberts* and *Phillip J. Foster*, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant was principal of the Hampton High School when, in February, 1983, the school's Board of Directors voted to offer him a new contract for the 1983-84 and 1984-85 school years. Appellant signed the contract on March 8, 1983, after directing the bookkeeper in the superintendent's office to add a provision to it under which he would receive rent-free housing. (His current contract provided for rent-free housing.) The contract was subsequently signed by the president of the school board, but the secretary of the board refused to sign it. After a meeting of the board held on March 14, 1983, the appellant was notified that the superintendent would recommend

that his contract not be renewed for the next year; and at a June 23, 1983, meeting, the school board accepted the superintendent's recommendation.

Shortly after appellant's contract was nonrenewed, he filed suit alleging that he had a valid two-year contract which appellees had breached. The trial court held that Ark. Stat. Ann. §§ 80-1304 and 80-509(d) (Repl. 1980) required that a teacher's contract must be in writing, signed by both the secretary and the president of the school board, or a majority of the members of the board, and since neither the secretary of the board nor a majority of the members of the board had signed appellant's proposed contract, no contract had been created.

On appeal to this court, it is argued that the trial court erred in holding that appellant did not have a valid and enforceable two-year employment contract. Appellant contends that by signing and returning the contract to the school board president, who also signed it, a valid and enforceable contract was created. Appellant relies on *Head* v. *Caddo Hills School District*, 277 Ark. 482, 644 S.W.2d 246 (1982), as inferring that "the contract issued Head and signed by him even though it was not accepted by the School District was in fact a valid contract." We do not believe *Head* supports that contention.

Head had been issued a contract and had signed it, but before it was accepted by the school board, he was notified that his contract would not be renewed. However, under a section of The Teacher Fair Dismissal Act of 1979, Ark. Stat. Ann. § 80-1264.3 (Repl. 1980), his contract was automatically renewed because he had not been notified during the term of his contract, or within ten days after the end of the school year, that his contract would not be renewed.

In the present case, however, the question of an automatic renewal is not involved. Here, the court held, and the appellant agrees, the issue is whether a valid and enforceable contract existed even though the secretary of the board had not signed it. We believe that the controlling case on this issue is *Johnson* v. *Wert*, 225 Ark. 91, 279 S.W.2d 274 (1955). In that case the school board had voted to give Johnson, its superintendent, a two-year contract, but before the formal contract was prepared, one of the board members asked Johnson to resign. He refused to resign,

and subsequently had a secretary in the County School Supervisor's office prepare a contract on a regular form prescribed by the State Board of Education and which contained blank spaces for the signature of Johnson and the president and the secretary of the board of directors of the school. Johnson signed the proposed contract and then obtained the signature of the board secretary. A few days later, the school board rescinded its action to rehire appellant and thereafter, when requested to do so, the president of the school board refused to sign appellant's contract.

Johnson filed suit alleging a breach of contract and the trial court held that the majority vote of the board to employ Johnson for a term of two years "did not of itself constitute a valid contract, in that subsequent to that time there must have been entered between the parties by mutual consent and understanding a written contract of employment, because the law requires that it be done." In affirming the trial court in that case, the Arkansas Supreme Court stated:

> The election of appellant for a new two-year term on February 27, 1953, was merely preliminary to the further requirement that a valid written contract in the form prescribed by the State Board of Education be executed. Under the undisputed evidence this second and final step essential to support a recovery of compensation was never met, and the trial court correctly directed a verdict in favor of appellees.

Appellant attempts to distinguish the *Johnson* case, but we do not think those distinctions are pertinent to the issue involved in the instant case. Here, no written contract was signed by a majority of the school board members, or for the board by both its president and secretary. Therefore, appellant had no contract which the board could breach.

Appellant also submits that the board's vote not to renew his contract was in violation of his rights to due process under the United States and Arkansas Constitutions. However, since no valid contract was ever created, no property interest arose and there was no violation of appellant's constitutional rights. *See Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972), and *Gillespie* v. *Board of Education of North Little Rock*, 528 F. Supp. 433 (E.D. Ark. 1981).

Affirmed.

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

LLLL CONSTRUCTION COMPANY
v. MEHLBURGER, TANNER, RENSHAW
AND ASSOCIATES, INC. and MOUNT HOLLY
WATER ASSOCIATION

CA 85-31 702 S.W.2d 29

Court of Appeals of Arkansas
Division II
Opinion delivered December 11, 1985

Hubbard, Patton, Peek, Haltom & Roberts, by: *George L. McWilliams*, for appellant.

Smith, Stroud, McClerkin, Dunn & Nutter, by: *R. Gary Nutter*, for appellee, Mehlburger, Tanner, Renshaw and Associates, Inc.

Compton, Prewett, Thomas & Hickey, P.A., by: *Floyd M. Thomas, Jr.*, for appellee, Mount Holly Water Association.

TOM GLAZE, Judge. In June 1980, Nell and George Stewart were injured when toxic chlorine gas entered their home through the water lines during a construction project on the Mount Holly water system. They filed suit for negligence against the appellant, LLLL Construction Company, Inc., the general contractor; Tom Loftin d/b/a Tom Loftin Construction Company (Loftin), the subcontractor; and appellee, Mount Holly Water Association (Mount Holly), the owner of the project. Loftin filed a third-party complaint against appellee, Mehlburger, Tanner, Renshaw & Associates (Mehlburger), the project engineers, who in turn filed a cross-complaint against appellant based upon an agreement wherein appellant, as contractor, agreed, among other things, to indemnify Mehlburger for claims, including attorney's fees and expenses, that resulted from its work on the project. Mount Holly also counterclaimed against appellant, seeking indemnification for attorney's fees and expenses. The jury returned a verdict for the Stewarts against the appellant and Loftin, but determined Mount Holly and Mehlburger were not negligent or liable for damages.

In pursuing their counterclaims, Mehlburger and Mount Holly subsequently filed motions for indemnity from appellant for their attorneys' fees and necessary expenses incurred in defending the suit. Appellant responded contending that appellees had waived the indemnity issue and their motions should be denied. The trial court ruled that, by agreement of counsel and

the court, the indemnity issue had been reserved for the court's determination after the jury had rendered its verdict on the negligence and damages issues. The court then heard evidence concerning attorney's fees and expenses, and awarded appellees judgment for such fees and expenses from which appellant brings this appeal. Appellant's sole argument on appeal is that the trial court erred in reopening the trial to accept evidence on the indemnity issue. We must disagree and affirm.

Appellant argues the appellees failed to submit to the jury their contractual claims for attorneys' fees and therefore waived any consideration of those claims after the jury verdict and entry of judgment confirming it. Appellees urge no waiver occurred because all parties agreed to reserve the contractual indemnity claims for trial before the court *after* the jury verdict. Although no earlier record or written stipulation had been made reserving the indemnity issue, the trial court, at a hearing on appellees' motions for attorneys' fees and expenses, specifically found:

> . . . we were in agreement that the issues relating to indemnity would be submitted to the court after the jury verdict and the court would then rule on the matters of attorney's fees and expenses as a matter of law and also as the trier of fact.

Under Rule 42(b) of the Arkansas Rules of Civil Procedure, the trial court could bifurcate the trial for convenience, to avoid prejudice or for expedition and economy. Absent an abuse of discretion, the trial court's decision to bifurcate will not be disturbed on appeal. *Fletcher* v. *Duke*, 5 Ark. App. 223, 635 S.W.2d 2 (1982). Here, this cause involved six parties and their respective tort and contractual claims. Because the indemnity claims could not be determined until the issue of who, among four defendants, was liable for the Stewarts' personal injuries, the trial court had good reason to bifurcate the trial, *i.e.*, to avoid confusion and any resulting prejudice when considering the different and distinct claims of the respective parties.

Appellant argues that, regardless of the trial court's authority to bifurcate the trial, the record simply fails to support the proposition that there was any discussion or agreement about bifurcation. While the original record fails to reflect any such agreement, it is undisputed that an unrecorded, pre-trial confer-

ence had been held. Though appellant disagrees with the trial court's finding, the court determined that appellees' indemnity claims were discussed not only during the trial but also even possibly at the pre-trial conference. In an attempt to settle the record concerning what previously had occurred at trial and at pre-trial, the trial court concluded that "[it] went forward with the understanding that we were in agreement that the issues relating to indemnity would be submitted to the court after the jury verdict. . . ." In so finding, the trial court supplemented the record as it was empowered to do, and, in so doing, rendered ineffective appellant's argument on appeal that the record fails to reflect an agreement to try the tort and indemnity issues in a bifurcated manner. *See also Fountain* v. *State*, 269 Ark. 454, 601 S.W.2d 862 (1980).

Appellant also contends the trial court erred because Rule 7(c) of the Uniform Rules for Circuit and Chancery Courts provides that the court will not recognize any agreement or stipulation between counsel unless it has been reduced to writing, signed by the parties or their attorneys and filed in the case, or unless it has been dictated into the record.[1] Suffice it to say, the agreement in issue here was not merely between the parties but instead involved the parties' counsel *and* the court. Under these circumstances, Rule 7(c) is not applicable or controlling.

We hold the trial court did not abuse its discretion by bifurcating the trial or in reserving and deciding the appellees' indemnity claims after the jury rendered its verdict.

Affirmed.

CLONINGER and MAYFIELD, JJ., agree.

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[1] Although not argued below, appellant now urges that the trial court violated Rule 60 of the Arkansas Rules of Civil Procedure. We do not consider assignments of error raised for the first time on appeal. *Bull v. Brantner*, 10 Ark. App. 229, 662 S.W.2d 476 (1984).

MARIANNA SCHOOL DISTRICT *v.* Mary Lou VANDERBURG

CA 85-304 700 S.W.2d 381

Court of Appeals of Arkansas
Division I
Opinion delivered December 18, 1985

H. Oscar Hirby, Public Employees Claims Division, Arkansas Insurance Department, for appellant.

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

GEORGE K. CRACRAFT, Chief Judge. The sole question presented by this appeal is the proper method for determination

under Ark. Stat. Ann. § 81-1312 (Repl. 1976) of the average weekly wage of an employee who holds two concurrent jobs with the same employer and suffers a compensable injury while performing one of them.

The facts are not in dispute. In 1974 Mary Lou Vanderburg was hired by the Marianna School District as a school bus driver. Her duties required her services in the early morning and mid-afternoon hours. In 1975 she was hired by the school district's food service department to work those hours between her bus schedules in the school cafeteria. The two jobs did not overlap. She signed separate contracts for each employment and was paid by separate checks drawn on different accounts maintained by the employer. The employer's workers' compensation insurance covered both employments and premiums were computed on the appellee's combined wage in both employments. On April 5, 1984 the appellee sustained a compensable injury while driving a bus for the school district.

The employer accepted the injury as a compensable one but contended that appellee's weekly benefits should be calculated only on her average weekly wage under the contract for bus driving duties. The employee contended that she was entitled to have her average weekly compensation determined on her earnings under both contracts. The Commission held that the wages paid for the two jobs should be combined for the purpose of determining the appellee's weekly compensation rate and this appeal followed. We find no error in the Commission's conclusion and affirm the award.

Ark. Stat. Ann. § 81-1310 (Supp. 1985) provides that the compensation payable to an injured employee for disability shall not exceed 66-⅔% of the employee's "average weekly wage." Ark. Stat. Ann. § 81-1302(h) (Repl. 1976) defines wages as the money rate at which the service rendered is recompensed under the contract of hire in force at the time of the accident. Ark. Stat. Ann. § 81-1312 provides that compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident.

This court has addressed the application of these sections to concurrent employments on two prior occasions. *Curtis* v. *Ermert Funeral Home & Ins. Co.*, 4 Ark. App. 274, 630 S.W.2d 57

(1982); *Hart's Exxon Service Station* v. *Prater*, 268 Ark. 961, 597 S.W.2d 130 (Ark. App. 1980). We do not agree with the appellant that these cases declare that the provisions of § 81-1312 do not permit the combining of wages from concurrent employments in any case. Both cases are distinguishable from the case at bar because both involve the proper method of determining the average weekly wage of an employee who held concurrent jobs with *different* employers and suffered an injury which arose out of his employment with one of them.

In both cases it was argued that we should adopt the majority rule that earnings from concurrent employments with different employers may be combined for this purpose if the employments are "related" or "similar," citing 2 Larson, *Workmen's Compensation Law*, § 60.30. In *Hart's Exxon* that argument was rejected because the Arkansas act contained no provision for combining wages in such circumstances. The court pointed out that to hold otherwise would impose upon the workers' compensation carrier an obligation it had not assumed and for which it had received no premium. In *Curtis* we were again asked to adopt the majority rule as stated in Larson and expressly overrule *Hart's Exxon.* This we declined to do.

In *Curtis* we pointed out that the wording of the statutory provision fixing the wage base of an injured employee varied from state to state and the enactments of those states adopting the majority rule differed from our own by either expressly or impliedly authorizing the combining of wages for all employments. Our statute, however, provides that the benefits shall be based on the employee's average weekly wage and defines "wage" as the money rate at which the service rendered is recompensed under the contract of hire in force at the time of the accident. We therefore concluded in *Curtis* that the clear wording of our statute made no provision for combining wages from concurrent employments with different employers in determining average weekly wages. Our statute, unlike those of many sister states, provides that average weekly wages means those wages currently earned by the injured worker under an employment contract with the employer in whose employment the injury is suffered.

The issue of combining wages earned in concurrent

employment with the same employer was not before us in either *Curtis* or *Hart's Exxon.* Those cases hold no more than that our statute makes no provision for combining wages earned in concurrent employment with different employers in the determination of the average weekly wage of an injured worker.

We find a sound basis for a distinction between the combining of wages earned in concurrent employments with different employers and those earned in concurrent ones with the same employer. The combining of wages from different employers would impose on the employer a liability of which he might not be aware and had not assumed and upon the carrier one for which it was not compensated by premiums. Here the injured worker worked full-time for the same employer and insurance premium computations were based on the wages paid her in both employments.

In 1C Larson, *Workmen's Compensation Law*, § 47.10, Professor Larson points out that workers' compensation enactments required a new concept of employer-employee which the common law of master and servant was ill-equipped to supply. These enactments contemplated a mutual arrangement between an employer and employee in which each gained rights and obligations which had not previously existed and gave up others that had. Injured employees gave up all rights to bring civil actions against employers in exchange for the right to be compensated for industrial injuries free of common law defenses. The primary purpose of these enactments was to provide for the injured employee a stipulated portion of his weekly wages lost as a result of injury arising out of that relationship.

We find that the legislative requirement that both the lost wages and the injury for which compensation is due arise out of that relationship is a reasonable one. We cannot conclude, however, that the legislature intended in every case to deprive an injured worker of a substantial portion of his lost wage benefits simply because that relationship has been established in separate agreements under which the employee works in different departments and is compensated on different wage scales by the same employer. We conclude that under the circumstances presented by this record the action of the Commission was correct.

Affirmed.

COOPER and CORBIN, JJ., agree.

Frank BINIORES *v.* STATE of Arkansas

CA CR 85-117 701 S.W.2d 385

Court of Appeals of Arkansas
Division I
Opinion delivered December 18, 1985
[Rehearing denied January 15, 1986.]

William C. McArthur, for appellant.

Steve Clark, Att'y Gen., by: *Connie Griffin*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. In this criminal case, the appellant was charged with first degree murder. After a non-jury trial, he was convicted of the crime of manslaughter for the shooting death of Larry Moss and was sentenced to six years in the

Arkansas Department of Correction. From that decision, comes this appeal.

On appeal, the appellant raises four points. First, he alleges that the trial court erred in allowing the State's expert pathologist to testify on matters outside the scope of her expertise. Second, he argues that the trial court erred in admitting multiple photographs of Moss's body. Next, he argues that the court erred in refusing to admit Moss's police record from the Little Rock Police Department as evidence. Last, he argues that there was insufficient evidence to sustain his conviction for manslaughter.

Pursuant to the Arkansas Supreme Court's decision in *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), we first examine the appellant's contention concerning the sufficiency of the evidence. We review the evidence in the light most favorable to the appellee, and we affirm if there is substantial evidence to support the verdict. *Harris* v. *State*, 15 Ark. App. 58, 688 S.W.2d 947 (1985); *Wilson* v. *State*, 10 Ark. App. 176, 662 S.W.2d 204 (1983). Substantial evidence must do more than merely create a suspicion; it must be of sufficient force and character so as to force the mind beyond conjecture and compel a conclusion one way or the other with reasonable certainty. *Harris*, 284 Ark. at 252; *Jones* v. *State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984).

Manslaughter is committed if, among other things, a person

> causes the death of another person under circumstances that would be murder, except that he causes the death under the influence of extreme emotional disturbance for which there is reasonable excuse. The reasonableness of the excuse shall be determined from the viewpoint of a person in the defendant's situation as he believes it to be; . . . he recklessly causes the death of another person . . .

Ark. Stat. Ann. Section 41-1504(1)(a), (c) (Repl. 1977). Here, the appellant admittedly shot Moss on April 2, 1984, but claimed that he killed Moss in self-defense. Moss's body was found in the Lakewood Addition of North Little Rock on April 2, 1984, at 7:30 P.M. He had been shot three times, twice in the top of the head and once in the center of the forehead. Although taken into custody the evening of the shooting for D.W.I., the appellant did

not report the shooting until the next morning when he called Little Rock Municipal Judge Allan Dishongh. Judge Dishongh contacted Little Rock Police Chief Sonny Simpson, and they went to the scene of the shooting, where they found the appellant.

While the appellant testified that Moss kept saying, "these hands can kill," there is no evidence in the record that Moss had, or that the appellant thought that he had, any weapon. The evidence indicates that the fatal shot was a level one, fired inches from Moss's forehead. When Moss was found, his arms were entangled in his jacket sleeves in such a manner that they were effectively restrained. The evidence also shows that Moss's blood-alcohol level at the time of his death was one which would normally render a person stuporous. Arkansas law provides that, when a fact finder

> "believes that the defendant shot under the belief that he was about to be assaulted, but that he acted too hastily and without due care, and was therefore not justified in taking life under the circumstances, he is guilty of manslaughter."

Hathcock v. *State*, 256 Ark. 707, 710-11, 510 S.W.2d 276, 279 (1974), (quoting *Bruder* v. *State*, 110 Ark. 402, 161 S.W.2d 1067 (1913). The trial court here could easily find from the above evidence that the appellant acted too hastily in shooting Moss. Therefore, we hold that the evidence was sufficient to support the appellant's conviction.

The appellant argues that the trial court erred in allowing Dr. Donna Brown, the State's expert pathologist, to give opinions on matters outside her field of expertise. The first portion of Dr. Brown's testimony to which the appellant objected concerned the lack of "powder stippling" on Moss's hands. The following question was asked:

> Q. In your opinion had a person been attempting to fend off the shot to the forehead and had his hands in a position in your opinion would they—
>
> MR. MCARTHUR
>
> (Interposing) Objection, your Honor. This is really beyond

the scope of this lady's qualifications. She is a medical doctor, not some expert on firearms in what they may or may not do.

THE COURT:

Overruled.

MR. NEAL, CONTINUING:

In your opinion, if a person had had their hands in close proximity of the forehead at the time of the shot would you have expected to have found powder burns or residue or stippling on the hands?

A. It is likely that I could have seen if it [sic] the hands were close enough together in an attempt to defend oneself. They could have been out here and still not quite gotten to the forehead or elsewhere.

Q. Okay.

A. But I saw no direct evidence of a natural, you know, block of the hand or wrist or something like that. That stippling would indicate to me.

We hold that the trial court did not err in overruling the appellant's objection to the quoted testimony. As the Arkansas Supreme Court has said:

> Every opinion must have a basis, whether expert or lay; that is, a witness must be qualified by education or circumstance to have an opinion that will carry some weight and be of assistance to the fact finder. Whether one is qualified is a question of law to be decided by the trial judge. *Gibson* v. *Heiman*, 261 Ark. 236, 547 S.W.2d 111 (1977).

Robinson v. *State*, 274 Ark. 312, 315, 624 S.W.2d 435, 437 (1981). Under Ark. Stat. Ann. Section 28-1001, Unif. R. Evid. 701 (Repl. 1979), a witness, even though not qualified as an expert in an area, may give an opinion which is rationally based on his or her perceptions and which is helpful to a clear understanding of that witness's testimony or of the determination of a fact in issue. Here, the witness had been allowed to testify, without objection, that powder stippling had occurred on the forehead,

but not the hands of the victim, and that such stippling occurred only when a gun is fired at a very close range, *i.e.*, a matter of inches, not feet. Dr. Brown's opinion that the hands were not within inches of the forehead, as she felt would have been the case if a natural block of the shot had taken place at the time of the shooting, is rationally based on her perceptions and is helpful in making a determination as to whether Moss had been able to use his hands in attempting to ward off the shot. *See Gruzen* v. *State*, 276 Ark. 149, 634 S.W.2d 92, *cert. denied*, 459 U.S. 386 (1982).

The appellant also objected to Dr. Brown's testimony concerning Moss's ability to move his arms when his jacket was pulled approximately halfway down his back and his arms were still in the sleeves. Moss's jacket was in this position when his body was found and when Dr. Brown examined the body. The appellant objected to Dr. Brown's testimony that Moss's arms were restrained, alleging that there was no proof as to how his arms got in that position. On appeal, that appellant argues that this testimony was outside Dr. Brown's area of expertise. As the State points out, only the specific objections made at trial are available on appeal; all others are waived. *Whaley* v. *State*, 11 Ark. App. 248, 669 S.W.2d 502 (1984). However, even if the appellant had properly preserved this objection below, he has failed to demonstrate any prejudice from the alleged error, as he allowed another witness to offer the same testimony without objection. We will not reverse absent demonstrated prejudicial error. *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984), *cert. denied*, ___ U.S. ___, 105 S. Ct. 1847 (1985).

The appellant next contends that the trial court erred in allowing certain photographs of Moss's body to be introduced into evidence. The objection is to the number of photographs rather than to the photographs themselves. Photographs are admissible when they tend to corroborate the testimony of witnesses, show the nature and extent of the wounds or the savagery of the attack, aid the witnesses' ability to describe the objects portrayed, or aid the fact finder's ability to understand the testimony. *Earl* v. *State*, 272 Ark. 5, 612 S.W.2d 98 (1981). They are admissible unless their probative value "is substantially outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence." Ark. Stat. Ann. Section 28-1001, Unif. R. Evid. 403 (Repl. 1979). The weighing of these

factors is a matter within the sound discretion of the trial court, and we will not overturn its decision without a showing of an abuse of that discretion. *Tucker* v. *State*, 3 Ark. App. 89, 622 S.W.2d 202 (1981). The fact that photographic evidence is cumulative or unnecessary does not, of itself, make it inadmissible. *Spillers* v. *State*, 272 Ark. 212, 613 S.W.2d 387 (1981). The pictures here were introduced by the State to show different views of the position of the body and the wounds. On that basis, the trial court allowed the pictures to be introduced into evidence, and we find no abuse of discretion.

The appellant next contends that the trial court erred in refusing to admit into evidence Moss's Little Rock Police Department record for the limited purpose of showing his past history of alcohol use and abuse. The trial court refused to admit the prior record and stated:

> a determination of fact of an issue that may be in trial in another Court is not admissible in evidence to prove that fact in the Court in which it is offered . . . The degree or content of alcohol to impair driving is such an amount that would have no probative value for the purposes that the [appellant] seeks the introduction . . . the arrest are [sic] so remote, at least most of them are to [not] have any probative value.

The appellant was attempting to use the record to show that Moss, unlike most people, was able to function with a blood-alcohol level of 0.29 per cent, the level found in Moss's brain. Determining the relevancy of evidence is a matter within the trial court's discretion; we will not reverse its ruling absent a showing of abuse of that discretion. *Jones* v. *State*, 277 Ark. 345, 641 S.W.2d 717 (1982); *James* v. *State*, 11 Ark. App. 1, 665 S.W.2d 883 (1984). Here, the court indicated that the blood-alcohol level required by law for the offenses shown on the proffered record was too low to be relevant to the claim that Moss was able to function with a blood-alcohol level almost three times the statutory limit. We hold that the trial court did not abuse its discretion in so ruling.

Affirmed.

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

FIRST SERVICE CORPORATION *v.* David L. SCHUMACHER

CA 85-131 702 S.W.2d 412

Court of Appeals of Arkansas
Division II
Opinion delivered December 18, 1985

E. DeMatt Henderson and *Richard H. Wooton*, for appellant.

Eudox Patterson and *Charles G. Vaccaro*, for appellee.

LAWSON CLONINGER, Judge. In this appeal from a jury's verdict in a breach of contract action, appellant raises three points for reversal. We affirm in part and reverse in part.

Appellant's predecessor, Southern Service and Management, Inc., a subsidiary of Hot Springs Savings and Loan Association, entered into a written agreement on August 31, 1978, with appellee, a builder, for the construction and sale of speculative homes in its Pine Meadows Subdivision in Hot Springs, Arkansas. The contract provided, among other things, that appellant would finance the project, pay all debts, and refrain from dealing with other speculative builders, while appellee, working for appellant on an exclusive basis, would split the profits from the sale of houses with appellant and receive a management fee of $20,000 per year. Subject to appellee's satisfactory performance, the agreement was not to be terminated until all remaining lots in the subdivision were developed. The contract stated, however, that "If at any point of the agreement all work is halted as the result of [appellant's] exercising its right to limit the number of units or its investment, this agreement may be terminated at the option of [appellant] upon written notice to

[appellee]."

In March, 1980, First Federal Savings and Loan Association of Little Rock acquired Hot Springs Savings and Loan, and First Federal's subsidiary, appellant First Service Corporation, absorbed Southern Service and Management, Inc. Appellant terminated the agreement without written notice on July 15, 1980, by refusing to make additional advances of appellee's management fees. Appellee filed suit for breach of contract on August 1, 1980, seeking compensation for the unpaid management fees, profits on houses already built and sold, and profits on houses to be built on the remaining 134 lots in the subdivision. After trial on October 25 and 26, 1984, the jury rendered a verdict in appellee's favor, awarding him $200,000 in compensatory damages and $200,000 in consequential damages. From that judgment this appeal arises.

Appellant argues in its first point for reversal that the trial court erred in submitting the issue of lost future profits to the jury on the basis of testimony by Barbara McCowan, appellee's bookkeeper. According to appellant, appellee's proof of lost profits was limited to McCowan's testimony, which was based on various settlement sheets from which she concluded that appellee's profit per house was about $2,300, derived from a total profit per house of between $4,500 and $4,600. McCowan's figures, says appellant, did not include as costs allocations attributable to management fees or interest; moreover, the settlement sheets from which she testified reflected only ten of the twenty houses built by appellee.

The proof of lost profits must be shown by evidence which makes it reasonably certain what the party claiming them would have made. *Robertson* v. *Ceola*, 255 Ark. 703, 501 S.W.2d 764 (1973). A party attempting to recover anticipated profits under a contract must present a reasonably complete set of figures and not leave the jury to speculate as to whether there could have been any profits. *Amer. Fid. Fire Ins. Co.* v. *Kennedy Bros. Const., Inc.*, 282 Ark. 545, 670 S.W.2d 798 (1984); *Sumlin* v. *Woodson*, 211 Ark. 214, 199 S.W.2d 936 (1947). The proof must be sufficient to remove the question of profits from the realm of speculation and conjecture. *Robertson* v. *Ceola, supra.* The fact, however, that a party can state the amount of damages he suffered only approximately is not a sufficient reason for disallow-

ing damages if from the approximate estimates a satisfactory conclusion can be reached. If it is reasonably certain that profits would have resulted had the breached contract been carried out, then the complaining party is entitled to recover. *Jim Halsey Co.* v. *Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985).

In the present case, the record reveals that McCowan's testimony was supported by appellee's testimony and three exhibits detailing costs and profits on three separate completed houses, entitling appellee to $10,273.70. Further, the contract itself provided that the agreement was to cover "all remaining lots" in Units 1 and 2 and that profits were to be divided equally between the parties. Had the contract not been breached, appellee would have been entitled to half the profits from the sale of 134 houses, which, at the estimated figure of $2,300 profit per house, would have amounted to $308,208. The $20,000 annual management fee, unpaid since April, 1980, would have risen, after a period of fifty-four months, to $90,000.18.

On appeal, we view the evidence in the light most favorable to the appellee and affirm if any substantial evidence supports the jury's verdict. *Jim Halsey Co.* v. *Bonar, supra; Amer. Fid. Fire Ins. Co.* v. *Kennedy, supra.* The weight of the evidence and the credibility of the witnesses are matters for the jury rather than the appellate court, and where there is a conflict in the evidence the determination by the jury of the issues is conclusive. *Stamper* v. *Aluminum & Zinc Die Cast Co.*, 283 Ark. 92, 671 S.W.2d 170 (1984). In the instant case, we believe that the jury had before it sufficient evidence to determine that appellee had suffered a loss of future profits; thus, the issue was properly submitted.

Appellant's second point for reversal, that the trial court erred in denying its motion for a new trial, is more persuasive. The motion stated that the trial court erred in allowing the jury to return both compensatory and consequential damages when no instruction was provided to assist the jury in understanding the meaning of consequential damages.

Appellee had submitted an instruction on consequential damages which was refused by the trial court. Although no alternative instruction defining consequential damages was subsequently requested or given, the trial court employed the term in

the following interrogatory verdict form:

> 1. Do you find from a preponderance of the evidence that the defendants, SOUTHERN SERVICE AND MANAGEMENT, INC. now FIRST SERVICE CORPORATION have committed breach of a contract with the plaintiff, DAVID SCHUMACHER: ANSWER: *Yes.*
>
> *2. If you find that the defendant has committed breach of a contract with the plaintiff, DAVID SCHUMACHER, state the amount of any compensatory damages, such as lost profits and management fees, that you find from a preponderance of the evidence were sustained by the plaintiff, DAVID SCHUMACHER, as a result of the occurrence. *$200,000*
>
> *3. If you find that the defendant has committed breach of a contract with the plaintiff, DAVID SCHUMACHER, state the amount of any consequential damages that you find from a preponderance of the evidence were sustained by the plaintiff, DAVID SCHUMACHER, as a result of the breach of contract. *$200,000.00*
>
> *If your answer to #1 is "no", you need not answer #2 and #3.
>
> /s/ Robert Ross

It is evident from the form that, while compensatory damages are at least explained by illustration, consequential damages are merely named.

Compensatory, or general, damages are awarded for the purpose of making the injured party in a lawsuit, as nearly as possible, whole. *Dunaway* v. *Troutt*, 232 Ark. 615, 339 S.W.2d 613 (1960). This was accomplished in the present case by the jury's award of $200,000 for lost profits and unpaid management fees. Consequential damages, an aspect of special damages, have been defined as "[s]uch damage, loss or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act." *Black's Law Dictionary*, 5th edn, *citing Richmond Redevelopment and Housing Authority* v. *Laburnum Const. Corp.*, 195 Va. 827, 80 S.E.2d

574 (1954). Consequential damages for breach of contract are recoverable when they may be said to have been fairly within the contemplation of the parties. *Shamburger* v. *Moody*, 322 F.Supp. 196 (E.D. Ark. 1970); aff'd 437 F.2d 1358 (8th Cir. 1971).

Under the circumstances of this case, we do not feel that appellee's evidence that he suffered severe financial problems as a result of appellant's breach constituted consequential damages within the contemplation of the parties when the contract was made. *See* Dobbs, *Remedies* (1973), § 3.2. We must reverse the trial court's judgment on this point and require either a remittitur of $200,000 from appellee or a new trial.

Appellant argues in its third point that the trial court erred in submitting the issue of damages to the jury in the absence of any evidence regarding the "present value" of appellee's future loss. The record indicates that the judge, in the court's instruction number 18, made the following statement to the jury:

> I have used the expression 'Present Value' in these instructions with respect to certain elements of damage which you may find that the Plaintiff will sustain in the future. This means that if you find that the Plaintiff is entitled to recover any elements of damage which require you to determine their present value, you must take into consideration the fact that money recovered will earn interest, if invested, until the time in the future when these losses will actually occur. Therefore, you must reduce any award of such damages to compensate for the reasonable earning power of money, but only as to future damages.

In addition, the court prescribed the following method of calculating lost profits in instruction number 14: "Lost profits are determined by the formula: contract price minus cost minus cost of performance equals profit."

Equipped with these directives, the jury was able to examine the evidence discussed earlier in relation to appellant's first point. A single example will suffice to cover the amount awarded in compensatory damages. Appellee, as the uncontroverted testimony shows, was never paid for the last three houses he built. The profits accrued on the other seventeen houses

totalled $34,071.57, averaging $2,004.21 per house. When the per house profit is multiplied by the 134 remaining lots, the profits lost as of the date of the trial amount to $268,564.14. This evidence was developed in the course of the trial, and, with the court's instructions, provided the jury with ample information on which to base a decision regarding the present value of appellee's future loss.

We find no substantial evidence to support the finding that appellee suffered consequential damages. The judgment is affirmed on the condition that remittitur is entered in the amount of $200,000 within thirty days; otherwise, the judgment will be reversed and the cause remanded for a new trial on all issues.

MAYFIELD and GLAZE, JJ., agree.

ARKANSAS STATE HIGHWAY COMMISSION *v.* JULIAN MARTIN, INC., et al.

CA 85-118 701 S.W.2d 389

Court of Appeals of Arkansas
Division II
Opinion delivered December 18, 1985

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

John M. Belew, for appellees.

TOM GLAZE, Judge. In this eminent domain case, appellant appeals from a jury verdict and judgment in favor of appellee for $108,000.00. For reversal, appellant contends that the trial court erred in (1) permitting questioning and testimony as to the development and planned expansion of the business located on the property in question, and (2) denying motions to strike the testimony of a part-owner of the appellee and one of appellee's expert witnesses. We affirm.

In 1977, appellee purchased a tract of land south of Batesville on Highway 25, on which it began operating a trucking terminal. In October 1983, appellee purchased 5.98 acres east of and adjacent to the existing property, bringing the total tract to approximately ten acres. On May 24, 1984, appellant condemned 1.21 acres across the property, dividing it into two sections. Appellant deposited $58,500.00 into the court registry as estimated compensation for the taking.

Appellant's first point for reversal is that the trial court erred in permitting testimony pertaining to the development and planned expansion of appellee's business over appellant's objections. Appellant contends that, because it stipulated that the highest and best use of the property was for commercial purposes, there was no justification for this line of questioning. We disagree.

The latitude allowed the parties in bringing out collateral and cumulative facts to support value estimates made by witnesses is left largely to the discretion of the trial judge. *Garner* v. *Arkansas State Highway Commission*, 5 Ark. App. 134, 633 S.W.2d 710 (1982). A landowner is entitled to show every advantage that his property possesses, present and prospective, to have his witnesses state any and every fact concerning the property which he would naturally adduce in order to place it in an advantageous light if he were selling to a private individual, and to show the availability of this property for any and all purposes for which it is plainly adopted or for which it is likely to have value and induce purchases. *Arkansas State Highway Commission* v. *First Pyramid Life Insurance Company of America*, 269 Ark. 278, 602 S.W.2d 609 (1980). The credibility of witnesses is a matter to be determined by the jury, and jurors are accorded great latitude in considering testimony as to damages. Their verdict will not be set aside as excessive unless it is not supported by proof, or is so excessive as to indicate passion, prejudice, or an incorrect appreciation of the law applicable to the case. *Arkansas State Highway Commission* v. *Carder*, 228 Ark. 8, 305 S.W.2d 336 (1957).

Appellant cites *Arkansas State Highway Commission* v. *Leavell*, 246 Ark. 1049, 441 S.W.2d 99 (1969), for the proposition that we are to be concerned with only the present market value, "and not those values based upon *speculative* anticipation of future development." (Emphasis added.) The *Leavell* court, however, went on to say that, while consideration must be given to existing uses, "it cannot be seriously argued that present usage is the guideline." 246 Ark. at 1053. There, testimony was presented that the highest and best use of a tract being used as farmland was for residential purposes because the city was expanding in that direction. The court held that it was proper to value the land for building purposes if those uses had an effect on the present market value of the land.

Here, appellee offered testimony to show that the highest and best use of the property was as a trucking terminal. Prior to the condemnation, appellee had started expansion of its existing terminal onto its adjacent and newly-acquired tract of land. Appellee also had purchased 120 new tractors and 110 new trailers, and additional facilities were planned to accommodate them. We believe the trial court correctly ruled this testimony was admissible for the jury to consider when determining the tracts' highest and best use.[1] *See Arkansas State Highway Commission* v. *Arkansas Real Estate Company, Inc.*, 251 Ark. 96, 471 S.W.2d 340 (1971) (wherein the court upheld the admission of testimony concerning the intended development of a piece of property when the owners had begun effecting their plans before the time of taking).

Appellant's second point for reversal is that the trial judge erred in denying motions to strike the testimony of Gene Carter, a part-owner of appellee, and Gary Ennis, one of appellee's appraisal experts. It claims Carter and Ennis erroneously testified that they damaged the remaining lands and improvements because of interference with the appellee's business.

Carter owns fifty percent of the stock of appellee and has been a stockholder since 1982. His testimony dealt with the history of the company and its development, the need for expanded facilities, the nature of the land in question, and the problems which would be encountered once the new highway was completed. He never testified to any monetary damages sustained by the company.

Ennis, however, depreciated the value of the property twenty percent due to its single-purpose nature. Because of the specialized facilities existing on the property, he stated that such a depreciation was necessary to give the property "appeal in the marketplace." His estimate of the value of the land taken and damage to the remainder was $261,438.00.

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[1] Appellant cites *United States v. Miller*, 317 U.S. 369 (1943), which states that special adaptability of land for its owner's use must be disregarded in arriving at "fair" market value. This case involved a railroad taking pursuant to a federal statute. We find no Arkansas cases which apply the *Miller* standard to takings under Arkansas law.

On direct examination, Ennis did not include damage to the business in his computations, except to describe the land as a single-purpose-use tract. On cross examination, he denied that he used frustration of the intended use of the land as an element of damage. Later on cross, after some confusion as to whether Ennis understood the questions he was being asked, the following exchange took place:

> Q. You depreciated the value of the lands out there because of our interference with the trucking business, is that correct?
>
> A. Yes, Sir.

Appellee's counsel promptly objected to the form of the question asked, stating, "[T]here has been no testimony that the business has been interfered with." Appellant then moved to strike Ennis' testimony as to damages. The trial judge, noting Ennis' testimony on direct, said that Ennis had dealt with the single-purpose nature of the land—not with damage to the business. The judge stated that, while he would not limit appellant's cross examination, he would not strike Ennis' testimony because appellant's counsel injected the business-damage issue by his questioning. The judge then denied appellant's motion. We note that, prior to trial, the judge had properly ruled that damage to the business was not a proper element, and throughout the trial, he was careful to keep such evidence from being admitted.

For reversal, appellant cites *Arkansas State Highway Commission* v. *Wallace*, 247 Ark. 157, 444 S.W.2d 685 (1969). There, the landowner testified that she considered, as an element of damage, the fact that her husband was no longer in the dairy business on the property. In reversing the trial court, the supreme court held the landowner's loss of business was not a proper element to be considered.

We fail to see how *Wallace* is applicable to Carter's testimony because he gave no damage testimony. Concerning Ennis' testimony, we believe *Wallace* is distinguishable. In *Wallace*, it was clear that the landowner's value testimony improperly included loss of business as an element of damage. Here, the parties agreed (and the court ruled) that damage to

business was not a proper element of damage. In previous testimony, Ennis specifically stated he had not included frustration to the business as an element. Instead, he properly testified to the single-purpose nature of the property and its highest and best use. It was only during a confused exchange on cross examination that Ennis—contrary to his earlier testimony—stated he depreciated the property because of appellant's interference with appellee's business.

It is well settled that a motion to strike the entire testimony of a witness is properly denied where any part of that testimony is admissible. *Arkansas Louisiana Gas Co.* v. *James*, 15 Ark. App. 184, 292 S.W.2d 761 (1985). Here, except for the questionable response by Ennis on cross examination, his testimony on value was otherwise admissible. We note that the bulk of Ennis' testimony was consistent with the testimony of appellee's two other experts. Appellant did not object to their testimony. Under these circumstances, we cannot say the trial judge abused his discretion by denying appellant's motions to strike the testimony of Carter and Ennis, and, therefore, affirm.

Affirmed.

CLONINGER and MAYFIELD, JJ., agree.

Randy STRICKLAND *v.* STATE of Arkansas

CA CR 85-122 701 S.W.2d 127

Court of Appeals of Arkansas
Division II
Opinion delivered December 18, 1985

[redacted]

[redacted]

Hilburn, Bethune, Calhoon, Forster, Harper & Pruniski, by: *John F. Foster, Jr.* and *Dorcy Kyle Corbin*, for appellant.

Steve Clark, Att'y Gen., by: *Joel Oliver Huggins*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Judge. Appellant appeals his conviction of conspiracy to manufacture a controlled substance for which he received a sentence of seven and one-half years in the Arkansas Department of Correction. For reversal, appellant submits the trial court erred in (1) refusing to instruct the jury that Donald Flaherty and Wesley Atkinson were accomplices as a matter of law, (2) denying his motion for a directed verdict because there was insufficient corroborating evidence of co-conspirators' and accomplices' testimonies to sustain his conviction, (3) granting the State's motion *in limine*, and (4) ruling it had jurisdiction.

Testifying for the State, Vickie Howell stated that she, James Boyce, and appellant decided to set up a lab to manufacture crystal methamphetamine. Howell testified that they all contributed equal amounts of money, and had spent about $2,500 on equipment and chemicals for the lab prior to their arrests. The items, which were ordered by Howell, were shipped to Wesley

Atkinson's apartment in Texas, and then were transported and stored in Boyce's house in Arkansas. A couple of weeks before appellant was arrested, Donald Flaherty gave appellant $750 to join the scheme, but about a week before the arrests, Flaherty went to appellant and, using a gun, got his money back.

Appellant contends that Atkinson and Flaherty were accomplices as a matter of law, and that the court erred when it instructed the jury that only Boyce and Howell were accomplices. The defendant in a criminal case has the burden of proof that a witness is an accomplice whose testimony must be corroborated. *Lear* v. *State*, 278 Ark. 70, 643 S.W.2d 550 (1982); *Robinson* v. *State*, 11 Ark. App. 18, 665 S.W.2d 890 (1984).

Flaherty testified that, approximately a month before the arrests, appellant talked to him on four to six occasions about buying into the scheme. On about April 7, 1984, Flaherty invested $750 in the enterprise, but he testified that, on or about April 14, he successfully demanded the return of his money. During this one-week period, a delivery was made to Atkinson's apartment, and a later one was made on April 19. The arrests were made on April 21, 1984.

The State argues that, because he withdrew his money, Flaherty's status as an accomplice was a fact issue for the jury. We do not agree. After Flaherty joined the conspiracy, he, too, became an accomplice. Thereafter, he did not lawfully withdraw his participation in the conspiracy or terminate his role as an accomplice in the offense of conspiracy.

The crime of conspiracy exists when one, for the purpose of promoting or facilitating the commission of a criminal offense, agrees with another person or persons that he will engage or aid in committing the offense, coupled with an overt act pursuant to the conspiracy. *Shrader* v. *State*, 13 Ark. App. 17, 678 S.W.2d 777 (1984); Ark. Stat. Ann. § 41-707 (Repl. 1977). The evidence here clearly establishes that Flaherty agreed with and joined in the conspiracy, committing an overt act by the payment of money. Once having done so, there was no way for him to renounce the conspiracy except in accordance with the provisions of Ark. Stat. Ann. § 41-710 (Repl. 1977). Section 41-710 provides that:

> It is an affirmative defense to a prosecution for conspiracy to commit an offense that the defendant:
>
> 1) thwarted the success of the conspiracy under circumstances manifesting a complete and voluntary renunciation of his criminal purpose; or
>
> 2) terminated his participation in the conspiracy and:
>
> (a) gave timely warning to appropriate law enforcement authorities; or
>
> (b) otherwise made a substantial effort to prevent the commission of the offense, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose.

Because his sole action was the retrieval of his money, we hold that Flaherty failed to renounce the conspiracy.

Furthermore, we do not agree that Flaherty withdrew as an accomplice when he retrieved his money. Ark. Stat. Ann. § 41-303(1) (Repl. 1977) provides:

> A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, he: (a) solicits, advises, encourages or coerces the other person to commit it; or (b) aids, agrees to aid, or attempts to aid the other person in planning or committing it. . . .

Flaherty became an accomplice to the crime of conspiracy when he agreed to join the conspiracy and provided funds for the accomplishment of its purpose. Thus, he failed to avoid liability as an accomplice, according to Ark. Stat. Ann. § 41-305(2) (Repl. 1977), which, in pertinent part, provides:

> It is an affirmative defense to a prosecution for an offense respecting which the liability of the defendant is based on the conduct of another person that the defendant terminates his complicity *prior to the commission of the offense* and. . . . (Emphasis added)

The conspiracy was in effect at the time Flaherty joined it, and his act of putting money into the scheme sealed his status as an

accomplice and co-conspirator.

The trial court, however, was correct when it determined Atkinson was not an accomplice as a matter of law. Atkinson's uncontradicted testimony was that, while he did store boxes delivered to his apartment, and transported some of them for delivery to Howell and Boyce, he did not know what the boxes contained. The court in *Cate* v. *State*, 270 Ark. 972, 606 S.W.2d 764 (1980), quoted the commentary to Ark. Stat. Ann. § 41-707 (Repl. 1977), the conspiracy statute, as being helpful in determining accomplice status. The commentary states that the phrasing "the purpose of promoting or facilitating the commission of any criminal offense" serves to exclude from the provision's application persons who engage in conduct that furthers the ends of a conspiracy, but who have no purpose to do so. Because Atkinson's knowledge of the conspiracy was in dispute, his complicity was a fact issue which was properly presented to the jury.

Holding that the trial court erred in failing to instruct the jury that Flaherty was an accomplice as a matter of law, we now consider appellant's second point: that the trial court erred in denying his motion for a directed verdict. Directed verdict motions are challenges to the sufficiency of the evidence. *Glick* v. *State*, 275 Ark. 34, 627 S.W.2d 14 (1982); *Walker* v. *State*, 13 Ark. App. 124, 680 S.W.2d 915 (1984). The test for determining the sufficiency of corroborating evidence is whether, if the testimony of the accomplice is disregarded, there is other independent evidence to establish the crime and connect the defendant with its commission. *Linell* v. *State*, 283 Ark. 162, 671 S.W.2d 741 (1984); *Walker, supra.*

Excluding the testimony of accomplices Howell, Boyce and Flaherty, Atkinson's testimony is the only evidence that could conceivably connect the appellant with the conspiracy offense. Atkinson testified that, on one occasion, Howell and Boyce were driving a white van with a greenish-blue stripe on its side when they picked up some boxes at his apartment. He said he did not know the owner of the van, but after the arrests were made, he saw the van at appellant's attorney's office, and saw appellant get out of it. He testified that he thought it was the same van that had been driven by Boyce and Howell, and it was

distinctive because of the stripe down its side. While one might infer from Atkinson's testimony that the van used by Howell and Boyce belonged to appellant, there is simply no corroborating evidence that connects or places him personally with any of the related acts of the conspiracy. At most, Atkinson's testimony raises only a suspicion of involvement on appellant's part. Because evidence which merely raises a suspicion that an accused may be guilty is not sufficient, *Polland* v. *State*, 264 Ark. 753, 574 S.W.2d 656 (1978), we have no alternative but to reverse the judgment and dismiss the cause. In so holding, we need not discuss the remaining issues.

Reversed and dismissed.

CLONINGER, J., agrees.

MAYFIELD, J., concurs.

MELVIN MAYFIELD, Judge, concurring. I concur in the majority opinion in this case. I think the witness Donald Flaherty was still an accomplice regardless of whether he had renounced the conspiracy or acquired a defense to prosecution as an accomplice, and his testimony had to be corroborated.

In *Shrader* v. *State*, 13 Ark. App. 17, 678 S.W.2d 777 (1984), we said:

> In *People* v. *Comstock*, 305 P. 2d 228, 234 (Cal. Dist. Ct. App. 1956) the court said: "The statutory requirement of corroboration is based primarily upon the fact that experience has shown that the evidence of an accomplice should be viewed with care, caution and suspicion because it comes from a tainted source and is often given in the hope or expectation of leniency or immunity." In 30 Am. Jur. 2d *Evidence* § 1148 at 323 (1967), it is said that "a long history of human frailty and governmental overreaching for conviction has justified distrust in accomplice testimony." We hold that Ark. Stat. Ann. § 43-2116 (Repl. 1977), requiring that the testimony of an accomplice be corroborated, applies to the testimony of Bill Smith as a matter of law under the circumstances of the record now before us.

IN RE: ACCELERATED CIVIL CASE LIST

700 S.W.2d 62

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

PER CURIAM. In a per curiam opinion handed down July 5, 1984, *see* 12 Ark. App. 415, we pointed out that criminal cases and certain civil cases are given preference by law as to the order in which they are submitted to the Arkansas Court of Appeals. In that opinion, we set out a procedure whereby the "other" civil cases could be placed on an accelerated civil list. Under Act 770 of 1985, criminal cases, child custody cases, appeals under the Workers' Compensation Law and the Employment Security Law, and appeals from the Public Service Commission are now given preference over all "other" civil cases. Experience has convinced us that we should now modify the procedure adopted by our per curiam of July 5, 1984.

Therefore, effective today, if an attorney files a motion in this court asking that a civil case, which is not now entitled to preferential submission, be placed on an accelerated civil list and states the reason for the request, the court may grant that request if all the briefs have been filed in the case.

A copy of any such motion shall be given to opposing counsel and a certificate to that effect endorsed on the request.

IN RE: MEMORANDUM OPINIONS

700 S.W.2d 63

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

PER CURIAM. In a per curiam opinion dated May 2, 1984, *see* 11 Ark App. 308, we stated that it had become necessary, in attempting to keep our docket current, to increase the number of cases submitted each week and to employ, under the authority of Supreme Court and Court of Appeals Rule 21, the use of brief memorandum opinions not designated for publication. We are today modifying the per curiam opinion of May 2, 1984, to give

notice that hereafter memorandum opinions may be issued in any or all of the following cases:

(a) Where the only substantial question involved is the sufficiency of the evidence;

(b) Where the opinion, or findings of fact and conclusions of law, of the trial court or agency adequately explain the decision and we affirm;

(c) Where the trial court or agency does not abuse its discretion and that is the only substantial issue involved; and

(d) Where the disposition of the appeal is clearly controlled by a prior holding of this court or the Arkansas Supreme Court and we do not find that our holding should be changed or that the case should be certified to the supreme court.

These cases will be submitted as "extra" cases and will not affect the disposition of cases entitled by law to preferential submission. Memorandum opinions may also be used in other cases from time to time, but an opinion in conventional form will be issued in any case where the court deems it necessary or desirable.