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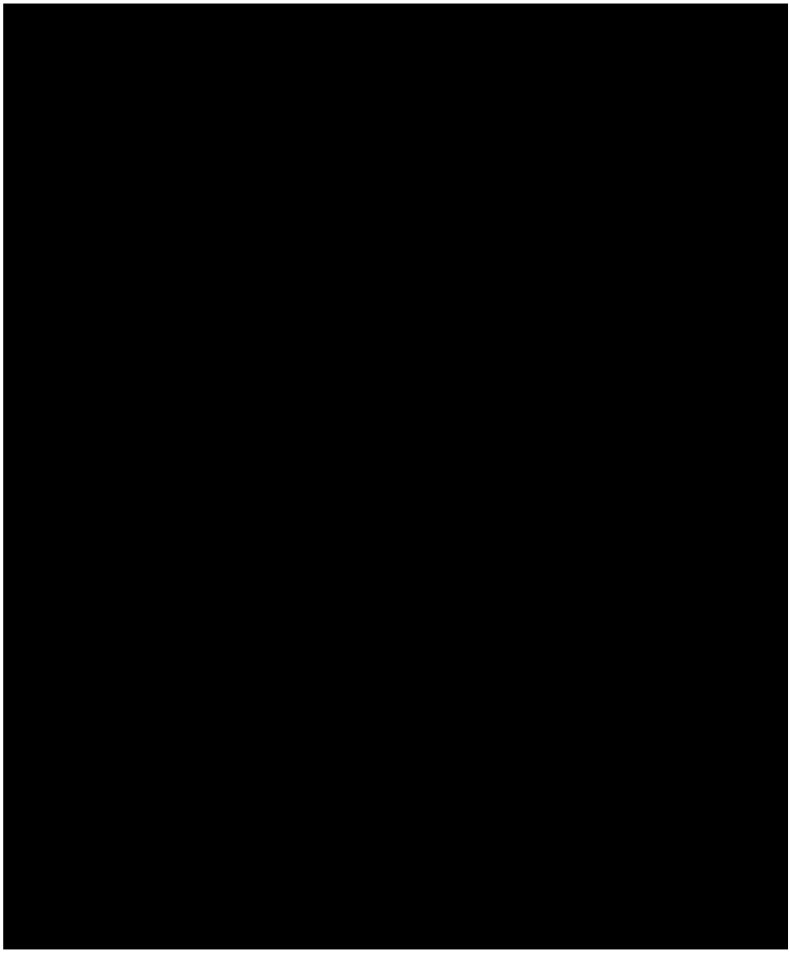

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McKAY AND COMPANY *v.* Charles R. GARLAND, et al.

CA 85-126 701 S.W.2d 392

Court of Appeals of Arkansas
Opinion delivered January 8, 1986
[Rehearing denied February 5, 1986.]

Catlett & Stubblefield, by: *Graham Catlett*, for appellant.

Richard L. Smith, P.A., by: *Fredrick S. Wetzel, III*, for appellee.

JAMES R. COOPER, Judge. The central issue on appeal is whether the chancellor erred in failing to find that the appellees breached the implied covenant of good faith arising out of their exclusive listing agreement with the appellant realty company. We reverse the chancellor's decision, and hold that the appellees acted in bad faith by selling their residence to a purchaser procured by the appellant.

The appellees hired a contractor, G. Pat Murtha, to build their new home for the sum of $127,935.00. As an incentive, the builder agreed to purchase the home then owned by the appellees and to give them a $113,000.00 credit towards the purchase price of the new house. The builder and the appellees also agreed that, until the new home was completed, the appellees were free to attempt to sell their home at a price in excess of $113,000.00. The appellees then entered into an exclusive listing contract with the appellant, giving the appellant the right to sell the old house for a gross sales price of $127,000.00. The exclusive listing agreement provided that it would expire at the end of sixty (60) days, but the contract provided that the appellant would be entitled to a commission if, within six (6) months after the expiration date, the house was sold as a result of information provided by the appellant during the listing period.

During the listing period, the appellant presented an offer by the Williamses, who offered to purchase the old house for $115,000.00. The appellees rejected the offer because it would have netted them less than $113,000.00, the credit they were entitled to from Murtha. The Williamses rejected the appellees' counteroffer, and no further negotiations took place between the Williamses, the appellees, and the appellant.

After the exclusive listing agreement expired, the appellees telephoned the Williamses and discussed arranging the sale of their residence through Murtha, the builder. Murtha never participated in any of the negotiations between the Williamses and the appellees, but the Williamses and the appellees agreed that the sale would be made to Murtha, who would then convey to

the Williamses.

After a trial on the merits, the chancellor held that the sale to the builder did not result from information provided by the appellant during the exclusive listing period. From that decision, comes this appeal.

On appeal, the appellant argues that the sale to the builder was a sham conveyance arranged solely to defeat the appellant's claim to a broker's commission. We agree with the appellant, for the two-step transaction which resulted in title to the house vesting in the Williamses was merely a means of avoiding payment of the appellant's commission.

We review chancery cases *de novo*, and do not reverse the chancellor unless his findings are clearly erroneous or against the preponderance of the evidence. Ark. R. C. P. Rule 52(a); *Reeder* v. *Arkansas Louisiana Gas Co.*, 6 Ark. App. 385, 644 S.W.2d 291 (1982). In the case at bar, we hold that the chancellor's decision is against the preponderance of the evidence.

It has long been the law in Arkansas that where a realtor who has been employed to sell land introduces a purchaser to the seller, and a sale results, the realtor is entitled to a commission even though the ultimate sale is made directly by the owner, *Scott* v. *Patterson & Parker*, 53 Ark. 49, 13 S.W. 419 (1890), even though the sale was made after the expiration of the listing agreement. *Beck* v. *Neal*, 228 Ark. 186, 306 S.W.2d 875 (1957).

The record shows that Murtha was not a party to any of the negotiations leading up to the sale from the appellees to the Williamses, and he testified that he had never even met the Williamses. All the negotiations were between the appellees and the Williamses. The Williamses presented the offer to the appellees, and Murtha accepted it on the terms presented. Although the two transactions were supposedly independent of each other, the two sales closed simultaneously, even though the appellees occupied their new home for about two months before the closing dates. It is also significant to note that no closing statement was ever prepared on the sale from the appellees to Murtha.

The evidence shows that Williams was concerned about the propriety of the two-step transaction and that Mr. Williams and the appellees discussed the possibility that the appellant would claim a commission. Appellee James Garland, who had previously worked for the appellant as a salesman, agreed with the Williamses that if a commission had to be paid, he would pay it. We hold that the evidence clearly shows that the appellees were the true sellers of their home to the Williamses, and that Murtha was simply a "straw man".

We reverse and remand this case to the chancellor, with instructions to enter judgment in favor of the appellant for its commission, and for all other relief deemed proper by the chancellor, including the award of interest.

Reversed and remanded.

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

WESTERN AUTO SUPPLY COMPANY *v.* BANK OF IMBODEN

CA 85-128 701 S.W.2d 394

Court of Appeals of Arkansas
Division II
Opinion delivered January 8, 1985

Barrett, Wheatley, Smith & Deacon, for appellant.

Ponder & Jarboe, for appellee.

LAWSON CLONINGER, Judge. Appellant, Western Auto Supply Company, and appellee, Bank of Imboden, both had security interests in the proceeds, fixtures, and inventory of an associate Western Auto store in Walnut Ridge owned by Ken Welsh. After Mr. Welsh held a "going out of business sale" he turned the proceeds from the sale over to appellee. Appellant filed suit, claiming that its security interest was filed before appellee's and that appellant had priority. At trial the only issue was whether appellant had agreed to subordinate its position to appellee. The trial court found in favor of the bank. For its appeal appellant argues that the trial court erred since its security interest was perfected and filed more than four years before appellee's was perfected and filed, that any defense based on contract, agreement or estoppel is unavailable to appellee since it did not affirmatively plead those defenses, and that as a matter of law, appellant would not be subordinated until the indebtedness of Ken Welsh to it was fully paid. We disagree and affirm the finding of the trial court. We note at this point that appellant cites no authority for its position, and its arguments are not persuasive. *See Davis* v. *State*, 12 Ark. App. 79, 670 S.W.2d 472 (1984).

When Ken Walsh opened his Western Auto store, appellant

financed the operation and had a security interest covering the equipment, fixtures and inventory then owned or thereafter acquired, and the proceeds therefrom. In the fall of 1970, Mr. Welsh was in financial trouble and approached appellee bank about a loan. Appellee agreed to arrange a loan through the Small Business Administration (SBA). Appellee told Mr. Welsh that the only way the SBA would approve the loan would be for appellant to subordinate its position in the security interests it held. A meeting was held at the bank which was attended by Jack Lewis, a division credit manager for appellant at the time, Mr. Welsh and Steve Jones, President of appellee bank.

Shortly after the meeting, appellee loaned Mr. Welsh $40,000.00. The testimony regarding the result of that meeting is in conflict. Mr. Welsh and Mr. Jones both testified that Mr. Lewis agreed to the subordination upon payment of the current debts due appellant. Mr. Lewis testified that although the subordination was discussed, a decision was not reached.

Appellee argues that an oral agreement to subordinate was reached. The evidence supports this. The evidence indicates that $34,000 of the proceeds of the loan was paid to appellant for Mr. Welsh's currently due inventory and installment debts. It was to appellant's advantage that this loan be made, so that Mr. Welsh could continue in business. The evidence supports the conclusion that both appellant and appellee knew that the SBA would not approve the loan unless appellant subordinated its position. A letter was sent from appellant to Mr. Welsh that indicated that as soon as the attached agreement had been signed, appellant would "amend their filing to give Bank first position."

An agreement between parties does not need to be reduced to writing in order to be enforceable, as long as the contract does not fall into one of the classes of contracts in the statute of frauds, Ark. Stat. Ann. § 38-101 et seq. (Repl. 1962). *Hunter* v. *Ward*, 476 F.Supp. 913 (E.D. Ark., 1979). Where the testimony is in conflict on the issue of whether the parties agreed, a fact question arises that is to be determined by the trial judge. The appellate court cannot reverse on this factual issue as long as there is evidence to support the trial court's finding and the finding is not clearly against the preponderance of the evidence. *Hunt* v. *McIlroy Bk. & Tr.*, 2 Ark. App. 87, 616 S.W.2d 759 (1981).

For its second argument, appellant states that any defense based upon contract, agreement, or estoppel is not available to appellee as these were not pleaded as affirmative defenses. However, appellant did not object to appellee using this defense at trial. At the opening of the trial, the judge asked the parties if it was agreed that the only issue was whether the appellant had agreed to subordinate its position. Appellant replied that that was its understanding. The whole trial concerned this single issue. Appellant cannot now raise this issue on appeal, since he did not make a timely objection. *See* ARCP, Rule 15(b).

Appellant finally argues that as a matter of law, its position would not be subordinated until Mr. Welsh's debt had been paid in full. As noted earlier, appellant does not cite any statutory or case law. Appellant does restate a writing that was introduced into evidence at trial that is not signed by appellant. Appellant had previously questioned the effectiveness of this writing since the bank's seal was not on it. Assignments of error by counsel in briefs unsupported by convincing argument or authority will not be considered on appeal unless it is apparent without further research that the assignments of error are well taken. *Davis* v. *State, supra.*

Affirmed.

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

John D. BUNKER *v.* Sheere Lammers BUNKER (DANIELS)

CA 85-127 701 S.W.2d 709

Court of Appeals of Arkansas
Division II
Opinion delivered January 15, 1986

[redacted]

[redacted]

James W. Haddock, for appellant.

Johnson & Harrod, by: *William E. Johnson*, for appellee.

JAMES R. COOPER, Judge. This is an appeal of the chancellor's denial of the appellant's motion to set aside an order entered on October 30, 1984, requiring him to pay delinquent child support in the amount of $23,200.00. The Drew County Chancery Court's order noted that the appellant, by his failure to file an appearance bond, was deemed to be in default and held him liable for the entire amount prayed for by the appellee, pursuant to the terms of a previous order entered on October 11, 1984. We affirm the chancellor's decision.

We first note that the appellant has designated a limited record on appeal, consisting only of the Final Decree of Divorce, dated November 29, 1977, the Petition for Contempt Citation, dated August 23, 1984, a copy of the return of service showing service on the appellant, a copy of each and every document reflecting the method of service of said Petition upon the appellant, and a copy of the Order entered on March 4, 1985, denying the appellant's motion to set aside the order. Among other things, the appellant did not designate the orders entered on October 11th and 30th (the first setting forth the requirements for a continuance and the second being the order the appellant is seeking to have set aside), the oral proceedings on October 8th (the original hearing on the contempt citation), his motion to set aside the Order, and the testimony taken at the hearing on that motion. However, he has provided a transcript that apparently includes all of the proceedings, except the hearing on October 8th, and has abstracted much of the undesignated material. The appellee properly points this out, together with the fact that the appellant failed to designate any points for appeal in his notice of appeal, but she did not move to require the appellant to supplement the record; nor has she attempted to show any prejudice from the appellant's unorthodox and unapproved methods. Furthermore, she does not limit her abstract and arguments to the record as designated, but instead, she dealt with the record that was provided. Therefore, we treat the matter as if the entire record had been designated, since it apparently has been

provided.

The appellant contends that the chancery court erred in entering the orders of October 11th and October 30th, alleging that they amount to judgments, and in failing to grant his motion to vacate those orders. In support of these contentions, he alleges that the chancellor entered a default judgment without a hearing as to the amount and without the written notice of the application for default judgment that Ark. R. Civ. P. Rule 55 requires to be issued at least three days prior to the hearing. The appellant further claims that the chancellor abused his discretion in requiring that a continuance be conditioned upon the posting of an appearance bond, alleging that service was had only six days prior to the hearing, whereas Ark. R. Civ. P. Rule 6(c) requires that notice be given at least ten days before the hearing on a motion.

In this case, the appellant filed his motion to set aside the judgment within 90 days of the filing of the order he seeks to have set aside. However, the order denying his motion was not entered until after the 90 days had expired, raising some question as to whether Ark. R. Civ. P. Rule 60(b) would even have been an available means of setting aside the judgment. *See State Farm Fire and Casualty Co.* v. *Mobley*, 5 Ark. App. 293, 636 S.W.2d 299 (1982) (Mayfield, C.J., concurring). We do not need to decide whether Rule 60(b) can be used in this case, as the appellant's claim that he was denied the three-day notice required by Rule 55 constitutes sufficient grounds for setting aside the judgment under Ark. R. Civ. P. Rule 60(c)(7), which provides that a judgment may be vacated after 90 days for "unavoidable casualty or misfortune preventing the party from appearing or defending." *Magness* v. *Masonite Corp.*, 12 Ark. App. 117, 671 S.W.2d 230 (1984).

The appellant contends that the judgment should have been set aside because he did not receive the three-day notice required when an application for a default judgment is made under Rule 55. Assuming, without deciding, that the notice requirement applied here and had not been complied with, the appellant must also make a prima facie showing that he has a valid or meritorious defense to the action before he is entitled to have the judgment set aside. *Magness, supra*; Ark. R. Civ. P.

Rule 60(d). The motion itself must assert this defense. *Taggart* v. *Moore*, 8 Ark. App. 160, 650 S.W.2d 590 (1983). The only time that a valid defense need not be shown is when the judgment is void, not voidable, such as when the appellant has received no notice whatsoever, actual or constructive. *See White* v. *Ray*, 267 Ark. 83, 589 S.W.2d 28 (1979).

In this case, the appellant does allege in his reply brief that he did not receive a copy of the October orders. However, he did not raise this issue below, and the record indicates that he was present at the hearing on October 8th, that he knew of the requirements, and that the orders were sent to the persons whom the appellant indicated he was going to try to hire as his attorney, one of whom was actually hired by him as his attorney. Therefore, in order to prevail under either Rule 60(b) or 60(c), the appellant was required to show that he had a meritorious defense. A meritorious defense is

> evidence (not allegations) sufficient to justify the refusal to grant a directed verdict against the party required to show the meritorious defense. In other words, it is not necessary to prove a defense, but merely present sufficient defense evidence to justify a determination of the issue by a trier of fact.

Tucker v. *Johnson*, 275 Ark. 61, 66, 628 S.W.2d 281, 283-4 (1984). This the appellant failed to do.

The appellant's motion to set aside the order merely alleged that the appellee "is not entitled to the amount entered and the [appellant] has a justifiable and good defense to the amount owed." The appellant gave the following testimony at the hearing on his motion:

> Q. Okay, now did you have a hearing as to the amounts of money owed?
>
> A. Well, one time she said I owed her $6000.00 and another time she said I owed sixteen and then the last time she said twenty something so I don't know what she is talking about in the way of money. . . .
>
> Q. Do you owe her the $23,200.00?
>
> A. Well, she said she hadn't received anything in five

> years. Now she says she has. Her—her—her recollection of funds received is kind of like the governor of Louisiana. I mean, her memory seems to come and go at will.
>
> Q. You claim to have paid her substantial sums . . .
>
> A. Yes sir, I certainly have.

We find no substantial difference between the facts of this case and those of *Meisch* v. *Brady,* 270 Ark. 652, 606 S.W.2d 112 (Ark. App. 1980), which we held to be insufficient to constitute a prima facie showing of a valid defense.

The appellant also contends that the chancellor improperly awarded the appellee the full amount she asked for without holding a hearing as to the amount. If this were indeed the case, and if the appellant had made the requisite showing of a meritorious defense, the appellant would be entitled to have the judgment set aside. *Rice* v. *Kroeck*, 2 Ark. App. 223, 619 S.W.2d 691 (1981). Here however, not only has the appellant not presented a meritorious defense, but the order of October 30th, which the appellant is trying to have set aside, specifically states that it is "based upon oral proceedings in open Court on October 8, 1984, at which proceedings both [appellee] and [appellant] were present in person." Where there is anything in the record which would indicate that oral proof was heard and not preserved, we conclusively presume the decree is correct and affirm. *Id.* Here, the oral proceedings were not preserved by the appellant, and it was his duty to do so. Therefore, we assume that the chancellor correctly awarded the appellee the entire amount for which she prayed.

Because the appellant has failed to raise a valid defense to the contempt proceeding, we need not address his final issue. Suffice it to say that we find that the appellant received proper timely notice by mail, in accordance with Ark. R. Civ. P. Rule 5(b), and that the chancellor did not abuse his discretion in conditioning the continuance upon the filing of an appearance bond.

The appellee alleges that the appellant's abstract is deficient and in violation of the Ark. R. of the Sup. Ct. Rule 9; she therefore asks to be awarded the costs she entailed in preparing her supplemental abstract. After reviewing the record as submit-

ted and abstracted by the appellant, and not as designated, we agree that the supplemental abstract was necessary. We find that the appellee is entitled to $400.00 as attorney fees for the additional abstracting required by the appellant's failure to comply with Rule 9.

Affirmed.

CORBIN, J., agrees.

CRACRAFT, C.J., concurs.

Linda N. GARNER, Insurance Commissioner for the State of Arkansas *v.* FOUNDATION LIFE INSURANCE COMPANY OF ARKANSAS

CA 85-275 702 S.W.2d 417

Court of Appeals of Arkansas
Division II
Opinion delivered January 22, 1986
[Rehearing denied February 12, 1986.]

[redacted]

David B. Simmons, for appellant.

Hardin, Jesson & Dawson, by: *Robert T. Dawson* and *Rex M. Terry*, for appellee.

JAMES R. COOPER, Judge. This is an appeal of an order of the Circuit Court of Sebastian County, entered upon a Petition for Review of the Insurance Commissioner's decision. The Insurance Commissioner had found that the appellee, a company which handled primarily credit life insurance policies, (a) engaged in unfair claims settlement practices, by promptly paying the credit beneficiary but not the secondary beneficiary, in violation of Ark. Stat. Ann. § 66-3005(9)(b-d) (Supp. 1985), (b) violated Ark. Stat. Ann. § 66-2830(1) (Repl. 1980), by paying commissions to unlicensed agents, (c) violated Ark. Stat. Ann. § 66-3206 (Repl. 1980) and Ark. Ins. Dept. Rule and Reg. 12, § 3.3, by accepting unsigned applications for credit life policies, and (d) violated Ark. Stat. Ann. §§ 66-2605(4) (Repl. 1980), -2628(6) (Supp. 1985), and -2637(2) (Supp. 1985), by having a

larger percentage of its assets invested in common stocks, real estate, and mineral interests than allowed by law. The Commissioner fined the appellee $6,000.00 for the unfair claims settlement practices and an additional $5,000.00 for the other violations. Upon review, the trial court, citing Ark. Stat. Ann. § 5-713(g) (Supp. 1985), took additional evidence over the Commissioner's (the appellant's) objection. It held that the Commissioner's finding that the appellee engaged in unfair trade practices was not supported by substantial evidence and, while the Commissioner's findings that the appellee violated §§ 66-2605(4), -2628(6), -2637(2), -2830(1), and -3206 were supported by substantial evidence, she abused her discretion in levying an unspecified portion of the $5,000.00 fine for those violations.

The Commissioner raises four issues on appeal. She claims that the court erred in (1) permitting and considering additional evidence, (2) determining that the Commissioner's finding that the appellee engaged in unfair claims settlement practices was not supported by substantial evidence, (3) determining that the Commissioner abused her discretion in fining the appellee for the payment of commissions to unlicensed agents, and (4) determining that the Commissioner abused her discretion in fining the appellee for its over-investment in certain types of assets.

The State Insurance Commissioner, when she acts as a hearing officer, is governed by the Administrative Procedure Act. *Woodyard* v. *Arkansas Diversified Insurance Co.*, 268 Ark. 94, 594 S.W.2d 13 (1980). The rules regarding judicial review of decisions under this Act are clear. As we said in *Carder* v. *Hemstock*, 5 Ark. App. 115, 623 S.W.2d 384 (1980),

> [t]he rules governing judicial review of decisions of administrative agencies are settled and are the same for both the circuit and appellate court. This review is limited in scope and such decisions will be upheld if supported by substantial evidence and not arbitrary, capricious or characterized as an abuse of discretion. . . .
>
> The substantial evidence rule applicable to these cases requires a review of the entire record and not merely that evidence which supports the Board's decision. Substantial evidence is more than a mere scintilla and means

> such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . Although hearsay evidence is admissible in hearings before administrative bodies, hearsay alone is not substantial evidence. . . . On numerous occasions in recent years our court has reaffirmed its earlier declarations that the questions of credibility of witnesses and weight to be accorded evidence presented to a board is the prerogative of the board and not of the reviewing court, and that courts must rely on their findings because they are better equipped by specialization, insight and experience in matters referred to them. The reviewing court may not displace the Board's choice between two fairly conflicting views even though the court might have made a different choice had the matter been before it *de novo*. The reviewing court may not set aside the board's decision unless it cannot conscientiously find from a review of the entire record that the evidence supporting the decision is substantial. . . .
>
> The question of whether a board's action is arbitrary and capricious is a narrow one, more restricted than the substantial evidence test. To set aside an agency decision on that basis, it must be found to have been willful and unreasoning and in disregard of the facts and circumstances of the case. This standard applies only where the board's action was unreasoned; its decision was not supported by any reasonable basis, and was made in willful disregard of the facts and circumstances.

5 Ark. App. at 118-19 (citations omitted).

Here, the Commissioner found that the appellee had a practice of paying the credit beneficiary promptly, but not the secondary beneficiary, in violation of § 66-3005(9)(b-d). She based her decision upon the presentation of three specific cases, found in a sample of fifty of the 216 cases handled by the appellee. (There was testimony that the number of cases in the sample was picked in accordance with the National Association of Insurance Commissioners' (NAIC) guidelines for samples to use in Market Conduct Examinations.) The Commissioner noted that the appellee's vice-president admitted that it owed the beneficiary in two of those three cases and did not know about the other. He also

testified that this was company policy in cases of questionable claims. The Commissioner based her decision not only on the above testimony, but also on the fact that this very same practice had been called to the appellee's attention in 1976, without objection, and that this was a matter of public record. No evidence was presented before the Commissioner to contradict the inference that, based on the sample, it was likely more cases of this type existed. While we may not have decided this issue in the same manner, we cannot say that this decision was not supported by substantial evidence.

The finding of the court that the Commissioner abused her discretion in fining the appellee for its continued over-investment in certain assets in violation §§ 66-2605(4), -2628(6), and -2637(2) is likewise error. While the Commissioner's failure to provide a hearing on the denial of a request for an extension of time would have been arbitrary and an abuse of discretion *if* the appellee had asked for a hearing, there is no showing or allegation in the record that such a hearing was requested, either before or after the denial. In light of this fact, and of the fact that the appellee had still not brought itself into compliance with the statutory requirements nearly a year after the divestiture was to have been completed, we cannot say that the Commissioner abused her discretion in fining the appellee for its continued noncompliance with the law.

The court found that there was substantial evidence to support the Commissioner's decision that the appellee violated § 66-2830(1), but found that the unspecified portion of the fine relating to this violation was an abuse of discretion, because (1) the appellee was not given notice of the Market Conduct Examination, though none was required; (2) the appellee was not given an opportunity to conference with the Insurance Department prior to the examination, an opportunity given other companies; and (3) the examiners did not discuss the Department's Bulletin 8-83 with the appellee. (This Bulletin indicated that previous Market Conduct Examinations found that possible confusion regarding licensing requirements existed.) The court further pointed out that it felt that fairness and reasonableness would appear to require that notice and a conference, as had been given other companies, be given to the appellee, as then it would have a chance to correct the deficiencies prior to the examination.

The appellant points out the court's first two grounds are based on its consideration of evidence presented before it. The appellant did not abstract this testimony, contending that it was wrongly admitted. These two reasons go towards alleged procedural irregularities in the administration of the Market Conduct Examination, the results of which formed the basis of the Commissioner's finding on this matter, and are not matters of record before the Commissioner. Therefore, the court could take evidence about these matters under § 5-713(g), as they go towards alleged irregularities in procedure not in the record and could support a showing of discriminatory treatment of the appellee. Because the appellant has failed to abstract the evidence which would be relevant to these reasons, we have no way of determining whether the evidence presented indicated that, had these procedures taken place, the outcome of the examination or of the hearing would have been different. However, we reverse on this point for the reasons stated below.

The appellant's final contention is that the court erred in taking additional evidence. The appellant declined to abstract this evidence, contending that it was unnecessary to do so as it was all improperly admitted. However, as stated above, the court is allowed to take additional evidence as to procedural irregularities that do not appear in the record. The testimony taken before the court should have been abstracted, so that we could determine whether the court's decision was based on such properly admitted evidence. *See* Ark. R. Sup. Ct. 9(d). While normally such a failure to abstract would be grounds for affirmance, in this case it is apparent upon a review of the court's decision that it considered improperly admitted evidence. For example, the court referred to the fact that the applications examined for signatures were from only five of the 160 banks taking applications, that only five of the 160 banks did not routinely require signatures, and that two of those five were part of the five banks examined by the Department — all matters which, absent any allegation that this was done purposely so as to discriminate against the appellee, are not related to procedural irregularities. This evidence was not, although it could have been, presented to the Commissioner. Therefore, we agree with the appellant that at least some of the evidence taken before the court was improperly admitted, although, because the appellant failed

to properly abstract the record, we cannot tell how much was so admitted. Accordingly, we reverse and remand points three (concerning the failure to meet licensing requirements) and four (concerning the failure to obtain properly signed applications) of the court's decision for reconsideration, directing that the court consider only that evidence related to alleged procedural irregularities, pursuant to Ark. Stat. Ann. § 5-713(g).

We reverse and remand the court's order insofar as it concerns the unfair claims settlement practices and the over-investment practices of the appellee, directing the court to reinstate the Commissioner's order as to these matters. We reverse and remand the remainder of the court's order, because of improperly admitted evidence, for reconsideration, pursuant to the limitations set forth in the previous paragraph.

Reversed and remanded.

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

SANYO MANUFACTURING CORPORATION *v.* Dewey STILES, Director of Labor, et al.

E 84-163 702 S.W.2d 421

Court of Appeals of Arkansas
Division II
Opinion delivered January 22, 1986

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

Allan Pruitt and *George R. Wise, Jr.*, for appellee Dewey Stiles, Director of Labor.

Youngdahl, Youngdahl & Wright, P.A., by: *Shereen Arent*, for appellees.

LAWSON CLONINGER, Judge. This is an appeal by the employer, Sanyo Manufacturing, from a determination of the Arkansas Board of Review that thirteen claimants are eligible for unemployment benefits. All of the thirteen claimants were placed on temporary layoff by appellant when they were medically restricted from performing their duties at work. All of the claimants' restrictions were for specific duties, and they were physically able to perform other duties. The claimants testified that they hoped to be recalled by Sanyo when jobs that they were able to perform became available. Appellant argues, first, that since appellees planned to return to work at Sanyo, they were not available for work as required by Ark. Stat. Ann. § 81-1105(c) (Repl. 1976). Appellant also argues that the Arkansas Appeal Tribunal erred by not giving it the right to cross-examine the doctors who wrote the medical restrictions for the claimants. We disagree with appellant's arguments and affirm.

In its first argument, appellant relies on the case of *Loftin* v. *Daniels*, 268 Ark. 611, 594 S.W.2d 578 (Ark. App. 1980). In that case we held that in a situation where a claimant and his employer hold a mutual expectation that the claimant will return to his job, then he is not eligible for unemployment benefits. Appellant argues that a mutual expectation existed here since all of the claimants testified that they did not intend to sever their relationships with appellant, since the claimants' seniority continued to accrue and medical insurance was paid by appellant while they were on layoff, and since all of the claimants had the right to back pay if appellant wrongfully neglected to call them back.

In *Loftin, supra*, the claimants were employees of a Headstart Program and were laid off without pay for the summer recess. A tie of expectation existed because the employees were subject to being called to attend workshops during the summer recess, the employer assumed the claimants were still a part of the staff, and the claimants and the employer expected the employees to return to work on a specific date. This court later decided *Haywood* v. *Everett*, 5 Ark. App. 140, 633 S.W.2d 395 (1982). That case also involved employees of a Headstart Program who

had been laid off for the summer. However, unlike the employees in *Loftin*, these claimants were not expected to attend any summer workshops and the employer refused to say whether the claimants would be able to return at the end of the summer recess. In *Haywood*, we said that the claimants had no more than a hope of employment, and stated that the ruling in *Loftin* should be confined to the facts of that case.

Like the employees in *Haywood*, the claimants in this case had no more than a hope of future employment with appellant. There is no evidence in the record that appellant informed the claimants of when, or if ever, they would be called back to work. All of the claimants testified that they expected or hoped to be called back to work by appellant, but that they had also looked for other work while laid off.

Statutes are to be construed with reference to the public policy which they are designed to accomplish. The public policy of the Employment Security Act, Ark. Stat. Ann. § 81-1101 *et seq.* (Repl. 1976) is to set aside reserves to be used for the benefit of persons who are unemployed through no fault of their own, *Feagin* v. *Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983). There is no indication in the record that these claimants were out of work due to any fault on their part. The evidence supports a finding that they became physically unable to perform their assigned tasks, and that appellant laid them off because there were no jobs available at the time within their abilities.

Appellant next argues that it was denied due process since it did not have an opportunity to confront and cross-examine adverse witnesses at the evidentiary hearings. Appellant argues that since the doctors who signed the work restrictions were not at the hearings, the statements were hearsay and they were denied an opportunity to confront them and cross-examine them.

There are two requirements which must be met before the admission of hearsay evidence will not violate a party'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, *Swan* v. *Stiles*, 16 Ark. App. 27, 696 S.W.2d 765 (1985). In this case appellant knew what

evidence was being considered because it introduced some of the statements itself at the first hearing before the Tribunal. Furthermore, these are the same statements that appellant used when it placed the claimants on restricted layoff and they were placed in the company's records. At the second hearing before the Tribunal appellant objected to the statements being introduced into evidence since they were hearsay; however, appellant did not request either a continuance or a remand in order to subpoena the doctors. *Swan* v. *Stiles, supra.*

At the hearings, appellant introduced several charts it had drawn up reflecting the increased use of medical restrictions by its employees. Appellant argues that these statistics are evidence of the fact that employees are requesting restrictions in order to avoid undesirable work assignments. We fail to see how this is relevant to the issue under consideration. Appellant urges that the doctor's testimony would have revealed that the claimants' medical restrictions were obtained for the purpose of avoiding less desirable work assignments. Appellant, at the second hearings, had full knowledge of what evidence was being considered and had an opportunity to subpoena witnesses for cross-examination or request a continuance. It did neither.

Affirmed.

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

Jimmy WRIGHT *v.* STATE of Arkansas

CA CR 85-110 702 S.W.2d 811

Court of Appeals of Arkansas
Division II
Opinion delivered January 29, 1986

J. F. Atkinson, Jr., for appellant.

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

GEORGE K. CRACRAFT, Chief Judge. Jimmy Wright appeals his conviction of driving while intoxicated, a felony for which he was sentenced to three years in the Department of Correction and fined $3,000. We find no error.

The appellant first contends that the trial court erred in not granting his motion to suppress evidence of a breath analysis which he argued was administered pursuant to an unlawful arrest. We find no merit in this contention. The deputy sheriff, Lloyd Schirmer, testified that he observed the appellant driving a vehicle into a parking lot. When the appellant got out of the vehicle it was apparent that he was under the influence of alcohol. Some difficulty arose between the appellant and the other occupants of the vehicle which Schirmer believed might result in a public disturbance. He stated that he would have arrested the appellant but did not want to involve a deputy who was with him because he had not fully recovered from an operation and was on limited duty. He therefore called for assistance.

A patrolman of the Fort Smith Police Department responded to the call. He had not seen appellant drive the vehicle but was told by the deputy sheriff what he had observed. The patrolman testified that it was obvious to him that the appellant was intoxicated and, based on the additional information furnished by Schirmer, arrested him for driving a vehicle while intoxicated.

A.R. Crim. P. Rule 4.1(a)(ii)(C) provides that an officer may make an arrest without a warrant if he has "reasonable cause to believe that the person has committed . . . driving a vehicle while under the influence of any intoxicating liquor or drugs."

Reasonable cause exists where facts and circumstances within the arresting officer's knowledge, and of which he has reasonably trustworthy information, are sufficient within themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested. *Gaylor* v. *State*, 284 Ark. 215, 681 S.W.2d 348 (1984). Here the officer had personal observations sufficient to warrant

his belief that the appellant was intoxicated. He had reasonably trustworthy information from a deputy sheriff that he had observed the appellant operating a motor vehicle in that condition a few minutes earlier. Under the circumstances of this case we cannot conclude that the arresting officer did not have reasonable cause for the arrest without a warrant.

Appellant next contends that the trial court committed prejudicial error in permitting an amendment to the information on the date of trial. We have not been favored with an abstract of the original information, the proffered amendment, or the ruling of the court on appellant's objection. Rules of the Supreme Court and Court of Appeals, Rule 9(d), imposes on the appellant the duty of furnishing the court with such an abridgment of the record as will enable the court to understand the issues presented on appeal. Without an abstract of the proceedings on the motion to amend the information we cannot tell if there was error or, if so, whether it was prejudicial. The court is not required to explore the transcript in search of error and will not do so. References to the transcript contained in argument is not a substitute for a proper record. *Kitchen* v. *State*, 271 Ark. 1, 607 S.W.2d 345 (1980).

The appellant next contends that the trial court erred in refusing to permit him to argue the issue of a suspended sentence to the jury. Although in most instances the jury may recommend mercy or the imposition of a suspended sentence, its recommendation is advisory only and not binding on the trial court. The trial court alone has the authority in a proper case to impose a suspended sentence. *James* v. *State*, 11 Ark. App. 1, 665 S.W.2d 883 (1984); *Clayton* v. *State*, 247 Ark. 643, 447 S.W.2d 319 (1969). Under the Omnibus DWI Act, however, the sentences and fines are mandatory and even the trial court lacks authority to reduce or suspend them. *Lovell* v. *State*, 283 Ark. 425, 681 S.W.2d 395 (1984). We find no error in the trial court's ruling.

The appellant finally contends that the court erred in denying his request to permit the jury to decide whether he had been represented by counsel on each of his prior DWI convictions. During the trial the court considered oral and documentary evidence for the purpose of determining whether the appellant had been represented by counsel on each of the prior convictions

and whether the documentary evidence was otherwise admissible. The trial court found that the appellant had been represented by counsel on all four prior convictions and the certified copies of those convictions were admissible. The appellant insisted that the trial court erred in not submitting the issue of whether he had been represented by counsel to the jury. Prior convictions for the same offense is a material element of felony DWI and must be proved to the satisfaction of the jury. *Peters* v. *State*, 286 Ark. 421, 692 S.W.2d 243 (1985). The court did submit that evidence to the jury for their consideration in reaching their verdict. We do not agree that the determination of whether the evidence of those convictions was admissible was a question for the jury. Preliminary questions as to the admissibility of evidence are to be determined by the trial court. Unif. R. Evid. 104(a). In *Peters* the court stated that trials for DWI, felony, should be bifurcated and that after a defendant is found guilty of the underlying DWI charge the jury should hear evidence of previous convictions. The court stated that the trial judge will still determine whether the accused was represented by, or entered a valid waiver of, counsel in the previous convictions alleged and will exclude evidence of any conviction not meeting the counsel requirements.

We conclude that the trial court properly decided the question of admissibility of the documentary evidence of prior convictions. In this case the proceedings were not bifurcated as set forth in *Peters*. No objection was made to the absence of bifurcated proceedings and that issue will not be considered for the first time on appeal. *Wing* v. *State*, 14 Ark. App. 190, 686 S.W.2d 452 (1985); *Young* v. *State*, 14 Ark. App. 122, 685 S.W.2d 823 (1985).

Affirmed.

COOPER and CLONINGER, JJ., agree.

Carroll Dee MALLETT *v.* STATE of Arkansas

CA CR 85-137 702 S.W.2d 814

Court of Appeals of Arkansas
Opinion delivered January 29, 1986

William R. Simpson, Jr., 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.

DONALD L. CORBIN, Judge. Appellant, Carroll Dee Mallett, was charged and convicted by a Pulaski County jury of first degree sexual abuse and sentenced to a term of eight years in the Arkansas Department of Correction. The only issue raised by this appeal is whether the trial court erred in refusing to instruct the jury on the lesser included offense of attempted sexual abuse in the first degree. We affirm.

The record in the case at bar reflects that appellant requested and proffered an instruction on attempted sexual abuse first degree, which the trial court refused. Appellant's argument below and now on appeal is that he was only guilty of an attempt to commit sexual abuse in the first degree because he touched the victim's breast through her sleepwear. The basis of the trial court's ruling on this question was that attempt was inappropriate and that under the evidence the jury could not reach a verdict on any other offense than first degree sexual abuse.

A person commits sexual abuse in the first degree if being eighteen years or older, he engages in sexual contact with a person not his spouse who is less than fourteen years old. Ark. Stat. Ann. § 41-1808(1)(c) (Repl. 1977). "Sexual contact" means any act of sexual gratification involving the touching of the sex organs or anus of a person, or the breast of a female. Ark. Stat. Ann. § 41-1801(8) (Repl. 1977).

Appellant's proffered instruction provided as follows:

> A person commits the offense of Sexual Abuse, First Degree, if:
>
> First: That the accused engaged in an act of sexual contact with another person; and,
>
> Second: That the accused was 18 years old or older; and,
>
> Third: That the other person was 13 years old or younger; and,
>
> Fourth: That the other person was not the spouse of the accused.

To sustain the charge of Attempted Sexual Abuse, First degree the State must prove the following things beyond a reasonable doubt:

First: That Carroll Mallett intended to commit the offense of Attempted Sexual Abuse, First Degree;

Second: That Carroll Mallett purposely engaged in conduct that was a substantial step in a course of conduct intended to culminate in the commission of Attempted Sexual Abuse, First Degree; and,

Third: That Carroll Mallett's Conduct was strongly corroborative of the criminal purpose.

"Sexual contact" means any act of sexual gratification involving the touching of the sex organs or anus of a person, or the breast of a female.

"Purposely." A person acts purposely with respect to his conduct when it is his conscious object to engage in the conduct.

The victim in this instant case testified that she spent the night of November 16, 1984, in the home of her aunt, the wife of appellant. She stated that she slept in her cousin's room on the side of the bed by the door. She wore a nightgown which came to her thighs. She testified that her uncle, appellant Mallett, entered the room twice during the night. The second time appellant entered her bedroom "he got on his knees and he said something like he was going to hit me. He got on his knees and put his hand on my breast . . ." The victim also stated that appellant was squeezing her breast and his hand was over her nightgown.

It is reversible error to refuse to give a correct instruction on a lesser included offense and its punishment when there is testimony furnishing a reasonable basis on which the accused may be found guilty of the lesser offense. *Glover* v. *State*, 273 Ark. 376, 619 S.W.2d 629 (1981). Where there is no evidence tending to disprove one of the elements of the larger offense the court is not required to instruct on the lesser one because absent such evidence there is no reasonable basis for finding an accused guilty of the lesser offense. In this type of case the jury must find the defendant guilty either of the offense

charged or nothing. *Fisk* v. *State*, 5 Ark. App. 5, 631 S.W.2d 626 (1982). Where, however, there is the slightest evidence tending to disprove one of the elements of the larger offense, it is error to refuse to give an instruction on the lesser included one. *Brewer* v. *State*, 271 Ark. 254, 608 S.W.2d 363 (1980).

Ark. Stat. Ann. § 41-701 (Repl. 1977), concerning the inchoate offense of criminal attempt, provides:

> (1) A person attempts to commit an offense if he:
>
> (a) purposely engages in conduct that would constitute an offense if the attendant circumstances were as he believes them to be; or
>
> (b) purposely engages in conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of an offense whether or not the attendant circumstances are as he believes them to be.
>
> (2) When causing a particular result is an element of the offense, a person commits the offense of criminal attempt if, acting with the kind of culpability otherwise required for the commission of the offense, he purposely engages in conduct that constitutes a substantial step in a course of conduct intended or known to cause such a result.
>
> (3) Conduct is not a substantial step under this section unless it is strongly corroborative of the person's criminal purpose.

The Committee Commentary to § 41-701 states that sections (1) and (2) are framed so as to apply only to purposeful conduct, accompanied in subsections 1 (a) and (b) by a belief in attendant circumstances and in (2) by a knowing culpable mental state regarding a result. It is noted that these sections have overlapping coverage and are not set out in alternative form solely to pick up distinct kinds of conduct. Subsection 1 (a) is directed at the completed course of conduct while subsections 1 (b) and (2) are primarily directed at situations where substantial steps not amounting to completed courses of conduct have been taken, but have not culminated in the commission of the object offense. Under subsection (2), knowledge regarding a result will generate liability when coupled with purposeful conduct.

It appears from the wording of appellant's proffered instruction previously quoted that he utilized the language from subsection (2) of § 41-701. He attempted to submit this instruction to the jury on the basis that he touched the victim through her nightgown and this conduct amounted to criminal attempt. We agree with the trial court that appellant's conduct did not constitute criminal attempt to commit sexual abuse in the first degree and that the proffered instruction was inappropriate. As previously noted from the Committee Commentary following § 41-701, subsection (2) is primarily directed to situations where substantial steps *not* amounting to completed courses of conduct have been taken, but have *not* culminated in the commission of the object offense. The evidence clearly established that appellant touched the breast of his victim and the trial court did not err in refusing appellant's proffered instruction.

In *Walters* v. *State*, 283 Ark. 243, 675 S.W.2d 364 (1984), the appellant argued in part that his conviction of kidnapping should be reversed because the trial court improperly refused to instruct the jury on the lesser included offense of attempted aggravated robbery. The Arkansas Supreme Court found no merit to this argument for two reasons. First, he did not ask for an instruction on what may have been the lesser included offense of aggravated robbery, but attempted aggravated robbery. Secondly, the Court found that the jury could not have returned a verdict of guilt to attempted aggravated robbery, only kidnapping. The evidence there established that the appellant stuck a knife to the victim's stomach, held the back of her neck and ordered her where to drive. The Court noted that appellant's conduct at that point went beyond any attempt and that his conduct constituted the offense itself, if anything.

Appellant relies upon the Arkansas Supreme Court's decision in *Kramer* v. *State*, 283 Ark. 36, 670 S.W.2d 445 (1984), as controlling. The appellant there was tried and convicted of sexual abuse, first degree, and argued on appeal that the evidence was insufficient to support his conviction. The Supreme Court reversed, holding that the touching of the buttocks was not prohibited sexual conduct as defined in Ark. Stat. Ann. § 41-1801(8). Justice Purtle stated in his concurrence that "I do not understand how any sound thinking person could say the touching of the buttock by a hand through the clothing is expressly

included in the foregoing statute [Ark. Stat. Ann. § 41-1801(8)]." *Id.* at 38, 670 S.W.2d at 446. This is the only reference made to the victim's clothing and the majority in *Kramer* did not reverse the conviction on that basis. Thus, we believe appellant's reliance on *Kramer* as dispositive of the issue here is misplaced.

In conclusion, we believe that appellant's argument is without merit as his conduct did not fit within the definition of criminal attempt and under the evidence the jury could only have reached a verdict of first degree sexual abuse.

Affirmed.

GLAZE and MAYFIELD, JJ., agree.

Larry Dean HUGHES *v.* STATE of Arkansas

CA CR 85-151 702 S.W.2d 817

Court of Appeals of Arkansas
Division I
Opinion delivered January 29, 1986
[Supplemental Opinion on Denial of Rehearing March 26, 1986.]

Young & Finley, by: *Dale W. Finley*, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant was convicted of operating a motor vehicle while under the influence of alcohol. He was arrested after his automobile left the road and went through a chain link fence. Officers on the scene observed that appellant's eyes were red and watery, his face was flushed, he looked sleepy, was unsteady on his feet, and had an odor of alcohol about him. Appellant was taken to the Pope County Detention Center where a breathalyzer test was performed which indicated a blood alcohol content of .11%. He was tried by a jury, found guilty of a second offense of DWI, sentenced to thirty (30) days in jail, assessed a fine and costs totaling $1,000 and had his driver's license suspended for one year.

Appellant first argues that the court erred in admitting the results of the breathalyzer test into evidence since Officer

Dilbeck, who calibrated the machine, testified that he did not know whether the test solution he used had been obtained from the Arkansas Department of Health or a private pharmaceutical company; did not know when the solution was purchased or how long it had been in the Pope County sheriff's office; and did not know whose possession the solution had been in before the breathalyzer test, who had access to the bottle after the seal was broken, or how many calibrations had been made using the same solution.

We do not think these matters make the test results inadmissible. The officer testified that the solution was supposed to be a .10% solution—not off more than .01%—that it tested .09% on the breathalyzer and that this established the reliability of both the testing solution and the machine. The appellant attempts to analogize the rule requiring that a chain of custody be established in blood-testing cases to the present case, but the evidence reveals that the situation here is entirely different. The content of a blood sample is obviously not known before the test, while the alcohol content of a calibrating solution is known before the test. So, when the calibrating solution is tested with results as expected, this tends to prove the integrity of the solution and the machine. Officer Dilbeck was certified by the Arkansas Department of Health as an operator of the breathalyzer and we think his testimony about the alcoholic content of the solution used in the calibration of the machine was admissible. In *Armstrong* v. *State*, 5 Ark. App. 96, 633 S.W.2d 51 (1982), it was argued that since there was no evidence that the substance dispensed by a pharmacist had been chemically analyzed, the state had failed to prove the appellant had fraudulently obtained a controlled substance. After reviewing some cases, we said:

> In the instant case we have the testimony of a licensed pharmacist who testified that he filled the prescription bottle from his larger container of Tussionex. Obviously he relied upon the representations of the supplier of the larger container in giving his opinion, but this is in keeping with *Milburn* v. *State*, 262 Ark. 267, 555 S.W.2d 946 (1977), and is authorized by Uniform Evidence Rule 703.

Appellant cites *Cossey* v. *State*, 267 Ark. 679, 590 S.W.2d 60 (Ark. App. 1979), as requiring strict compliance with health

department regulations regarding calibration of the breathalyzer before the results will be admissible at trial. In that case, although the regulations required daily calibration of the machine, the evidence did not show that the instrument had been calibrated at all between May 10 and May 15. Under those circumstances, it was held that compliance with the regulations was not sufficiently substantial to permit the jury to be instructed on the presumption of intoxication based upon a test performed on May 13. In the instant case, however, the instrument was correctly calibrated with a solution of known alcohol content on the same day appellant was tested.

Appellant's next contention is that the court erred in permitting testimony concerning practices not contained in the health department regulations. Here appellant is arguing that Officer Dilbeck was allowed to testify that he had been told at a health department training session that it was permissible to purchase the calibrating solution from either the department or from private suppliers. Appellant contends this was impermissible hearsay evidence. First, we think the testimony was not hearsay because it was not offered for the truth of the matter asserted but rather to explain why Officer Dilbeck thought it was proper to use a privately obtained solution. *Hall* v. *State*, 286 Ark. 52, 689 S.W.2d 524 (1985). In the second place, Arkansas Department of Health, *Regulations for Blood Alcohol Testing*, at 26 & 28 (2nd revision 1984), require that approved calibrating devices and standard solutions be used, but do not specify where they are to be obtained. The trial court could properly take judicial notice of these regulations. *Johnson* v. *State*, 6 Ark. App. 78, 638 S.W.2d 686 (1982).

The appellant's third argument is that Officer Dilbeck was erroneously permitted to testify to the contents of the health department regulations. This objection is based on what has been called the "best evidence" or "original writing" rule. *See* J. Reynolds, *Arkansas Uniform Rules of Evidence*, 207 (1983). Since the officer testified correctly as to what the regulations provide, appellant has not demonstrated any prejudice sustained by him and we do not reverse on the basis of nonprejudicial error. *Nolen* v. *State*, 278 Ark. 17, 643 S.W.2d 257 (1982). Moreover, Unif. R. Evid. 1005 provides that if a copy of a public record cannot be obtained by the exercise of reasonable diligence, other

evidence of its contents may be admitted.

Finally, although appellant contends he was convicted solely on the basis of the result of the breathalyzer test, we note that even without that evidence there was substantial evidence to sustain his conviction. Appellant admitted to the officers on the accident scene that he had been driving the car. In addition, two police officers testified about the appellant's appearance and condition, as detailed in the opening paragraph of this opinion, and testified that he was intoxicated. When viewed in the light most favorable to the state, as we must on appeal, we find that the officers' testimony constitutes substantial evidence to support the jury's verdict.

Affirmed.

CORBIN and GLAZE, JJ., agree.

Supplemental Opinion on Denial of Rehearing
March 26, 1986

705 S.W.2d 455

MELVIN MAYFIELD, Judge. A petition for rehearing in this case calls our attention to certain factual errors in our original opinion; however, we find these errors do not change the result of our decision.

The record in this case shows that the type of instrument used to test appellant's breath was an Alco-Analyzer Gas Chromatograph, Model 1000. In our original opinion, we said Arkansas Department of Health, *Regulations for Blood Alcohol Testing*, at 26 & 28 (2nd revision 1984), "require that approved calibrating devices and standard solutions be used, but do not specify where they are to be obtained." Appellant's petition for rehearing states that we referred to the wrong pages. While it is true that we should have referred to page 29 instead of 28, we actually made an even greater error.

Although the case of *Johnson* v. *State*, 6 Ark. App. 78, 638 S.W.2d 686 (1982), cited in our original opinion, makes it clear that both trial and appellate courts may take judicial notice of the regulations of state boards and agencies, we took judicial notice of regulations which became effective on April 15, 1984, when the offense in this case occurred on November 19, 1983. The proper regulations at that time were those which became effective on April 28, 1970, as revised effective October 28, 1971. Those regulations, promulgated under authority of Section 2(c) of Act 106 of 1969, *see* Ark. Stat. Ann. § 75-1046(c)(Repl. 1979), contained the following provisions:

PART E. CALIBRATION

AP-340 *Breath Testing Instruments.* Instruments designed to test direct breath samples shall be calibrated no less frequently than once each day the instrument is in operation by a Senior Operator or Operator Supervisor, using appropriate solutions of ethyl alcohol, and using methods and techniques for calibration recommended by the manufacturer of the calibration device as approved by the Department.

AP-341 *Other Methods.* Procedures other than direct breath tests shall be calibrated with known concentrations of ethyl alcohol at least once each day that tests are run. This calibration shall be performed by an Operator Supervisor, Laboratory Director or under a Laboratory Director's general supervision.

AP-342 *Other Calibration Solutions.* Gas Chromatograph calibration may be accomplished by addition of an appropriate internal standard.

Although we cited the wrong regulations in our original opinion, we do not think this affects the result of our decision. Neither set of regulations provides, as contended by appellant in his original brief, that the calibrating solution must be obtained from the health department. Now, in his petition for rehearing, the appellant complains that he was unable to find out whether the calibrating solution was "standard" since the officer who calibrated the machine did not know where the solution came from. However, there was evidence that the officer was trained and certified by the health department, that the sheriff's office purchased small containers labeled for use in mixing a .10% calibrating solution, that the proper amount of distilled water was mixed and heated to a certain temperature, and that this solution tested .09% on the machine. The officer said this established a proper test for use of the solution for the purpose of calibrating the machine. Substantial compliance with the health department regulations is all that is required. *Sparrow* v. *State*, 284 Ark. 396, 398, 683 S.W.2d 218 (1985). We think the test results were properly admitted into evidence.

The appellant's petition for rehearing also points out that this case was submitted to the jury only on the question of whether he was in physical control of a motor vehicle while his blood alcohol content was .10% or more. From the briefs and abstract, we understood appellant was convicted of driving while intoxicated. However, the Arkansas Supreme Court has recently held that Ark. Stat. Ann. § 75-2503 (Supp. 1985) provides the same penalty for either conduct and that the "two conditions are simply different ways of proving a single violation." *See Wilson* v. *State*, 285 Ark. 257, 685 S.W.2d 811 (1985), and *Yacono* v.

State, 285 Ark. 130, 685 S.W.2d 500 (1985). Thus, in either event, the conviction appealed from is supported by substantial evidence.

CORBIN and GLAZE, JJ., agree.

Virginia F. ALLEN *v.* James Edwin ALLEN

CA 85-197 702 S.W.2d 819

Court of Appeals of Arkansas
Division I
Opinion delivered January 29, 1986

Bob Scott, for appellant.

Rick Sellars, for appellee.

TOM GLAZE, Judge. Virginia F. Allen appeals from a decree of the Pulaski County Chancery Court awarding custody, child support, attorneys' fees and disposing of marital property. Appellant contends the court erred in failing to (1) divide the marital property according to Ark. Stat. Ann. § 34-1214 (Supp. 1985), (2) award alimony and (3) award reasonable attorney's fees to her present counsel.

The parties were married on July 24, 1966, and separated on or about August 19, 1977. Appellant filed for divorce on August 22, 1977, and later filed an amended complaint seeking separate maintenance. On November 22, 1977, an order was entered, *nunc pro tunc* to September 20, 1977, granting appellant custody of the parties' minor children, support, and use and possession of the marital home. Appellee answered and counterclaimed for divorce on December 5, 1977, and on August 2, 1984, nearly seven years later, a decree was entered granting appellant a divorce, but providing that all prior orders would remain in effect until a final determination of property rights. On February 27, 1985, a decree was entered awarding custody, child support, possession of the marital residence, and attorneys' fees to appellant. Appellant appeals from the February 27th decree.

In June 1967, Albro, Inc. (Albro) was incorporated, with appellee, appellee's sister, and Vernon Brown's wife, holding one share of stock each. At the same time, Vernon Brown and two other individuals set up the Flaming Arrow Supper Club, Inc. (Flaming Arrow), which was organized as a nonprofit corporation, whose sole purpose was to provide social, cultural, and recreational facilities for its members. Appellee testified that Albro was established to buy the whiskey and other inventory for the Flaming Arrow. In September 1968, appellee bought out the Browns' interests in the Flaming Arrow and Albro, and in 1973, he sold the assets of Albro to the Flaming Arrow for $12,129.79. Appellee was president of the Flaming Arrow until he was charged with gambling violations in 1975. Appellant then served as president until the parties' separation, at which time appellee's daughter by a previous marriage replaced appellant as president. After appellee was released from federal prison, he was employed as management consultant to the Flaming Arrow.

In its decree of February 27, 1985, the court ordered

appellee to pay, in lieu of alimony, the principal, taxes and insurance on the marital home until the minor child is eighteen years old, at which time the house is to be sold and the proceeds divided equally between the parties. The court awarded attorneys' fees of $1,100.00 to appellant's previous attorney and $300.00 to her present attorney.

On appeal, appellant contends the court erred because it failed to divide the marital property according to Ark. Stat. Ann. § 34-1214 (Supp. 1985). Specifically, she argues that she should have been awarded an interest in (1) the Flaming Arrow (2) a $29,738.66 note due appellee from the Flaming Arrow, and (3) the $6,379.00 remaining due on a note from the Flaming Arrow to Albro—a company in which appellee has an ownership interest. After noting she was awarded no interest in the two notes, she further argues that the chancellor gave no basis or reasons for the unequal distribution of marital property as is required by § 34-1214(A)(1) (Supp. 1985). Because we find merit in appellant's contentions regarding the two notes, we reverse and remand for further proceedings.

Appellant first argues that the nonprofit status of the Flaming Arrow should have been disregarded by the trial court and that she should have been given her marital interest in that business. While appellant correctly points to a number of instances when appellee failed to comply with the state statutes covering nonprofit corporations, and noting appellee had withdrawn funds from the Flaming Arrow seemingly at will, it is undisputed that the Flaming Arrow was established as a nonprofit corporation for a legitimate purpose—a supper club where mixed drinks were served. Appellee testified that the Flaming Arrow was comprised of 1,100 members who owned the business. Although appellant notes the books of the Flaming Arrow reflect the issuance of $300.00 in capital stock, appellee explained this entry as a reference to stock that must have been carried over from the Flaming Arrow's purchase of Albro in 1973. We believe the evidence sufficiently supports the conclusion that the Flaming Arrow is a nonprofit organization in which neither appellee nor appellant was entitled to an awardable property interest.

Regarding appellant's argument that she is entitled to an interest in the notes due Albro and appellee from the Flaming

Arrow, appellee contends that, at most, appellant is entitled only to that portion of the notes due prior to their separation and an order entered by the court on November 22, 1977. In support of this contention, appellee relies on Act 705 of 1979, compiled as Ark. Stat. Ann. § 34-1214(B)(3) (Supp. 1979). This Act excluded from marital property any property acquired by a spouse after a decree of legal separation.[1] We cannot agree.

The November 22, 1977, order was a temporary one, entered pursuant to Ark. Stat. Ann. § 34-1210 (Repl. 1962). As such, that order did not deal with or effect the distribution of the parties' properties. Instead, the parties' division of marital property, which occurred by court decree in February 1985, was governed by the statute in effect on the date the divorce was granted, August 2, 1984. *See Chrestman* v. *Chrestman*, 4 Ark. App. 281, 630 S.W.2d 60 (1982). The statute in force and effect on that date was Ark. Stat. Ann. § 34-1214 (Supp. 1985), which provides that all marital property shall be distributed one-half to each party unless the court finds such a division inequitable after giving consideration to nine specified factors. When the property is not divided equally between the parties, the court is required to state its basis and reasoning.

Here, the trial court failed to award appellant her interest in the two notes which appellee owned or in which he had an ownership interest. She clearly had a right to her marital interest in those notes, or the trial court should have given its basis and reasons for not having awarded her one-half interest.

While ordinarily we would on *de novo* review decide this matter rather than remand it for further proceedings, the appellant raises issues involving alimony and attorney's fees as well. In addition, the record reflects various properties, but the

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[1] Even if appellee had correctly characterized the court's November 22, 1977, order as a decree of legal separation, the law does not seem to substantiate his contention. Ark. Stat. Ann. § 34-1214(B)(3) (Supp. 1979) was amended by Act 799 of 1981. Section 4 of that Act reads as follows: "It is hereby found and determined by the General Assembly that under the present Arkansas law, there is no provision for a 'decree of legal separation'; that since there is no such provision, paragraph (3) of subsection (b) of Section 461 of the Civil Code [Ark. Stat. Ann. § 34-1214(B)(3)] as amended by Act 705 of 1979 actually has no application. . . ." Act 799 of 1981 amended § 34-1214(B)(3), excluding from marital property any property acquired by a spouse after a decree of divorce from bed and board.

evidence is unclear or silent concerning the parties' respective ownership interests in them. Therefore, we believe the interests of justice would be better served by reversing that portion of the decree dealing with alimony, attorney's fees, and property division to enable the chancellor to reconsider the disposition in light of the views expressed herein. *Womack* v. *Womack*, 16 Ark. App. 139, 698 S.W.2d 306 (1985).

Reversed and remanded.

CORBIN and MAYFIELD, JJ., agree.

Donald F. WALTER *v.* SOUTHWESTERN BELL TELEPHONE COMPANY

CA 85-353 702 S.W.2d 822

Court of Appeals of Arkansas
Division II
Opinion delivered February 5, 1986
[Rehearing denied March 5, 1986.]

Anthony W. Bartels, for appellant.

Phillip Cuffman, for appellee.

JAMES R. COOPER, Judge. This is an appeal from a decision of the Workers' Compensation Commission, which held that the appellee controverted liability for disability payments in excess of

twenty-five percent to the body as a whole and awarded the appellant attorney fees of $1,000.00. The appellant's sole contention is that the Commission's award is insufficient. On cross-appeal, the appellee contends that the Commission erred in finding the claim controverted and that, if it were controverted, the amount awarded by the Commission as attorney fees is correct. We find merit in the appellee's first point on cross-appeal, and we therefore need not reach the other points raised on appeal. The record shows that the appellant was injured on April 25, 1977, and the appellee paid various periods of temporary total and permanent partial disability, based on an anatomical rating of twenty-five percent to the body as a whole. The last payment of permanent partial disability was made on April 26, 1984, when the appellee sent the appellant his final check, stating in the attached letter that it was the final installment due the appellant for his permanent partial disability of twenty-five percent loss to the body as a whole (a period of 112.5 weeks), and asked the appellant to call if there were any questions.

On June 4, 1984, the appellee sent the appellant an A-11 form to sign as a receipt for the payments received. The appellant responded through his attorney on June 7th, asking for copies of all his medical records in the appellee's possession which related to his workers' compensation claim. The appellee replied on June 19th that it was its policy not to supply copies of an employee's medical records, stated that it had paid the appellant everything that the law required, and asked if there was a problem with the claim. The appellee's attorney, Patricia Nobles, closed the letter by stating she would be happy to discuss any problems with the appellant.

The next communication between the parties occurred on August 8, 1984, when the appellant submitted interrorgatories to the appellee. In a letter dated August 13th, Ms. Nobles acknowledged receipt of the interrogatories and professed confusion as to why they were sent. She pointed out to the appellant's attorney that the appellee had not received any notification of any claim that the appellant may have had pending before the Commission, and stated that the appellee's records showed that the appellant had a twenty-five percent disability to the body as a whole, for which they paid the 112.5 weeks of benefits required (the last payment being made on April 26, 1984). She again asked if there

was a disagreement with the manner in which the appellee had handled the claim and stated that, if so, she would be happy to discuss it. She further stated that, without some sort of informal appraisal of the nature or basis of the appellant's claim, the appellee was unwilling and unable to comply with the interrogatories.

The record further reflects that the appellee first found out the nature of the appellant's claim on August 20th, *after* a hearing date had been set, by way of the administrative law judge's response to its inquiry. The law judge informed the appellee that the claim was apparently for additional temporary total and permanent partial disability benefits. After receipt of the law judge's letter, the appellee called the appellant's attorney on August 30th to attempt to resolve the problem. In a letter dated August 30th, confirming this conversation, Ms. Nobles stated that the appellant was requesting permanent total (*not* temporary total and permanent partial) disability benefits and that the appellee did not contest that claim up to its statutory limit of liability. She stated that the appellee was not controverting, and had not controverted, the appellant's claim and informed the appellant's attorney that, if he had informed the appellee of the nature of the claim when that information had been requested on previous occasions, the claim could have been resolved many months ago.

A hearing was held on September 5th, at which time the appellee informed the law judge that it had only received the appellant's medical records the day before the hearing and that the appellant had only informed it of the nature of his claim six days before the hearing. The law judge gave the appellee ten days in which to determine its position in regard to the appellant's claim, in light of the appellant's failure to give the appellee reasonable notice of his claim and medical records prior to the hearing. Within those ten days, the appellee agreed to pay total permanent disability benefits. Another hearing was held on November 7th, to determine whether the appellee's actions in regard to this claim constituted controversion, which would require the appellee to pay attorney fees to the appellant. The law judge found that such controversion existed and awarded the appellant the maximum attorney fees allowed by statute.

The Commission agreed that the appellee had controverted the award, but modified the amount of the attorney fee allowed to $1,000.00. It based its finding of controversion on the appellee's refusal to provide medical reports and to answer interrogatories, and on the testimony of Ms. Pat Knowles, an employee of the appellee, that the appellee made no attempt to determine the full extent of the claimant's permanent disability. The Commission found, in short, that the appellee "offered no cooperation to claimant or his attorney after permanent partial disability benefits were terminated." The Commission pointed out that "[w]hen a respondent places a claimant into the position of having to employ the services of an attorney to prove disability benefits, once a claim has been accepted as compensable, and then, further, refuses to assist in the determination of the extent of disability, the claim is controverted."

We have no problem with the definition of a controverted claim set forth by the Commission in its opinion. However, we find that there is no substantial evidence to support its conclusion that the appellee refused to assist in determining the extent of liability, thereby controverting the claim. Therefore, we reverse.

The determination of whether a claim is controverted is a fact question to be resolved from the circumstances of the particular case. *Climer* v. *Drake's Backhoe*, 7 Ark. App. 148, 644 S.W.2d 637 (1983). The mere failure of the employer to pay benefits does not, in and of itself, amount to controversion, especially when the carrier accepts the injury as compensable and is attempting to determine the extent of the disability. *Revere Copper & Brass, Inc.* v. *Talley*, 7 Ark. App. 234, 647 S.W.2d 477 (1983). Here, the appellee told the appellant and his attorney that it would be glad to discuss any problems with the way the appellant's claim had been handled and asked them more than once what, if any, additional claim was being made. The uncontradicted evidence shows that the appellant made no reply to these requests until August 30th, less than a week before the scheduled hearing. Furthermore, it is undisputed that the appellee continued paying medical bills during this time and only discontinued the permanent partial disability benefits after the statutory time period had run. Before the appellee can be found to have aided or not aided the appellant in determining the extent of liability, the appellee needs to be informed of what, if any,

additional disability is being claimed. The appellant's failure to cooperate with, and provide information about his claim to, the appellee is what caused the need for the hearing and the delay in benefits, not the appellee's failure to provide medical records and answer interrogatories for a claim which, to its knowledge, did not exist. *Cf.*, *Turner* v. *Trade Winds Inn*, 267 Ark. 861, 592 S.W.2d 451 (Ark. App. 1979).

There being no substantial evidence that the appellee had controverted the appellant's claim, we reverse the Commission's decision.

Reversed.

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

UNIVERSAL UNDERWRITERS INSURANCE COMPANY, et al. *v.* David BUSSEY

CA 85-323 703 S.W.2d 459

Court of Appeals of Arkansas
Division I
Opinion delivered February 5, 1986

John W. Unger, Jr., for appellant.

Shackleford, Shackleford & Phillips, P.A., by: *Jay E. Hoggard*, for appellee.

DONALD L. CORBIN, Judge. Appellants, Universal Underwriters Insurance Company and Foster Olds-Toyota, Inc., appeal a decision of the Arkansas Workers' Compensation Commission wherein appellee, David Bussey, was awarded permanent partial disability of 15% to his whole body; penalties for controversion and payment of all medical and doctor bills that accrued without

the benefit of the Commission's prior approval of a change of physicians by appellee. We affirm.

Appellee testified that he underwent a cervical fusion by his previously selected physician, Dr. J.C. Callaway, on February 10, 1984. He remained very symptomatic and in a great deal of pain. Dr. Callaway advised him that he had done all he could for him and that appellee would have to learn to live with his pain. Dr. Callaway refused to refer him to Dr. Wilbur M. Giles, a neurosurgeon. Appellee stated he was in excruciating pain and in an effort to alleviate the same sought the services of Dr. Giles on May 21, 1984.

Dr. Giles immediately diagnosed appellee's problem to be a moving graft, i.e., the fusion by Dr. Callaway had failed, causing a false joint. Dr. Giles stated at the initial visit that appellee was extremely anxious, tearful, complaining of severe pain, with marked limitation. Dr. Giles concluded that appellee was a "basket case." Dr. Giles admitted appellee to a hospital on the day he first saw him and performed surgery three days later. Following the surgery appellee experienced a marked reduction in his symptomatology and was able to return to work on July 8, 1984.

The Administrative Law Judge stated in his opinion, which was adopted by the Full Commission, that he did not rely on the failure of the employer to furnish appellee a copy of Commission form A-29, which sets out the requirements for a change of physician, in finding the services of Dr. Giles, other hospitals and physicians compensable. He relied instead upon a portion of Ark. Stat. Ann. § 81-1311 (Supp. 1985), which provides that any emergency treatment afforded an injured employee shall be at the expense of the employer.

Appellants first contend that the Commission erred in ordering appellants to pay all medical expenses associated with the surgery performed by Dr. Giles for the reason that the order was an error of law and unsupported by the facts. Ark. Stat. Ann. § 81-1311 provides in part:

> If the employee selects a physician, the Commission shall not authorize a change of physician unless the employee first establishes to the satisfaction of the Commission that

> there is a compelling reason or circumstance justifying a change. . . . Treatment or services furnished or prescribed by any physician other than the ones selected according to the foregoing, except emergency treatment, shall be at the claimant's expense.

We fail to find error here. Appellants ask this Court to adopt a strict construction of the term "emergency treatment" and hold that an emergency situation only exists where life is threatened. That construction is contrary to the intent and spirit of the Arkansas Workers' Compensation Act and we decline to adopt it.

As observed by this Court, the Workers' Compensation Act is entitled to receive liberal construction from the courts, and the humanitarian objects of such laws should not, in the administration of them, be defeated by over-emphasis on technicalities. Form should not be put above substance. *Brim* v. *Mid-Ark Truck Stop*, 6 Ark. App. 119, 639 S.W.2d 75 (1982).

The record in the case at bar reflects that appellee had been advised by Dr. Callaway that he had done all he could for appellee. Appellee was in such excruciating pain he could not function and was taking massive amounts of drugs. Dr. Callaway refused to refer appellee to another physician. At this time appellee was not represented by counsel. In desperation, appellee sought the services of Dr. Giles.

Immediately upon seeing Dr. Giles, appellee was diagnosed as having an obvious pseudoarthrosis, or false joint, and Dr. Giles admitted appellee to the hospital. Dr. Giles performed surgery to correct the false joint three days later.

Dr. Giles testified that, "Emotionally this young man was at his wits end. He was crying and stated that he had been in need of help and had felt that that had not been provided."

Dr. Giles also testified:

> At the time that I saw him he was extremely anxious, tearful, complaining of severe pain, marked limitation, well, he had marked limitation of range of motion of his neck and in all areas, both flexion, extension, and on lateral rotation.

He had marked cervical trapesius spasm and he had weakness in his left biceps and muscle on the left side.

We agree with the Commission that the facts here warranted the conclusion that an emergency situation existed as contemplated by § 81-1311. This conclusion is supported in part by the fact that appellee was immediately hospitalized by Dr. Giles for an obvious pseudoarthrosis and surgery was performed three days later. Appellee thereafter experienced a marked reduction in his symptomatology and was able to return to work. We cannot say that the Commission's finding that appellants were responsible for all medical bills of Dr. Giles and those hospitals and doctors to whom Dr. Giles referred appellee was in error.

Appellants next contend that the finding by the Commission that appellants controverted appellee's permanent partial disability and temporary total disability is an error of law and unsupported by the facts of the case. Their argument is based primarily on their initial disagreement as to the permissibility of appellee's claim for medical treatment rendered by Dr. Giles. Appellants argue that they never controverted the fact that appellee had a disability and claim they had no knowledge as to the extent of appellee's disability. Furthermore, they rely upon the fact that Dr. Callaway never made an assessment of appellee's disability. The record reflects that by a letter to appellants dated August 27, 1984, Dr. Giles opined that appellee had sustained a 5% permanent partial disability to the body as a whole as a result of his injury. On September 26, 1984, counsel for appellants advised appellee that appellants did not controvert appellee's permanent partial disability of 5%. Counsel offered to tender that sum to appellee in full and complete settlement of his claims. As noted by the ALJ in his opinion, appellants took the inconsistent position of admitting appellee had a 5% permanent partial disability but had not paid him any permanent disability benefits. Controversion is a question of fact for the Commission, *Bemberg Iron Works* v. *Martin*, 12 Ark. App. 128, 671 S.W.2d 768 (1984), and we find substantial evidence to support the Commission's finding that appellants controverted appellee's claim.

For their third contention for reversal, appellants argue that

the 10% penalty on the disability benefits awarded appellee is contrary to the law and unsupported by the facts of the case. Appellants contend that the penalty provisions of Ark. Stat. Ann. § 81-1319(e) (Supp. 1985), do not apply to medical bills and legal expenses. However, in the ALJ's opinion it was stated that "All disability benefits, temporary and total, shall be increased by 10% pursuant to § 19(e)." The 10% penalty was neither sought by appellee nor awarded by the Commission on appellee's medical bills and legal expenses.

Appellants also argue that the Administrative Law Judge did not recognize any payments made by appellant Foster Olds-Toyota, Inc., in the form of full salary as a credit against amounts due and payable to appellee. The record is clear that the Commission's award did not include or embrace any periods of time during which appellee received his salary from appellant Foster Olds-Toyota, Inc. It has been specifically held that the excess of wages paid over the weekly compensation award cannot be deducted from the award. The employer cannot make such payments and later claim credit for the excess against an award made. *Looney* v. *Sears Roebuck*, 236 Ark. 868, 371 S.W.2d 6 (1963). We find no merit to this contention.

Finally, appellants argue that the award of attorneys' fees is contrary to the law and unsupported by the evidence. Appellants contend that "compensation" as used in Ark. Stat. Ann. § 81-1332 (Supp. 1985), which provides for payment of legal fees on that portion of a compensation award which is controverted, does not include medical expenses.

An identical argument has been made before the Arkansas Supreme Court and was expressly rejected. *Ragon* v. *Great American Indemnity Co.*, 224 Ark. 387, 273 S.W.2d 524 (1954). *Ragon, supra*, held that attorneys' fees in a workers' compensation case should consist of a percentage of the amounts expended for medical services and hospitalization in addition to a percentage of the cash awarded to the claimant, since the compensation from which the fees are to be derived include medical and hospital services. We find no error here.

Affirmed.

GLAZE and MAYFIELD, JJ., agree.

James Charles WILLIAMS *v.* STATE of Arkansas

CA CR 85-128 702 S.W.2d 825

Court of Appeals of Arkansas
En Banc
Opinion delivered February 5, 1986

William R. Simpson, Jr., Public Defender, *Donald K. Campbell, III*, Deputy Public Defender, by: *Carolyn P. Baker*, Deputy Public Defender.

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

DONALD L. CORBIN, Judge. Appellant, James Charles Williams, was charged with the first degree murder of his brother and convicted of second degree murder by a Pulaski County Circuit Court jury. He was sentenced to thirty years imprisonment in the Arkansas Department of Correction. The only issue raised by this appeal is whether the trial court committed reversible error in refusing to instruct the jury on the lesser included offense of manslaughter. We reverse and remand.

Testimony adduced at trial established that appellant, Fred Williams, Elbert Townsend and Johnny Griffin played cards on October 14, 1984, at Townsend's apartment. Griffin testified that appellant and his brother, Fred Williams, argued about appellant cheating. He observed appellant walk over by Fred Williams and pull out a knife. Fred Williams then grabbed a chair to try to protect himself. Griffin also stated that Fred Williams was backing up and that he "wasn't serious with the chair." He further stated that he saw appellant stab his brother three to five times.

Townsend testified that an argument broke out between appellant and his brother. Fred Williams stated to appellant, "Shut your mouth before I put my foot in it." Townsend stated appellant then told his brother that he would kill him first. Townsend testified that appellant had a knife in his hand and tried to swing at his brother. Townsend observed Fred Williams trying to block his brother's advances with a chair.

Appellant took the stand and testified that he and his brother got into an argument and Fred Williams scooted from the table quickly. Appellant did not know what was going on and he stood

up. His brother grabbed the chair and scooted back and appellant went into his pocket to get his knife out. Before he was able to get it out of his pocket, appellant stated his brother struck appellant with the chair on his left shoulder. Appellant testified he started swinging with the knife and upon observing blood coming from his brother, got scared and ran. He also stated that when he left the scene he observed that his brother had the chair and was on his feet. Appellant testified that he did not mean to kill his brother and that everything happened real fast.

Roy Jackson testified that on the night of October 14, 1984, appellant came to his home and asked to talk to him. He observed some blood on appellant's shirt and asked him about it. Appellant told him that he and his brother had gotten into a fight and that he had cut his brother. Appellant also told Jackson that his brother had picked up a chair and was going to hit him with it.

Frank Randolph testified that on October 14, 1984, appellant called him and wanted Randolph to pick him up. Appellant told Randolph that he had gotten into a fight with his brother and that he thought he had hurt him real bad. Randolph was subsequently stopped by the police on his way to pick appellant up.

Dr. Lee Beamer, the Associate Medical Examiner, testified that he performed an autopsy on Fred Williams. He stated that Fred Williams sustained five stab wounds to his person which were the cause of death. Toxicology tests performed established that Fred Williams had been drinking alcohol.

The record in the case at bar reflects that appellant requested and proffered an instruction on manslaughter which the trial court refused. The basis of its refusal was that an instruction on manslaughter was not justified under the evidence of the trial. Manslaughter is committed by one who recklessly causes the death of another person. Ark. Stat. Ann. § 41-1504(1)(c) (Repl. 1977). "Recklessly" is defined as follows:

> "Recklessly." A person acts recklessly with respect to attendant circumstances or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that disregard thereof

constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

On the other hand, second degree murder is committed by a person if he knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life or with the purpose of causing serious physical injury to another person, he causes the death of any person. Ark. Stat. Ann. § 41-1503(1)(b) and (c) (Repl. 1977). The jury in the instant case was instructed on this basis.

As noted by the Arkansas Supreme Court in *Robinson* v. *State*, 269 Ark. 90, 598 S.W.2d 421 (1980), no right has been more zealously protected than the right of an accused to have the jury instructed on lesser included offenses. "This is so, no matter how strongly the trial judge feels that the evidence weighs in favor of a finding of guilty on the most serious charge." *Id.* at 93, 598 S.W.2d at 423, 424. It is reversible error to refuse to give a correct instruction on a lesser included offense and its punishment when there is testimony furnishing a reasonable basis on which the accused may be found guilty of the lesser offense. *Glover* v. *State*, 273 Ark. 376, 619 S.W.2d 629 (1981). Where there is no evidence tending to disprove one of the elements of the larger offense the court is not required to instruct on the lesser one because absent such evidence there is no reasonable basis for finding an accused guilty of the lesser offense. In this type of case the jury must find the defendant guilty either of the offense charged or nothing. *Fisk* v. *State*, 5 Ark. App. 5, 631 S.W.2d 626 (1982). Where, however, there is the slightest evidence tending to disprove one of the elements of the larger offense, it is error to refuse to give an instruction on the lesser included one. *Brewer* v. *State*, 271 Ark. 254, 608 S.W.2d 363 (1980).

In this case there was evidence presented on which the jury might have found that appellant recklessly caused the death of his brother. While it appears most unlikely, the jury could have believed appellant's testimony and found that the criminal intent required for conviction of the larger offense was lacking. It is the jury's sole prerogative to evaluate the conflicting evidence and to draw its own inferences.

In *Savannah* v. *State*, 7 Ark. App. 161, 645 S.W.2d 694 (1983), this Court reversed the appellant's conviction and re-

manded for a new trial upon the trial court's refusal to instruct the jury on the lesser included offense of robbery. There, the appellant participated in a liquor store robbery and testified at trial that he did not know his riding companion had a weapon until after the robbery or that his companion intended to rob the store. Upon abandoning the car, appellant stated that they went in separate directions but met later at appellant's parents' home. The appellant claimed his companion later left the pistol at the house. The pistol was recovered at that address by the police. We noted in *Savannah* that it was the jury's sole prerogative to evaluate the evidence and draw its own inferences as to whether the appellant knew his companion had a pistol when the robbery was committed and why the pistol was recovered at appellant's residence after the robbery. Finally, we stated there that if the jury believed the appellant's version of the robbery, it could have found him guilty of robbery, not aggravated robbery.

In *Bongfeldt* v. *State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982), we held that the trial court had committed prejudicial error in failing to instruct the jury on the lesser included offense of criminal trespass. Appellant had testified at trial that he entered the building intending to borrow some gasoline and pay the owner for it the next morning. This testimony provided evidence on which the jury might have found the appellant's entry was without the criminal intent required for conviction of the larger offense of burglary. We stated there that it was not impossible for the jury to have found the appellant guilty only of criminal trespass and reversed and remanded for a new trial.

We conclude that it was prejudicial error of the court in the case at bar to fail to give the proffered instruction on manslaughter and we therefore reverse and remand for a new trial.

Reversed and remanded.

COOPER and GLAZE, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. I agree with the majority opinion when it states that it is reversible error to refuse to give a correct instruction on a lesser included offense when there is evidence furnishing a *reasonable* basis on which the accused could be found guilty of the lesser included offense. In the case at bar, however, I find no reasonable basis for giving an

instruction on manslaughter. Manslaughter requires a lesser degree of intent than does first or second degree murder, requiring only that the defendant acted "recklessly" (The proffered instruction referred only to subparagraph (c) of Ark. Stat. Ann. Section 41-1504 (Supp. 1985).).

In the case at bar, the appellant and the victim had been arguing over a card game, and the appellant, in response to the victim's threat to put his foot down the appellant's throat, told the victim that he would kill him first. Shortly thereafter, following a scuffle, the appellant stabbed the victim *five* times. According to the medical examiner, either of two of the stab wounds were fatal wounds.

I simply cannot agree that, where the appellant threatened to kill the victim and then stabbed him five times, a reasonable basis existed for a jury to find that the appellant "recklessly" caused his brother's death. I would affirm.

SECOND INJURY FUND *v.* FRASER-OWENS, INC.

CA 85-101 702 S.W.2d 828

Court of Appeals of Arkansas
En Banc
Opinion delivered February 5, 1986

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

Davis, Cox & Wright, by: *Constance G. Clark*, for appellee Fraser-Owens, Inc. and CNA Insurance Company.

Donald E. Bishop, for appellee Carvel H. Logan.

MELVIN MAYFIELD, Judge. The Second Injury Fund appeals a decision of the Workers' Compensation Commission holding it liable for a portion of the compensation due claimant who suffered a compensable back injury when he fell from scaffolding on August 2, 1982.

The administrative law judge held that, prior to the August 2nd injury, appellant had a permanent impairment of 5% to the body as a whole; that the August injury resulted in an additional impairment of 15%; and that a portion of the disability existing after that injury should be paid by the Second Injury Fund. The full Commission affirmed the law judge's findings, except for his calculation of the amount of compensation owed by the Fund. That matter was remanded for "redetermination or clarification" by the law judge.

On appeal to this court, the Fund first argues that it has no liability to the claimant because he did not have a loss-of-

earning-capacity impairment, pursuant to Ark. Stat. Ann. § 81-1313(i) (Supp. 1985), prior to his compensable injury on August 2, 1982. We agree.

The issue involved in this case has recently been considered by us in the cases of *Osage Oil Co.* v. *Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985); *Second Injury Fund* v. *Girtman*, 16 Ark. App. 155, 698 S.W.2d 514 (1985); and *Second Injury Fund* v. *Coleman*, 16 Ark. App. 188, 699 S.W.2d 401 (1985). In those cases, we agreed with the Fund's contention that the word "disability" in Ark. Stat. Ann. § 81-1313(i), *supra*, means loss of earning capacity due to a work-related injury, that "impairment" means loss of earning capacity due to a nonwork-related condition, that the word "handicapped" means a physical disability that limits the capacity to work, and we now add that the words "anatomical impairment" mean the anatomical loss as reflected by the common usage of medical impairment ratings. We think these definitions are necessary to accomplish the purpose of the second injury statute and to fix the liability of the parties in accordance with the mathematical formula set out in that statute.

At the time of the first hearing in this case, the claimant was 46 years old. After completing high school and one semester in Arkansas State Teachers College, he entered the military where he was a paratrooper and made 32 jumps. Claimant began work for the appellee-employer in May of 1982 as a heavy equipment operator and was then reclassified to "construction carpenter." At the time of his injury on August 2, 1982, he was working on a scaffold when his crowbar slipped off of a nail and he fell backwards off the scaffold. He landed in a semisitting position, more or less on his tailbone, and was taken to a hospital where he received immediate medical treatment.

Claimant testified that when he went to work for the appellee-employer he was not aware that he had any back problem. He did admit, however, that 10 years before he had applied for a job with the City of Wichita, Kansas, and had a preemployment physical in which X rays of his lower lumbar spine revealed evidence of a spondylolysis involving L5. Claimant testified that he was shocked because he had never had any back problems and thought the doctor must have looked at someone

else's X rays. He was, however, turned down for employment by the City of Wichita because of the report from the doctor as to his back condition. He returned to see this doctor in 1973 after being involved in a rear-end automobile accident. He was off work for three or four days at that time and said he had no back problems thereafter.

Subsequently, claimant went into business for himself, first as a commercial and residential paint and sandblast contractor, and then, in 1977, as a dirt contractor, installing septic systems, digging ponds, building driveways and private roads, and hauling dirt and gravel. Later, he worked as a welder on an offshore drilling rig. He passed the physical, and did all types of heavy lifting, climbing and hanging upside down. He testified it was the most demanding work in which he had ever been involved and that it gave him no problem with his back. After that, he did some part-time work for a sawmill operator, cutting and trimming logs, loading them on a truck, and unloading them at the sawmill. His next job was with the appellee-employer.

Claimant's family doctor in Wichita, Kansas, testified by deposition that claimant was born with his back condition and that people with this condition were more susceptible to back injuries than people without it. A doctor who treated claimant after his August 1982 injury testified that it would not be unusual for the claimant to be unaware of his back problem and to attribute any discomfort to everyday hard work. But the doctor said that as the claimant gets older, he would have more problems with his back.

The Commission's opinion states:

> Claimant's preexisting spondylolysis unquestionably caused claimant to be rejected for employment in 1972. As this preexisting condition did, at least on one occasion, adversely affect claimant's earning capacity by causing him to be denied employment, we find it impossible to say that it was not a preexisting disability within the meaning of the law.

We fully recognize our duty 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,

Georgia Pacific Corp. v. *Ray*, 273 Ark. 343, 619 S.W.2d 648 (1981); *Bemberg Iron Works* v. *Martin*, 12 Ark. App. 128, 671 S.W.2d 768 (1984). However, there is really no dispute as to the facts as set out above. The Commission's decision simply relies upon the claimant's rejection for employment in 1972. We do not think that is enough to constitute substantial evidence to support a finding that the claimant had a preexisting condition that was independently causing a loss-of-earning capacity prior to the second injury and continued to do so after that injury. The *Rogers*, *Girtman*, and *Coleman* cases, cited above, relied on previous decisions of this court and the Arkansas Supreme Court which make it clear that the solvency of the Second Injury Fund is important, that it is a limited and restricted fund, and that it is not liable unless the above stated preexisting condition exists. We think the following statement in appellant's brief may well be correct:

> 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 Workers' Compensation case, bankrupt the SIF, and not serve to encourage the employment of truly handicapped workers.

We hold there is no substantial evidence to support liability against the Second Injury Fund in this case. In all other respects, the Commission's decision is affirmed.

Alan STALLINGS, et al. *v.* Earl POTEETE

CA 85-132 702 S.W.2d 831

Court of Appeals of Arkansas
Division I
Opinion delivered February 5, 1986

Laws & Swain, P.A., by: *Ike Allen Laws, Jr.*; and *Owens, McHaney & Calhoun*, by: *John C. Calhoun, Jr.*, for appellants.

Edmund M. Massey, for appellee.

TOM GLAZE, Judge. Appellants appeal from the chancellor's order upholding a lease between appellee and Mary House, deceased. For reversal, appellants contend that the chancellor erred in (1) upholding the lease, (2) holding the renewal option valid, and (3) failing to hold that all hunting rights are held by the owner. We find no error and affirm.

On June 1, 1978, Mary House leased her farm to appellee for

$10,000 a year. The lease was to end on January 1, 1991, and could be renewed under the same terms and conditions. When the lease was executed, Miss House was ninety years old. Nine months following the execution of the lease, she was hospitalized and subsequently transferred to a nursing home, where she died in early 1981.

In her will, executed in 1975, House left her farm to appellants, and named Alan Stallings as executor. No copy of the 1978 lease to appellee was found among the decedent's effects and the appellants became aware of it only when appellee told them of its existence after House died. After consulting an attorney, appellants notified appellee that the lease was invalid. Appellee then filed an action against appellants to enjoin them from harassing him. Appellants counterclaimed for a declaration that the lease was invalid.

For their first point, appellants contend that the chancellor erred in upholding the lease because (1) House was not mentally competent to enter a valid lease, (2) the consideration and term of the lease made it unconscionable, and (3) the acknowledgement was defective. Concerning the mental competence and unconscionability issues, the parties presented mixed or conflicting testimonies. The record reflects that House and appellee had entered into leases in 1972 and 1974 which were identical to the 1978 lease, except for the term. Although the 1974 lease was for a six-year term, it was superseded by the 1978 lease, which covered not only the time remaining under the 1974 lease, but included an additional ten-year term. Appellants argue the appellee unduly influenced House by taking advantage of her failing mental state. To support their argument, they presented testimony that she was unable to care for herself or read without a magnifying glass and that she received no independent counsel before executing the 1978 lease. Appellee's witnesses testified that House had managed her farm for many years and was rational when the lease was executed. Significantly, Grace Farish, a long-time friend of House's, testified that House desired a long-term lease with appellee so she would be secure during her lifetime. Farish further stated that House trusted appellee and wanted him to remain as her tenant.

We find the evidence is similarly conflicting when consider-

ing appellants' argument that the lease was patently unconscionable because of the inadequate consideration appellee paid for it. Again, both sides presented witnesses who gave differing opinions concerning the fair rental value of House's farm. They considered such factors as estimated crop yield, crop prices, and soil content. Appellants' witnesses testified that a fair rental value would be in the range of $26,000. However, two of appellee's witnesses, who had farmed House's farm, stated that the actual crop yield was not as high as appellants' witnesses had estimated, and that the property was difficult to utilize because it was divided into several sections. They related they would pay no more than $10,000 to rent the farm. Appellee also testified that he was required to perform many more duties than in other, normal farming operations.

From the foregoing and other evidence, the chancellor found that House knew the extent of her property, entered into the 1978 lease on her own initiative, had an attorney prepare the lease, expressed satisfaction with its terms, and desired appellee to remain as her tenant. He also found she had reasons for wanting a long-term lease, and the consideration was adequate.

Appellants have cited us to several cases where instruments have been invalidated due to incapacity or undue influence. Those cases notwithstanding, the rule on appeal is that the findings of the chancellor will not be reversed unless clearly against a preponderance of the evidence. Since the question of a preponderance of the evidence turns largely on the credibility of the witnesses, we defer to the superior position of the chancellor. *Andres* v. *Andres*, 1 Ark. App. 75, 613 S.W.2d 404 (1981). In this case, the chancellor made his findings based on evidence which was oftentimes conflicting, and even though we might have reached a different conclusion, we cannot say he was clearly wrong in the result he reached.

Appellants further contend that the lease is invalid because the acknowledgement was made by telephone. In support of their contention, they cite Ark. Stat. Ann. § 49-208 (Repl. 1971), which provides that an acknowledgment of an instrument affecting real estate must be made by "the grantor appearing in person" before the proper official. Here, Marjorie Waller, the notary public who had acknowledged the 1972 and 1974 leases,

acknowledged the lease on June 2, 1978, upon receiving a telephone request from House. Waller testified that she knew House and recognized her voice on the telephone when House called to state she had signed the paper [lease]. These facts are similar to those in *Abernathy* v. *Harris*, 183 Ark. 22, 34 S.W.2d 765 (1931). There the court upheld a telephone acknowledgment of a mortgage when the notary testified he had known Harris for many years and was familiar with her voice. Here, as was true in *Abernathy*, the notary's certificate of acknowledgment is regular on its face, and absent any finding of fraud or forgery, we conclude the telephone acknowledgment is valid.

Next, appellants argue that the chancellor erred in holding the renewal option valid. The following language from the lease is pertinent:

> The term of this lease shall be from the first of June, 1978, to the first of January, 1991. The Tenant shall have the option of renewing this lease under the same terms and conditions as herein set out provided he shall notify the landlord in writing within three (3) months prior to the expiration of the lease term.

In the 1972 lease, the words, "for an additional four years," followed the word "lease" in the second sentence quoted above, but those words had been scratched through and initialed by both appellee and House. Those words were omitted from the 1974 and 1978 leases. Appellants contend that this omission invalidates the provision because the renewal term is undefined. Appellants also point to appellee's testimony that, although he and House never discussed it, appellee believed a new lease would have to be drawn up in order to renew.

Appellants cite *Lonoke Nursing Home* v. *Wayne and Neill Bennett Family Partnership*, 12 Ark. App. 282, 676 S.W.2d 461 (1984), wherein our Court stated the rule that an option in a written lease to renew upon terms and conditions to be agreed upon is void for uncertainty. In *Lonoke*, the lease provided that the terms, conditions, and rent would be agreed upon prior to the renewal date. In the instant case, no such lease provision exists. While appellants point to appellee's testimony concerning his belief that he did not believe he could renew the 1978 lease until another one was drawn up, appellee also explained that he never

recalled discussing the matter with House. In fact, as already noted, appellee and House omitted any mention in the lease that they must agree to the conditions and terms prior to a renewal lease.

Our supreme court has long held that a general covenant to renew is sufficiently certain because it imports a new lease like the old one upon the same terms and conditions. *Keating* v. *Michael*, 154 Ark. 267, 242 S.W. 563 (1922). Here, the term of the lease is provided in the same paragraph as the renewal option. Accordingly, we conclude that the chancellor, consistent with the *Keating* rule, was correct in holding the renewal lease valid for the same term specified in the 1978 lease.

Finally, appellants argue that the chancellor erred in failing to hold that appellants have exclusive control of hunting rights on the property. The chancellor ruled that appellants have the right to hunt on the property so long as they do not interfere with appellee's farming operation, and that hunting rights are vested in appellants, appellee, and their guests. Our research has failed to reveal any Arkansas case law or statute dealing with hunting rights under a lease. Appellants cite several cases from other jurisdictions which hold that hunting and fishing rights remain with the landlord, but each of these cases was decided under a statute giving the landlord these rights. As previously noted, Arkansas has no such statute.

In the absence of statutory authority, we must turn to the common law. *Lucas* v. *Handcock*, 266 Ark. 142, 583 S.W.2d 491 (1979). Arkansas has adopted the common law of England as of 1607. *See* Ark. Stat. Ann. § 1-101 (Repl. 1976). Appellants have cited us to *Copland* v. *Maxwell*, 2 L.R.-S. & D. App. 103, 8 Scot. L. Rep. 450 (1871), contending that all hunting rights are vested in the landlord without special reservation. However, that case was decided under Scottish law, not English law, and in *Copland*, the House of Lords noted that "[i]n England . . . the right of shooting is conveyed to the tenant by the lease unless it is excluded. . . ." 8 Scot. L. Rep. at 454. *See also Moore* v. *Lord Plymouth*, 7 Taunt. 614, 18 R.R. 604, 129 Eng. Rep. 245 (1817); A. Spencer, *Woodfall's Law of Landlord and Tenant*, at 883 (21st ed. 1924). Accordingly, we hold that the chancellor did not err in granting hunting rights to appellee. Since the issue of the

owners' hunting rights is not raised, we need not reach that issue.

Affirmed.

CORBIN and MAYFIELD, JJ., agree.

Donald RIGGINS *v.* STATE of Arkansas

CA CR 85-143 703 S.W.2d 463

Court of Appeals of Arkansas
Division I
Opinion delivered February 12, 1986

Guy Jones, Jr., P.A., for appellant.

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

JAMES R. COOPER, Judge. The appellant was convicted by jury of driving while intoxicated (DWI) and of violating Ark. Stat. Ann. § 41-3151 (Repl. 1979) (carrying prohibited weapons) in the Faulkner County Circuit Court. He was sentenced to thirty days and fined $500.00 for the DWI, and he was fined $250.00 for the weapons conviction. The appellant raises three points on appeal: (1) the trial court erred in refusing to instruct the jury on a defense to the charge of carrying a prohibited weapon; (2) the court improperly admitted into evidence the testing procedures used in administering the breathalyzer test, and the test results; and (3) the court improperly admitted statements made by the appellant to the police officer in violation of the fifth amendment of the United States Constitution. We affirm the conviction.

On his first point for reversal, the appellant contends that he was entitled to an instruction that being on a "journey" was a defense to the charge of carrying a prohibited weapon. The appellant is entitled to a correct instruction as to his theory of the case *if* there is any *supporting evidence*, and if it is not covered by other instructions given by the court. *Johnson* v. *State*, 252 Ark.

1113, 482 S.W.2d 600 (1972). A journey has long been defined as

> where one travels a distance from home sufficient to carry him beyond the circle of his neighbors and general acquaintances and outside of the routine of his daily business. . . . "The prohibition was designed to stop the carrying of weapons among one's habitual associates; the exception was designed to permit it when necessary to defend against perils of the highway to which strangers are exposed, and that are not supposed to exist among one's own neighbors."

Ellington v. *Denning*, 99 Ark. 236, 237, 138 S.W. 453, 453 (1911) (quoting *Hathcote* v. *State*, 55 Ark. 181, 185, 17 S.W. 721, 722 (1891)). The court in *Hathcote* also stated that, "while we cannot state an unbending rule by which to define the scope of the exception, it should in every case be interpreted in the light of good sense and with regard to the spirit and intent of the statute." 55 Ark. at 185. In this case, the appellant testified that he was on his way back from Morrilton, a distance of some twenty-six miles, after attempting to visit a friend who lived there. He indicated that he went to Morrilton frequently and testified that he did not consider driving to Morrilton to be a trip. There is no evidence in the record which indicates that, by driving to Morrilton and back, the appellant had traveled beyond the circle of his neighbors and general acquaintances, making it necessary to defend against the perils of the highway. There being no evidence to support the giving of the instruction, we hold that the court's failure to do so did not constitute reversible error.

The appellant's second point for reversal concerns the admission of the breathalyzer testing procedures and test results. The appellant contends that, because there was a period of three-months time in the log book where there was no indication of the daily calibration tests, any use, or any repairs of the machine until four days prior to the administering of the test to the appellant, the State failed to show proper compliance with the Arkansas Health Department Regulations for Blood Alcohol Testing, § 5.11(G). Only substantial compliance with Health Department regulations is required. *Sparrow* v. *State*, 284 Ark. 396, 683 S.W.2d 218 (1985). Here, the machine had been recertified by the Health Department on April 18, 1984, the end of the three-

month gap, and records had been kept since that time. While the appellant's argument would have merit if the certification had not occurred since the gap, the records kept since the recertification are complete and substantially comply with the regulations.

The appellant also contends that it was error to admit the test results into evidence, as the appellant had to blow into the machine three times before the machine received an adequate volume of air to register any results. The appellant contends this was error because the machine was not reset between each breath, and he alleges that the failure to reset the machine improperly increased the percentage of alcohol in the sample. The Health Department regulations do not require that a breathalyzer be reset if the first test attempt does not provide enough breath to be analyzed. The only regulation related to sample size is § 3.41, which provides that "[t]he quantity of breath shall be established by direct volumetric measurement or by collection of a fixed breath volume at a constant temperature." The senior operator who administered the test, Officer Springer, testified that the machine had a light which would light up for a period of four to five seconds whenever the machine received a sufficient volume of air to analyze, and that this did not occur until the appellant's third try. He also testified that, during his training, he was informed that when a suspect did not blow hard enough to obtain a sufficient sample of breath, he should have that person blow again. He said that at no time during this training was he advised that the machine had to be reset and that it was his understanding that, when multiple breaths were needed to obtain a sufficient air sample, they would not raise the alcohol content of the sample. The appellant made no attempt at trial, other than his own unsupported testimony, to show that such a procedure would, or could, increase the alcohol content of the sample. We find that the testing procedures and subsequent test results were in substantial compliance with the department regulations.

The appellant's final point gives us the most problem. It is undisputed that the arresting officer had the appellant in custody and had failed to read him his rights before questioning him about the ownership of the guns. There is no doubt that the trial court erred in admitting the officer's testimony that the appellant told him the guns were his. *See Shelton* v. *State*, 287 Ark. 322, 699 S.W.2d 728 (1985); *Weatherford* v. *State*, 286

Ark. 376, 692 S.W.2d 605 (1985). However, the appellant also confessed on the stand that one of the guns did belong to him. The appellant's statement in court was elicited on direct examination. We hold that, with this confession, the jury had conclusive proof that the appellant owned one gun, a prohibited weapon, and therefore, the admission of the confession, although erroneous, could not have been prejudicial. *Trollinger* v. *State*, 14 Ark. App. 184, 686 S.W.2d 796 (1985); *Hays* v. *State*, 268 Ark. 701, 597 S.W.2d 821 (Ark. App.) *cert. denied*, 449 U.S. 837 (1980); *Mize* v. *State*, 267 Ark. 743, 590 S.W.2d 75 (Ark. App. 1979).

There being no prejudicial error shown on the part of the trial court, we affirm the appellant's conviction.

Affirmed.

CLONINGER, and MAYFIELD, JJ., agree.

SHIPLEY BAKING COMPANY *v.* Dewey STILES, Director of Labor, and Jerry D. SMITH

E 85-70 703 S.W.2d 465

Court of Appeals of Arkansas
En Banc
Opinion delivered February 12, 1986

Bethell, Calloway, Robertson & Beasley, for appellant.

Allan Pruitt, for appellee.

LAWSON CLONINGER, Judge. The sole issue in this appeal is whether the decision of the Board of Review that appellee Jerry D. Smith was not discharged from his employment with appellant Shipley Baking Company for misconduct in connection with his work pursuant to Ark. Stat. Ann. § 81-1106(b)(1) (Supp. 1985) was supported by substantial evidence. We find that the record does not provide evidence of such substance to support the Board's ruling, and we reverse its decision.

Appellee Smith filed his claim for unemployment benefits in February, 1985, indicating that he had been discharged for failing to write a report on an air leak in a tractor's brake system. In its initial determination, the Employment Security Division of the Department of Labor disqualified him from receiving benefits under Ark. Stat. Ann. § 81-1106(b)(1) (Supp. 1983) on a finding that he was discharged for misconduct in connection with his work. Smith appealed the decision, and, in April, 1985, the ESD Appeal Tribunal reversed the agency determination, allowing him benefits. In May, 1985, the Board of Review affirmed the Appeal Tribunal's decision and found that appellee Smith had been discharged for reasons other than misconduct in connection with his work. From that ruling appellant brings this appeal.

In order for an employee's action to constitute "misconduct," it must be an act of wanton or willful disregard for

the employer's interests, a deliberate violation of the employer's rules, or a disregard of the standard of behavior that the employer has a right to expect of his employees. *St. Vincent Inf.* v. *Ark. Emp. Sec. Div.*, 271 Ark. 654, 609 S.W.2d 675 (Ark. App. 1980). Mere inefficiency, unsatisfactory conduct, failure of good performance as the result of inability or incapacity, inadvertence, and ordinary negligence or good faith errors in judgment or discretion are not considered misconduct for unemployment insurance purposes unless they are of such degree or recurrence as to manifest culpability, wrongful intent, evil design, or an intentional or substantial disregard of an employer's interests or of an employee's duties and obligations. *Dillaha Fruit Co.* v. *Everett*, 9 Ark. App. 51, 652 S.W.2d 643 (1983); *Nibco, Inc.* v. *Metcalf*, 1 Ark. App. 114, 613 S.W.2d 612 (1981).

On appeal, the findings of fact of the Board of Review are deemed conclusive if they are supported by substantial evidence. *Feagin* v. *Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983). Even though there is evidence upon which the Board might have reached a different result, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it; we may not substitute our findings for those of the Board even though we might have reached a different conclusion had we made the original determination upon the same evidence. *Id.* This is not to say, of course, that our function on appeal is merely to ratify whatever decision is made by the Board of Review. It is essential that the Board's findings of fact be supported by substantial evidence upon which a particular conclusion could reasonably have been reached. We are not at liberty to ignore our responsibility to determine whether the standard of review has been met.

In the present case, the Director of Labor concedes that appellee Smith at times may have exercised poor judgment in connection with his work but denies that his actions were of a willful, deliberate nature. We must examine the record in the case to determine whether this view of the matter can be sustained.

Appellee Smith was hired as a tractor-trailer driver by appellant in May, 1984. He delivered bakery products to Ozark, Russellville, and other communities outside the Fort Smith area. He received instructions regarding various responsibilities, such

as loading the truck, inspecting it upon completion of his deliveries, and notifying his employer of any problems.

The record reveals that appellee Smith received four letters of reprimand before finally receiving a letter of termination. In August, 1984, Smith received a written warning concerning his refusal to load his truck despite his having been specifically instructed to do so by his sales supervisor. Smith received another letter of reprimand in September, 1984, when he took home paperwork that was supposed to remain at the bakery. When told by a fellow employee that this action created a problem at the bakery, he was reported as having said, "So what if it gives them a little extra work?" Also in September, 1984, Smith received a letter of reprimand for having failed on one occasion to report to work and to notify appellant that he would be absent, and for having been one to two hours late for work on seven different occasions. This letter further advised him that if his record did not improve he would be given a three day layoff without pay. In November, 1984, Smith received a letter of reprimand and disciplinary layoff for failing to report a flat tire on his trailer to his supervisor. He received notice of termination in February, 1985, through a letter that called to his attention his failure to notify appellant that he had continued to drive his tractor and trailer after the tractor brake had broken off, causing a rupture and leak in two air lines on the tractor.

The plant superintendent also testified that on four different occasions, despite his having instructed Smith not to do so, appellee persisted in stopping his engine while using his hydraulic lift to unload his truck, thus causing the battery to run down. As a result, appellant had to call a tow truck to move Smith's tractor and trailer so that other waiting vehicles could be unloaded. Although the plant manager had issued a general directive requiring engines to be shut off when company vehicles were parked, appellee had received specific orders from the superintendent to continue running his motor when unloading. Moreover, on four separate occasions Smith had allowed the battery to run down; such conduct suggests at the very least a willful disregard for his employer's interests. *Cf. Hall* v. *Daniels*, 269 Ark. 748, 600 S.W.2d 436 (1980).

We believe, with the accumulated evidence of appellee

Smith's behavior before it, that the Board of Review could not reasonably have reached its decision. Without departing from the bounds limiting the scope of our review, we hold that the Board's finding that Smith had been discharged for reasons other than misconduct in connection with work is not supported by substantial evidence. The conduct of the claimant was of such nature and of such degree and recurrence as to manifest intentional and substantial disregard of his employer's interests and of claimant's duties and obligations as an employee. The Board of Review's decision must be reversed.

CRACRAFT, C.J., and COOPER, J., dissent.

JAMES R. COOPER, Judge, dissenting. I dissent from the majority opinion because I am of the opinion that it violates our standard of review. We are required to affirm the Board of Review where its decision is supported by substantial evidence, *Harris* v. *Daniels*, 263 Ark. 897, 567 S.W.2d 954; *Hodnett* v. *Daniels*, 271 Ark. 479, 609 S.W.2d 172 (Ark. App. 1980), and, although I might have decided this case differently had I been the fact-finder, I believe that there is substantial evidence to support the Board's decision.

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

JACKSON COOKIE COMPANY *v.* Bertha FAUSETT, et al.

CA 85-265 703 S.W.2d 468

Court of Appeals of Arkansas
Division II
Opinion delivered February 12, 1986
[Rehearing denied March 12, 1986.]

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

Southern, Allen, East, James & Jones, by: *Henry A. Allen*, for appellee.

DONALD L. CORBIN, Judge. This is an appeal of a decision by the Workers' Compensation Commission. The full Commission affirmed an order by the Administrative Law Judge which denied appellants' petition for a credit against benefits due appellee, the claimant, for sums recovered by appellee in settlement of a third-party action. Appellants claim that, under Ark. Stat. Ann. § 81-1340 (Supp. 1985), they were entitled to notice and an opportunity to intervene in the third-party action and that appellee failed to give appellants proper notice. Therefore, appellants assert, they have a right to a credit against the settlement entered into by appellee and the third-party. Appellants also claim that at the time of the settlement of the third-party tort action, they had not been held liable in the workers' compensation action; therefore, they assert, Ark. Stat. Ann. § 81-1340 did not require that they intervene in order to protect their rights to a credit.

The Arkansas Workers' Compensation Law provides for third-party liability in Ark. Stat. Ann. § 81-1340. This section provides that the making of a claim for workers' compensation shall not affect the right of the employee to make a claim or maintain an action in court against the third party, but is subject to the carrier's right to notice and intervention, and a lien upon two-thirds of the net recovery for payment of the compensation period paid and to be paid. Subsection (a)(2) provides that the commencement of an action against the third party, or the adjustment of any such claim, shall not affect the right of the employee to recover compensation, but the recovery shall be applied, after cost of collection, one-third in every case to the employee. The remainder, as necessary, is applied to discharge the actual amount of liability of the carrier, and the excess shall belong to the employee. Subsection (c) provides that settlement of such claims under subsections (a) and (b) must have the approval of the court or the Commission, except that the distribution of that portion of the settlement which represents the compensation payable under the Act must have the approval of

the Commission. *Bituminous Insurance Co.* v. *Georgia-Pacific Corp.*, 2 Ark. App. 245, 620 S.W.2d 304 (1981).

The full Commission found that appellants had actual knowledge of the on-going third-party suit and, by their failure to intervene in said suit, appellants are precluded from recovering any part of the settlement to appellee-claimant from the third-party tort claim. The Commission stated as follows:

> This is a difficult case and we reluctantly affirm the Law Judge because we feel the respondents [appellants here] failed to assert their rights under Ark. Stat. Ann. § 81-1340 in a timely fashion. The respondents never undertook any action to intervene in the Georgia tort claim [the third-party action in this case]. It is clear from the Stipulation and Agreement that the Georgia action was settled in April, 1983, but the respondents did not learn of this settlement until November 11, 1983, *even though* the respondents had been in communication with the Georgia defense attorneys in the tort claim.
>
> Not until June 11, 1984, did the respondents request the Administrative Law Judge for a credit pursuant to Section 40 [§ 81-1340]. We must agree with the Administrative Law Judge 'that the respondents in this case were effectively on notice that a third-party settlement was proceeding and given ample opportunity to intervene.'
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> . . . .
>
> We also are not swayed by the respondents' argument that at the time the suit in Georgia was filed and the respondents subsequently learned of it, they had no standing to intervene as no final adjudication had been made as to their liability for the claimant's death. As soon as the respondents became aware of a third-party action, in order to protect their interests under Section 40, intervention in the Georgia action should have been attempted.
>
> While we cannot say that affirmance of the Law Judge is the outcome we wish to obtain, we feel that in the face of all the evidence and especially in view of the length of time the respondents had in which to intervene in the Georgia action, this Commission, *under these specific*

circumstances, is compelled to affirm the Law Judge.

It is within the province of the Commission to reconcile conflicting evidence and determine the true facts. The Court of Appeals reviews the evidence in the light most favorable to the findings of the Workers' Compensation Commission and the Commission is the trier of fact and the sole judge of the credibility of the witnesses. *Cotton Plant Plywood Corp.* v. *Speed*, 8 Ark. App. 326, 651 S.W.2d 470 (1983).

The Arkansas Supreme Court has interpreted Ark. Stat. Ann. § 81-1340 in *Travelers Insurance Co.* v. *McCluskey*, 252 Ark. 1045, 483 S.W.2d 179 (1972). Appellee McCluskey drew workers' compensation benefits from his employer's insurance carrier, Travelers Insurance Company, for injuries sustained when a wrench he was using broke. McCluskey settled a third-party tort action arising out of the compensable injury. He subsequently filed for additional workers' compensation benefits. The compensation carrier, Travelers, sought a credit for the proceeds McCluskey received in the third-party settlement. The Workers' Compensation Commission ruled in favor of McCluskey, holding that Travelers had notice of the third-party action but did not intervene, and therefore had no lien against the proceeds of the third-party settlement. The Arkansas Supreme Court affirmed the decision of the Commission, stating as follows:

> Since the statutory purpose of § 81-1340 is to protect the rights of both the compensation carrier and the employee, we . . . require that as between the employer (or carrier) and employee, the proceeds of *any* compromise settlement of a tort claim be subject to the lien of the employer or the compensation carrier unless the settlement has been approved by a court having jurisdiction or by the Workmen's Compensation Commission, after the compensation carrier has been afforded adequate opportunity to be heard.

McCluskey, 252 Ark. at 1052, 483 S.W.2d at 183-184.

Ark. Stat. Ann. § 81-1340 creates a right of repayment in the employer, or insurance carrier, out of the proceeds which may be asserted by intervening in the third-party action brought by the employee. In our view, neither the employer nor its

insurance carrier is admitting liability when it intervenes in the third-party action. By intervening under § 81-1340, they are merely preserving their right to a lien to 2/3 of the proceeds paid to the employee-claimant as a credit against their compensation exposure. In the instant case, the employer and its insurance carrier were already exposed to liability because the workers' compensation claim had been filed against them. To reserve their right to a credit under § 81-1340, it was essential for them to intervene in appellee's third-party action.

The language of § 81-1340 supports this interpretation. The statute provides in pertinent part:

> **Third party liability. — (a) Liability unaffected.** (1) The making of a claim for compensation against any employer or carrier for the injury or death of an employee shall not affect the right of the employee, or his dependents, to make claim or maintain an action in court against any third party for such injury, but the employer or his carrier shall be entitled to reasonable notice and opportunity to join in such action. If they, or either of them, join in such action they shall be entitled to a first lien upon two thirds [2/3] of the net proceeds recovered in such action that remain after the payment of the reasonable costs of collection, for the payment to them of the amount paid and to be paid by them as compensation to the injured employee or his dependents.
>
> . . . .
>
> (c) **Settlement of claims.** Settlement of such claims under subsections (a) and (b) of this section must have the approval of the Court or of the Commission, except that the distribution of that portion of the settlement which represents the compensation payable under this act must have the approval of the Commission. . . .

Where the employee has made a claim under the Workers' Compensation Act and the employer or carrier has had reasonable notice and an opportunity to join in a third-party action, we hold that the employer and its carrier must intervene in a third-party action to have a right to a credit, whether or not the liability of the employer or the carrier has been determined. Therefore, we

affirm the decision of the Arkansas Workers' Compensation Commission.

Affirmed.

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

Kenneth R. JOHNSON *v.* STATE of Arkansas

CA CR 85-175 703 S.W.2d 475

Court of Appeals of Arkansas
Division II
Opinion delivered February 12, 1986

Elrod & Lee, by: *Daniel R. Elrod*, for appellant.

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

TOM GLAZE, Judge. Kenneth R. Johnson appeals his conviction of violating the Arkansas Omnibus DWI Act, Section 3(b). He was sentenced to forty-eight hours in the county jail, and ordered to pay a $350.00 fine and court costs of $306.75. In addition, his driver's license was suspended for ninety days. For reversal, appellant contends the trial court erred in refusing to grant his motion to dismiss because (1) hearsay testimony was used to prove a senior operator existed in laying the foundation for the admission of breathalyzer results, and (2) the State failed to introduce a senior operator's certificate in violation of the "best evidence" rule. We affirm.

On August 23, 1983, Deputy Harry Perry observed a pickup truck driven by appellant on Highway 71 between Fayetteville and Springdale. The truck was weaving between the two northbound lanes and glancing the curb. Perry stopped the truck and smelled alcohol on appellant's breath. Appellant's eyes were "bloodshot" and watery, and his speech was slurred. Perry conducted a field sobriety test, arrested appellant, and took him to the Springdale Police Department. Upon arrival there, Perry read appellant the Miranda and breathalyzer test rights. Officer Charles Clark administered the breathalyzer test, and appellant measured .20. He was found guilty of driving while intoxicated by the Springdale Municipal Court, and he appealed *de novo* to circuit court.

During the *de novo* trial, both Perry and Clark were called as State's witnesses. Clark testified that he was certified by the State Health Department to administer blood-alcohol tests. His certificate was admitted into evidence without objection. The instru-

ment certificate for the breathalyzer used in this case was also admitted without objection. When the State attempted to introduce the installation certificate issued to the Springdale Police Department, appellant objected, stating that a senior operator's certificate was necessary to show a proper foundation for the admission of the installation certificate. The prosecutor then asked Clark if the Springdale Police Department had a senior operator who calibrated the machine and Clark answered in the affirmative. Again, appellant's attorney made a hearsay objection which was overruled. The State then introduced a page of the daily log showing that the senior operator had calibrated the machine on the day appellant was administered the breathalyzer test. The court also allowed the installation certificate to be admitted over appellant's objection.

Appellant argues the trial court erred in overruling his hearsay objection to Clark's testimony concerning the Police Department's senior operator, the installation certificate, and in allowing the State to prove the certification of the senior operator in violation of the "best evidence" rule. We hold the trial court should be affirmed, but we do so on a more fundamental basis, unrelated to the arguments put forth by appellant. Our review of the law reveals that there is no requirement that an installation certificate is necessary to prove the chemical analysis method used was statutorily valid. The governing statute is Ark. Stat. Ann. § 75-1031.1(c) (Supp. 1985), which provides:

> The chemical analysis referred to in this section shall be made by a method approved by the State Board of Health. *The method approved may be proved by a certificate duly acknowledged by a representative of the State Board of Health and said certificate shall be admissible per se in any criminal prosecution and shall not be subject to any objections on grounds of heresay [hearsay].* Provided, however, *the machine performing the chemical analysis shall have been duly certified at least once in the last three (3) months preceding arrest and the operator thereof shall have been properly trained and certified.* Provided further, the person calibrating the machine and the operator of the machine shall be made available by the State for cross-examination by the defendant or his counsel of record upon reasonable notice to the prosecuting attorney. (Emphasis

supplied.)

In sum, § 75-1031.1(c) requires that (1) the method of testing must be approved by the Board of Health, (2) the machine must have been certified in the three months preceding arrest, and (3) the operator must have been trained and certified. Neither a senior operator's certificate nor an installation certificate are mentioned in the statute. Simply put, § 75-1031.1 does not require proof of an installation certificate before test results may be admitted into evidence.

The State complied with the requirements in § 75-1031.1 by introducing a certificate which approved the method and the machine used by the Springdale Police Department. Specifically, it authorized the use of an Alco-Analyzer Gas Chromatograph, Model 1000, from July 1, 1983, through October 1, 1983, which period covered the date of appellant's arrest. Appellant did not object to this certificate. Next, the trial court admitted, without objection, an "Operator's Certificate for Alcohol Analysis" issued to Charles F. Clark of the Springdale Police Department, stating that Clark was authorized to perform breath testing using a gas chromatograph 1000. Thus, all of the statutory requirements were met at this point, and the trial court was correct in admitting the test results into evidence.

While § 75-1031.1(c) does not require the State to introduce an installation certificate or a senior operator's testimony as a prerequisite to the introduction of chemical analysis test results, it does provide that the person who calibrates the machine (namely, the senior operator) and the person who operates it will be made available for cross-examination by the defense upon reasonable notice to the prosecutor. No such notice was given in this case. The State contends the appellant invited error by his failing to request the senior operator's presence at trial and then objecting to the operator's absence. We agree. It is well settled that one who is responsible for error should not be heard to complain of that for which he was responsible. *See Clinkscale* v. *State*, 13 Ark. App. 149, 680 S.W.2d 728 (1984). Here, if appellant had desired to cross-examine the senior operator, he had the burden of notifying the prosecutor to make that operator available. He, therefore, cannot complain of the State's failure to produce the senior operator or his certificate.

Finding that all the statutory requirements were met, and that no substantial error was committed, we affirm.

Affirmed.

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

Benjamin PHILLIPS *v.* STATE of Arkansas

CA CR 85-131 703 S.W.2d 471

Court of Appeals of Arkansas
Division II
Opinion delivered February 12, 1986

Gregory E. Bryant, for appellant.

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

TOM GLAZE, Judge. Appellant was convicted, by the trial court sitting as a jury, of robbery and sentenced to twenty years in the Arkansas Department of Correction. He appeals his conviction based on three alleged errors committed by the trial court, and argues that his probation was improperly revoked. We affirm.

Appellant's first point for reversal is that no robbery was proved because there was insufficient evidence that a theft of property occurred. He argues that, because he was unaware of the acts of his female companion, he cannot be held liable for her actions.

On October 22, 1983, a store clerk observed appellant and a woman, whom the clerk previously had watched for shoplifting, coming into the dress department and walking around together. The woman took one dress into a dressing room and then, before she would have had time to try it on, came out with it, and went back in with at least three dresses. The clerk said the woman was carrying the dresses as if she were trying to hide them, so the clerk called the store's security. When the woman came out with only

two dresses, the clerk checked the dressing room and found nothing. She alerted the security officer, an off-duty policeman, and when appellant and the woman left the store, he followed them outside. The officer testified he stopped them in the parking lot, identified himself as a police officer, and asked for identification. Appellant produced his driver's license but the woman had none. The officer asked them to accompany him back into the store. When they refused, he testified that he told them they were under arrest for shoplifting. Appellant and the woman began cursing, and when she started walking away, the officer said he grabbed her by the arm and attempted to place a handcuff on her. She then jerked away, and a scuffle ensued between appellant and the officer. The officer, who was pinned to the ground, was then assisted by an on-looker who got between the woman and the officer's gun. Another police officer arrived, and appellant was handcuffed and taken into custody. The woman escaped, but two dresses were found on the parking lot, about ten feet from where appellant was arrested.

Appellant's version of the events was almost in total conflict. He testified that he did not really know the woman, and that he was just giving her a ride to the store where she said she needed to pay a bill. After waiting for her in his car for about thirty to forty minutes, he said he went into the store, found her, and told her he needed to leave because he had to meet someone. He denied being with her in the dress department, and said he did not see her conceal any dresses. Appellant said he became involved in the scuffle with the officer when the officer grabbed the woman's arm and pushed it behind her, grabbed the back of her neck, and slammed her into the car. He said he and the officer exchanged words, and then the fight began.

On appeal in criminal cases, we view the evidence in the light most favorable to the appellee, and, whether tried by judge or jury, we will affirm if there is substantial evidence to support the finding of the trier of fact. *Harris* v. *State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985). Substantial evidence is that evidence that is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other; it must force or induce the mind to pass beyond a suspicion or conjecture. *Jones* v. *State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984).

When two or more persons assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both. *Parker* v. *State*, 265 Ark. 315, 578 S.W.2d 206 (1979). Each participant is criminally liable, ultimately, for his own conduct, but he cannot disclaim responsibility because he did not personally take part in every act that went to make up the crime as a whole. *Id.*

The State's evidence tended to show that appellant accompanied his female companion into the dress department. They left the department and store together, and refused to come back into the store after the officer accused them of theft. Appellant wrestled with the officer, permitting the woman to escape, and two dresses were found within ten feet of the arrest. We hold this is substantial evidence to support the conviction of robbery.

Secondly, appellant contends that the security officer had no knowledge that would give rise to the shoplifting presumption. We cannot agree. Ark. Stat. Ann. § 41-2202(2) (Repl. 1977) provides that the knowing concealment, upon his person or the person of another, of unpurchased goods or merchandise offered for sale by any store or business creates a presumption that the actor took the goods with the purpose of depriving the owner thereof. The State's evidence that appellant was involved in a shoplifting incident need not be restated. Suffice it to say, there was sufficient evidence placing appellant on the premises with the woman to give rise to the necessary presumption.

Appellant further argues that Ark. Stat. Ann. § 41-2251 (Supp. 1985) is unconstitutional because it allows a private individual to make a *Terry* stop.[1] This issue need not be addressed.

First of all, appellant cites no cases, other than *Terry* v. *Ohio*, 392 U.S. 1 (1968), and makes no convincing argument on this subpoint. Secondly, he does not claim that any evidence should be suppressed, and a flaw in the manner of arrest is not

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[1] Section 41-2251 provides that a person who engages in conduct that gives rise to the shoplifting presumption may be detained for a reasonable time and in a reasonable manner by a peace officer or a merchant or a merchant's employee.

sufficient cause to set aside a judgment of conviction. *Webster* v. *State*, 284 Ark. 206, 680 S.W.2d 906 (1984).

Appellant's third point for reversal is that the trial court erred in refusing to grant him a continuance on the day of trial. Appellant was charged on October 31, 1983, and the public defender was appointed as counsel. On January 8, 1985, appellant visited with another attorney, Mr. Bryant, about representing him, and about ten days before trial, appellant again mentioned to Bryant that he wanted to hire him. Mr. Bryant agreed, provided appellant could pay him a retainer. On April 8, 1985, the day of trial, appellant requested to substitute Bryant as counsel and asked for a twenty-four hour continuance, due to the late entry of counsel. The court granted his request to substitute counsel, but denied his motion for a continuance.

Whether to grant a continuance is a matter lying within the sound discretion of the trial court and will not be overturned absent a showing of clear abuse of discretion. *Berry* v. *State*, 278 Ark. 578, 647 S.W.2d 453 (1983); *Parks* v. *State*, 11 Ark. App. 238, 669 S.W.2d 496 (1984). The burden lies with the appellant to demonstrate both the abuse and resulting prejudice. *Id.*

In denying the motion for a continuance, the judge noted that the witnesses were present and ready for trial. There is no indication in the record nor does appellant allege any prejudice from the denial of his motion for a continuance. We find no abuse of discretion, and therefore, uphold the denial of the motion.

Finally, appellant contends that he did not waive the sixty-day requirement imposed in a revocation hearing pursuant to Ark. Stat. Ann. § 41-1209(2) (Repl. 1977). Consequently, he argues, the trial court erred in revoking his probation.[2]

Section 41-1209(2) provides that a suspension or probation shall not be revoked except after a revocation hearing, and that such hearing must be held within a reasonable time after defendant's arrest, not to exceed sixty days.

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[2] While appellant argues that his *probation* was improperly revoked, we note from the record that it was suspended sentences that were revoked by the State. Appellant was sentenced to probation on a federal charge, and that probation was revoked previously, for reasons other than the robbery charge.

Appellant was charged with violating the terms of his suspended sentences on November 3, 1983. On July 12, 1984, he appeared and entered a plea of not guilty to the robbery charge. The following exchange also took place:

> The Court: And these other four, I believe, are revocations. Do you wish to enter a plea of not guilty on those also?
>
> Mr. Allen: We plead not guilty to those, Your Honor. We would waive the 60-day requirement, and ask that they be set the same day as the jury trial.

On appeal, appellant argues that he did not know he had a right to a revocation hearing within sixty days of his arrest, and that he did not *personally* waive the requirement. He contends that his right to a hearing within sixty days is a fundamental right guaranteed by the fourteenth amendment of the United States Constitution. The State argues, however, that while the right to a hearing before probation or parole can be revoked is a constitutionally protected right which cannot be waived without prior consent of the defendant, the sixty-day requirement is only a statutory rule of procedure. As long as the defendant is afforded a hearing and has a reasonable time to prepare, there is no violation of his right to due process. We agree with the State.

Appellant's suspended sentences were revoked after a full trial and verdict of guilty on the robbery charge. Thus, there is no question that he was afforded his due process rights before the revocation decision was made. In addition, the appellant suffered no prejudice by the revocation hearing not being held within the sixty-day limitation because after appellant's arrest on the robbery charge, he already had been incarcerated on an unrelated charge. As the court noted in *Boone* v. *State*, 270 Ark. 83, 603 S.W.2d 410 (1980), the purpose of the sixty-day limitation period is to assure that a defendant is not detained in jail for an unreasonable time awaiting his revocation hearing. When he is already serving time on another charge, the limitation loses its meaning. That was the case here.

Furthermore, appellant's attorney's waiver of the sixty-day requirement was consistent with the American Bar Association's "Standards Relating to Probation." In *Haskins* v.

State, 264 Ark. 454, 572 S.W.2d 411 (1978), the court noted that the standards recommend that a revocation proceeding based solely upon the commission of another crime not be initiated until after the disposition of the other charge. The court went on to state that the prosecutor and defendant may prefer that action on the revocation petition be deferred until a decision has been reached in the other case. That is exactly what happened here.

Appellant has not demonstrated how he was jeopardized by his counsel's action nor from our review do we find any prejudice.

Affirmed.

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

Nita COX *v.* Walter COX

CA 85-145 704 S.W.2d 171

Court of Appeals of Arkansas
Division I
Opinion delivered February 19, 1986
[Supplemental Opinion on Denial of Rehearing April 12, 1986.]

Merl O. Barns, for appellant.

F.H. Martin, for appellee.

JAMES R. COOPER, Judge. This is an appeal from an order of the Washington County Chancery Court, which modified the divorce decree of the parties by requiring the appellant to either sign a joint federal tax return for the year 1983 or pay one-half of the increased tax, interest, and penalty caused by her refusal to sign. The appellant contends that the court had no jurisdiction to modify the decree, that the court erred in making additional special findings when the appellee had waived his right to request them, and that the court's decision was clearly erroneous. We find no merit in any of these contentions.

The appellant first contends that the court had no subject-matter jurisdiction to modify the decree because the ninety days allowed by Ark. R. Civ. P. 60 had expired, and the case did not fit into any of the exceptions set forth in Rule 60(c). Here, the original divorce decree, entered after a lengthy and contested trial, spelled out in detail the parties' marital property and debts. In its final paragraph, the decree stated "[t]he court retains jurisdiction of this cause for the entry of other and further orders as may be necessary herein, including alimony and child support." While the chancellor made no finding as to the tax liability of the parties in the original decree, by retaining jurisdiction in this matter, he expressly reserved the right to make any further orders regarding the decree, which includes the

determination of tax liability. *See Bagwell* v. *Bagwell*, 282 Ark. 403, 668 S.W.2d 949 (1984); *Miles* v. *Teague*, 251 Ark. 1059, 476 S.W.2d 245 (1972). In this situation, Rule 60 is inapplicable. *See Miles, supra.*

The appellant next contends that the court could not make additional findings of fact when the appellee waived his right to request such findings under Ark. R. Civ. P. 52(a). The appellant cites no cases to support her proposition where, as here, the chancellor has expressly retained jurisdiction to modify the decree; nor have we found any such holding. Indeed *Bagwell, supra*, indicates that, where jurisdiction has been retained by the chancellor, findings as to tax liability may be made at a later date.

The appellant's final point on appeal is that the trial court was clearly erroneous in finding that the appellant stated she would sign a joint tax return for 1983, contending that the most the record would support is a finding that her agreement to sign such a return was conditioned upon the parties being married at the end of 1983. We disagree. While we review chancery cases *de novo*, we will not reverse the chancellor's decree unless it is clearly erroneous, giving due regard to the chancellor's superior position to determine the credibility and weight to be given a witness's testimony. *Rose* v. *Dunn*, 283 Ark. 42, 679 S.W.2d 180 (1984); Ark. R. Civ. P. 52(a). The appellant was asked by her attorney if she would sign a joint income tax return in 1983, to which she replied yes. Upon continued questioning by her attorney, the appellant stated that she would also sign such a tax form in 1984 and 1985 if the parties were married at the end of those years. The appellant contends that the use of the word "would" rather than "will" means that her agreement was conditioned upon the granting of her counter-claim for separate maintenance. However, upon cross-examination, the appellant was asked if she was *willing* to sign a 1983 tax return, even though she could be held liable for any tax deficit. She replied yes, adding that "I still love [the appellee] and anything that will help him monitarily [sic] will not keep me from trying to help." The chancellor found that these statements led him to believe the appellant would sign the tax forms and affected his decision in drafting the original decree. We cannot say that the chancellor was clearly erroneous in so finding.

Although it is not necessary to the disposition of this case, we note that, in his order of December 17, 1984, the chancellor states that he "cannot compel the [appellant] to sign a joint federal income tax return for the year 1983." A court of equity may mould any remedy that is justified by the proof. *Keith* v. *Barrow-Hicks Extensions of Water Improvement District No. 85 of Pulaski County*, 275 Ark. 28, 626 S.W.2d 951 (1982); *State ex. rel. Peevy* v. *Cate*, 236 Ark. 836, 371 S.W.2d 541 (1963). The chancellor may require a person to do a specific act by the issuance of a mandatory injunction. *See Carter* v. *Oslin*, 228 Ark. 629, 309 S.W.2d 328 (1958); *Haberman* v. *Van Zandvoord*, 1 Ark. App. 204, 614 S.W.2d 242 (1981). *Cf.* Ark. R. Civ. P. 65(e) (requiring the terms and scope of mandatory and prohibitory injunctions to be set forth explicity); Ark. R. Civ. P. 70 (giving the court power to deal with those who refuse to obey and comply with orders to do specific acts). We see no reason that, if he had so desired, the chancellor could not have required the appellant to sign the joint income tax return.

There being no merit to the appellant's contentions, we affirm the order of the chancellor.

Affirmed.

CLONINGER and MAYFIELD, JJ., agree.

Supplemental Opinion on Denial of Rehearing
Delivered April 2, 1986

CA 85-145 705 S.W.2d 902

JAMES R. COOPER, Judge. The appellant's petition for rehearing contends that we misapplied the law when we found a general reservation of jurisdiction sufficient to render Ark. R. Civ. P. 60 inapplicable. We do not agree.

The appellant contends that the Supreme Court, in *Fullerton* v. *Fullerton*, 230 Ark. 539, 323 S.W.2d 926 (1959), held that a specific identification of reserved issues is necessary to bypass the time limitations for modification of a decree. We do not read *Fullerton* to so hold. In *Fullerton*, the Court found that, because the parties had specifically stated in the pleadings that no property rights were at issue in the case and because the decree did not make any disposition of realty, the general reservation of jurisdiction (virtually identical to the one in the case at bar) could not apply to questions concerning real property. The Court went on to point out that the reservation properly reserved the issue of alimony for modification, as it had been raised before the court in the original action. *Cf. Fullerton* v. *Fullerton*, 233 Ark. 656, 348 S.W.2d 689 (1961) (holding that the same parties were not barred by *res judicata* from asserting property rights not adjudicated in the original decree). *See also Horn* v. *Horn*, 232 Ark. 723, 339 S.W.2d 852 (1960) (distinguishing *Fullerton* v. *Fullerton*, 230 Ark. 539, 323 S.W.2d 926 (1959), when it held that a general reservation of jurisdiction was sufficient to give the original court jurisdiction over an attempt to collect dower awarded in the original divorce decree from property transferred to a third party in a different county).

The other cases cited by the appellant, purporting to approve her definition of the holding of *Fullerton*, are likewise inapposite. In both *Collie* v. *Collie*, 242 Ark. 297, 413 S.W.2d 42 (1967), and *Harrison* v. *Bradford*, 9 Ark. App. 156, 655 S.W.2d 466 (1983), *Fullerton* was cited for the general proposition that a decree may not be modified after the expiration of the "term time" (now ninety days under Ark. R. Civ. P. 60), absent statutory grounds. Neither *Collie* nor *Harrison* were concerned with the reservation of jurisdiction by the court. Furthermore, *Collie* deals with an independent property settlement, which may not be modified by the chancellor even if jurisdiction is retained, and *Harrison*, like *Fullerton*, dealt with the disposition of property which was not involved in the original action.

Here, unlike the situations in the above cited cases, the chancellor reserved jurisdiction *and* had the issue of tax liability before him in the original action. The issue having been originally brought before the chancellor, his general reservation of jurisdiction was sufficient to allow him to modify the decree.

Petition denied.

CLONINGER and MAYFIELD, JJ., agree.

Martha SISNEY *v.* LEISURE LODGES, INC., et al.

CA 85-391 704 S.W.2d 173

Court of Appeals of Arkansas
Division I
Opinion delivered February 19, 1986

Youngdahl, Youngdahl & Wright, P.A., for appellant.

Gerald D. Lee, for appellees.

LAWSON CLONINGER, Judge. The issue in this workers' compensation appeal is whether the Commission erred as a matter of law in its interpretation of Ark. Stat. Ann. § 81-1318(b) (Repl. 1976) when it held that appellant's claim for additional medical benefits was barred by the statute of limitations. Upon review, we have determined that the Commission erroneously applied the law to the facts of the present case, and we reverse its decision and remand the matter for proceedings not inconsistent with this opinion.

Appellant, Bertha Sisney, was employed by appellee, Leisure Lodges, Inc., on March 8, 1979, when she fractured her right hip at work. Temporary total disability benefit payments were made through March 20, 1980, and payments on an impairment rating of 25% to the right lower extremity were made through May 6, 1982. Appellant filed a claim for additional disability and rehabilitation benefits on May 19, 1980, upon which claim no action was taken. By a letter from her attorney dated August 26, 1983, she requested additional medical and disability benefits.

Following a hearing before an administrative law judge in October, 1983, appellant was denied additional benefits on the basis that her claim was barred by the limitation on actions imposed by Ark. Stat. Ann. § 81-1318(b) (Repl. 1976). On July 3, 1985, the full Commission, in a divided two-to-one decision, affirmed the law judge's opinion. From that order appellant brings this appeal.

Section 81-1318(b), *supra*, provides as follows:

> In cases where compensation for disability has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the Commission within one [1] year from the date of the last payment of compensation, or two [2] years from the date of the injury, whichever is greater. The time limitations of this subsection shall not apply to claims for replacement of medicine, crutches, artificial limbs and other apparatus permanently or indefinitely required as the result of a compensable injury, where the employer or carrier previously furnished such medical supplies.

The administrative law judge, in reaching his decision that this

section of the Workers' Compensation Act erected a barrier to appellant's claim, relied on the Commission's holding in *Bledsoe* v. *Georgia-Pacific Corp.*, WCC Claim No. C613937 (February 1, 1984), which in turn was based upon the rationale of *Petit Jean Air Service* v. *Wilson*, 251 Ark. 871, 475 S.W.2d 531 (1972).

In *Petit Jean, supra*, the claimant argued, and the Commission agreed, that the statute of limitations did not bar a claim for additional compensation filed thirteen months after the last payment of compensation and more than two years after the date of the last injury because the earlier claims were never finally disposed of. On appeal, the Arkansas Supreme Court reversed the Commission, observing that "Apparently, the commission viewed the claims, in those circumstances, as being analogous to cases pending in court, as to which the statute of limitations is suspended." The court went on to dismiss the analogy, noting, in distinction, that "[c]ourt cases, almost without exception, are contested," while "hardly one compensation case in fifty is controverted."

After the administrative law judge rendered his opinion in the present case and before the Commission took up the appeal, this court overturned the Commission's decision in *Bledsoe*. We held, in *Bledsoe* v. *Georgia-Pacific Corp.*, 12 Ark. App. 293, 675 S.W.2d 849 (October 3, 1984), that the filing of a claim for additional workers' compensation benefits within the statutory period tolls the statute of limitations. We distinguished *Petit Jean* and *Bledsoe* on the basis that, where in *Petit Jean* the claimant contended that the original claim tolled the statute, the appellant in *Bledsoe* had simply argued that her claim for additional benefits, which fell well within the one year statutory period, tolled the statute. We said: "We must agree. Otherwise, the statute has no meaning. If the statute is not tolled when the claimant filed a claim for additional benefits, what could possibly toll the statute? We prefer to think the statute means what its plain language implies."

In its opinion in the instant case, the Commission majority noted a distinction between this appeal and *Bledsoe*: "[T]he claimant here filed a request for *rehabilitation benefits* and *additional permanent disability benefits* on May 19, 1980. Not until 3 years later, August 26, 1983, did the claimant request

additional medical benefits. In *Bledsoe* the claimant requested the same type of benefits, *i.e.*, additional permanent partial disability." (Emphasis in the original.) The majority rejected appellant's position that the May 19, 1980, filing tolled the statute for all purposes, stating that she should have filed within one year of the last compensation payment of May 6, 1982.

The Commission also cited our decision in *Terminal Van & Storage* v. *Hackler*, 270 Ark. 113, 603 S.W.2d 893 (Ark. App. 1980), in which we held that payment for replacement medicine does not revive a claim for additional benefits once the statute of limitations has run against other forms of compensation. The majority acknowledged that the case was not clearly on point because it dealt with replacement medicine and corrective shoes instead of what the majority in the present case perceived to be two separate claims for additional benefits. We find it difficult to understand why *Terminal Van* was enlisted to reinforce the Commission's order; as the majority conceded, it has little application to the current matter, dealing as it does with categories expressly set apart by § 81-1318(b).

We find striking factual parallels between *Bledsoe, supra*, and the instant case. Both claimants were injured in 1979; Bledsoe received temporary total disability and medical benefits through February, 1980, and appellant received the same through March, 1980; Bledsoe received her last benefits on March 9, 1982, and appellant hers on May 6, 1982; Bledsoe filed her claim for additional benefits in October, 1981, and appellant hers in May 1980; Bledsoe's hearing was held in June 1983, and appellant's in August, 1983. It should be emphasized that appellant's 1980 claim, like the 1981 claim in *Bledsoe, supra*, and unlike that in *Petit Jean, supra*, was for *additional* benefits, and the subsequent claim related to the prior claim for additional benefits rather than to the original claim.

To draw distinctions between, on the one hand, additional rehabilitation and permanent disability benefits and, on the other, additional medical benefits, as the Commission majority has done, is to invoke a measure of precision uncalled for by the broad language of the statute and unsupported by the case law of this state.

We hold that, under the standard established in *Bled-*

soe v. *Georgia-Pacific Corp., supra*, the Commission erred as a matter of law in holding that appellant's claim for additional medical benefits was barred by the statute of limitations.

Reversed and remanded.

COOPER and MAYFIELD, JJ., agree.

SECOND INJURY FUND *v.* Mildred McCARVER, and MUNRO-CLEAR LAKE FOOTWEAR

CA 85-339 704 S.W.2d 639

Court of Appeals of Arkansas
En Banc
Opinion delivered February 19, 1986

David L. Pake, for appellant.

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

MELVIN MAYFIELD, Judge. This is an appeal by the Second Injury Fund from a decision by the Workers' Compensation Commission.

The claimant was employed by appellee Munro-Clear Lake Footwear when she sustained a compensable injury to her lower back in October of 1979. The administrative law judge found she sustained an anatomical impairment of 5% to the body as a whole as a result of that injury. On August 4, 1983, the claimant sustained a compensable injury to her right shoulder, arm, and hand while working for the same employer. The law judge found she sustained an anatomical impairment of 5% to the body as a whole as a result of this second injury. Finding the claimant's overall disability as a result of both injuries to be 30%, the law judge held the Fund liable for 20% of that 30% disability. The full Commission affirmed.

On appeal to this court, the Fund argues that it has no liability to the claimant because (1) the claimant did not have a

loss-of-earning disability or impairment at the time she sustained her second injury, and (2) both injuries were sustained while in the employment of the same employer.

The law involved in the first point has been resolved in keeping with the Fund's contention in the cases of *Osage Oil Co.* v. *Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985); *Second Injury Fund* v. *Girtman*, 16 Ark. App. 155, 698 S.W.2d 514 (1985); and *Second Injury Fund* v. *Coleman*, 16 Ark. App. 188, 699 S.W.2d 401 (1985). Those cases were decided after the Commission's decision in the present case. The Commission in this case took a different view of the meaning of the statute, Ark. Stat. Ann. § 81-1313(i) (Supp. 1985), and held that Second Injury Fund liability did not require a preexisting loss-of-earning capacity at the time of the second injury. Therefore, the Commission's factual findings in the instant case are not specific enough to be reconciled with the law of the *Rogers, Girtman,* and *Coleman* cases. However, our view on the second point renders the first point moot.

■ We agree with the Fund's second contention as set out above and are today issuing an opinion in another case holding that the Fund is not liable where all of a claimant's disability or impairment results from injuries occurring while in the employment of the same employer. In the other case, *Second Injury Fund* v. *Riceland Foods, Inc.*, 17 Ark. App. 104, 704 S.W.2d 635 (1986), this point is fully discussed; however, a portion of the oral argument made by the employer's able counsel in this case deserves further comment.

Our holding on this second point results from our interpretation of the language used in Ark. Stat. Ann. § 81-1313(i), *supra*. The first sentence of that section very plainly states that the Second Injury Fund is established to insure that an employer employing a handicapped worker will not be liable for a greater disability or impairment than actually occurred *while the worker was in his employment*. It is argued that the statute not only serves to encourage employers to hire handicapped workers but also to encourage employers to retain or rehire employees who are injured while in their employment. It is said it would frustrate the underlying intent of the statute to create an artificial distinction between retaining an injured worker as compared to hiring a new

one that has been injured or is handicapped. The problem with this argument is that the statute, in our opinion, simply does not apply where both injuries occur while in the employment of the same employer.

Not only does the language of the statute prevent the interpretation urged by the employer in this case, but there are reasons that negate against stretching the language to make it convey that meaning. As our opinion in *Second Injury Fund* v. *Riceland Foods, Inc., supra*, points out, the Arkansas Supreme Court said in *Arkansas Workmen's Compensation Commission* v. *Sandy*, 217 Ark. 821, 233 S.W.2d 382 (1950), that the solvency of the Second Injury Fund requires that its provisions be strictly complied with. In that regard, the last sentence of Ark. Stat. Ann. § 81-1348(a)(Supp. 1985), provides that if after July 1, 1983, the balance in the Fund becomes insufficient to meet its obligations, payments shall be suspended until the Fund is able to meet those obligations and, in no event, shall there be a reverter of responsibility to the employer or carrier. An article by W. W. Bassett, Jr., in the July 1983 issue of *The Arkansas Lawyer* had this to say about this statutory provision:

> [T]he Legislature has said . . . that in the event of fund insolvency, any payment due a claimant will be "suspended until such time as The Second Injury Fund is capable of meeting its obligations." Let's pray that doesn't happen but I, for one, fear it. It doesn't take much intelligence to comprehend that if the legislature fails to adequately finance The Second Injury Fund, or if through decisions of the administrative process reinforced by the courts, The Second Injury Fund is substantially invaded, that serious problems for injured workers in Arkansas lie ahead.

Bassett, *Second Injury Law, Old and New*, The Arkansas Lawyer, July 1983, at 122, 124.

Nor do we think the statute should be stretched in an attempt to encourage employers to retain employees injured while in their employment. The legislature expressly stated that the purpose of the statute is to insure that an employer employing a handicapped worker will not be required to pay for a greater amount of disability or impairment than that which the worker sustains

while in the employment of that employer. Stretching the statute to require the Second Injury Fund to assume liability for part of the disability or impairment sustained by a handicapped worker while in an employer's employment relieves that employer of part of his statutory liability and grants him a windfall or subsidy. It was not, in our opinion, the legislature's intent to give employers that type of encouragement to hire or retain handicapped or injured workers.

The Commission's finding of liability against the Second Injury Fund is reversed, and this matter is remanded for the Commission to assess the claimant's disability against the employer after giving it credit for any portion of that disability it has already paid.

Reversed and remanded.

GLAZE and CLONINGER, JJ., dissent.

SECOND INJURY FUND *v.* RICELAND FOODS, INC.

CA 85-231 704 S.W.2d 635

Court of Appeals of Arkansas
En Banc
Opinion delivered February 19, 1986
[Rehearing denied March 26, 1986.]

Thomas J. O'Hern, for appellant.

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

MELVIN MAYFIELD, Judge. This is an appeal from a Workers' Compensation Commission decision holding the Second Injury Fund liable for all of claimant's disability in excess of the amount previously paid by the employer for a 15% permanent disability to the claimant's left leg.

The record reveals that in 1946 the claimant, Harry L. Brown, began working for the appellee, Riceland Foods. In 1955, he was critically injured when he inhaled toxic gas while performing his duties for Riceland. Although it was first thought that he would be unable to return to work, or even survive, he made a miraculous recovery and returned to work in April of 1956. However, he was left with several debilitating conditions including toxic hepatitis, and as a result, he was required to take heavy medication and eat a highly restricted diet. He did not file a workers' compensation claim for his injury and received no compensation for it, although the company did pay his medical bills and buy his medicine for several years. Over the years, claimant's physical condition gradually deteriorated, and by 1981, he was suffering from heart, liver and lung diseases and was in such a weakened condition that he had to use a walking cane.

In March 1981, while at work for Riceland, claimant fell and severely sprained his ankle. He was medically rated as having a 15% disability to the left leg below the knee and received compensation for that disability. At a hearing to determine

whether claimant was entitled to additional compensation, an administrative law judge found him totally and permanently disabled and held under the provisions of Ark. Stat. Ann. § 81-1313(i) (Supp. 1985), which is Section 4 of Act 290 of 1981, the payment of compensation for all disability in excess of the 15% previously paid by Riceland was the responsibility of the Second Injury Fund. That decision was affirmed by the full Commission.

On appeal to this court, the Fund argues that since all the claimant's injuries occurred while in the employ of Riceland, the Commission erred in finding that section 81-1313(i) applied. The Fund contends that this section of the compensation act was enacted by the Arkansas General Assembly to encourage the employment of handicapped workers by insuring that an employer would not be required to pay for a greater amount of disability than that which actually occurred during the time the employee was working for the employer. Riceland contends that, because section 81-1313(i) states in the second paragraph that it applies to "*all cases* of permanent disability or impairment where there has been a previous disability or impairment," it applies even in situations where the employee receives more than one injury while working for the same employer. However, the first sentence of section 81-1313(i) states:

> 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*. (Emphasis added.)

The administrative law judge, whose opinion the Commission adopted, based his finding of Second Injury Fund liability on paragraph three of the statute which provides:

> If the previous disability or impairment or disabilities or impairments whether from compensable injury or otherwise, and the last injury together result in permanent total disability, the employer at the time of the last injury shall be liable only for the actual anatomical impairment resulting from the last injury considered alone and of itself; . . . .

Although it is possible to make the interpretation made by the law judge and Commission, we do not think "previous disability or impairment" refers to a condition which occurred while in the employment of the second-injury employer. Obviously, if as provided in the very first sentence of the statute—the sentence stating the reason and purpose for the statute—the employer employing a handicapped worker is to be liable *only* for the disability or impairment that occurs when the worker sustains an injury during that employment, then it must follow that such employer will be liable for *all* the disability or impairment that occurs when the worker is injured while in that employment. We hold that the Second Injury Fund is not liable where all of the claimant's disability or impairment results from injuries occurring while in the employment of the same employer.

In addition to the language used in the second injury statute, as discussed above, we think it also proper to consider the following language used by the Arkansas Supreme Court in *Arkansas Workmen's Compensation Commission* v. *Sandy*, 217 Ark. 821, 233 S.W.2d 382 (1950):

> 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.

And in this connection, we also take note that the last sentence of Ark. Stat. Ann. § 81-1348(a) (Supp. 1985), provides:

> If, on or after July 1, 1983, the balance in the Second Injury Trust Fund becomes insufficient to fully compensate those employees to whom it is obligated, payment shall be suspended until such time as the Second Injury Trust Fund is capable of meeting its obligations, . . . in no event shall there be an reverter of responsibility to the employer or carrier on or after July 1, 1983.

Riceland argues that employers will be encouraged to

dismiss disabled workers after they are injured on the job if we hold that the Fund is not liable when all of the claimant's disability results from injuries occurring while employed by the same employer. We are not convinced. In the first place, the Workers' Compensation Act itself contains sanctions against any employer who retaliates against an employee for filing a workers' compensation claim. *See* Ark. Stat. Ann. § 81-1335(b) (Repl. 1976). In addition, we think an employer is much more likely to retain an employee who has a good work record than to hire a new worker he knows nothing about. Furthermore, an injured worker who is dismissed because of his injury and has difficulty finding comparable work at comparable wages might be found to be totally disabled thus subjecting the employer at the time of injury to greater liability than otherwise. And, in any event, as we said in *Second Injury Fund* v. *Coleman*, 16 Ark. App. 188, 699 S.W.2d 401 (1985), and *Osage Oil Co.* v. *Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985), it is not the purpose of the second injury statute to give a windfall or subsidy to employers who employ handicapped workers.

Riceland also points to the law judge's finding that claimant is permanently and totally disabled "as a result of his March 30, 1981, compensable injury, as well as his general physical condition," and argues that the 1955 injury was not a cause of claimant's additional disability. This argument overlooks the fact that the law judge's opinion, adopted by the Commission, contains the following language:

> [I]t is apparent from both the lay testimony and the medical evidence that claimant was substantially disabled or impaired as a result of a previous injury, as well as the deterioration of his general physical condition.

Finally, appellee argues that, if it alone is held liable for the claimant's disability, we must remand the case to the Commission to determine the extent of this liability because the Commission did not pass upon the employer's liability for disability over and above the 15% disability to claimant's left leg. We do not agree because the Commission *affirmed* and *adopted* the law judge's opinion. Therefore, the law judge's finding of total and permanent disability became a finding of the Commission. We affirm that finding, but reverse the finding that the Second

Injury Fund is liable for the payment of any part of the compensation due, and hold that payment of the compensation due is an obligation of appellee Riceland Foods, Inc.

Affirmed in part and reversed in part.

GLAZE and CLONINGER, JJ., dissent.

TOM GLAZE, Judge, dissenting. While I dissent from the majority opinion, I might mention one point upon which all of us can agree: The Second Injury Fund law (Fund law) is poorly worded, subject to more than one reasonable interpretation and is in desperate need of remedial legislation. Because the new Fund law is ambiguous in parts, the majority has devoted most of its attention to what it believes the General Assembly intended by the law's enactment. The basic, overall premise upon which I disagree with the majority's opinion is that I believe my colleagues have artifically placed handicapped workers into two unequal categories: One in which the employer is induced to *hire* the handicapped worker who previously incurred his or her injury while employed by another employer; and a second in which that same employer, who employs a worker who sustains his or her first injury while in that employment, is induced to *fire* that injured or handicapped employee in an attempt to avoid liability for a prospective second injury. Under the majority's interpretation of the new Fund law, the employer in the first category is relieved of liability for any greater disability or impairment than actually occurred while the employer employed the worker. The employer in the second category must pay for all the employee's claims because both of the employee's injuries were sustained when working for the same employer.

The majority court reasons that handicapped workers in the second category will not be terminated or released because the Workers' Compensation Act (Act) contains sanctions against any employer who retaliates against an employee for filing a claim. *See* Ark. Stat. Ann. § 81-1335(b) (Repl. 1976). Of course, no provisions of the Act compel an employer to retain or rehire an employee. Besides, the employee is still placed in the position of showing his dismissal was the result of filing a workers' compensation claim. The majority further reasons that an injured worker who is dismissed might be found, as a result of such disability, totally disabled. Again, the burden is the employee's to show total

disability and that burden is far greater, as we all know, than merely proving he or she was not retained after sustaining an injury.

To further support its interpretation of the new Fund law, the majority emphasizes the law was not intended to give a windfall or subsidy to employers who employ handicapped workers. I must totally disagree on this point since it is the employers themselves who contribute to the Fund. Through that Fund, the employers are sharing the risk for those employees' second injuries which meet the specific or narrow requirements set forth in Ark. Stat. Ann. § 81-1313(i) (Supp. 1985) as interpreted by our earlier decisions in *Second Injury Fund* v. *Coleman*, 16 Ark. App. 188, 699 S.W.2d 401 (1985) and *Osage Oil Co.* v. *Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985). In a companion case to the one here, *Second Injury Fund* v. *McCarver*, 17 Ark. App. 101, 704 S.W.2d 639 (1986), our Court's majority also infers the Fund might become insolvent if this Court adopts an interpretation of the Fund law that permits employers to seek Fund relief in instances where injured or handicapped workers sustain both the first and second injuries while with the same employer. The majority's inference is not based on any evidence before this Court, and while I believe the Fund's solvency might be a legitimate concern, I am of the opinion the General Assembly can and will address it if that concern becomes a reality. Under any circumstances, it is not this Court's role to presume the General Assembly will allow the Funds to deplete so that injured workers will be precluded from benefits. In any event, we should not decide the issues presented here based upon such policy decisions when such decisions are best left to a legislative body. In sum, I cannot agree with the underlying reasons for the majority's decision to treat differently the worker who sustained first and second injuries when employed by the same employer from the handicapped or injured worker who was employed by a second employer when the worker sustained a second injury.

Neither do I believe the statutory construction of the new Fund law dictates the result reached by the majority. Section 81-1313, as amended by Act 290 of 1981, governs the second injury sustained by appellant, Harry L. Brown, since Act 290 was effective March 3, 1981, and Brown's second injury occurred on

March 30, 1981. Act 290 is compiled as section (i) of § 81-1313; that section had been newly created by Act 253 of 1979. Section 1313(i) states in pertinent part:

> 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. (Emphasis supplied.)

* * *

From the foregoing language, § 81-1313(i) clearly governs all claims and second injury issues after January 1, 1981. It does not exempt or except claims based upon injuries in the same employment. Instead, same employment injuries are mentioned as follows in paragraphs (3) and (4) of § 1313(i):

> (3) If more than one (1) injury in the same employment causes concurrent temporary disabilities, weekly benefits shall be payable only for the longest and largest paying disability.
>
> (4) If more than one (1) injury in the same employment causes concurrent and consecutive permanent partial disability, weekly benefits for each subsequent disability shall not begin until the end of the compensation period for the prior disability.

In my opinion, § 1313(i) clearly covers and includes injuries in the same employment, and to accept the Fund's argument, adopted by the majority court, frustrates the true, underlying purpose of the Fund law which is to encourage employers to allow injured or handicapped workers to be employed.

Because I believe the Commission correctly determined the Fund's liability for Brown's disability, I would affirm.

CLONINGER, J., joins in this dissent.

Julia STOREY *v.* ARKANSAS BLUE CROSS/BLUE SHIELD, INC.

CA 85-327 704 S.W.2d 176

Court of Appeals of Arkansas
Division II
Opinion delivered February 19, 1986

Everett & Whitlock, by: *John C. Everett*, for appellant.

Everett A. Martindale, for appellee.

TOM GLAZE, Judge. Appellant, then nineteen years old, was injured on August 8, 1981, in an automobile accident in California. She qualified for medical and hospital benefits under a group health insurance policy her mother had with appellee through the Arkansas Public School Employees Committee. On December 14, 1981, appellant, represented by her attorney-father, settled a tort claim for $39,000.00 against one of the tortfeasors. Appellee filed suit for reimbursement and, based upon a jury verdict, was awarded a judgment of $3,234.00. For reversal, appellant contends that the trial court erred in (1) denying her motions to dismiss and for a directed verdict, (2) allowing testimony regarding the sum of the settlement, (3) excluding photographs taken of appellant following the accident, and (4) allowing into evidence one of appellee's exhibits. We affirm.

On November 23, 1981, appellee made its first payment on behalf of the appellant under the policy. On January 16, 1982, appellee sent an accident questionnaire to appellant's mother. Appellant's father testified that he probably saw the questionnaire and assisted his wife in preparing it. The questionnaire, signed by appellant's mother, was returned to appellee. In response to a question whether she intended to make a claim against the responsible party or his insurance company for damages arising from the injury, appellant's mother answered "no." There was also a question, left unanswered, as to whether an attorney had been retained. Appellee contended that these responses were misleading, and were intended to deter its discovery of the settlement.

In May 1982, appellee learned about the settlement, and in July 1982, it contacted appellant's father, requesting reimbursement. His response was that there indeed had been a settlement with one of the tortfeasors but that there was still a claim that could be made against a second tortfeasor. He suggested that appellee pursue that claim. Appellee declined, and in March 1983, filed its complaint.

In its complaint, appellee contended that, under the insurance contract, it was entitled to reimbursement under the following provision:

> In the event any benefits or services of any kind are furnished to a Member or payment made or credit ex-

> tended to or on behalf of any Member for a physical condition or injury caused by a third party or for which a third party may be liable, the Plan shall be subrogated and shall succeed to such Member's rights of recovery against any such third party to the full extent of the value of any such benefits or services furnished or payments made or credits extended. The Member shall, at the Plan's request, take such action, furnish such information and assistance, and execute such documents as the Plan may require to facilitate enforcement of its rights hereunder. In the event of the Member's failure to comply with such request, the plan shall be entitled to withhold benefits, services, payments, or credits due under this contract. The Member shall do nothing after acceptance of benefits hereunder to prejudice the subrogation rights of the Plan.

Appellee also contended that, under Arkansas law, it had subrogation rights.

In her motions to dismiss and for a directed verdict, appellant argued that, because she was not a party to the contract between her mother and appellee, she was not bound by its terms. We disagree.

It is undisputed that, under the provisions of the policy, appellant was a "member" who was entitled to and, indeed, accepted benefits under the policy which appellee continued to pay until June of 1982. As a member entitled to benefits, appellant would have an action against appellee if it refused to pay her claims, and in fact, appellant did counterclaim against appellee for certain unpaid claims she had made. Appellant's position, however, is that even though she may be bound by some provisions of the contract, for example, the requirement to submit proof of loss, she has no reciprocal duty to comply with the other terms of the contract because of lack of privity of contract. Appellant cites no authority for the proposition she urges, and from our independent research, we know of none.

We find the factual issue here is controlled by the rule of law enunciated in *Williams Mfg. Co.* v. *Strasberg*, 229 Ark. 321, 314 S.W.2d 500 (1958), and reiterated in *Ray* v. *Pearce*, 264 Ark. 264, 571 S.W.2d 419 (1978). In these cases, the Arkansas Supreme Court held that a party cannot accept benefits under a

contract, and at the same time, avoid his obligations under such agreement, even in spite of a breach of contract by the other party. Although appellant's attorney correctly points out that *Williams* and *Ray* involve disputes between the contracting parties, we know of no valid reason why the principle should not apply here. Appellant was entitled to the benefits paid by appellee pursuant to its contract with appellant's mother, and upon payment of medical benefits on appellant's behalf, appellee was entitled under the contract provisions to recoup those payments. While appellant had the option to decline any benefits as a member under the contract, she simply chose not to do so.

Appellant's last three points address the trial court's actions in admitting or excluding certain evidence. Appellant contends the trial judge first erred in allowing appellee to present testimony regarding the amount of appellant's settlement with the third party tortfeasor. Once having committed that error, however, she argues the judge further erred when he excluded photographs she offered in an attempt to show the extent of her injuries.

While we tend to agree with appellant that the settlement amount had no relevance concerning appellee's right to reimbursement under the insurance contract, the critical question is whether there was prejudicial error. As the court held in its supplemental opinion in *Jim Halsey Co., Inc.* v. *Bonar*, 284 Ark. 461, 473-C, 688 S.W.2d 275, 276 (1985), error is no longer presumed to be prejudicial, and based upon appellant's theory of the case and the evidence presented, we fail to see how she was prejudiced. To succeed in its action against appellant, appellee had to prove (1) that its insurance contract with appellant's mother was also binding on appellant, (2) that appellee paid medical bills on behalf of appellant and (3) that appellant settled her claim against the third-party tortfeasor for injuries for which she had received medical payments from appellee. Appellant has never denied that she had settled her claim against the third-party tortfeasor and that claim involved the same injuries for which appellee paid medical benefits on her behalf. In fact, appellant stipulated she settled her claim in an amount in excess of the sum the appellee sought to recover in this cause. In addition, the amount of medical benefits paid by appellee on appellant's behalf—$3,234.05—was undisputed. Thus, appellant's case at trial was premised on the sole legal issue that

appellee had no standing to sue appellant because she was not a party to the insurance contract entered into between her mother and the appellee. Of course, we already have rejected appellant's theory, holding she indeed was liable to appellee once she accepted benefits as a member under the insurance contract. Given the essential facts to which the parties either stipulated or left undisputed, and what we believe was a correct statement of the law, the jury was duty bound to return a verdict, as it did, in the amount of $3,234.05. Thus, regardless of the trial court's ruling concerning appellant's settlement amount and her photographs, we believe the record clearly demonstrates she was not prejudiced on either the issues regarding liability or damages.

Finally, appellant urges, again on relevancy grounds, the trial court erred in admitting into evidence the accident questionnaire which had been completed and executed by appellant's mother. She also claims that even if the questionnaire was relevant, the trial court should have excluded it under Rule 403 of the Uniform Rules of Evidence. Once again, appellant's argument is premised upon her earlier contention that appellee had no right of recovery against appellant. In rejecting appellant's argument that she had no obligations under the insurance contract even though she accepted benefits under it, we cannot agree that her mother's actions concerning that contract had no relevancy or were in any way confusing to the jury. We affirm.

Affirmed.

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

John LEFLORE, Jr. *v.* STATE of Arkansas

CA CR 85-157 704 S.W.2d 641

Court of Appeals of Arkansas
Division II
Opinion delivered February 26, 1986

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.

DONALD L. CORBIN, Judge. Appellant, John LeFlore, was charged and convicted of committing the offenses of burglary and theft of property by a Sebastian County jury and sentenced to concurrent terms of five years with three years suspended. We find no merit to appellant's six points for reversal and affirm.

Appellant first contends that the trial court erroneously permitted the introduction of his confession into evidence. The record reflects that between April 19, 1984, and April 23, 1984, a bank bag containing $4,675.20 was removed from a safe in the municipal clerk's office of the Sebastian County Courthouse. Appellant was a maintenance worker for Sebastian County and had been so employed for approximately two years. Appellant was subsequently questioned about the burglary and theft by the police and gave a detailed confession. He testified at his trial to essentially the same facts as were contained in his confession. Appellant argues that his confession was not voluntary and that the trial court erred in denying his motion to suppress the confession.

Detective Larry Hammond testified that he read the Miranda warning to appellant and that appellant signed the Waiver of Rights form before being interviewed. Appellant did not have any questions, did not appear to be under the influence of alcohol or drugs, did not ask for an attorney and did not ask the officers to cease their questioning of him. Appellant initially denied any participation in the crime. Hammond suggested that appellant take a polygraph examination to which appellant agreed. Appellant was advised of his rights prior to the exam. Appellant dictated a three-page statement which Hammond typed after appellant was informed of the results of the polygraph examination. Hammond testified that nothing was offered appellant in exchange for submitting to the polygraph examination and that appellant was not threatened or coerced to give a statement. Hammond estimated that appellant was in custody for approximately five hours but was not questioned continuously during this period of time.

Appellant testified that he was advised on Monday by Bobby Collins, an employee of Sebastian County, that he should return to the courthouse. Upon his arrival there at approximately 10:00 a.m., he was informed that there was money missing and detectives wanted to interview him. Appellant was advised of his rights and he denied any involvement. He was told he could go to lunch and appellant went to the snack bar in the courthouse. He was subsequently told that the detectives wanted to interview him and the questioning began again at approximately 1:00 p.m. Appellant stated that Detective Chapman told appellant that it would be better for him to admit to the crime and produce the money and checks. He was not offered a specific deal. A polygraph examination was mentioned and appellant agreed to take it. He was informed following the test that the test revealed that appellant was not telling the truth. Appellant gave a statement and did not recall being advised of his rights again. He stated that he admitted to committing the offense because he knew that the officers had already interviewed his wife and he did not want her brought into it. Appellant admitted that he never asked for an attorney or for the questioning to stop and was not threatened or beaten. Appellant testified that he had read his statement and that it was fairly accurate.

Appellant LeFlore stated that he had been drinking all weekend prior to the questioning and that he was a diabetic. He had an 11th grade education. He further stated that if he drank, the insulin did not metabolize the liquor and that he was still feeling the effects of the three-day drunk on the Monday he was questioned. Appellant testified that in this condition he was not clear-headed and was more susceptible to pressure. He admitted that he had not drank in the twelve hours preceding his questioning.

Bobby Collins testified that he spoke to appellant the day appellant was questioned about the theft. He stated that appellant appeared clear-headed to him and did not smell of alcohol.

It is well settled that it is the duty of the state to prove by a preponderance of the evidence that a custodial statement was voluntarily given. *Richardson* v. *State*, 274 Ark. 473, 625 S.W.2d 504 (1981). In ascertaining on appeal the voluntariness of a confession, we make an independent determination based upon

the totality of the circumstances, resolving all doubts in favor of individual rights and constitutional safeguards, and, after doing so, we affirm the trial court's finding unless clearly against the preponderance of the evidence. *Thomerson* v. *State*, 274 Ark. 17, 621 S.W.2d 690 (1981).

Under the totality of the circumstances existing in this case, we are unable to say that the state has failed to meet its burden of proof by showing through a preponderance of the evidence that appellant's statement was not voluntarily made. Therefore, we hold the trial court's denial of appellant's motion to suppress and the introduction of the statement did not constitute error.

Appellant's second assignment of error concerns the admission of testimony by a deputy municipal clerk as to the amount taken from the safe. He argues that the testimony of Susan Pierce and the records of the municipal court clerk's office "indicate a lack of trustworthiness" and should not have been admitted. The witness testified that she was an employee in the clerk's office at the time the money was stolen and that she and another clerk had closed the office on the Thursday night before Good Friday. She further testified that when they arrived for work on the following Monday, they noticed that $4,675.20 was missing from the safe. Her tabulation of that amount came from the record of receipts regularly kept by the clerk's office in its daily course of business. She stated that she made most of the entries she referred to and that she had equal access to the records as did the clerk or custodian.

Appellant contends that the admission of this evidence was not harmless error and that his conviction should be reversed and a new trial held on this basis. We do not agree. Ark. Unif. R. Evid. 803(8) provides the following hearsay exception even though the declarant is available as a witness:

> To the extent not otherwise provided in this paragraph, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.

It is evident in the case at bar that the witness's testimony was clearly admissible pursuant to Rule 803(8) and the trial court did not err in admitting this evidence.

Appellant contends on appeal that there was insufficient evidence to sustain his conviction of burglary. A person commits burglary if he enters or remains unlawfully in an occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment. Ark. Stat. Ann. § 41-2002 (Repl. 1977). The essence of appellant's argument here is that the state failed to prove appellant either entered or remained *unlawfully* in the courthouse. We find no merit to this contention.

The record reflects that on April 19 and 20, 1984, maintenance work was done at the courthouse. The maintenance supervisor, Bobby Collins, testified that appellant and two trustees painted the municipal clerk's office and completed the work on Saturday. At approximately 1:00 a.m. on Sunday, appellant went to Collins' house and asked to borrow his key to retrieve some tools appellant had left in the office. Collins stated that appellant returned in about ten or fifteen minutes.

From the statement appellant gave the police and from his testimony at trial, it is clear that appellant drove to the courthouse early Sunday morning and opened the safe. He placed the bank bag under his shirt and retrieved his tools in the maintenance office. He subsequently lost the bank bag after spending approximately $50 contained in it. On cross-examination, appellant stated that he knew taking the money was wrong and that he originally borrowed the keys to retrieve his tools but had been thinking about the money as well.

He argues that his entry into the municipal clerk's office was not unlawful because he had been given the keys and the very nature of the work he performed required that it be lawful for him to make such an entry. "Enter or remain unlawfully" means to enter or remain in or upon premises when not licensed or privileged to do so. Ark. Stat. Ann. § 41-2001(3) (Repl. 1977). We agree with appellee's statement that appellant's license or privilege to go into one section of the courthouse for the purpose of retrieving his tools did not authorize him to go into other unauthorized areas for the purpose of committing

theft. His license or privilege ended when he completed or failed to complete the purpose for which his license was granted to enter the maintenance office. *See Sims* v. *State*, 272 Ark. 308, 613 S.W.2d 820 (1981). We hold that there is substantial evidence to support appellant's burglary conviction.

Appellant also alleges error in the trial court's refusal to instruct the jury on the lesser included offense of criminal trespass. He contends that since he raised the affirmative defense of intoxication, it was within the power of the jury to find that he was so intoxicated that he could not form the requisite intent to commit burglary. A person commits criminal trespass if he purposely enters or remains unlawfully in or upon a vehicle or the premises of another person. Ark. Stat. Ann. § 41-2004 (Repl. 1977).

It is reversible error to refuse to give a correct instruction on a lesser included offense and its punishment when there is testimony furnishing a reasonable basis on which the accused may be found guilty of the lesser offense. *Glover* v. *State*, 273 Ark. 376, 619 S.W.2d 629 (1981). Where there is no evidence tending to disprove one of the elements of the larger offense the court is not required to instruct on the lesser one because absent such evidence there is no reasonable basis for finding an accused guilty of the lesser offense. In this type of case the jury must find the defendant guilty either of the offense charged or nothing. *Fisk* v. *State*, 5 Ark. App. 5, 631 S.W.2d 626 (1982). Where, however, there is the slightest evidence tending to disprove one of the elements of the larger offense, it is error to refuse to give an instruction on the lesser included one. *Brewer* v. *State*, 271 Ark. 254, 608 S.W.2d 363 (1980).

We conclude that it was not prejudicial error by the court in the case at bar to refuse to give the proffered instruction on criminal trespass in view of appellant's admission on the stand and in his statement that he intended to go to the courthouse to steal the money before he actually got there. *See also Robinson* v. *State*, 7 Ark. App. 209, 646 S.W.2d 714 (1983).

Appellant argues that the state failed to prove that the value of the property taken was in excess of $200. He contends that because the state did not prove which portion of the $4,675.20 in receipts taken by him was cash as opposed to checks,

he is entitled to a conviction of misdemeanor theft only. This argument is also without merit. It is well settled that the state has the burden of proving value. *Robinson* v. *State*, 10 Ark. App. 423, 664 S.W.2d 890 (1984), citing *Lee* v. *State*, 264 Ark. 384, 571 S.W.2d 603 (1978). Furthermore, value testimony must be based on facts in order to constitute substantial evidence, and testimony based on conclusions or hearsay is not substantial evidence. *Hughes* v. *State*, 3 Ark. App. 275, 625 S.W.2d 547 (1981). "Value" means in the case of written instruments, other than those having a readily ascertainable market value, the greatest amount of economic loss that the owner might reasonably suffer by virtue of the loss of the written instrument, if the written instrument is other than evidence of a debt. Ark. Stat. Ann. § 41-2201(11)(c)(ii) (Repl. 1977).

In the case at bar the record reflects that appellant was charged and convicted of committing the offense of class B felony theft of property. Theft of property is a class B felony if the value of the property is $2,500 or more. Ark. Stat. Ann. § 41-2203(2)(a)(i) (Supp. 1985). As previously noted appellant argues that the state failed to prove the value of the property taken was in excess of $200. Theft of property is a class C felony where the property is valued at more than $200 but less than $2,500. Ark. Stat. Ann. § 41-2203(2)(b)(i) (Supp. 1985). Appellant's argument is couched in terms of class C felony theft of property and is addressed by appellee on that basis as well. We will, however, address this assignment of error on the basis of whether or not the state proved the value of the property taken was in excess of $2,500.

Appellant does not contest that $4,675.20 in receipts was actually taken by him but asserts that the lack of certainty as to the type of receipts making up the $4,675.20 entitled him to a misdemeanor theft conviction instead of felony theft conviction. Susan Pierce, the deputy municipal clerk, testified from the daily journal sheets of her office which were entered in evidence that $4,675.20 was received on April 19, 1984. She further stated that of that amount, $842.45 was collected in fees for the state and $3,632.75 was collected in fees for the city. Pierce was unable to state from the daily journal sheets how much of the total amount was made up of cash or checks. She also testified that the money had not been recovered or returned to her office and that the

checks were never made good.

We believe the above constitutes substantial evidence of value in excess of $2,500 and we cannot say that the state failed to meet its burden of proof in this regard. In addition, we agree with appellee that although checks do not have a readily ascertainable market value, they can be valued for purposes of the theft of property statute under Ark. Stat. Ann. § 41-2201(11)(c)(ii).

Finally, appellant alleges as error the trial court's refusal to instruct the jury on the lesser included offense of misdemeanor theft of property. Theft of property of less than $200 value is a class A misdemeanor. Ark. Stat. Ann. § 41-2203(2)(d) (Supp. 1985). The evidence adduced established that the municipal clerk's office was deprived of property valued at $4,675.20. There was no evidence tending to disprove one of the elements of class B felony theft of property and the trial court properly refused to instruct the jury on misdemeanor theft of property. Accordingly, we find no merit to this argument.

Affirmed.

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

Gladys JOHNSON *v.* STATE of Arkansas

CA CR 85-180 704 S.W.2d 647

Court of Appeals of Arkansas
Opinion delivered March 5, 1986

William C. McArthur, for appellant.

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

PER CURIAM. The appellant has appealed from her conviction of possession of a controlled substance with intent to deliver for which she was sentenced to a term of four years in the Department of Correction. Appellant's brief does not comply with Rule 9(d) of the Rules of the Supreme Court and the Court of Appeals.

Rule 9(d) requires that the appellant furnish us an abstract of the record containing a condensation of those material parts of the record which are necessary to an understanding by the court of all questions presented for decision. The main thrust of appellant's argument is that the trial court erred in not suppressing evidence obtained pursuant to a search warrant, contending that the warrant was issued on an insufficient showing of probable cause for a nighttime search. The abstract furnished us does not contain the search warrant, the affidavit, or other documentation on which it was issued. The appellee did not submit a supplemental abstract as permitted by Rule 9(e)(1) but bases his argument on facts not found in the abstract.

On appeal the abstract of the record constitutes the

record and the appellate court considers only that which is contained in the abstract. We have often stated that where the appellant's abstract does not contain the testimony on which he bases his argument we will not explore the record for prejudicial error. The scattering of transcript references throughout an argument is not a substitute for a proper abstract. *Kitchen* v. *State*, 271 Ark. 1, 607 S.W.2d 345 (1980); *Horne* v. *State*, 12 Ark. App. 301, 677 S.W.2d 856 (1984). The court has also pointed out the difficulty of all judges of this court exploring a single record.

The appellant's brief is flagrantly deficient and causes an unreasonable and unjust delay in the disposition of this case. However, in view of the sentence imposed, this court finds that it would be unjustly harsh to affirm this case for this noncompliance as authorized by the rule.

Pursuant to Rule 9(e)(2), appellant's attorney will be allowed fifteen days to supplement the abstract to conform to Rule 9(d) at his own expense. The appellee will be allowed fifteen days thereafter to revise or supplement its brief if the supplemented abstract requires it.

R & R PIPELINE COMPANY, et al. *v.* Darron CLARK

CA 86-30 704 S.W.2d 647

Court of Appeals of Arkansas
Opinion delivered March 5, 1986

Warner & Smith, by: *Wayne Harris*, for appellant.

No response.

PER CURIAM. Appellant has filed a motion asking that this matter be remanded to the Workers' Compensation Commission for the commission to consider a joint petition to settle the case.

We, therefore, remand the record in this case to the commission and if the joint petition is approved, this appeal may

be dismissed and if the joint petition is not approved, this appeal may be processed to decision upon application for brief time.

Jack MARTIN D/B/A YOUNG'S IRON COMPANY
v. Richard YOUNG

CA 85-388 705 S.W.2d 445

Court of Appeals of Arkansas
Division I
Opinion delivered March 12, 1986

Gary Vinson, for appellant.

Joseph Philip James, for appellee.

GEORGE K. CRACRAFT, Chief Judge. On February 18, 1985 the administrative law judge entered an order finding that Jack Martin D/B/A Young's Iron Company had more than three employees and was subject to the Arkansas Workers' Compensation Act when Richard Young received a compensable injury during the course of his employment. The order directed appellant to pay all accrued benefits and an attorney's fee. A copy of this order was sent to appellant by certified mail on March 8, 1985.

After more than thirty days expired from the date of the mailing of that order the appellee caused an execution to be issued on the money award. On April 23, 1985 the appellant filed a notice of appeal to the full Commission and a petition alleging that he did not have three or more employees at the time of the injury and that the Commission was therefore without jurisdiction. He further alleged that he had never received notice of injury, the filing of the claim, or the hearing, and prayed an order setting aside the order of the administrative law judge and affording him an opportunity to appear and present evidence in opposition to the claim.

He further argued that he had not received a copy of the order of the administrative law judge until he had been served with the writ of execution on March 27, 1985, and that the order appealed from did not become final until thirty days after he had received a copy of it. Ark. Stat. Ann. § 81-1325 (a) (Supp. 1985). The Commission incorporated the entire file and testimony at the hearing for the purposes of reviewing the motion. It found that the notice of the claim and fifteen day response letter was sent to the employer on December 4, 1984, at his correct address, and were not returned. It found that notice of the February 13, 1985 hearing was sent by certified mail and returned unclaimed, but

that there was no indication that the postal service failed to notify the employer of the mailing or that the certified mail hearing notice had not been tendered to the appellant. The Commission further found that a copy of the February 18, 1985 opinion was sent to the appellant at his correct address by certified mail on March 8, 1985. It found that the return receipt bore no signature but that the opinion had not been returned to the Commission undelivered. The Commission found that these mailings created a presumption that appellant did receive the documents mailed to him and concluded:

> The employer contends that he did not receive notice of the filing of the claim, the hearing, or copy of the order until execution was served on him. To believe this we must adopt the position that the U. S. Postal Service failed or refused to deliver duly stamped and addressed mailings on at least four separate occasions. We are not persuaded that the mailings sent to the respondent were never delivered.

When a letter properly addressed and stamped is shown to have been mailed, there is a presumption of fact that the letter was received by the addressee in due course. This presumption, however, ceases where the addressee denies having received the letter, whereupon it becomes a question of fact whether the letter was written or received. *Old Republic Ins. Co.* v. *Martin*, 229 Ark. 1064, 320 S.W.2d 266 (1959).

On appellate review of workers' compensation cases the evidence is reviewed in the light most favorable to the findings of the Commission and given its strongest probative value in favor of its order. The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding. The extent of our inquiry is to determine if the finding of the Commission is supported by substantial evidence. Even where a preponderance of the evidence might indicate a contrary result, we will affirm if reasonable minds could reach the Commission's conclusion. *Bearden Lumber Co.* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

Although the appellant denied receiving notice of injury or notice of claim, there was evidence it had been mailed to him at an address at which he received his mail. There was evidence adduced at the February 13, 1985 hearing, and in

support of the motion to dismiss the notice of appeal, that appellant had independent knowledge of these events.

Although the appellant denied having received the notice of hearing before the administrative law judge, there was evidence from two witnesses that they saw a letter from the Workers' Compensation Commission, with a "green card" attached, on appellant's desk prior to that hearing. The fact that it was subsequently returned to the Commission does not negate the Commission's finding that there was no indication that it had not been tendered to him and he chose to reject and ignore it. Nor does the fact that the return receipt attached to the certified mailed copy of the administrative law judge's opinion establish that it was not received by the appellant. When all the facts and circumstances are considered we cannot conclude that reasonable minds could not reach the conclusion that the order appealed from had been mailed and was received more than thirty days before the notice of appeal and petition were filed.

Appellant finally contends that the administrative law judge's finding that appellant had more than three employees at the time of the injury is not supported by substantial evidence. In view of our conclusion that the appeal from that order was untimely, we do not address that issue.

Affirmed.

GLAZE and COOPER, JJ., agree.

Herbert and Joyce MILLER, et al. *v.* Bromislaw JASINSKI, et al.

CA 85-60 705 S.W.2d 442

Court of Appeals of Arkansas
Division II
Opinion delivered March 12, 1986

John W. Beason, for appellants.

Sandra L. Burns, for appellees.

GEORGE K. CRACRAFT, Chief Judge. The appellants are

landowners whose residences were located adjacent to and in the vicinity of a sanitary landfill operated by the appellees. The appellants brought this action alleging that the appellees' collection and burial of garbage and industrial and hazardous waste, and use of heavy equipment, created obnoxious odors and excessive noises which interfered with the ordinary use of their properties. Appellants also alleged that they were damaged by diminution of property values and by the loss of use of their properties. They alleged that the operation of the landfill was both a public and private nuisance and prayed that its operation be abated by injunction, and for damages for the diminution of their property values. The appellees answered, denying that any hazardous waste had been placed on the property, asserting that it was in full compliance with all rules and regulations of the Department of Pollution Control and Ecology, that it operated under a permit issued by the agency, and denying all other allegations of the complaint. At the conclusion of the five day trial the chancellor filed a written opinion in which he discussed the evidence presented by both sides and found all of the controverted issues in favor of appellees. The complaint was dismissed on the chancellor's conclusion that the operation of the landfill did not constitute a public or private nuisance.

Appellants bring this appeal contending that the chancellor erred in not finding the operation to be a public or private nuisance, in refusing introduction of evidence of an intended expansion of the landfill, and in refusing to award damages. We find no error.

At the trial the appellants offered evidence that the operation of the landfill was within an exclusively residential area and caused obnoxious odors, excessive noises, littering of the highways, and the creation of a traffic hazard. There was testimony that a change in land contour resulted in an increase in run-off of surface water onto their lands and that the burial of hazardous waste, and failure to adequately control the burial, contributed to appellants' discomfort and created a fear that their water supply would become contaminated by decaying waste. The appellees' witnesses testified that the landfill was operated under well-controlled conditions and regulations, did not generate offensive odors, litter, noise, or undue increases in traffic, and that the conditions of which the appellants complained did not exist and

were not likely to occur in the future as a result of the operation of the landfill. There was also evidence that the opinions of appellants' experts as to the effects of the landfill on appellants' property had no reasonable basis. There was testimony that the area was a typical rural community, consisting of scattered private dwellings, with interspersed commercial business enterprises and two operating gravel pits.

A nuisance is defined as conduct by one landowner which unreasonably or unlawfully interferes with the use and enjoyment of the lands of another and includes conduct on property which disturbs the peaceful, quiet, and undisturbed use and enjoyment of nearby property. Equity will enjoin the conduct which culminates in a private or public nuisance where the resulting injury to the nearby property and residents, or to the public, is certain, substantial, and beyond speculation and conjecture. The distinction between private and public nuisance is simply the extent of the injury, i.e. the number of the persons suffering the effects of the nuisance. *City of Newport* v. *Emery*, 262 Ark. 591, 559 S.W.2d 707 (1977); *Ark. Release Guidance Foundation* v. *Needler*, 252 Ark. 194, 477 S.W.2d 821 (1972).

In his thirty page memorandum the chancellor found (with one exception to be hereinafter discussed) all of the controverted allegations in favor of the appellees and concluded that the operation of the landfill did not constitute a nuisance. While chancery cases are reviewed *de novo* on the record, the findings of a chancellor will not be overturned unless they are found to be clearly against a preponderance of the evidence. ARCP Rule 52(a). Since the question of a preponderance of the evidence turns largely on the credibility of the witnesses, this court defers to the superior position of the chancellor to determine the credibility of the witnesses and the weight to be given their testimony. *Bohannon* v. *Bohannon*, 12 Ark. 296, 675 S.W.2d 850 (1984).

The trial of this case lasted more than five days, during which over forty lay and expert witnesses testified and numerous documents and exhibits were introduced. A recitation of all of the conflicting evidence would unduly lengthen this opinion. Suffice it to say that from our review of the record we cannot conclude that the chancellor's finding that the operation of the landfill did not

constitute either a public or private nuisance is clearly against a preponderance of the evidence.

During the trial, some of the appellants testified that the operation of the landfill had diminished the value of their properties and offered expert testimony as to the extent of that diminution. While the appellees offered testimony that the landfill had no effect upon land values and that the expert's opinion as to the extent of the diminution had no reasonable basis in fact, the chancellor made no finding on the issue of diminution of values. The appellants contend that absent such a finding the chancellor's conclusion that there was no nuisance is clearly erroneous. Appellants argue that even though the chancellor found on conflicting evidence that the activity conducted by appellees did not interfere with the use and enjoyment of their property, the depreciation in property value standing alone makes the activity constitute a nuisance which should be abated and forms the basis for an award of damages. We do not agree.

The chancellor found that the appellees' operation of the landfill in a rural setting, under a permit issued pursuant to law, was not an illegal activity and hence not a nuisance per se. He further found that the landfill was operated under controlled conditions which did not result in an unreasonable interference with the peaceful use and quiet enjoyment of neighboring lands and was therefore neither a public or private nuisance. It is well settled that a landowner may make such use of his property as he chooses so long as he does not unlawfully or unreasonably interfere with or harm his neighbor. It is only the unreasonable use or conduct by one landowner which results in unwarranted interference with his neighbor which constitutes a nuisance and is subject to abatement. If the lawful use of one's property does not create a private or public nuisance, that use cannot be enjoined merely because it renders a neighboring property less valuable. If there is no public or private nuisance created by the use of the property, no recovery of damages or relief by abatement is warranted for the diminution of value of property by the lawful and reasonable use of the lands of a neighbor. The harm or damage which becomes actionable or subject to abatement is that which results from an illegal or unreasonable activity which becomes a nuisance. *Winget* v. *Winn-Dixie Stores, Inc.*, 242 S.C. 152, 130 S.E.2d 363 (1963); *Bader* v. *Iowa Metropolitan Sewer*

Co., 178 N.W.2d 305 (Iowa 1970); *Continental Oil Co.* v. *City of Wichita Falls*, 42 S.W.2d 236 (Tex. Com. App. 1931); *City of Amarillo* v. *Maddox*, 297 S.W.2d 750 (Tex. Civ. App. 1956); 66 C.J.S. *Nuisances* § 19 at 771 (1950).

The appellants argue that *Mitchell* v. *Bearden*, 255 Ark. 888, 503 S.W.2d 904 (1974) compels an opposite conclusion. The opinion in *Mitchell*, and those in *Blair* v. *Yancy*, 229 Ark. 745, 318 S.W.2d 589 (1958) and *Powell* v. *Taylor*, 222 Ark. 896, 263 S.W.2d 906 (1954) which preceded it, make it clear that our courts now treat mortuaries which intrude into exclusively residential areas as an exception to the general rule that in order to constitute a nuisance the intrusion must result in physical harm (as distinguished from unfounded fear of harm) which must be proven to be certain, substantial, and beyond speculation and conjecture. In *Powell*, the court stated the decisions on which it relied were not based on a finding that the operation of a funeral parlor within an exclusively residential area was physically offensive, but on the premise that its continued suggestion of death and dead bodies tends to destroy the comfort and repose sought in home ownership. In *Mitchell* and *Powell*, it was the nature and location of the business rather than the manner in which it was operated that constituted the nuisance. *Blair* makes it clear that the mortuary exception to the general rule is restricted to exclusively residential areas and does not extend to rural or residential areas which are in a state of transition to a business district. All three cases limit the exception to mortuaries.

Here the activity objected to was the operation of a sanitary landfill rather than a mortuary. Although the manner of operation of an otherwise legal activity within a predominately residential area can constitute an abatable nuisance, the chancellor expressly found that the landfill was not operated in such a manner as to cause unreasonable harm to adjacent owners and that the area in which it was located was a rural one "with farm lands and scattered housing."

The appellants next contend that the chancellor erred in refusing to accept evidence of a proposed expansion of the landfill across the highway from its present location, which they argue would have brought the landfill operation even closer to the residential property of some of the appellants. We find no merit in

this contention for several reasons. The issue of the proposed expansion of the landfill was not raised as an issue in any of the pleadings. ARCP Rule 15 permits amendments to pleadings and amendments to conform to the proof, but that rule vests broad discretion in the trial court to allow or refuse to allow such amendments and the exercise of that discretion will be sustained unless it is manifestly abused. *Kay* v. *Economy Fire & Casualty Co.*, 284 Ark. 11, 678 S.W.2d 365 (1984). Appellants have not pointed out in their argument and we have not found in the abstract that a proffer of the evidence sought to be introduced was made. Unif. R. Evid. 103(a)(2) provides that error may not be predicated upon a ruling which excludes evidence where the substance of the evidence sought to be introduced is not made known to the court by offer or apparent from the context in which the questions were asked.

A contemplated move and expansion of the landfill is an event to occur in the future. Abatement by injunction is permissible only when a preponderance of the testimony shows that the activity is certain to be a nuisance. *City of Newport* v. *Emery, supra*; *Kimmons* v. *Benson*, 220 Ark. 299, 247 S.W.2d 468 (1952). Without knowing what the evidence would have disclosed we cannot determine whether it might have established that the activity was certain to be a nuisance or that the effects of such a move were not based upon speculation and conjecture.

The appellants finally contend that the chancellor erred in refusing to award damages to the adjacent landowners for the continued operation of the landfill by balancing the equities. In view of our affirmance of the chancellor's determination that the activities did not constitute a nuisance, we do not address this issue. Damages could be awarded only in the event that the activity was determined to constitute a nuisance.

Affirmed.

COOPER and CLONINGER, JJ., agree.

FARMERS AND MERCHANTS BANK
v. Wayne BARNES

CA 85-186 705 S.W.2d 450

Court of Appeals of Arkansas
Division II
Opinion delivered March 12, 1986

Croxton & Boyer, for appellant.

Davis & Associates, P.A., for appellee.

LAWSON CLONINGER, Judge. In this appeal from the decision of a chancellor denying a deficiency judgment, appellant argues two points for reversal. We find neither persuasive, and we affirm the holding of the trial court.

Appellee, Wayne Barnes, purchased a used 1972 Case excavator from Dale Scott in February, 1982, for $35,000. Appellant, Farmers and Merchants Bank of Rogers, Arkansas, financed the sale and obtained a security interest in the equipment. After appellee defaulted on the note, Scott, acting at the direction of appellant, repossessed the excavator in November, 1982. The equipment was stored on Scott's property from

November, 1982, until March, 1984. Appellant bank permitted Scott to use the excavator in his construction business during this period.

In January, 1983, appellant obtained from a Case construction equipment dealer an appraisal of the value of the machinery of between $11,000 and $12,000. The appraiser noted that $1,000 worth of repairs were needed, and he expressed interest in purchasing the excavator for $7,000 to $9,000 for resale.

Appellee received notice from appellant of a private sale for $12,500 to take place on April 20, 1984. This sale, however, was never consummated. Instead, the excavator was sold, without notice to appellee, on June 20, 1984, for $9,500. Appellee's account was credited with $12,500, the amount stated in the notice given him of the proposed sale in April.

In the meantime, appellant filed suit to obtain a deficiency judgment against appellee in the amount of the debt plus interest and expenses less the amount credited. The chancellor held that appellant had not proceeded in a commercially reasonable manner in that it retained the equipment for nineteen months, sold it for $9,500 when two years before it had a value of $35,000, neglected to repair the excavator although repairs would have increased the sale price, and, most significantly, permitted its agent to use the equipment extensively, thus diminishing its value. The burden of proof of the value of the collateral, said the chancellor, was upon the creditor. From the trial court's denial of the deficiency judgment, appellant brings this appeal.

In its first point for reversal, appellant argues that the chancellor erred in finding that the sale of the excavator was not effected in a commercially reasonable manner. According to appellant, every reasonable precaution had been taken to protect appellee's rights and to obtain the highest price possible for the repossessed equipment.

The Uniform Commercial Code, as codified at Ark. Stat. Ann. § 85-9-504 (Supp. 1985), provides that a "secured party after default may sell, lease, or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing." Further, "every aspect of the disposition including the method, manner,

time, place, and terms must be commercially reasonable."

A creditor who repossesses chattels and resells them in a manner inconsistent with the provisions of the Uniform Commercial Code bears the responsibility to prove that the sale was commercially reasonable before he is entitled to a deficiency judgment. *Rhodes* v. *Oaklawn Bank*, 279 Ark. 51, 648 S.W.2d 470 (1983). Whether a sale of collateral was conducted in a commercially reasonable manner is essentially a question of fact. *Henry* v. *Trickey*, 9 Ark. App. 47, 653 S.W.2d 138 (1983).

The chancellor in the present case enumerated several factors that impelled him to his decision to deny appellant's claim for a deficiency judgment. As mentioned above, one of the considerations was the excessive length of time that had elapsed between repossession and sale. Appellant cited in its brief two cases to support its position that there was nothing unreasonable in the nineteen month holding period. In both *Meachum* v. *Worthen Bank & Trust Co.*, 13 Ark. App. 229, 682 S.W.2d 763 (1985), and *Brown* v. *Ford*, 280 Ark. 261, 658 S.W.2d 355 (1983), however, efforts made by the creditors to sell or repair the collateral offset the effects of long delays. In the instant case, $30 was spent six months after repossession on advertising for 120 days in a trade circular, but no local or statewide notices were run in newspapers with a general circulation.

The chancellor also expressed concern over the disparity between the price for which the excavator was sold and the value assigned it when appellee purchased it. The Arkansas Supreme Court, in *Goodin* v. *Farmers Tractor & Equipment Co.*, 249 Ark. 30, 458 S.W.2d 419 (1970), quoted Ark. Stat. Ann. § 85-9-507(2) for the principle that "The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially unreasonable manner." In *Goodin*, such proof was the only evidence offered of commercial unreasonableness. Here, however, other questionable elements are present in the record, and the chancellor merely added the $25,500 disparity to his list of reasons for denying appellant's claim.

Another factor entering into the chancellor's decision was the failure of appellant to repair the equipment. Ark. Stat.

Ann. § 85-9-504 (1)(a) (Supp. 1985) permits "commercially reasonable preparation or processing" to enhance sale value and allows a creditor to recover the cost of any preparation or repairs. Appellant's own appraiser indicated that about $1,000 in repairs were needed. Testimony at trial revealed that windows on the vehicle were broken, paint was peeling from the body, pins were worn out, teeth were worn off the bucket, and leaks were found on the machine. The chancellor, confronted with this evidence, was entitled to reach the conclusion that some expenditure on repairs would have resulted in a higher sale price.

The overriding consideration in the chancellor's mind, finally, was the fact that appellant allowed the original owner, Dale Scott, to use the excavator in his construction business for six months. In *Henry* v. *Trickey, supra*, the creditor rendered a repossessed combine unsalable for approximately one year by loaning its engine to a customer. In the present case, the entire machine was subject to the wear and tear of construction use, and the chancellor had reason to conclude that the sale value of the equipment was diminished in consequence. When all the factors listed by the chancellor are considered together, we believe that it cannot be said that his finding that the sale of the excavator was not effected in a commercially reasonable manner was clearly erroneous or against the preponderance of the evidence.

Appellant's second argument is that the chancellor applied the wrong measure of damages to the sale of the collateral. The judge had ruled that evidence of the use of the excavator by Scott for an extensive period of time indicated a reduction in value but that he was unable to determine the extent to which value was diminished. "As the burden of proof in this regard is upon the creditor," said the chancellor, "a deficiency judgment cannot be granted."

If a secured creditor sells collateral in a commercially unreasonable manner, a presumption arises that the value of the collateral is equal to the outstanding debt; the burden then shifts to the creditor to prove that the reasonable value of the collateral was less than the debt. *Henry* v. *Trickey, supra*; *see also Norton* v. *National Bank of Commerce*, 248 Ark. 143, 398 S.W.2d 538 (1966).

To provide evidence of value, appellant offered the testimony

of Bill Pritchard, a Case construction equipment dealer. Mr. Pritchard appraised the worth of the excavator for a quick sale at between $11,000 and $12,000. The chancellor was entitled to regard this opinion with a degree of skepticism, however, because the witness acknowledged his interest in purchasing the equipment for $7,000 to $9,000 with the hope of realizing a good profit. Moreover, it appears from the record that the appraiser was unaware that the excavator had a new motor at the time it was sold to appellee, a fact that, in his view, would have materially affected the value of the equipment. Pritchard also admitted that he did not start or operate the machine, although it was not customary for him to appraise a vehicle without starting it and moving it forward and backward.

Dale Scott's foreman testified that the excavator was not in as good condition upon repossession as when it had been sold to appellee and that subsequent use by Scott did not alter its condition. Appellee countered that the equipment had suffered abuse as outlined earlier. The chancellor resolved the conflicting evidence in appellee's favor and we find no reason to disturb his conclusion. The finding of the chancellor that appellant failed to meet its burden of proving that the value of the excavator was less than the debt of $35,000 was not clearly against the preponderance of the evidence; a deficiency judgment was properly denied.

Affirmed.

MAYFIELD and CORBIN, JJ., agree.

Billy J. JONES *v.* Clara JONES

CA 85-162 705 S.W.2d 447

Court of Appeals of Arkansas
Division II
Opinion delivered March 12, 1986

Peel & Eddy, for appellant.

Dennis Sutterfield, for appellee.

LAWSON CLONINGER, Judge. Appellee, Clara Jones, was granted a decree of divorce from appellant, Billy J. Jones, on December 13, 1984, by the Pope County Chancery Court. At the conclusion of the trial, the chancellor ordered the parties' real property sold and the proceeds divided equally. He found an individual retirement account and pension plan in appellee's name to be marital property, but awarded appellee the entire interest in them, stating as his reasons the eight factors specified in Ark. Stat. Ann. Section 34-1214(A)(1) (Supp. 1983), emphasizing that it was appellee who contributed to their acquisition and cited appellant's ability to support himself.

The chancellor further found that a certain piece of real property in Dover, Arkansas, owned by appellee's sister and brother-in-law, the Myers, was not being held in trust for appellee and dismissed appellant's third-party complaint against the Myers. He further stated that, if the "Dover property" was found to be held in trust for appellee, it would be inequitable to give appellant any interest therein.

Appellant argues two points for reversal: (1) The finding of the trial court that the "Dover property" was not held in trust for appellee is against the preponderance of the evidence; and (2) the trial court failed to comply with Ark. Stat. Ann. Section 34-1214(A)(1) (Supp. 1983) in awarding appellee the entire interest in her individual retirement account and pension plan which the trial court found to be marital property. We do not find appellant's arguments persuasive, and we affirm.

For his first point, appellant contends there was insufficient evidence for the trial court to find that the "Dover property" belonged to the Myers. Because appellee advanced the Myers part of the purchase money for the property and there was no written proof that the advance was a loan, appellant contends that the trial court should have found a resulting trust in favor of appellee. We do not agree.

A resulting trust must be proven by clear and convincing evidence. *Crain* v. *Keenan*, 218 Ark. 375, 236 S.W.2d 731 (1951); *Festinger* v. *Kantor*, 272 Ark. 411, 616 S.W.2d 455

(1981). Appellee and her sister testified there was no agreement that appellee was to own the "Dover property." Appellee loaned the Myers money, from which Myers paid the down payment, closing costs, and insurance payment on the property; however, the loan was repaid in full prior to trial. All documents of title relating to the property were in the Myers' names. In *Byers* v. *Danley*, 27 Ark. 77 (1871), the court held a resulting trust will not attach in the person paying the purchase money, unless the parties intended that the estate should vest in him. We cannot say on the basis of the evidence before us that the trial court's findings were clearly against the preponderance of the evidence or that they were clearly erroneous.

Although we review chancery cases *de novo*, we will not reverse the chancellor unless his findings are clearly erroneous or clearly against the preponderance of the evidence, giving due regard to the opportunity of the chancellor to judge the credibility of the witnesses. ARCP Rule 52(a); *Lyons* v. *Lyons*, 13 Ark. App. 63, 679 S.W.2d 811 (1984).

For his second point, appellant contends that the chancellor abused his discretion in awarding appellee the entire interest in her individual retirement account and pension plan because the court failed to comply with the requirements of Ark. Stat. Ann. Section 34-1214(A)(1) (Supp. 1983) in making an unequal division of marital property. We do not agree with this contention.

Ark. Stat. Ann. Section 34-1214(A)(1) controls the division of marital property. It states as follows:

> Ark. Stat. Ann. Section 34-1214(A)(1) (Supp. 1983). (1) All marital property shall be distributed one-half [½] to each party unless the court finds such a division to be inequitable, in which event the court shall make some other division that the court deems equitable taking into consideration (1) the length of the marriage; (2) age, health and station in life of the parties; (3) occupation of the parties; (4) amount and sources of income; (5) vocational skills; (6) employability; (7) estate, liabilities and needs of each party and opportunity of each for further acquisition of capital assets and income; (8) contribution of each party in acquisition, preservation or appreciation of marital property, including services as a homemaker; and

> (9) the federal income tax consequences of the Court's division of property. When property is divided pursuant to the foregoing considerations the court must state its basis and reasons for not dividing the marital property equally between the parties and such basis and reasons should be recited in the order entered in said matter.

At the conclusion of the trial, the chancellor found appellee's pension plan and individual retirement account were marital property but stated it would be inequitable to give appellant any part of them. He stated he was relying on the reasons cited in Section 34-1214(A)(1) for not equally dividing the property, and the main reasons were that it was appellee who contributed to their acquisition and appellant was able to support himself. He then read into the record the nine factors listed under Section 34-1214(A)(1). In the decree, however, no reasons were specified for an unequal division except that the decree stated the grounds for this action are those stated orally by the court at the conclusion of the trial. We believe the chancellor sufficiently complied with Section 34-1214(A)(1) in stating his reasons for not equally dividing the pension plan and individual retirement account at the conclusion of the trial.

Appellant contends the chancellor's mechanical recitation of his reasons does not comply with the statute. For this proposition, appellant cites *Davis* v. *Davis*, 270 Ark. 180, 603 S.W.2d 900 (1980), and *Glover* v. *Glover*, 4 Ark. App. 27, 627 S.W.2d 30 (1982), which held when marital assets are not divided equally the chancellor is required by statute to state in writing the reasons for not so dividing the marital property.

Davis and *Glover*, however, are distinguishable from the present case, because they were decided prior to the 1983 amendment to Section 34-1214. Prior to the 1983 amendment, Section 34-1214(A)(1) read, "When property is divided pursuant to the foregoing considerations the court *must state in writing* its basis and reasons for not dividing the marital property equally between the parties." (Emphasis ours.) In 1983, Section 34-1214 was amended, and the requirement that the chancellor must state his basis for making an unequal division of marital property in writing was deleted. Moreover, in *Davis* and *Glover*, the courts failed to state any reason for not dividing the property equally. In

the case at bar, the chancellor stated his reasons for making an unequal division at the conclusion of the trial.

Appellant further argues that even if this court finds the chancellor complied with Section 34-1214(A)(1), there is no evidence in the record to support an unequal division. Appellee testified she contributed 70% of the family's support since 1972 and testified to the amount of her yearly income and that of appellant. She also stated that all the funds contributed to her pension plan were paid solely by her employer. Appellant testified that his employment had been pretty steady since 1972 and did not introduce anything into the record to indicate he was unable to support himself. From this testimony, we cannot say that the chancellor was in error in making an unequal division.

Affirmed.

GLAZE and MAYFIELD, JJ., agree.

Danny Franklin SPENCER *v.* STATE of Arkansas

CA CR 85-179 705 S.W.2d 454

Court of Appeals of Arkansas
Division II
Opinion delivered March 12, 1986

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

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

MELVIN MAYFIELD, Judge. Appellant Danny Spencer was convicted by a jury of battery in the third degree. He was sentenced to one year in jail and fined $1,000.

The charge against appellant involved his girl friend's two-and-a-half-year-old daughter, Nikki, and arose after a babysitter noticed what appeared to be bite marks on the child's buttocks, and pinch marks and apparent fingerprints on the child's face. Upon being questioned, the child said that Danny had bitten and hurt her. The babysitter contacted SCAN and an investigation by the Barling Police Department ensued.

Appellant's sole argument for reversal is that the state failed to prove the existence of a physical injury. Battery in the third degree is committed if a person purposely or recklessly causes physical injury to another person. Ark. Stat. Ann. § 41-1603(1) (Repl. 1977). Physical injury is defined as the impairment of physical condition or the infliction of substantial pain. Ark. Stat. Ann. § 41-115(14) (Repl. 1977). Appellant contends the state has produced no evidence that Nikki suffered an impaired physical condition or substantial pain.

The appellant relies on *Kelley* v. *State*, 7 Ark. App. 130, 644 S.W.2d 638 (1983), where the majority concluded that the victim's testimony that he *believed* the cut he received went through his clothes but was not sure because it had been so long ago, and the testimony of a witness that the injury was like a "fingernail scratch" did not constitute enough evidence of substantial pain to support a conviction of third degree battery. Appellant contends that bite marks on the child's buttocks and pinch marks on her face are not sufficient to constitute physical injury as interpreted by controlling case law.

We do not agree. We think this case falls in a category with *Middleton* v. *State*, 14 Ark. App. 92, 685 S.W.2d 182(1985), and *Hall* v. *State*, 11 Ark. App. 53, 666 S.W.2d 408 (1984), which the appellant tries to distinguish. In both of those cases, as here, only bruises were shown, but it was held that there was evidence of the infliction of substantial pain. In *Hall*, that evidence was testimony that the appellant had hit a six-year-old child, knocking him down, and in *Middleton*, it was a statement that the appellant had grabbed and squeezed a baby's chin and left bruises on her. Here, there is testimony by the babysitter, Mrs. Crowson, that Nikki appeared to be terrified of appellant; that there were occasions when the child reacted strongly to his presence; and that once, when Danny and Mrs. Crowson's husband were alone with Nikki in the Crowson house, Nikki started screaming and ran to Mrs. Crowson's husband and would not let go of him. The jury could reasonably find from this testimony that the infliction of the bruises was accompanied by the infliction of substantial pain.

Our criminal code scales battery in degrees of first, second, and third, with the severity of punishment based in part on the harm done to the victim. *Harmon* v. *State*, 260 Ark. 665, 543 S.W.2d 43 (1976), *Hall* v. *State, supra*. We think there is a distinct difference between the pain sustained by a man who couldn't remember the incident and a child who showed fear of an adult who had bitten her.

We find no merit in appellant's argument that the state failed to show substantial pain.

Affirmed.

CLONINGER and CORBIN, JJ., agree.

J.W. MULLINS, Earl MULLINS and Danny FORTNER
v. Ken VARNER

705 S.W.2d 17

Court of Appeals of Arkansas
En Banc
Opinion delivered March 12, 1986

Brazil, Clawson & Adlong, by: *William Clay Brazil*, for appellant.

Fritzie Vammen, for appellee.

PER CURIAM. Appellants' motion for Rule on the Clerk is granted.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. The court has today granted a motion for a rule on the clerk filed by the above named appellants who are attempting to appeal from an award in favor of their employee granted by the Workers' Compensation Commission. I dissent from this action. Motions for rule on the clerk are generally decided by the Arkansas Supreme Court. *See* Arkansas Supreme Court and Court of Appeals Rule 29(1)(i). However, since this motion involves an attempt to appeal from the Workers' Compensation Commission, the motion has been decided by this court but can be reviewed by the Supreme Court. *See Davis* v. *C & M Tractor Co.*, 2 Ark. App. 150, 617 S.W.2d 382 (1981). Because the issue involved concerns, in my opinion, a construction of statutory law and a matter of major importance, I am filing a written dissent to the action of the majority of this court.

Ark. Stat. Ann. § 81-1325(b) (Supp. 1985) provides in part as follows:

> A compensation order or award of the Workers' Compensation Commission shall become final unless a party to the dispute shall, within thirty (30) days from receipt by him of the order or award, file notice of appeal to the Court of Appeals, which is hereby designated as the forum for judicial review of such orders and awards. Such appeal to the Court of Appeals may be taken by filing in the office of

> the Commission, within thirty (30) days from the date of the receipt of the order or award of the Commission, a notice of appeal, whereupon the Commission under its certificate shall send to the Court all pertinent documents and papers, together with a transcript of evidence and the findings and orders, which shall become the record of the cause.

In this case, the appellants have filed a motion alleging that they mailed a notice of appeal to the Commission and a copy of said notice to the clerk of the Court of Appeals. The motion also alleges that these notices were mailed within thirty (30) days of the date of the Commission's award. It is further alleged that the Commission refuses to prepare a transcript unless ordered to do so by the Court of Appeals. Attached to the motion is an affidavit of a deputy clerk of the Court of Appeals which states that he received a copy of the notice of appeal from the appellants' attorney, that he marked it as received, and returned a copy to the attorney "stating on said copy that I had forwarded it to the Workers' Compensation Commission."

Before passing on the motion for rule on the clerk, this court issued a per curiam on February 12, 1986, pointing out that the appellants had not filed anything with their motion to show us whether or when a notice of appeal was actually filed with the Commission. The order stated: "An affidavit by some official or employee of the Commission competent to state what the records of the Commission show would surely be forthcoming at [appellants'] request," and we passed the motion for fifteen (15) days to allow supplemental matters to be filed. The appellants then filed a supplemental motion in which they stated that the records of the Workers' Compensation Commission do not contain a notice of appeal but that a notice was mailed which was "lost, misplaced, or for some reason failed to get in the file."

We now have a situation where the time to file a notice of appeal with the Commission has run and the appellants, by their motion, concede that the records of the Commission do not contain a notice of appeal and that the notice that was mailed was "lost, misplaced, or for some reason failed to get in the file." There is no question but what the timely filing of a notice of appeal is jurisdictional and that the rule of unavoidable casualty does not

apply to the failure to file the necessary notice of appeal. *Burris* v. *Burris*, 278 Ark. 106, 643 S.W.2d 570 (1982); *LaRue* v. *LaRue*, 268 Ark. 86, 593 S.W.2d 185 (1980); *City of Hot Springs* v. *McGeorge Contracting Co.*, 260 Ark. 636, 543 S.W.2d 475 (1976).

In our conference, the majority of this court said there is a presumption that a letter mailed is received, and therefore decided, as a matter of fact, that the notice of appeal to the Commission was received. This finding of fact must of necessity be based upon one, or both, of the affidavits attached to the appellants' motion. One of those affidavits is that of a secretary of the attorney for appellants and states that she mailed copies of the notice of appeal to the Workers' Compensation Commission and to the clerk of the Arkansas Court of Appeals. The other affidavit is that of the deputy clerk of this court referred to above. It should be noted that the clerk's affidavit does not state that the copy of the notice was actually "forwarded", but only that he stated on the attorney's copy that he had "forwarded" it to the Commission. Also, we do not know whether it was mailed or not. If it was not mailed, the presumption that a letter properly mailed was received would not apply. On the other hand, the affidavit of the attorney's secretary states that it was mailed to the Commission but does not state that it contained the proper or sufficient postage affixed thereto.

It is true that the presumption relied upon by the majority arises in a proper case. The case of *Old Republic Ins. Co.* v. *Martin*, 229 Ark. 1065, 320 S.W.2d 266 (1959), dealt with this presumption and by coincidence involved the mailing of a notice of appeal to the Workers' Compensation Commission. In that case, the court, quoting from previous decisions, stated as follows:

> Under the cases above cited, it is uniformly held as a presumption of fact, not of law, that where a letter, properly and sufficiently addressed and properly stamped, is mailed, that it was received by the addressee in due course of mail. But the presumption ceases to exist where the addressee denies receiving the letter. In that case it becomes a question of fact whether the letter was received.
>
> The presumption arising where proof shows a letter properly mailed is not conclusive presumption of law, but a

> mere inference of fact founded on the probability that the officers of the government will do their duty. Such a presumption can of course be rebutted. *Bluthenthal* v. *Atkinson*, 93 Ark. 252, 124 S.W. 510.

229 Ark. at 1067.

In this case, I think one must engage in conjecture, speculation, and legal legerdemain to find that appellants' notice of appeal was ever filed with the Commission. My view is in keeping with the following paragraph from *Old Republic Ins. Co.* v. *Martin*:

> The Court does not care to indulge in speculation or conjecture, as to what occurred to the letter, but it is not impossible nor improbable that the letter, when mailed in Fort Smith, before transmission in due course, might have been lost or misplaced. The court prefers, however, to predicate its finding upon the evidence in the record.

Based upon the record, I cannot agree to the granting of the rule on the clerk, but I predict a rash of similar opportunities to do so in the future.

E.P. DOBSON, INC. *v.* Ray A. RICHARD, et al.

CA 85-232 705 S.W.2d 893

Court of Appeals of Arkansas
Division II
Opinion delivered March 19, 1986

Henry C. Kinslow, for appellant.

James J. Calloway, for appellee.

DONALD L. CORBIN, Judge. This is an appeal from a decision of the Union County Circuit Court denying appellant's claim against appellees for damage to appellant's equipment as a result of the alleged negligence of appellees' son. The case was tried without a jury and the question on appeal is whether there is sufficient evidence to support the trial judge's decision.

In June 1984, appellees' son, Robert Richard, damaged appellant's gas pump while driving a car registered in the name of appellees' business. A few days later, appellant's employee, C. W. Kinslow, informed appellee Ray Richard of the damage. Mr. Richard told Kinslow that his insurance would take care of the loss. The parties disagree as to whether Mr. Richard also stated that Robert was working for him when the accident occurred. Within a few days after the incident, appellees learned that they did not have insurance to cover the loss, and Kinslow was informed of this when he spoke with Mrs. Richard by telephone a few days later. Since the appellees had worked for appellant in the past, Kinslow called Mrs. Richard two or three times to discuss the possibility that they might work off the debt, but in January 1985, Mrs. Richard informed Kinslow that they were not going to pay it.

Appellant filed suit in February 1985 against appellees and their son, Robert Richard. However, service was never perfected upon Robert Richard, who had moved to California in the fall of 1984. Appellant proceeded against appellees on two theories: (1) as principals liable for the negligence of their agent; and (2) in contract resulting from appellant's forbearance to sue in reliance upon appellees' promises and representations that the debt would be paid. Without stating its reasons, the court entered judgment for the appellees.

On appeal, the appellant argues three points:

(1) the trial court erred in failing to find that Robert Richard was appellees' agent and that appellees had ratified his negligent act;

(2) the trial court erred in failing to find that appellees were

liable to appellant in contract because of appellant's forbearance from filing suit against all three defendants; and

(3) under the holding in *Jim Halsey Co., Inc.* v. *Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985), the appellant's contract and tort theories partially support each other, and taken together, should allow recovery.

With regard to appellant's contention that Robert was appellees' agent, the evidence was sharply in conflict. The burden was upon appellant to prove the existence of the agency relationship. *B.J. McAdams, Inc.* v. *Best Refrigerated Express, Inc.*, 265 Ark. 519, 579 S.W.2d 608 (1979). Appellant's argument that "the possession of the agent is the possession of the principal" and that "appellees ratified the acts of their son" is premature, because the agency relationship must first be shown to exist. The doctrine of ratification is inapplicable when no agency relationship is proved. *Runyan* v. *Community Fund of Little Rock*, 182 Ark. 441, 31 S.W.2d 743 (1930). In *Evans* v. *White*, 284 Ark. 376, 378, 682 S.W.2d 733, 734 (1985), the Arkansas Supreme Court said:

> We have adopted the definition of agency contained in the Second Restatement of the Law of Agency, Section 1, comment a, which provides that the relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control. *Crouch* v. *Twin City Transit*, 245 Ark. 778, 434 S.W.2d 816 (1968). The two essential elements of the definition are authorization and right to control.

Agency can be proved by circumstantial evidence, if the facts and circumstances introduced in evidence are sufficient to induce in the minds of the jury the belief that the relation did exist and that the agent was acting for the principal in the transaction involved. *B.J. McAdams, Inc.* v. *Best Refrigerated Express, Inc., supra.* If the facts are in dispute, agency is a question of fact. *Evans* v. *White, supra.* On appellate review of a trial judge's decision we must give due regard to his opportunity

to judge the credibility of the witnesses and we will not set aside his findings unless clearly against the preponderance of the evidence. ARCP Rule 52(a); *Superior Improvement Co.* v. *Mastic Corp.*, 270 Ark. 471, 604 S.W.2d 950 (1980). We cannot hold that the trial judge's decision was clearly against the preponderance of the evidence on this point.

Appellant's second point is that appellees became liable in contract because they initially agreed to pay the debt and, in reliance on that promise, appellant waited approximately six months to bring suit. Appellant is correct in its assertion that the waiver of a legal right (such as forbearance to sue) is sufficient consideration to support a promise to pay the debt of another. *Jonesboro Hardware Company* v. *Western Tie & Timber Company*, 134 Ark. 543, 204 S.W. 418 (1918). In *Rohrscheib* v. *Helena Hospital Association*, 12 Ark. App. 6, 9, 670 S.W.2d 812, 815 (1984), this court explained:

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

Accord, The Fausett Company v. *Rand*, 2 Ark. App. 216, 619 S.W.2d 683 (1981).

The determination of whether an oral contract is an original undertaking or a collateral one is a question of fact, and is dependent upon all of the relevant facts:

> It is also well settled that in determining whether an oral contract is original or collateral the intention of the parties at the time it is made must be regarded and in determining that intention the exact words of the promise, the situation of the parties and all of the circumstances surrounding the transaction should be taken into consideration. This deter-

> mination ordinarily is one of fact and not of law. *Missouri Pacific Railroad Co.* v. *Havens*, 164 Ark. 108, 261 S.W. 31 (1924).

Barnett v. *Hughey Auto Parts, Inc.*, 5 Ark. App. 1, 4, 631 S.W.2d 623, 625 (1982). *Accord, Millsaps* v. *Nixon*, 102 Ark. 435, 144 S.W. 915 (1912).

"It is also well settled that mere forbearance from exercising a legal right, without any request to forbear, or circumstances from which an agreement to forbear may be implied, is not a consideration which will support a promise." *Federal Compress & Warehouse Co.* v. *Hall*, 209 Ark. 274, 280, 189 S.W.2d 922, 925 (1945). A review of the evidence in the instant case fails to reveal any request by appellees to forbear from suit or sufficient circumstances from which such agreement may be implied. In view of this, the trial judge was not clearly wrong in rejecting appellant's second point.

Appellant's third point for reversal must also be rejected. Relying upon *Jim Halsey Co., Inc.* v. *Bonar, supra*, appellant contends that "even if such errors were not separate grounds for reversal, the combined effect of the two errors is grounds for reversal." The case, however, does *not* support the argument. Instead, it simply underscores a plaintiff's right to proceed under two consistent theories of recovery when a defendant denies liability. "Contract and tort theories have been determined to be consistent when both seek the same relief and the evidence to support recovery on one theory partially supports it on another." *Id.* at 465, 683 S.W.2d at 902. The case simply does not stand for the principle for which it is cited by appellant.

Affirmed.

CLONINGER and MAYFIELD, JJ., agree.

SLOAT CHIROPRACTIC CLINIC *v.* STEVE EVANS DATSUN, et al.

CA 85-435 706 S.W.2d 181

Court of Appeals of Arkansas
Division II
Opinion delivered March 19, 1986

Eddie H. Walker, Jr., for appellant.

Daily, West, Core, Coffman & Canfield, by: *Eldon F. Coffman* and *Douglas M. Carson*, for appellee.

DONALD L. CORBIN, Judge. This appeal from the Arkansas Workers' Compensation Commission presents the novel question of whether a chiropractor has an independent right to seek compensation for a medical bill for services to a patient who has not filed a workers' compensation claim. The Commission found no support in the act for this proposition and reversed the ALJ's decision. We affirm.

James Yarbrough, an employee of appellee Steve Evans Datsun, was involved in an automobile accident in September,

1983, which allegedly occurred while Yarbrough was driving for appellee. A few days later Yarbrough went to appellant Sloat Chiropractic Clinic for treatment. Several x-rays were taken. Yarbrough informed appellant that he had been injured in a car accident while working for appellee and signed an agreement entitled "Assignment of Payment" which provided as follows:

> My attorney and/or insurance company are hereby requested and authorized to pay direct to H.C. Sloat, D.C. any monies due him on account, the same to be deducted from any settlement made on my behalf.
>
> Further, I agree to pay H.C. Sloat, D.C. the difference, if any, between the total amount of his charges and the amount paid him by the attorney and/or insurance company. It is further understood that I, the undersigned, agree to pay H.C. Sloat, D.C. the full amount of his charges, should my condition be such that it is not covered by my policy or if for any reason the insurance company refuses to pay my claim.
>
> Dated 9-26-83 /s/ James Yarbrough

The record reflects that Yarbrough elected not to file a claim for benefits under the Arkansas Workers' Compensation Act and, instead, pursued a third party action against the driver of the other automobile. That action resulted in a settlement to Yarbrough of $9,097. The settlement covered payment of Yarbrough's attorney's fee and all medical bills except for the $250 bill from appellant Sloat Chiropractic Clinic.

Yarbrough testified at the hearing that when he signed the Assignment of Payment he thought that his workers' compensation would cover appellant's charges. He stated that he found out that he was hurt more seriously than he originally thought and hired an attorney. Yarbrough testified that he continued to receive a bill from appellant but that appellant had taken no legal action against him to collect its $250. Yarbrough stated further that for some reason or other, appellant's bill was not paid along with his other medical expenses when the lawsuit was settled.

The Commission noted in its decision that the ALJ had erroneously based his ruling on that portion of Ark. Stat. Ann. § 81-1311 (Supp. 1985), which provides:

> All persons who render services or provide things mentioned herein shall submit the reasonableness of the charges to the Commission for its approval, and when so approved, shall be enforceable by the Commission in the same manner as is provided for the enforcement of compensation payments, but the foregoing provisions relating to charges shall not apply where a written contract exists between the employer and the person who renders such service or furnishes such things.

This provision apparently led the ALJ to conclude that appellant had an independent right to pursue a claim for its charges before the Commission independent of the decision by Yarbrough not to file a workers' compensation claim. The ALJ also erroneously based his decision on Ark. Stat. Ann. § 81-1320(a) (Supp. 1985), which provides in part as follows:

> [Waiver of compensation.] No agreement by an employee to waive his right to compensation shall be valid, and no contract, regulation, or device whatsoever, shall operate to relieve the employer or carrier, in whole or in part, from any liability created by this Act [§§ 81-1301 — 81-1349], except as specifically provided elsewhere in this Act.

Waiver was not an issue in the case at bar as no claim was filed by Yarbrough and this section is therefore inapplicable. Neither § 81-1320(a) nor § 81-1311 authorize the medical provider to initiate a claim on behalf of an employee in the event a worker elects not to file a claim for benefits.

■ The question presented by this appeal has not been addressed in Arkansas. In A. Larson, *The Law of Workmen's Compensation* § 61.12(k) (Vol. 2 1983), it is stated that:

> The rights of a physician to recover fees in a compensable case are derivative; that is, there must first have been compensation claim proceedings initiated by the employee or employer. The physician has no independent standing to make claims within the compensation system, unless this right has been expressly created by statute.

In *Grantham* v. *Coleman Co.*, 190 Kan. 468, 375 P.2d 629 (1962), the Kansas Supreme Court held that the compensation

commissioner had no jurisdiction to entertain a doctor's claim for services where no proceeding for compensation had been begun by the employee or employer.

The Supreme Court of Rhode Island held in *Wynne* v. *Pawtuxet Valley Dyeing Co.*, 101 R.I. 455, 224 A.2d 612 (1966), that where specific language providing the right of a physician to proceed under its Workmen's Compensation Act directly against an employer had been deleted in a later revision of the act, physicians no longer had the right to proceed under the act independently of a proceeding instituted by an employee.

In *Eastern Elevator Co.* v. *Hedman*, 290 So.2d 56 (Fla. 1974), an injured workman went to a physician for treatment. The physician treated him and submitted a bill to the state Department of Commerce. The full fee was not approved, and the physician himself sued the employer, presenting himself as a claimant under the Workmen's Compensation Act. The Judge of Industrial Claims and the Commission found that the physician had standing to bring this independent action. The Florida Supreme Court reversed, holding that under Florida law a physician is entitled to payment for services only after it has been determined that the claim was a compensable one, and that in any event the employer has a duty to pay the injured employee, not the physician. Physicians had no standing to sue as claimants under the Florida law.

Appellant Sloat Chiropractic Clinic relies upon *Willits & Son Sod Farm* v. *Moon*, 262 Ark. 742, 561 S.W.2d 82 (1978), and *Hulvey* v. *Kellwood Co.*, 262 Ark. 564, 559 S.W.2d 153 (1977), for the proposition that the Commission has the authority to determine who is liable for the payment of medical charges. In *Willits* the Arkansas Supreme Court upheld the Commission's finding that the employer was liable for medical expenditures due the Veterans Administration Hospital. There, the employee sustained a compensable injury and was admitted to the Baptist Medical Center in a comatose condition. He was later transferred to the Veterans Administration Hospital where he died without ever regaining consciousness. The Veterans Administration Hospital promptly filed its claim with the Commission for medical services rendered to the employee upon receiving notice of coverage. The employer and compensation carrier controverted

the employee-decedent's claim as well as the claim of the widow for death benefits on the basis that his injury and death were unrelated to his employment. They did not, however, challenge the validity of the Veterans Administration Hospital's claim or the standing of the widow to press for payment of the claim. By footnote, the opinion of the court noted that the Veterans Administration Hospital was not a party litigant to the action and that its only involvement was its filing a claim for medical services rendered, but the widow was the moving party against the employer and insurance carrier for consideration of the claim. After an unpublished opinion involving a collateral matter concerning the merits of the widow's claim for death benefits was handed down, the employer and insurance carrier challenged the Veterans Administration Hospital's claim for the first time on the sole ground that the hospital did not comply with Rule 21 of the Commission. Sometime thereafter the employer and insurance carrier asserted in a letter that the hospital had no standing to recover on its claim for medical services rendered. In dismissing the lack of standing argument on appeal, the court noted that the widow had taken all of the affirmative steps to require the employer and insurance carrier to pay the medical expenditures incurred in connection with her husband's injury.

Appellant Sloat Chiropractic Clinic's reliance upon the holding in *Willits* for the proposition that a medical services provider has an independent right to seek compensation is misplaced. Contrary to appellant's argument, there is no language in the *Willits* opinion which provides authority for appellant to initiate a claim on behalf of an employee in the event a worker elects not to file a claim for benefits.

Appellant also relies upon *Hulvey* v. *Kellwood Co.*, 262 Ark. 564, 559 S.W.2d 153 (1977). The question on appeal there was whether there was substantial evidence to support the Commission's reduction of a chiropractor's charges as being unreasonable. The Commission also refused to award the chiropractor an attorney's fee because the matter had been pursued by the doctor and his attorney rather than by the claimant and her attorney. On appeal the circuit court affirmed the reduction in the chiropractor's fees but found that an attorney's fee was recoverable and remanded the cause to the Commission. The Arkansas Supreme Court stated that the circuit court was correct in finding that an

attorney's fee should be allowed, relying upon that portion of § 81-1311 which provided that reasonable charges for medical services, when approved by the Commission, "shall be enforceable by the Commission in the same manner as is provided for the enforcement of compensation payments." *Id.* at 566, 567, 559 S.W.2d at 155.

Appellant Sloat Chiropractic Clinic submits in its brief that since a medical provider has an independent right to obtain legal counsel in regard to the providing of treatment to an injured worker as per the holding in *Hulvey*, there is no difference in principle in regard to a chiropractor having an independent right to file a claim for treatment that has been rendered in good faith to an injured worker. In *Hulvey* the injured worker had filed a workmen's compensation claim for an admittedly compensable injury. This fact clearly distinguishes *Hulvey* from the facts in the case at bar. We do not construe the holding in *Hulvey* as authority for a medical provider to independently initiate a claim.

Appellant further asserts that it has standing to initiate a claim on the basis of Yarbrough's execution of the Assignment of Payment. We do not find this argument persuasive inasmuch as the law provides that the right to compensation is not assignable. Ark. Stat. Ann. § 81-1321 (Repl. 1976). The language of the Assignment of Payment clearly indicates that Yarbrough assigned to appellant only his rights to payment.

Ark. Stat. Ann. § 81-1305 (Repl. 1976), provides that "Every employer should secure compensation to his employees . . . ." Liability by its own language thus runs in favor of the employee under the act. Any right appellant might have to pursue its claim must be found within the terms of the Arkansas Workers' Compensation Act. We have examined the act and can find no provision which confers upon the Commission the power to hear such claims. Since the legislature has been silent in this area, we cannot fill the void by judicial interpretation.

In conclusion, we hold that the decision of the Commission was correct in determining that appellant Sloat Chiropractic Clinic could not maintain the proceeding to recover its claim for services in the absence of a workers' compensation proceeding initiated by the employee, employer or other direct representatives.

Affirmed.

CLONINGER and MAYFIELD, JJ., agree.

Rosalee HOBBS *v.* Dewey STILES, Director of Labor, and O.K. FOODS, INC.

E 85-76 705 S.W.2d 900

Court of Appeals of Arkansas
Division I
Opinion delivered March 19, 1986

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

George Wise, Jr., for appellees.

TOM GLAZE, Judge. Appellant seeks reversal of the Board of Review decision finding that her appeal to the Board was filed in an untimely manner and that she had failed to show the late filing was due to circumstances beyond her control. We affirm.

Appellant first argues her appeal was filed timely. On March 22, 1985, the appeal referee issued his opinion denying appellant benefits, and at the same time, appellant was notified she had twenty days, or until April 11, 1985, to appeal the decision. Within the twenty-day period, appellant admits she went to the "unemployment office" to discuss the tribunal's decision and before leaving, she obtained an appeal form captioned "Petition for Appeal to the Board of Review." While she concedes she failed to file this petition-for-appeal form until after the April 11th deadline, appellant argues that on April 10th she had filed three letters with the tribunal and the Board erroneously failed to consider those letters as her notice of appeal. We cannot agree.

The letters upon which appellant relies were written by others on appellant's behalf; they make no mention of an appeal, and at most, the letters can be characterized as additional evidence that the appellant filed with the tribunal in an attempt to reverse the tribunal's decision. Even if a notice of appeal had been filed, such letters are the type evidence the Board cannot consider for the first time in any appeal to it. *See Ramsey* v. *Everett, Director*, 7 Ark. App. 120, 644 S.W.2d 621 (1983). Accordingly, we must conclude the Board's findings that appellant's letters did not constitute an appeal notice and that her appeal was untimely are supported by substantial evidence.

Next, we consider appellant's contention that no substantial evidence exists to support the Board's finding that she had failed to show that the untimeliness of her appeal was due to circumstances beyond her control. Again, we must disagree. In *Paulino* v. *Daniels*, 269 Ark. 676, 599 S.W.2d 760 (Ark. App. 1980), this Court held that reasons for late filing involve fact issues to be determined by the Board of Review and not this Court on appeal. Here, appellant testified to certain personal and economics hardships, and said, "so I had some problems during that period of time trying to think of things when I needed to think of them." However, she concedes that she obtained her appeal

form within the twenty-day period during which she was required to file it. In fact, while appellant testified that she had misplaced the form, she admitted she waited a week before mailing it after she had relocated the form. Appellant also indicated she had intended to include the appeal form with the three letters she mailed to the appeal tribunal on April 10, 1985. Of course, her testimony cannot be taken as undisputed. *Butler* v. *Director of Labor*, 3 Ark. App. 229, 624 S.W.2d 448 (1981).

From the evidence presented, the Board could have reasonably concluded the appellant had either forgotten or decided belatedly to appeal the tribunal's decision. Either way, the appellant had duly discussed the adverse decision with someone at the Employment Security Division and obtained an appropriate form to appeal that decision. If she had acted diligently, appellant could have easily filed a timely appeal, but she simply failed to do so. We cannot say the Board erred in finding appellant did not prove her late appeal was due to circumstances beyond her control.

Affirmed.

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

WILDWOOD CONTRACTORS *v.* THOMPSON-HOLLOWAY REAL ESTATE AGENCY

CA 85-191 705 S.W.2d 897

Court of Appeals of Arkansas
Division I
Opinion delivered March 19, 1986

Vickery & Jones, P.A., for appellant.

Jay E. Hoggard, for appellee.

TOM GLAZE, Judge. Appellant, Wildwood Contractors, appeals a judgment from the Union County Circuit Court against it in favor of appellee, Thompson-Holloway Real Estate Agency, for $982.00, which represents additional insurance premiums for coverage written by appellee for appellant through the Hartford Insurance Company. The amount was determined as a result of an audit of actual business activity of appellant for a one-year period in order to "true up" premiums with actual risk incurred by the insurance company during the audit year. The audit was conducted not by appellee or its employees, but rather by the

Hartford Insurance Company, which wrote appellant's insurance through appellee. The case was tried to the court without a jury, and the only witness was Robert H. Archer, a partner in the appellee insurance agency, who presented an exhibit consisting of the disputed audit. The audit was admitted into evidence over appellant's objection. Based upon the audit, the trial court found for appellee and entered judgment, finding that the audit constituted a record of regularly conducted business activity which fell within the hearsay exception provided in Unif. R. Evid. 803(6).

For reversal, appellant contends that the trial court erred in admitting the results of the audit as a business record within the hearsay exception provided in Unif. R. Evid. 803(6). The rule provides that records of a regularly conducted business activity are not excluded by the hearsay rule from evidence "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

Rule 803(6) articulates, *inter alia*, the types of records falling within the business records exception. As stated in *Cates* v. *State*, 267 Ark. 726, 589 S.W.2d 598 (Ark. App. 1979), there are seven factors which must be present in order for a business record to be admissible under the rule: the evidence must be (1) a record or other compilation, (2) of acts or events, (3) made at or near the time the act occurred, (4) by a person with knowledge, or from information transmitted by such a person, (5) kept in the course of a regularly conducted business, (6) which has a regular practice of recording such information, (7) all as shown by the testimony of the custodian or other qualified witness. *Id.* at 728, 589 S.W.2d at 598-599.

While this case presents several close questions as to whether the audit in question falls within the "business records" exception to the hearsay rule, we cannot say from our review of the evidence that the trial court abused its discretion in admitting the audit into evidence. The audit in question certainly qualifies as a "record" of "acts or events" consisting of business activity during a specific calendar year. In order to be admissible under Rule 803(6), the audit report must be made at or near the time of the examination of the records upon which it is based, and not necessarily when the activity shown in the audited records was performed. *Pfeffer* v. *S. Texas Laborers' Pension Trust Fund*,

679 S.W.2d 691, 694 (Tex. App. 1 Dist. 1984). Here, the audit was conducted within a reasonable time.[1]

Archer testified that the record was compiled from information transmitted by some person with knowledge who worked for appellant. Finally, audits such as the one here, according to the evidence, are a regularly conducted business activity and are utilized as a regular practice by the insurance underwriter to square actual risk incurred with anticipated risk, and the audits are relied upon to adjust premiums.[2]

It is the fact that regularly kept business records are relied upon for business decisions that makes them trustworthy enough to be admissible as an exception to the hearsay rule. *See* E. Cleary, *McCormick On Evidence*, Section 306 (3d Ed. 1984). A trial judge has wide discretion to determine whether a business record lacks trustworthiness. *See United States* v. *Page*, 544 F.2d 982, 987 (8th Cir. 1976).

Finally, appellant strongly contends that Archer was not qualified to sponsor the audit because he could not of his own personal knowledge vouch for the results of the audit or even as to the manner in which it was conducted. However, the business records exception does not mandate that the custodian be able to explain the record-keeping procedures in question. *United States* v. *Henneberry*, 719 F.2d 941, 948 (8th Cir. 1983). It is not necessary that the sponsoring witness have knowledge of the actual creation of the document in question; the personal knowledge of the sponsoring witness regarding preparation of the business record goes to the weight rather than the admissibility of the evidence. *See Page, supra.* The trial judge has the discretion to determine the qualifications of witnesses and the admissibility of evidence. *Smith* v. *Chicot-Lipe Insurance Agency*, 11 Ark. App. 49, 51, 665 S.W.2d 907, 908 (1984). *See also Cates, supra.*

Based upon our review of the evidence, we cannot say

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[1] According to Archer, the audit was conducted and the report prepared within 90 to 120 days of February 11, 1984, which was the end of the period for which insurance was provided.

[2] In fact, the parties had utilized such audits on at least three previous occasions, resulting in additional premiums being paid by appellant in two of those years and appellant receiving a refund for one of those years.

that the trial court abused its discretion in finding that the audit in question fell within the requirements of Unif. R. Evid. 803(6) as a business record exception to the hearsay rule and was therefore admissible. The decision of the trial court is affirmed.

Affirmed.

COOPER and CLONINGER, JJ., agree.

Jerome WILLIAMS *v.* STATE of Arkansas

CA CR 85-173 705 S.W.2d 896

Court of Appeals of Arkansas
Division I
Opinion delivered March 19, 1986

Chet Dunlap, for appellant.

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

TOM GLAZE, Judge. Jerome Williams appeals his conviction for theft of property, for which he was sentenced, as a habitual offender, to serve a fifteen-year term in the Arkansas Department of Correction and to pay a fine of $5,000.00. For reversal, he contends the trial court erred in refusing to grant a mistrial. We affirm.

Appellant was tried by a jury and convicted after a two-day trial in Poinsett County Circuit Court. Testimony in the case was concluded the first day, and on the second day, after jury instructions were read, closing arguments were made, and the jury retired, appellant made his argument to the judge on his motion for a mistrial. Appellant's attorney said that prior to trial, he had asked the sheriff that appellant not be handcuffed while he was transported to the courthouse. He stated he thought that it might prejudice some jurors if they were to see his client that way. On the second day of trial, appellant told his attorney that he had been led in handcuffs from a police car to the courthouse, and had been seen by most of the jurors who were standing in front of the courthouse. He recognized one juror specifically. Appellant said he also was observed later by another juror in the hallway of the courthouse. Appellant argues that he was denied a fair trial because the jurors saw him in handcuffs, and because the sheriff acted in bad faith.

The granting of a mistrial is a drastic remedy and should be granted only when justice cannot be accomplished by continuing the trial. *Parks* v. *State*, 11 Ark. App. 238, 669 S.W.2d 496 (1984). We will not reverse a judgment for an error which is unaccompanied by prejudice. *Burnett* v. *State*, 287 Ark.

158, 697 S.W.2d 95 (1985); *Hughes* v. *State*, 17 Ark. App. 34, 702 S.W.2d 817 (1985).

The Arkansas Supreme Court has held that it is not prejudicial per se when a defendant is brought into a courtroom handcuffed. *Johnson* v. *State*, 261 Ark. 183, 546 S.W.2d 719 (1977). More recently, the supreme court held that the trial court did not err by not declaring a mistrial when there was a brief, inadvertent sighting of the appellant in handcuffs by some of the jurors. *Hill* v. *State*, 285 Ark. 77, 685 S.W.2d 495 (1985). There, as in this case, appellant offered no proof of any jurors actually having seen him, and he requested no *voir dire* to substantiate his allegation of prejudice. In addition, there was no affirmative showing of prejudice by appellant.[1] The court in *Hill* relied extensively on *United States* v. *Carr*, 647 F.2d 867 (8th Cir. 1981). In *Carr*, the defendant was allegedly seen by several members of the jury panel while in handcuffs and a waist chain before trial. The court stated: "[B]rief and inadvertent exposure of defendants to jurors is not inherently prejudicial; the defendant must bear the burden of affirmatively demonstrating prejudice." *Id.* at 868 (quoting *United States* v. *Robinson*, 645 F.2d 616, 617 (8th Cir. 1981)). While appellant attempts to distinguish *Carr*, claiming his exposure here was *not* brief, the record, as we already mentioned, belies such a claim.

Furthermore, the record fails to substantiate appellant's allegation of bad faith on the part of the sheriff. No proof was offered to show that appellant was not transported according to established procedure. Nor was there evidence that there was an alternate route by which appellant could have been taken to avoid the public, or that the officers intentionally exposed him to the jurors. Accordingly, we affirm.

Affirmed.

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[1] Appellant argues he was deprived of an opportunity to show prejudice because the trial judge delayed the argument on his motion for a mistrial until after the jury retired. Because this incident arose on the second day of trial rather than when the trial began, counsel and the trial court were admittedly at a poorer stage at which to offer and consider the motion. Nonetheless, appellant was not precluded from offering evidence to support his motion and requesting that the court rule on it.

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

Gerland Lee GASS, a/k/a Gerl GASS *v.* STATE of Arkansas

CA CR 85-95 706 S.W.2d 397

Court of Appeals of Arkansas
Division I
Opinion delivered March 26, 1986
[Rehearing denied April 30, 1986.*]

* Cloninger, J., not participating.

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.

GEORGE K. CRACRAFT, Chief Judge. Gerland Lee Gass

appeals from his conviction of the crime of conspiracy to deliver a controlled substance for which he was sentenced to a term of thirty years in the Department of Correction and a fine of $15,000. We find no error and affirm the conviction.

At approximately 9:15 p.m. on August 2, 1984, L. C. Sandefer was travelling from Batesville to the Sulphur Rock community when he encountered a Lincoln Continental occupied by two men and being driven in an erratic manner. The Lincoln was being driven very slowly and crossed over the yellow line several times. He observed that the brake lights on the Lincoln came on several times for no apparent reason. By driving his truck very close to the rear bumper of the Lincoln he was able to ascertain that the car was licensed in Georgia and bore the license plate number GLK-310. Because of the behavior of the driver, Sandefer reported to the sheriff's office that the driver was probably intoxicated and ought to be checked out.

The next morning, David Aldridge, a deputy sheriff received a telephone call from an individual who stated that he and a companion, while driving along the highway, had seen a bank bag lying in a ditch by the side of the road. The officer went to the scene and obtained the bank bag. He described it as a zipper-type bag with a lock on the end of it and bearing the notation of "Hamilton County" and the name of a bank. The officer stated that he had no idea where Hamilton County was at that time, took the bag to the sheriff's office, and cut it open to determine what it contained. Inside he found a freezer bag containing a white powdery substance which was field tested and found to be cocaine. The persons finding the bag stated that they had found it at approximately 7:00 a.m. and delivered it to Officer Aldridge within an hour.

Charles Rutledge, an officer of the sheriff's department, stated that after learning the bag contained cocaine, he had the persons who found it take him to the location at which it was found. The bag was found in the area in which Sandefer had reported seeing the Lincoln the night before. Bryan Everett reported to the sheriff's office that on the morning of August 5, 1984, he and Sandefer observed the same Lincoln Continental on three occasions in the area where the bag had been found. He further reported that he again saw the same vehicle that after-

noon parked on the side of the road and observed two people in the ditch who acted as if they "were looking for something." The sheriff's office then directed all of its officers to locate the Lincoln bearing the Georgia license number and apprehend its occupants. Later that afternoon the officers located the car, stopped it, and took its occupants into custody. An individual named Wofford was driving and the appellant was the only passenger. At the time of the stop the officers noticed mud on the trousers and shoes of both of the occupants and a "white powdery" substance on the appellant's shirt. No warrant had been issued for the arrest.

At the jail, the parties were required to disrobe and change into prison uniforms. Wofford emptied his pockets and the content disclosed two keys to Room 405 of the Powell Motel and a large sum of cash. A third key, bearing the inscription "No. ARCO7," was also discovered at that time. Wofford stated that they key was to a motel room in Mississippi where he had spent the night and had forgotten to return the key. It was later determined that this key fit the bag containing the cocaine. The powdery substance on appellant's shirt was determined to be cocaine. In the pocket of appellant's shirt was found a piece of paper bearing the name of Joseph McKinney and a Mountain View, Arkansas, telephone number.

Acting on what they then knew, the officers sought and obtained a warrant authorizing the search of the motel room and the Lincoln for controlled substances, weapons, and drug paraphernalia. Pursuant to the warrant the vehicle was searched and nothing was discovered. The officers found a number of weapons and other items in the motel room, but no cocaine or anything else linking the appellant to the conspiracy. None of the items seized in the motel room were introduced at trial. The officers remained in the motel room for a period of time during which several incoming telephone calls for the appellant and Wofford were received and electronically recorded. These recordings were not used in the trial and did not lead to any other evidence of the appellant's guilt.

While in the motel room, one of the officers called Joseph McKinney at the telephone number found in appellant's shirt pocket, located his whereabouts, and subsequently took him into custody. McKinney testified with immunity at the trial as to his

involvement with the appellant, Wofford, and others in a conspiracy to sell the 2.2 pounds of cocaine found in the money bag. McKinney also testified that he had received a telephone call from the appellant informing him that one of the co-conspirators had thrown the "stuff" out of the window while their vehicle was being chased by the police and the appellant asked him to go with them to Batesville to recover it.

On appeal the appellant does not contend that the evidence was insufficient to establish the conspiracy charge, but only that the evidence established that he had withdrawn from the conspiracy before the arrest and that the trial court erred in not suppressing much of the State's evidence which established the existence of the conspiracy.

The appellant asserts that the bank bag found in the ditch was either abandoned property or found property. He contends that if it be considered abandoned property he could not be convicted of conspiracy because, by throwing away the object of the conspiracy, he had renounced the criminal purpose. In the alternative, he contends that if it be considered found property, the opening of the locked container constituted an illegal search and seizure and that all evidence of it or flowing from it should have been suppressed as "fruits of the poisonous tree." We do not agree.

Ark. Stat. Ann. § 41-710 (Repl. 1977) provides that renunciation of the criminal purpose is an affirmative defense to a prosecution for criminal conspiracy if a conspirator (1) thwarts the success of the conspiracy under circumstances manifesting a complete and voluntary renunciation of his criminal purpose, or (2) terminates his participation in it and gives timely warning to the police or makes a substantial effort to prevent the commission of the offense under circumstances manifesting a complete renunciation of the conspiracy. The appellant's argument presupposes that he was the person that discarded the bag and that he did so in an effort to thwart the conspiracy or terminate his participation in it. There is not a scintilla of evidence on which a finding that any of these requirements had been met could be based. Joseph McKinney, one of the co-conspirators, testified that the appellant was not the one who discarded the bag. He stated that the appellant told him that he had "sent a guy up here

with the stuff and on getting to Batesville the guy had been chased or followed out of town and thrown the stuff out of the car." He further testified that on the date of the arrest the appellant and a companion came to his house and asked him to go to Batesville with them to look for the "stuff that was throwed out of the car. . . . They said they had to go back to Batesville and look for the stuff, that they had to find it." Unless a conspirator produces affirmative evidence of withdrawal, his participation in the conspiracy is presumed to continue until the last overt act by any of the conspirators. *United States* v. *Panebianco*, 543 F.2d 447 (2d Cir. 1976). Our review of the record discloses no affirmative evidence of appellant's withdrawal. To the contrary, the evidence shows that until shortly before his arrest he and at least one other co-conspirator were seeking to regain possession of the cocaine in order to continue their criminal purpose.

Appellant next contends that the trial court erred in not suppressing evidence of the cocaine found in the locked container. He argues that the evidence was obtained as a result of an illegal warrantless search and seizure. We find no merit in this contention. Appellant's pretrial motion to suppress evidence made no mention of the content of the container or request that evidence of it be suppressed. That motion raised questions concerning the circumstances surrounding the stop and arrest and the legality of the warrant issued for the search of the Lincoln and motel room. At the commencement of the trial, appellant orally moved for suppression of evidence obtained from the search of the bag, but offered no evidence in support of that motion.

The trial court correctly ruled that appellant had no standing to challenge the legality of the search because he never asserted a proprietary or possessory interest in the container or its content, or that he was at or near the scene when it was seized, and possession of the cocaine at the time of the seizure is not an essential element of the crime of criminal conspiracy to deliver a controlled substance. *Brown* v. *United States*, 411 U.S. 223 (1973); *United States* v. *West*, 557 F.2d 151 (8th Cir. 1977). In *Brown*, the appellant was accused of criminal conspiracy to transport stolen goods in interstate commerce. The object of the conspiracy was seized during a search of a co-conspirator's premises pursuant to a defective warrant. At the time of the search, the appellant was in custody in a different state. The

appellant did not assert a proprietary or possessory interest in the seized contraband. The conspiracy statute under which he was charged was similar to our own and possession of the contraband was not an essential element of the offense. There the Court said:

> In deciding this case, therefore, it is sufficient to hold that there is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.

Brown, 411 U.S. at 229. *Brown* also declared that the proper manner of asserting the proprietary interest or otherwise establishing standing to challenge the legality of a search is at a pretrial hearing at which the claims can be made without danger of self-incrimination and that one who fails to do so has no standing to make the challenge.

Appellant's reliance on *United States* v. *Chadwick*, 433 U.S. 1 (1977) and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979) and their progeny is misplaced. Those cases are distinguishable from the instant one in several material respects. In those cases, the seizure was made at a time when the appellants were in actual or constructive possession of the container in question and were at or near the scene when the seizure was made. Also, in both *Chadwick* and *Sanders*, the appellants were charged with possession of a controlled substance and proof of possession of the contraband was an essential element of the offense. Furthermore, the accused in both of those cases asserted and established a possessory or proprietary right in the container and standing to challenge the seizure and subsequent warrantless search at a proper pretrial hearing. Here the appellant did not do so.

The appellant next contends that the trial court erred in not suppressing all evidence obtained at or as a result of the felony stop and arrest of the appellant and his companion because the stop and arrest were without probable cause and illegal. He argues that evidence seized or obtained as a result of the arrest was "fruit of the poisonous tree." He contends that the suppressed

evidence should include the evidence of cocaine on appellant's shirt, the address and telephone number of McKinney found in his shirt pocket leading the officers to McKinney's damaging evidence of the conspiracy, and the keys to the money bag and the motel room found on the person of his co-defendant, Wofford.

A.R.Cr.P. Rule 4.1(a)(i) provides that a law enforcement officer may arrest a person without a warrant if he has reasonable cause to believe that person has committed a felony. Rule 4.1(d) provides that a warrantless arrest by an officer not personally possessed of information sufficient to constitute reasonable cause is valid where the arresting officer is instructed to make the arrest by a police agency which collectively possesses knowledge sufficient to constitute reasonable cause. Reasonable cause exists where facts and circumstances within the arresting officer's knowledge, and of which he has reasonably trustworthy information, are sufficient within themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested. *Gaylor* v. *State*, 284 Ark. 215, 681 S.W.2d 348 (1984). The test of probable cause for the stopping of an automobile rests upon the collective information of the police officers and not upon the information of the officer actually stopping the vehicle. *Tillman* v. *State*, 271 Ark. 552, 609 S.W.2d 340 (1980).

Probable cause is simply a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man to believe that the accused has committed a felony. The quantum of proof required to support a conviction is not required. Our courts have committed themselves to the reasonable, common-sense approach to these determinations and arrests are to be appraised from the viewpoint of prudent and cautious police officers at the time the arrest is made. Constitutional standards permit common-sense, honest judgment by police officers in their probable cause determinations. *Reed* v. *State*, 9 Ark. App. 164, 656 S.W.2d 249 (1983).

On appeal, all presumptions are favorable to the trial court's ruling on the legality of an arrest and the burden of demonstrating errors rests on the appellant. *Sanders* v. *State*, 259 Ark. 329, 532 S.W.2d 752 (1976). When we indulge these presumptions and consider the totality of the circumstances

leading up to the warrantless arrest, we conclude that there was sufficient evidence to sustain the finding of probable cause for the arrest. We further conclude that as the custodial arrests of the appellant and his companion were based on reasonable cause, the limited search of their persons incident to the arrests required no additional justification. *Baxter* v. *State*, 274 Ark. 539, 626 S.W.2d 935 (1982). The court was therefore correct in denying the motion to suppress the evidence flowing from the seizure of appellant's shirt and the paper containing the name and telephone number of McKinney found in its pocket. We likewise conclude that the warrantless arrest of Wofford was upon probable cause and lawful, and the motel keys and key to the lock on the bank bag found on his person were lawfully seized. In any event, the appellant would have no standing to assert Fourth Amendment rights as to any violation of the rights of Wofford. *United States* v. *Bell*, 651 F.2d 1255 (8th Cir. 1981); *United States* v. *Baucom*, 611 F.2d 253 (8th Cir. 1979).

Appellant finally contends that the trial court should have suppressed all evidence obtained as a result of the warrant issued for the search of the motel room under the fruit of the poisonous tree doctrine. He contends that the search warrant was obtained as a result of illegally seized evidence and the officers' "misrepresentations and reckless disregard for the facts" when seeking the warrant. Appellant concedes that there is a presumption of validity with respect to the affidavit supporting the search warrant and that the attack upon it must be by allegations of deliberate falsehood or reckless disregard for the truth, accompanied by proof of those facts. Notwithstanding this, the appellant has not favored us with an abstract of the affidavit which he seeks to attack. We do not know what information was sworn to before the magistrate. That which appellant contends reflects a reckless disregard for the facts is nothing more than a few minor inconsistencies in the testimony of the police officers at the trial on the merits. Furthermore, none of the articles seized in that search were introduced into evidence at the trial.

Appellant's allegation that the officers acted beyond the scope of the warrant because they electronically taped some telephone conversations while in the motel room is also without merit. Although the officers did listen to incoming telephone calls, the appellant does not point out to us that the content of any of

them was used as evidence in the trial. While in the room, the officers did call McKinney at the number found in appellant's shirt pocket at the time the search incident to the arrest was made. The mere fact that the officer made the telephone call while in the motel room, however, could not be violative of any Fourth Amendment guarantee. Although that conversation was recorded, the recording was not used at the trial, as McKinney testified in person. Since nothing discovered as a result of the search pursuant to the warrant was introduced at trial, no prejudice could have resulted even had the search been unlawful.

We affirm.

GLAZE and COOPER, JJ., agree.

Clarence SMITH d/b/a CONTINENTAL SIGN MANUFACTURERS *v.* FLASH TV SALES AND SERVICE, INC.

CA 85-283 706 S.W.2d 184

Court of Appeals of Arkansas
Division I
Opinion delivered March 26, 1986

Gean, Gean & Gean, by: Lawrence W. Fitting, for appellant.

Hardin, Jesson & Dawson, by: *David Hardin*, for appellee.

JAMES R. COOPER, Judge. This appeal is from an order of the Sebastian County Circuit Court denying the appellant's motion to modify, set aside and vacate a writ of mandamus to the sheriff, which directed execution upon property claimed by the appellant to be his homestead.

In May, 1983, the appellee obtained a judgment of $13,750.00 against the appellant, which was not satisfied. A writ of execution was issued on December 6, 1983, and served upon the appellant on February 6, 1984. The property, which was to be sold on April 25, 1984, was a residence and lot at 2813 South Houston in Fort Smith. At the time of service of the writ of execution, the appellant and his family were living at a home owned by the appellant at 8112 Cypress Street. However, in April 1984, the appellant and his family moved into the house on South Houston, paid off the mortgage on the Houston property and commenced construction work on it. On April 24, 1984, the appellant filed a petition in bankruptcy, which stayed the sheriff's sale.

The bankruptcy proceedings were dismissed on August 13, 1984, and on September 13, 1984, the appellee requested the sheriff to schedule a sale of the property on Houston Street. After the sheriff refused to do so because the appellant and his family were living in the house, the appellee obtained a writ of mandamus directing a sale of the property. Shortly thereafter, the appellant moved to modify, set aside, and vacate the writ of mandamus on the ground that the property on Houston Street was exempt from execution as his homestead. At the conclusion of the hearing, the circuit court noted that the case was "very close" but found that the property was not the appellant's homestead and directed that the property be sold. The only substantial question involved in this appeal is whether the circuit court's finding that the property is not the appellant's homestead is clearly erroneous.

The appellee has preliminarily argued that the order in question is not appealable. This argument, however, is without merit. The order denying the appellant's motion to modify, set aside, and vacate the writ of mandamus ordered that the sale of the property, under levy of execution, proceed. Clearly this order falls within the ambit of Ark. R. App. P. 2. The test of finality and appealability of an order is not whether the order settles the issue as a question of law, but to be final, the order must also put the court's directive into execution, ending the litigation or a separable branch of it. *Scaff* v. *Scaff*, 5 Ark. App. 300, 635 S.W.2d 292 (1982). *Accord Morgan* v. *Morgan*, 8 Ark. App. 346, 652 S.W.2d 57 (1983). As explained in *Omni Farms, Inc.* v. *Arkansas Power & Light Co.*, 271 Ark. 61, 607 S.W.2d 363 (1980), *appeal dismissed*, 451 U.S. 935 (1981), an order is appealable if it would divest a substantial right in such a way as to put it beyond the power of the court to place the party in the party's former condition.

It is undisputed that the appellant purchased the property on Houston Street and established a homestead there in 1966. However, the house was severely damaged by termites, and the appellant began nearly a total reconstruction of the house in 1977 or 1978. At that time, the appellant moved into a house which he owned on Iola Street, and in 1980, the appellant purchased and moved into a house on Cypress Street.

The testimony established that at some point, the electricity

and gas to the house on Houston Street were shut off. According to the appellant, this rendered the house too cold to inhabit during the winter months. The appellant testified that between 1978 and April of 1984, he and his family lived in the house on Houston Street during the warm months. Repairs of service lines were made later. Appellant also claimed that he had never abandoned the residence as a homestead, had always intended to live there again, and that he had never attempted to sell the property. He claimed that numerous items of personal property were left in the house and never removed during their absence. The appellant further claimed that the house on Houston Street had never been levied upon before, and that if it had been, he would have invoked the homestead exemption. The appellant called Hollis Scott, the owner of a pest control company who was contracted by the appellant in April 1984 to inspect the property, as a witness. On cross-examination, Scott testified that, although there was some furniture stored in the rebuilt garage, as well as some dishes in the kitchen, there were no sleeping facilities, and it did not appear that anyone was living in the house.

The appellee introduced much documentary evidence (in the form of summonses and writs of execution) showing that the appellant and his family actually were in residence at the house on Cypress Street during many of the warm months falling in the period in question, contrary to the testimony of the appellant. Additionally, the exhibits reflected that the appellant did not reside at the Houston Street address in June or December of 1978, January of 1982, or March of 1984. The appellant had also listed his residence address in responses to interrogatories as 8112 Cypress Street.

The appellee further introduced evidence that, contrary to the appellant's assertion, the house on Houston Street *had* been previously levied upon and that the appellant had not raised the homestead exemption, but had satisfied the judgment. Additionally, the appellee introduced the business records of the local gas and electric company to show that the service begun in the appellant's home at the Cypress Street address was still continuing; that between September of 1981 and January of 1983, the service at the Houston Street house was listed in the name of another individual (the appellant's son-in-law) and that, after the meter was removed in February of 1984, service was re-estab-

lished to the appellant at the Houston Street address on May 3, 1984.

Since there is no question that the appellant did in fact establish a homestead on Houston Street in 1966, the controlling issue is whether the appellant abandoned that homestead in 1977 or 1978. If he did in fact abandon the homestead, his return thereto after the levy of execution would not create a homestead exempt from execution. *See Tillar* v. *Bass*, 57 Ark. 179, 21 S.W. 34 (1893); *Patrick* v. *Baxter*, 42 Ark. 175 (1883).

Homestead laws are remedial and should be liberally construed to effectuate the beneficent purposes for which they were intended. *City National Bank* v. *Johnson*, 192 Ark. 945, 96 S.W.2d 482 (1936). However, "one must actually and in good faith occupy land as a residence, before the levy of an execution, to impress it with the homestead character and to make it exempt from the levy of the execution." *Bank of Quitman* v. *Mahar*, 193 Ark. 1111, 1113, 104 S.W.2d 800, 801 (1937). In *King* v. *Sweatt*, 115 F. Supp. 215, 218 (W.D. Ark. 1953), the federal district court explained:

> Although the law creating the homestead right should be liberally construed in the debtor's favor, it should not be so applied or construed as to make the law an instrument for the accomplishment of fraud or imposition. Construction should not be so liberal as to depart from the plain and obvious meaning of the words used in the Constitution or to confer rights upon persons who have not brought themselves at least within the spirit of the Constitutional provisions.

The general rule is that the burden of proving a sufficient occupancy of the property to establish a homestead is upon the party claiming the right to the exemption. *Arkansas Savings and Loan Association* v. *Hayes*, 276 Ark. 582, 637 S.W.2d 592 (1982); *Automotive Supply, Inc.* v. *Powell*, 269 Ark. 255, 599 S.W.2d 735 (1980); *Barnhart* v. *Gorman*, 131 Ark. 116, 198 S.W. 880 (1917); *Gibbs* v. *Adams*, 76 Ark. 575, 89 S.W. 1008 (1906).

"[I]ntention to abandon [a homestead] is an issue of fact, and in such a situation, evidence is rarely clear. . . .

However, the legal presumption is that the homestead right continues until it is clearly shown that it has been abandoned." *Vesper* v. *Woolsey*, 231 Ark. 782, 785-86, 332 S.W.2d 602, 604-05 (1960). *Accord City National Bank, supra.* The burden is upon one claiming that a homestead has been abandoned to establish that fact. *Melton* v. *Melton*, 126 Ark. 541, 191 S.W. 20 (1917).

In *City National Bank, supra*, the Arkansas Supreme Court explained that the intention of the one claiming the exemption is central to the determination of such cases:

> The Constitution provides for the homestead, and, when once established, the presumption is that it continues until it is shown by the evidence that it has been abandoned. The question of homestead and residence, being a question of intention, must be determined by the facts in each case, and the [trial court's] finding of fact will not be disturbed unless it appears to be against the preponderance of the evidence.

192 Ark. at 949, 96 S.W.2d at 484.

In *Caldcleugh* v. *Caldcleugh*, 158 Ark. 224, 250 S.W. 324 (1923), the court dealt with the issue of intent in the context of abandonment of the homestead:

> It is well settled that a removal from the homestead, where there is a fixed and abiding intention to return to it, will not constitute an abandonment of it as a homestead. An abandonment of a homestead is almost, if not entirely, a question of intent, which must be determined from the facts and circumstances attending each case. A removal from the homestead may be caused by necessity or for business purposes, and if the owner has an unqualified intention to preserve it as a homestead and return to it, his removal will not result in an abandonment of the land as a homestead.

158 Ark. at 230-31, 250 S.W. at 326. *Accord Monroe* v. *Monroe*, 250 Ark. 434, 465 S.W.2d 347 (1971); *Harrison* v. *Rosensweig*, 185 Ark. 281, 47 S.W.2d 2 (1932); *McDaniel* v. *Conlan*, 134 Ark. 519, 204 S.W. 850 (1918); *Melton, supra; Stewart* v. *Pritchard*, 101 Ark. 101, 141 S.W. 505 (1911); *Brown* v. *Watson*, 41 Ark.

309 (1883); *Euper* v. *Alkire & Co.*, 37 Ark. 283 (1881).

It has also been held, however, that one will be presumed to have abandoned his old home when he leaves it and acquires another, where he resides for a considerable time, in the absence of convincing testimony to the contrary. *Gillis* v. *Gillis*, 164 Ark. 532, 262 S.W. 307 (1924); *Wolf* v. *Hawkins*, 60 Ark. 262, 29 S.W. 892 (1895). "The facts that the absence extended over a period of six years, and that the debtor during that period occupied another house owned by him, tend to show a change of residence, but are not conclusive." *Robinson* v. *Swearingen*, 55 Ark. 55, 58, 17 S.W. 365, 366 (1891). *See also Brown, supra.* Additionally, the abandonment of a homestead may be proved by conduct, circumstances, and actions, as well as by direct testimony. *Harrison, supra; Lilly* v. *Lilly*, 178 Ark. 324, 11 S.W.2d 765 (1928).

This Court recently considered the question of abandonment of a homestead in *Ross* v. *White*, 15 Ark. App. 98, 689 S.W.2d 588 (1985). In that case, we held that the trial judge's decision that the debtor had impressed a homestead on his property and never abandoned it was not clearly erroneous. In *Ross*, the debtor had moved out of state, but had continued to make the mortgage payments on the property, and had occupied and worked on the house during his returns to Arkansas. He had also allowed his sister to move into the house without paying rent. He further continued to pay taxes and was registered to vote in Arkansas and claimed to have never abandoned his Arkansas homestead. However, unlike the instant case, wherein the evidence is conflicting, the debtor's evidence in *Ross* upon the issue of abandonment was uncontradicted.

In the instant case, the evidence as to the appellant's intent in leaving the house on Houston Street and in purchasing and establishing residences on Iola and Cypress Streets is clearly conflicting. However, given the discrepancy between the appellant's claim that his family lived on Houston Street during warm weather and the documentary evidence showing the contrary, as well as the testimony of the pest control company owner and the electric and gas company accountant, it cannot be said that the circuit court was clearly erroneous in its factual determination that the property was not the appellant's homestead. Further, the

appellant's credibility must also be considered in view of his statement that the house on Houston Street had never previously been the subject of a levy of execution when in fact it had been.

The question of homestead and residence, being a question of intention, must be determined by the facts in each case, and the trial court's finding of fact will not be disturbed unless it appears to be against the preponderance of the evidence. *City National Bank, supra.* Our duty is to give due regard to the judge's opportunity to observe the witnesses and affirm his findings of fact unless they are clearly against the preponderance of the evidence. *Superior Improvement Co.* v. *Mastic Corp.*, 270 Ark. 471, 604 S.W.2d 950 (1980); *Izard County Board of Education* v. *Violet Hill School District No. 1*, 10 Ark. App. 286, 663 S.W.2d 207 (1984); ARCP Rule 52(a). We hold that the judge's decision is neither clearly erroneous nor against the preponderance of the evidence, and therefore, we affirm.

Affirmed.

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

Bobby BRATTON and Leyon BRATTON d/b/a BUFFALO RIVER FLOORING COMPANY and BRATTON MANUFACTURING COMPANY, INC. *v.* ST. PAUL SURPLUS LINES INSURANCE COMPANY, CITIZENS BANK & TRUST OF VAN BUREN, ARKANSAS and COMMERCIAL NATIONAL BANK OF LITTLE ROCK, ARKANSAS

CA 85-189 706 S.W.2d 189

Court of Appeals of Arkansas
Division II
Opinion delivered March 26, 1986

Davidson Law Firm, Ltd., by: *Charles Darwin Davidson* and *Geoffrey B. Treece*, for appellant.

Friday, Eldredge & Clark, by: *Donald H. Bacon*, for appellee.

LAWSON CLONINGER, Judge. Appellants raise three points for reversal in this appeal from the trial court's dismissal of their complaint against appellee St. Paul Surplus Lines Insurance Company. We find none of their arguments persuasive, and we accordingly affirm the summary judgment granted below.

Appellants contracted with appellee insurance company to insure business property consisting of buildings and their contents at four different locations. The single premium payment was $7,392. A "Schedule of Locations" attached to the policy sets forth the value of each building insured and its contents; the combined figures amount to $528,000.

While the policy was in force, the building, machinery, and other contents situated at "location #2" in Marshall, Arkansas,

were completely destroyed by fire. The schedule valued the building at $80,000 and the contents at $140,000; appellee carrier paid appellants the combined amount of $220,000.

Appellants filed an action seeking the difference between the total policy coverage of $528,000 and the $220,000 paid, as well as damages and interest. Appellees replied that the "Schedule of Locations" limited appellants' recovery to the value assigned the property at each site. Both parties filed motions for summary judgment, and the circuit court held that the schedule imposed a recovery limit of $220,000 for the property in question. This appeal followed.

In the first of their alternative arguments for reversal, appellants contend that the trial court erred in not finding the insurance policy to be "entire" under *McQueeny* v. *Phoenix Ins. Co.*, 52 Ark. 257, 12 S.W. 498 (1889). Put another way, appellants are saying that the judge erred in determining that insurance on "location #2" was limited to $220,000. They quote the following sentence from *McQueeny, supra*: "If the consideration is single the contract is entire, whatever the number or variety of the items embraced in its subject." 52 Ark. at 259-260. Hence, they insist, the fact that they made a single premium payment of $7,392 entitles them to recover the amount of their actual loss sustained at the one location up to the total policy amount of $528,000.

We believe that appellants have taken the language of *McQueeny* out of context. The court in that case was addressing the issue of divisibility with respect to the breach of a part of an insurance contract. Divisibility is discussed in *Couch on Insurance* 2d, § 17.1, as follows:

> The question of divisibility or severability of insurance, this is whether the contract of insurance is entire or severable, is of great importance in determining the effect of a *breach of the contract* as to a part of the subject matter of the insurance, since, if the contract is *entire*, all of the protection will be lost if there is a breach as to any part of risk, whereas, if the contract is *severable*, it will be avoided only as to the part directly affected by or connected with the breach. (Emphasis added).

The Arkansas Supreme Court said in *Phoenix Ins. Co.* v. *Public Parks Amusement Co.*, 63 Ark. 187, 202, 37 S.W. 959 (1896):

> The fact that separate amounts of insurance were apportioned to separate items or classes of property did not make the policy divisible. The contract and risk being indivisible, the contract is entire, and any breach which renders it void as to a part of the property affects it in the same manner as to the remainder.

Omitted from appellants' brief was the following statement by the court in *McQueeny, supra*: "It is more reasonable, we think, to hold that the sole effect of the apportionment of the amount of insurance to the different subjects insured is to limit the extent of the insurer's risk, upon each item, to the amount named." 52 Ark. at 261. It is clear from a reading of both of the cited cases that divisibility and apportionment are distinct and essentially unrelated concepts; an insurance contract may be entire although the amount for which it is issued is apportioned to different items. There is no error on the trial court's part in finding the insurance coverage on "location #2" limited to the $220,000 apportioned in the schedule.

For their second point in the alternative, appellants argue that the trial court erred in not finding the insurance contract to be ambiguous, and therefore erred in not ruling in favor of the insured. Appellants cite *Aetna Cas. & Sur. Co.* v. *Stover*, 327 F.2d 288 (8th Cir. 1964), for the principle that when a policy provision is subject to more than one reasonable interpretation, the interpretation favoring the insured is adopted. Appellants assert that the ambiguity in the instant case derives from the fact that, while on the declaration page of the policy the "Description and Location of Property Covered" contains the phrase "See Schedule Attached," the "Amount of Insurance" on the same page simply states the total of $528,000, with no qualification by reference to the "Schedule of Locations."

We are unable to detect any ambiguity in the example provided by appellants. The reference to the schedule under the "Description" incorporates the apportioned amounts of coverage as a part of the listing of the items of property. In the construction of an insurance contract, different clauses must be read together and the instrument construed so that, if possible, all

of its parts harmonize. *Pate* v. *United States Fid. & Guar. Co.*, 14 Ark. App. 133 (1985). The intention of the parties is to be gathered not from particular words and phrases but from the context of the agreement as a whole. *Id.* The purpose of appellants was to obtain coverage for their business property at each of the four locations. It is not logical to believe the parties anticipated the simultaneous destruction of property at all locations; the carrier clearly set forth the limitations of coverage at each site. The trial court's holding thus merely gave effect to the intent of the parties.

Appellants' final argument in the alternative is that the trial court erred in granting summary judgment for appellee insurance company because a genuine issue of material fact existed concerning the purpose for which the schedule was included in the policy and the intent of the parties regarding it. This question, however, was not addressed below. Instead, both parties moved for summary judgment, requesting that the court determine as a legal matter whether the "Schedule of Locations" delineated the policy limits at the location in question. No issue of fact remained to be resolved.

Affirmed

CORBIN and MAYFIELD, JJ., agree.

Willie JENKINS *v.* HALSTEAD INDUSTRIES

CA 85-429 706 S.W.2d 191

Court of Appeals of Arkansas
Division II
Opinion delivered March 26, 1986

Daggett, Van Dover, Donovan & Cahoon, by: *David W. Cahoon*, for appellant.

Wright, Lindsey & Jennings, for appellee.

DONALD L. CORBIN, Judge. This case involves a question of first impression concerning the interpretation of Ark. Stat. Ann. § 81-1314(a)(3) (Repl. 1976), as it relates to the apportionment rule applicable to occupational diseases.

The Commission upheld the finding by the ALJ that Ark. Stat. Ann. § 81-1314(a)(3) required apportionment of appellant Willie Jenkins' claim for total disability upon a finding that the appellant's disability was attributable 92% to cigarette smoking and 8% to the occupation. We affirm.

The appellant is a 53-year old male who began his employment with appellee Halstead Industries on January 22, 1968. Appellant had smoked cigarettes since he was 25 or 30 years of age. Appellant testified that he had been advised by Dr. Hosea Young in 1970 to change jobs and stop smoking. Appellant began having breathing difficulties after he became a quality control station inspector on March 3, 1970, when he was exposed to fumes coming from a casting furnace on a daily basis. He continued in that position until April 20, 1975, when he was placed in a packer position for two months after being treated by Dr. Hosea Young for lung problems. He then worked as a bench helper or packer until March 8, 1976. Thereafter, he worked as a rubber extruder operator, which he continued until he terminated his employment with appellee due to his physical condition. While employed as an extruder operator, appellant was exposed to a dry powdered chemical known as talc which he contends caused his pulmonary problems.

Dr. Howard Armstrong, an occupational medicine practitioner, stated that appellant's exposure in the rubber curing process resulted in a chronic obstructive pulmonary disease, commonly referred to as emphysema. Dr. Armstrong's opinion was supported by Fine and Peters, *Respiratory Morbidity in Rubber Workers*, Occupational Health Program, Jan.-Feb. 1976, at 5.

Appellee produced testimony of Dr. William L. Mason, a physician specializing in internal medicine with a sub-specialty in

lung disease. He examined appellant and inspected appellant's place of employment. He diagnosed appellant as suffering from significant chronic obstructive pulmonary disease and opined that he was totally disabled as a result of his pulmonary impairment. Dr. Mason stated that the rubber curing process could have aggravated appellant's disease but that it most likely would only have been on a temporary or intercurrent basis and would account for episodes of acute bronchitis while he was at work. He assessed appellant's impairment attributable to the work place at eight percent and concluded that that impairment developed concurrently with the other nonemployment disabling processes already well in motion. It was Dr. Mason's opinion that appellant would be permanently and totally disabled even if he had never been exposed to the conditions at appellee Halstead Industries. Appellant's impairment would continue to progress, not because of his exposure to talc or fumes at his work place, but because of the nature of his underlying severe pulmonary emphysema which was unequivocally caused by lifelong cigarette inhalation. Dr. Mason attributed ninety-two percent of his disability to cigarette inhalation.

Dr. Hosea Young began treating appellant in 1970 for emphysema and bronchitis. He stated in a report that appellant was permanently and totally disabled and that he believed "there is definitely a causal relationship between Mr. Jenkins' severe pulmonary problems and the dust and fumes he inhales at work."

Appellant contends that the full Commission erred as a matter of law when it apportioned the compensation based upon "percentages of impairment" and not upon "disability". Appellant contends that the Commission should have made a finding of "disability" which was attributable to a non-compensable infirmity and then applied the apportionment rules. He argues that even though he may have had a ninety-two percent impairment, there was no proof that there had been a ninety-two percent loss in appellant's earning capacity. Appellant further argues that the fact that he has worked with this condition for numerous years establishes that his "disability" was actually less than his anatomical impairment. Appellant asserts that the impairment was only producing a twenty-five percent disability and that his exposure to talc was "the straw that broke the camel's back."

We do not believe the Commission erred in finding that 92% of appellant's disability was attributable to smoking and 8% of his disability was attributable to his occupation. Ark. Stat. Ann. § 81-1314(a)(3) contemplates two situations wherein apportionment is appropriate. The first situation arises when an occupational disease is aggravated by any other noncompensable disease or infirmity, whereas the second situation arises when a noncompensable disability or death is aggravated, prolonged, accelerated or in any way contributed to by an occupational disease. There is substantial evidence in the record to support the Commission's finding that this is a case wherein an occupational disease was aggravated by another disease or infirmity, not itself compensable, and that apportionment was proper. Ark. Stat. Ann. § 81-1314(a)(3) provides:

> Where an occupational disease is aggravated by any other disease or infirmity, not itself compensable, or where disability or death from any other cause, not itself compensable, is aggravated, prolonged, accelerated or in any wise contributed to by an occupational disease, the compensation payable shall be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease, as a causative factor, bears to all the causes of such disability or death, such reduction in compensation to be effected by reducing the number of weekly or monthly payments or the amounts of such payments, as under the circumstances of the particular case may be for the best interest of the claimant or claimants.

We agree with the Commission's conclusion that the legislature did not intend for our occupational disease apportionment statute to be interpreted and applied in the same manner as our accidental injury apportionment statute, Ark. Stat. Ann. § 81-1313(f)(2)(ii) (Repl. 1976). Under § 81-1313(f)(2)(ii), apportionment does not apply unless the prior impairment was independently causing disability prior to the second injury and continued to do so after that injury. *Craighead Memorial Hospital* v. *Honeycutt*, 5 Ark. App. 90, 633 S.W.2d 53 (1982). We also agree with the Commission's conclusion in the case at bar that there is no requirement in § 81-1314(a)(3) for the non-

compensable disease or infirmity to be independently producing disability before and after the development of the occupational disease in order for it to be apportionable.

Ark. Stat. Ann. § 81-1314(a)(3) mandates that, when the requirements are met, the compensation shall be reduced to the proportion that the occupational disease, as a causative factor, bears to all the causes of the disability. Here, the only testimony stating the proportion, as a causative factor, that the occupational disease bore to the total disability was the testimony of Dr. Mason. He testified that the occupational disease, as a causative factor, was 8% of the cause of appellant's disability. The Administrative Law Judge determined, in accordance with Dr. Mason's testimony, that appellant had a permanent partial disability of 8%. The Commission adopted and approved that finding. That finding is amply supported by substantial evidence and the decision of the Commission is affirmed.

Affirmed.

CLONINGER and MAYFIELD, JJ., agree.

RAWICK MANUFACTURING CO., INC.
v. TALISMAN, INC., et al.

CA 85-354 706 S.W.2d 194

Court of Appeals of Arkansas
En Banc
Opinion delivered March 26, 1986

Ramsey, Cox, Lile, Bridgforth, Gilbert, Harrelson & Starling, by: *Martin G. Gilbert* and *L. Layne Livingston*, for appellant.

Highsmith, Gregg, Hart, Farris & Rutledge, for appellee, White River Regional Housing Authority and John Baker, Executive Director.

Cearley, Mitchell & Roachell, by: *Michael W. Mitchell*, for appellee, Phillips Development Corp.

Basil V. Hicks, for appellee, Talisman, Inc.

TOM GLAZE, Judge. Rawick Manufacturing Company, Inc., appeals from a chancellor's decree which found (1) that a construction project—developed by appellee Phillips Development Corporation (Phillips)—to which Rawick supplied materials was a public project not subject to a materialman's lien, and (2) that Rawick also could not recover its claim for unpaid supplies as a third-party beneficiary under a bank's letter of credit issued to Phillips to protect the purchaser of the project, appellee White River Regional Housing Authority (Housing Authority), against any liens filed under Arkansas law. We believe the chancellor clearly erred in finding the project was public and not subject to Rawick's materialman's lien.

The facts giving rise to this litigation on appeal are undisputed. On June 26, 1981, appellees Talisman, Inc. (Talisman)

and Phillips entered into a contract whereby Talisman would construct twenty-five public housing units on land owned by Phillips. The project was financed with private funds. On July 7, 1981, Phillips entered into a "Turnkey Contract of Sale" with the Housing Authority, and that contract provided that Phillips would sell the project upon its completion to the Housing Authority. On July 9, 1981, Rawick submitted to Talisman a proposal to supply materials for the project, which Talisman accepted on July 22, 1981.

Rawick delivered the last of its materials for the project to Talisman in February 1982. Phillips, by warranty deed dated March 29, 1982, and recorded April 6, 1982, conveyed the "turnkey project" to the Housing Authority. On April 7, 1982, Rawick notified Phillips that it was claiming a materialman's lien on the project, because Talisman had not paid Rawick for the materials Rawick had furnished. On July 11, 1983, Rawick filed an action to enforce the lien against appellees Phillips, Talisman, the Housing Authority and its director. After the issues were joined, the chancellor dismissed Rawick's complaint.[1]

Rawick contends the project was privately owned and funded during the period it supplied materials for the project's construction, and its materialman's lien validly attached and could not be impaired by Phillips' subsequent sale of the turnkey project to the Housing Authority. Appellees counter, arguing the evidence clearly showed the project was a *public* one and, therefore, Rawick could have no liens against the subject public improvement. We believe Rawick's argument unquestionably is correct.

Rawick's entitlement to a materialman's lien and its enforcement is rooted in both Arkansas's statutory and case law. Too, while Arkansas courts have not decided the exact legal issue presented here, the Missouri Supreme Court has, and it held contrary to the decision the trial judge reached below and to what the appellees ask us to do here. *See Home Building Corp.* v.

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[1] While other parties and separate actions were involved at different stages of litigation between the parties, we limit our recitation of events to those matters required for understanding and disposition of the legal issues and arguments presented in this appeal.

Ventura Corp., 568 S.W.2d 769 (Mo. 1978). Because the factual situation in *Ventura* is almost exactly on all fours with the one here, we discuss that holding first.

In *Ventura*, as here, a private developer, Ventura Corporation, had contracted to sell a "turnkey" housing project to a local housing authority. The project was to be constructed on property owned by the developer. There, like the case here, a material supplier was unpaid and, after the completed project had been conveyed to the housing authority, the supplier sought to perfect and enforce its lien against the property comprising the housing project. There, as here, the housing authority urged that the property was public property not subject to a mechanic's or materialman's lien. The Missouri Supreme Court disagreed, stating:

> [T]he first question to be resolved is whether this property was municipally owned property at the time the lien attached. We conclude that it was not. As previously noted, Authority became the equitable owner when it contracted to buy the tract and to receive a deed thereto after the housing units had been erected. However, Ventura retained possession of the property and under its contract with Authority was to erect housing units thereon. It retained control over the tract until the units were completed and a deed executed. It continued to be an owner which had the authority to contract for erection of improvements which resulted in the statutory lien which HBC [Home Building Corporation] claims under the provisions of Chapter 429 [dealing with establishment of mechanic's liens]. This was not municipal property at this point.

Id. at 775.

In the instant case, Phillips, like Ventura Corporation, was a private developer who retained ownership (1) while the housing project was constructed, and (2) after the Housing Authority acquired an asserted equitable interest in the project by virtue of its "Turnkey Contract of Sale" executed on July 7, 1981. All appellees concede the project was privately owned and funded during the entire period Rawick supplied materials to the project. As was true in *Ventura*, the project was simply not public

when Rawick's lien attached. On this point, we need only note that in Arkansas, the lien of a materialman attaches when the materials are used in the improvement, *Eudora Lumber Co.* v. *Neal & Jones*, 263 Ark. 40, 562 S.W.2d 294 (1978), and the lien relates back to the commencement of construction of the improvement. *Wiggins* v. *Searcy Federal Savings & Loan Association*, 253 Ark. 407, 486 S.W.2d 900 (1972). Again, it is undisputed that Phillips owned and funded the project when its construction commenced and when Rawick furnished supplies that were incorporated into the improvement.

Relevant to another argument made by appellees here, the Missouri court in *Ventura* further held the local authority's purchase of a project upon which a lien exists does not destroy that lien because the project was municipally owned. Under a Missouri statute, an authority's real property is exempt from levy and sale and no execution or judicial process can issue against the property nor can judgment against an authority be a charge or lien upon its property. *See* Mo. Ann. Stat. § 99.200 (Vernon 1971); *cf.* Ark. Stat. Ann. § 19-3022 (Repl. 1980) (identical provision).

Although an authority's real property is exempt from liens under § 99.200, the Missouri Supreme Court determined it would be unjust to permit a municipality, by purchasing property which is subject to claims for mechanic's lien rights, to defeat those liens simply because the property has been acquired for municipal purposes. In support of its holding, the court cited *Crane Creek Irrigation District* v. *Portland Wood Pipe Co.*, 231 F. 113 (9th Cir. 1916); *City of Salem* v. *Lane & Bodley Co.*, 189 Ill. 593, 60 N.E. 37 (1901); *Findorff* v. *Fuller & Johnson Mfg. Co.*, 212 Wis. 365, 248 N.W. 766 (1933); and *Meads* v. *Dial Finance Co.*, 56 Ala. App. 84, 319 So.2d 281 (Ct. App. 1975).

The Missouri court's *Ventura* decision makes sense, especially when we consider its applicability to the facts here. Not only did Phillips continue ownership and funding of the project, but also, in its July 7, 1981, contract of sale with the Housing Authority, Phillips agreed to furnish the Authority with an irrevocable, unconditional letter of credit to protect the Authority against any liens or encumbrances. Thus, contrary to its argument now, the Housing Authority clearly contemplated a lien

might ensue during the project's construction and protected itself against such an eventuality. We note, as well, that Talisman, the contractor, provided a labor and material payment bond, naming Phillips and its bank which furnished the letter of credit, the obligees under the bond.[2] Undoubtedly, the parties negotiating and contracting for the construction of this project were fully aware that a lien might attach and thereby affect clear title to the project.

Phillips and the other appellees attempt to distinguish the *Ventura* decision from the instant case by arguing that Ark. Stat. Ann. § 51-632 (Supp. 1985) requires the general contractor to provide a bond for any public project covering the contract amount of the project. This statutory bond, they argue, is required when public construction is involved because such projects are not subject to liens. In sum, appellees argue that because Talisman provided such a bond here (albeit the surety became financially irresponsible), appellees are not subject to Rawick's lien. Appellees rely on *National Surety Co.* v. *Edison*, 240 Ark. 641, 401 S.W.2d 754 (1966).

Appellees argument is wrong for at least three reasons. First, appellees' reliance on § 51-632 is misplaced, because that provision requires a bond only when the public authority enters into a contract to *repair, alter* or *erect* a public building, structure or improvement. Here, the Housing Authority entered into a contract to purchase the public housing units *after* the units were constructed. Second, the *Ventura* decision is not distinguishable based upon Arkansas's statutory bond requirements because Missouri, too, requires every contractor to provide a bond for public works of any kind. *See* Mo. Ann. Stat. § 107.170 (Vernon 1966). Third, the *Edison* case is factually nowhere close to the facts presented here or in *Ventura*. In *Edison*, the court properly concluded the project was public, not private, and held that National Surety was obligated on its bond for labor and material and machinery rentals which National Surety issued to cover "a public works project." There, the electorate of the City of Texarkana and Miller County passed a public bond issue on February 13, 1963, to erect and equip a building for manufactur-

[2] The surety issuing the bond was dismissed without prejudice from this cause.

ing purposes, to be located on land owned by a nonprofit corporation—Texarkana Industrial Foundation, Inc. Texarkana Industrial, however, transferred title to its land to the City of Texarkana on or about February 9, 1964, which was prior to Edison's leasing of certain equipment used in constructing the building, thereby making the equipment covered under National Surety's bond. Unlike the situation here and in *Ventura*, the project in *Edison* was publicly funded and city owned during the period Edison leased its equipment to the City of Texarkana. As suggested by Justice George Rose Smith in his concurring opinion, it appeared that the parties had created Texarkana Industrial to hold the property initially in an effort to circumvent the mandatory-bond requirement under § 51-632. Here, the parties contracted for a turnkey project which was both privately funded and owned and was never intended to become publicly owned by the Housing Authority until all of the construction was completed.

Consequently, Rawick perfected its materialman's lien in the time and manner provided by Arkansas law, and the subsequent conveyance of the project to the Housing Authority did nothing to divest Rawick of its lien.[3] Therefore, we reverse.

As counsel for the parties noted in oral argument, our holding, giving effect to Rawick's lien, renders it unnecessary to discuss and decide Rawick's right as a third-party beneficiary to enforce its claim under the letter of credit issued to the developer, Phillips. However, we do reach the argument of appellee, John Baker, Executive Director of the Housing Authority, who urges the chancellor was correct when he dismissed Baker as a party defendant. We agree that part of the chancellor's decision should

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[3] We note here *Dow Chemical Co.* v. *Bruce Rogers Co.*, 255 Ark. 448, 501 S.W.2d 235 (1973), which cites with approval the case of *Tropic Builders, Ltd.* v. *United States*, 52 Hawaii 298, 475 P.2d 362 (1970), wherein the private prime contractor and builder held a 55-year lease and agreed to construct military housing on a site owned by the United States. From the outset, the builder's (lessee's) capital stock was to be transferred to the United States immediately upon completion of the project. The court upheld a mechanic's lien against the builder's leasehold-interest even though the government held a fee simple interest in the site. It further held the builder's subsequent transfer of its stock and ownership to the government after completion of the project did not affect the validity of the mechanic's lien which attached during private ownership.

stand, and at oral argument, Rawick came just short of conceding the point. Undisputedly, the Housing Authority purchased and owned the project, and Baker had no interest in it. Therefore, we affirm the chancellor's dismissal of Baker from this cause.

Reversed in part and affirmed in part.

John WOOTEN *v.* ARKANSAS ALUMINUM WINDOW AND DOOR, INC., et al.

CA 85-448 706 S.W.2d 198

Court of Appeals of Arkansas
Division I
Opinion delivered March 26, 1986
[Rehearing denied May 21, 1986.*]

Lesly W. Mattingly, for appellant.

Walter A. Murray Law Firm, by: *William C. Frye*, for appellee.

TOM GLAZE, Judge. John Wooten appeals from a Workers'

* Mayfield, J., dissents; Cloninger, J., and Wright, Sp. J., not participating.

Compensation Commission decision which affirmed the administrative law judge's finding that appellant was not entitled to temporary total disability benefits, but reversed a finding that the record was not sufficiently developed to determine the extent of permanent disability. For reversal, appellant contends that the Commission acted without power, or in excess of its powers, in ruling that the law judge could not hold in abeyance the issue of permanent partial disability and deciding appellant failed to prove any permanent disability. We remand.

Appellant sustained a compensable back injury on April 4, 1984. He contended he was entitled to both temporary total and permanent partial disability benefits.[1] Appellant was the only witness called at the hearing, although letters written by two medical doctors and a chiropractor were introduced. After several months of treatment, Dr. Carpenter, the chiropractor, gave appellant a permanent impairment rating of 25% to the body as a whole. In July 1984, Dr. Saer, an orthopedist, performed a CT scan which showed a mild bulge at L5-S1. Dr. Saer reported that appellant did not want to undergo a myelogram at that time. On December 27, 1984, appellee submitted to the administrative law judge a letter from Dr. Wilson, an orthopedist, in which he suggested appellant undergo a myelogram. Dr. Wilson also stated that "[t]he medical findings that are present indicate a herniated nucleus pulposus. . . ." Appellant testified that he was afraid to undergo a myelogram because he did not like needles. However, he stated that "if it came down to it, I would take a myelogram if I get worse."

At the hearing before the law judge on October 11, 1984, appellee reserved the right to take depositions of doctors Saer and Carpenter, and the law judge took the case under advisement pending the taking of those depositions. On January 2, 1985, the law judge issued his opinion denying temporary total benefits but reserving a finding on the permanent disability issue because "the degree of [appellant's] permanent partial impairment could not be determined at this time." The law judge, noting appellant's

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[1] The administrative law judge found that appellant was not entitled to temporary total disability benefits because he continued to draw his full salary during his healing period. That finding was affirmed by the Commission, and it is not in issue here.

remark that he would take a myelogram, stated that it is only reasonable to assume that if the appellant, after having a myelogram, is diagnosed as having a herniated nucleus pulposus, either with or without surgery, appellant would have an anatomical rating of permanent partial impairment.

Appellant appealed the law judge's decision and filed with the Commission a motion to submit new evidence, including certain medical depositions. The Commission denied the motion, upheld the law judge's denial of temporary total benefits and found the appellant had failed to meet his burden of proof on the issue of permanent partial disability.

In support of its opinion, the Commission cited *Hill* v. *White-Rodgers*, 10 Ark. App. 402, 665 S.W.2d 292 (1984), and *Haygood* v. *Belcher*, 5 Ark. App. 127, 633 S.W.2d 391 (1982), which list the prerequisites for remands by the Commission for the taking of new evidence. Those cases, however, involved requests by appellants to reopen their cases to submit additional evidence after the law judges decided the disability issues. Here, the law judge, after denying temporary disability benefits to appellant, expressly reserved his decision on the permanent disability claim. While the Commission found fault with the law judge in withholding his decision on the permanency issue until that issue was fully developed, we are unaware of any reason why he could not do so. Clearly, the law judge, under Ark. Stat. Ann. § 81-1327(c) (Supp. 1985), had discretion to order further hearings for the purpose of introducing additional evidence even though that same provision directs that each party must present all evidence at the initial hearing. Thus, if the law judge can order additional evidentiary hearings, *a fortiori*, the judge necessarily should have the power and discretion to reserve his or her decision on a related issue which might be affected by any additional evidence.

We can appreciate the Commission's interest in encouraging a prompt resolution of pending claims, but the law judge, under the circumstances here, had the discretion to reserve his ruling on the permanent disability issue. Until the law judge hears and decides that issue, the Commission is in no position to conduct a *de novo* review regarding appellant's permanent disability claim. Therefore, we remand this cause with direction

to permit the law judge to hear and decide that issue.

Remanded.

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

Rehearing Denied May 21, 1986

709 S.W.2d 412

PER CURIAM. Petition for Rehearing is denied.

MAYFIELD, J., dissents.

CLONINGER, J., and WRIGHT, SP. J., not participating.

MELVIN MAYFIELD, Judge, dissenting. The majority of the court has today refused to grant the petition for rehearing filed by the appellees in this case. The original opinion, *Wooten* v. *Arkansas Alum. Window & Door, Inc.*, 17 Ark. App. 209, 706 S.W.2d 198 (1986), was handed down by a division of this court, but under Ark. Stat. Ann. § 22-1211 (Supp. 1985), petitions for rehearing are decided by the court en banc. I dissent from the refusal to grant rehearing because I think the original opinion grants an administrative law judge procedural discretion in excess of that allowed the full Commission itself.

John Wooten, appellant in this court, filed a claim with the Commission on July 20, 1984, by letter from his attorney which requested "that this matter be set for a hearing at the earliest convenience of the Commission on the issues of *permanent* and temporary total disability." (Emphasis added.) A hearing was held by an administrative law judge on October 11, 1984, at which counsel for Wooten contended his client was entitled to payment of medical expenses, temporary disability benefits, and "either permanent partial or permanent and total disability, minimum of twenty-five percent permanent partial." The employer's counsel denied that Wooten was entitled to an award for any of these benefits.

At the conclusion of the hearing, the law judge took the matter under advisement subject to the introduction of a report from Dr. John Wilson, which was subsequently submitted, and the depositions of two other doctors, provided the parties notify him within 15 days that the depositions had been scheduled. The

depositions were not taken, and on January 2, 1985, the law judge filed his opinion finding Wooten entitled to payment of all reasonable and necessary medical expenses; that he was not entitled to temporary total benefits since he had drawn full salary during the healing period; and that the record was "not sufficiently developed to make a finding as to permanent disability."

Wooten filed notice of appeal to the full Commission stating the law judge's decision was contrary to the facts and the law. He also filed a motion to submit additional evidence to the full Commission. The motion was denied, the law judge's decision as to temporary total disability was affirmed, and Wooten's "claim for permanent partial disability benefits" was denied and dismissed. In discussing this matter, the Commission said that the law judge erred in holding that the record was "not sufficiently developed to make a finding as to permanent disability." The Commission found there was sufficient evidence to make a finding on that issue, and held that Wooten failed to prove by a preponderance of the evidence that he was entitled to permanent disability benefits. Pointing out that counsel for appellant admitted, on oral argument before the Commission, that all the "additional" evidence he wanted to submit had been obtained after the law judge's decision, the Commission said:

> It is obvious that counsel for Wooten simply read the decision of the Administrative Law Judge and realized that his client had failed to prove by a preponderance of the evidence that he was entitled to permanent disability benefits. He then began gathering evidence to prove that contention. Instead of deciding the case on the evidence, the Administrative Law Judge virtually became mentor for Wooten and left the record open for "additional evidence." Counsel for Wooten, like anybody faced with a second chance to make a case, lost no time in submitting "additional evidence."

In reversing the full Commission's decision, the opinion of the panel of this court found that the law judge "should have the power and discretion to reserve his or her decision on a related issue which might be affected by any additional evidence." Ark. Stat. Ann. § 81-1327(c) (Supp. 1985) is cited in support of the

court's statement. *See* 17 Ark. App. at 211. However, I think this view overlooks the point involved.

Although section 81-1327(c) does provide that evidence, in addition to that presented at the initial hearing, may be presented "at the discretion of the hearing officer or Commission," the issue here is whether, on the facts of this case, this court should reverse the full Commission for holding that the law judge erred in reserving the question of permanent disability which had been submitted to him. The Commission was considering a law judge's opinion that indicated he thought a myelogram would be helpful in determining the question of permanent disability, but no one had requested his permission to introduce this additional evidence and Wooten had refused to take a myelogram. Even at the hearing, Wooten said he would take one only "if I get worse; because now I can get around." While I would concede that a law judge has *some* inherent power that would allow him or her to reserve decision on an issue that has not been sufficiently developed by the evidence, surely that power must be exercised with discretion. Under the facts, I submit the Commission was justified in finding that the law judge abused his discretion in this case. To hold otherwise, it seems to me, is to simply substitute our judgment for that of the Commission. After all, "It is just as important that the judiciary respect the province of the Workmen's Compensation Commission as it is that we observe the boundary between the legislative and judicial departments of government." *Oak Lawn Farms* v. *Payne*, 251 Ark. 674, 474 S.W.2d 408 (1971).

I would not, however, simply affirm the Commission's decision. I would remand this matter to the Commission with directions that it remand the matter to a law judge for a decision on the permanent disability question based on the record as it existed on January 2, 1985, which was the day the opinion of the law judge was filed in this case. The Commission's opinion states that this decision should have been made by the law judge on the record before him on that day. Indeed, there was a doctor's report in the record before the law judge that gave Wooten a 25% anatomical impairment to the body as a whole. Thus, the judge should have the opportunity to apply his knowledge of industrial demands, limitations and requirements to the evidence. *See Oller*

v. *Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

I dissent from the denial of the appellees' motion for rehearing.

Bobby EPPERSON, Special Administrator of the Estate of Leon L. THOMPSON, Deceased *v.* Phoebe BIGGS

CA 85-192 705 S.W.2d 901

Court of Appeals of Arkansas
Division I
Opinion delivered April 2, 1986

Gordon & Gordon, P.A., by: *Nathan Gordon*, for appellant.

Felver A. Rowell, Jr., for appellee.

GEORGE K. CRACRAFT, Chief Judge. Bobby Epperson, Special Administrator of the Estate of Leon L. Thompson, deceased, brings this appeal from an order of the circuit court denying his motion to dismiss an action for damages brought by Phoebe Biggs against the estate of Leon L. Thompson. We do not reach any of the arguments for reversal because we find that the

order appealed from was not appealable.

On August 3, 1979 Phoebe Biggs was involved in an automobile accident with Leon Thompson and later filed suit against Thompson in circuit court to recover damages for injuries allegedly received as a result of that accident. Upon discovering that Thompson was then deceased, appellant was appointed special administrator, but his authority was restricted to accepting process in the pending damage action. Service was had upon the special administrator in that action, but appellee subsequently took a voluntary nonsuit.

Several months later, appellee again filed suit against the Estate of Leon L. Thompson and caused service of summons to then be served on appellant, who appeared and filed an answer. Thereafter, appellant filed a motion to dismiss the action alleging that as his appointment as special administrator was for the limited purpose of receiving process in the earlier action, he was not authorized to receive process in the second one, and that service therefore had not been properly had upon the Estate of Leon L. Thompson. He further alleged that as both the three-year statute of limitations and the one-year statutory period following the nonsuit had then passed, the cause of action should be dismissed with prejudice. The trial court denied that motion and this appeal follows.

We decline to address any of the arguments advanced by the appellant in support of his appeal because the denial of a motion to dismiss an action is not a final judgment from which an appeal may be taken. Rules of Appellate Procedure, Rule 2. In order for a judgment to be final, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Roberts Enterprises, Inc.* v. *Arkansas State Hwy. Commission*, 277 Ark. 25, 638 S.W.2d 75 (1982); *Roy* v. *International Multifoods Corp.*, 268 Ark. 958, 597 S.W.2d 129 (Ark. App. 1980). The only matter disposed of by the order appealed from was that the case should proceed to trial, and those matters put in issue are not lost by continuing through a trial of the matter. *Heber Springs Lawn & Garden, Inc.* v. *F.M.C. Corp.*, 275 Ark. 260, 628 S.W.2d 563 (1982).

The appeal is dismissed and the case remanded to the circuit court.

COOPER and GLAZE, JJ., agree.

Richard J. ORINTAS *v.* Bryant J. MEADOWS, Ella MEADOWS, BENDIX CORPORATION, and DONALD H. BACON, P.A.

CA 85-175 706 S.W.2d 199

Court of Appeals of Arkansas
Division I
Opinion delivered April 2, 1986

Richard J. Orintas, for appellant.

Friday, Eldredge & Clark, for appellees Bendix Corp. and Donald H. Bacon, P.A.

Timothy O. Dudley, for appellees, Bryant and Ella Meadows.

JAMES R. COOPER, Judge. The appellees Bryant and Ella Meadows, residents of Ohio, were injured when they were involved in an automobile accident with an Arkansas driver in Clay County, Arkansas. The Meadowses were employed by the appellee Bendix Corporation, an Indiana corporation, and they collected worker's compensation benefits from Bendix Corporation pursuant to Indiana law. The Meadowses hired the appellant, attorney Richard Orintas, to pursue a third-party liability claim against the estate of the Arkansas driver for a 35% contingency fee. Determining that the estate of the Arkansas driver had no substantial assets, except for an automobile liability policy, the appellant and the attorney for Bendix Corporation agreed to accept the $50,000 automobile policy limit in settlement of their claims. A dispute then arose between the parties as to how the $50,000 settlement proceeds would be distributed. The appellees contended that, pursuant to Ark. Stat. Ann. Section 81-1340 (Repl. 1976), Bendix Corporation was entitled to two-thirds of the $50,000 settlement ($33,334), the Meadowses were entitled to one-third ($16,666),and appellant should receive a fee

of 35% of the $16,666 settlement received by the Meadowses. The appellant contended that he was entitled to a fee equal to 35% of the entire $50,000 settlement and that the Indiana Workmen's Compensation Law should be applied to determine how the settlement should be divided. The trial court concluded that Arkansas Workers' Compensation law applied to the distribution of the settlement proceeds, awarded two-thirds of the settlement proceeds to Bendix Corporation and one-third to the Meadowses, and determined that the appellant was entitled to a fee of 35% of the $16,666 settlement received by the Meadowses.

For his appeal, the appellant argues three points for reversal: (1) the court erred in not applying Indiana law to the distribution of the settlement proceeds; (2) the court erred in not finding that, under Ark. Stat. Ann. Section 81-1340 (Repl. 1976), attorneys fees are included in costs of collection; and (3) the court erred in failing to find that the appellant is entitled to an attorney fee of 35% of the entire $50,000 settlement. We find no merit to the appellant's alleged points of error and, therefore, affirm.

The appellant argues it was error for the trial court to apply Arkansas Workers' Compensation law because the appellees made a binding election when they made and accepted payments pursuant to Indiana law, and further, there were no significant contacts with Arkansas which would permit Arkansas to apply its laws. In *Wallis* v. *Mrs. Smith's Pie Co.*, 261 Ark. 622, 550 S.W.2d 453 (1977), the court listed five factors to be considered in determining whether to apply Arkansas law or the law of the foreign state, emphasizing the forum's governmental interest and the better rule of law. In its letter opinion, the trial court specified Arkansas's contacts with this cause of action.

> The accident took place in Arkansas, indeed the cause of action arose in Arkansas, and if any lawsuit was filed as a result of the accident, it would have been brought here. The third party tortfeasor was an Arkansas resident. Arkansas counsel was employed to resolve the tort claim.

We are not persuaded that the trial court erred in finding significant contacts with Arkansas to apply its laws. Furthermore, we do not agree that, by accepting Indiana Workmen's Compensation benefits, the appellees made a binding election to accept the third-party settlement pursuant to Indiana law.

McAvoy v. *Texas Eastern Transmission Corp.*, 187 F. Supp. 46 (W.D. Ark. 1960), held that it is a settled principle of Arkansas law that the right of an injured employee to recover in tort is to be determined by the law of the state where the injury occurred and, further, the acceptance by an employee of payments under the Louisiana Workmen's Compensation Statute did not amount to an election to have his right to maintain an action determined by Louisiana law.

The appellant further implies that the court must apply Indiana law because the Indiana Workmen's Compensation Act provides the employer and employee are bound by the provisions of the Indiana Workmen's Compensation Act when injury occurs in some other state. Ind. Code Ann. Sections 22-3-2-2, 22-3-2-20 (Burns 1974 and Supp. 1985). We do not agree that we are bound by Indiana law. *Carroll* v. *Lanza*, 349 U.S. 408, 412 (1955), stated that "the Full Faith and Credit Clause does not require a State to substitute for its own statute, applicable to persons or events within it, the statute of another State reflecting a conflicting and opposed policy."

In *Carroll*, a Missouri resident, employed in Missouri, was injured in Arkansas. The employee received benefits under the Missouri Compensation Act, which provided exclusive remedies for injuries received inside or outside Missouri under contracts made in Missouri, even as against the general contractor. The Arkansas Worker's Compensation Act allowed a suit against the general contractor for common law damages. The employee sued the general contractor in Arkansas and obtained a judgment. The United States Supreme Court held the Arkansas judgment did not deny full faith credit to the Missouri law.

Next, the appellant argues that, although Indiana law should be applied to the division of the settlement proceeds, under Ark. Stat. Ann. Section 81-1340 (Repl. 1976), attorneys fees are included under reasonable costs of collection. Therefore, his 35% attorney fee should be deducted from the entire $50,000 settlement before the proceeds are divided between the parties. In *Burt* v. *Hartford Accident & Indemnity Co.*, 252 Ark. 1236, 483 S.W.2d 218 (1972), the court refused to allow the employee's attorney fee to be considered costs of collection under Ark. Stat. Ann. Section 81-1340. Citing *Winfrey & Carlile* v. *Nickles*, 223

Ark. 894, 270 S.W.2d 923 (1954), the court in *Burt* stated that, in the usual situation, the question of an allowance of fees to the employee's attorney as part of the costs of collection would not likely arise, because the intervening carrier would either retain the employee's counsel for a fee mutually agreed upon or the employer would employ another attorney of his own choice. Under these circumstances, the court would simply apportion the recovery, leaving each to pay his own attorney. 252 Ark. at 1240-1; *Nickles*, 223 Ark. at 900. *Accord, St. Paul-Mercury Indemnity Co.* v. *Lanza*, 131 F. Supp. 684 (W.D. Ark. 1955); *Phillips* v. *Morton Frozen Foods*, 313 F. Supp. 228 (E.D. Ark. 1970). In the case at bar, Bendix Corporation employed its own attorney to pursue the estate of the third-party tortfeasor, and in view of the circuit judge's superior ability to evaluate the situation, we cannot say the trial court committed error in refusing to allow the appellant his attorney fees as costs of collection under Section 81-1340.

Finally, the appellant argues that the court erred in refusing to enforce his contingency fee contract with the Meadowses by awarding him 35% of the entire $50,000 settlement proceeds received by the appellees. The appellant's contract with the Meadowses read in part, "The party of the first part [Bryant J. and Ella Meadows] . . . agrees to pay the party of the second part [the appellant] thirty-five percent (35%) of any and all sums received by compromise before suit is instituted." The trial court interpreted this contract to mean the appellant was entitled to a fee of 35% of any settlement proceeds received by the Meadowses. The trial court reasoned that, if the appellant's position were correct, he would be entitled to receive his clients', the Meadowses, full recovery under the settlement with the third party tortfeasor, and his clients would still owe him $834.00. The trial court concluded that it would seem reasonable and logical that the Meadowses would receive one-third of the settlement, and that Bendix Corporation would receive two-thirds, after reasonable costs of collection are taken off the top, then both would pay their respective attorneys out of the proceeds. We believe the trial court correctly interpreted the contingency fee agreement between the appellant and the Meadowses.

On appeal, we cannot overturn the findings of the circuit judge sitting as the fact-finder unless we find them to be

clearly erroneous or clearly against the preponderance of the evidence. *Izard County Board of Education* v. *Violet Hill School District No. 1*, 10 Ark. App. 286, 663 S.W.2d 207 (1984); ARCP Rule 52(a). From our review, we conclude the court's findings of fact were not clearly erroneous and its conclusions of law were correct. We therefore affirm.

Affirmed.

CLONINGER, and GLAZE, JJ., agree.

Susan C. NIX *v.* Gary P. NIX

CA 85-428 706 S.W.2d 403

Court of Appeals of Arkansas
Division II
Opinion delivered April 2, 1986

Vaughan & Bamburg, for appellant.

Howell, Price, Trice, Basham & Hope, P.A., for appellee.

DONALD L. CORBIN, Judge. Appellant, Susan C. Nix and appellee, Gary P. Nix were divorced on October 31, 1983. By agreement, each party was given joint custody of the two minor children. Appellee brought this action on February 13, 1985, seeking a change of custody and appellant responded, seeking a change of custody to her. On September 19, 1985, the trial court ruled that the custody of the two minor children should be placed with appellee. We affirm.

Both parties agree that a material change in facts and circumstances occurred since the divorce because the joint custody arrangement resulted in an unstable environment for the children and was not in their best interests. The parties differ as to whom should be granted custody. The evidence summarized reveals that appellant began a sexual affair with a married man, Ralph Wiggins, shortly before her divorce from appellee in 1983. Subsequent to the entry of the divorce decree, appellant allowed Mr. Wiggins to stay overnight with her when he was in Little Rock. During the weeks the children were with appellant, Mr. Wiggins spent several nights a week with appellant. He was in the home when the children went to bed, but would be gone when the children got up in the morning. Appellant stated that when appellee filed his motion for change of custody on February 13, 1985, she voluntarily moved Mr. Wiggins out on March 9, 1985, and since that time has not allowed Mr. Wiggins nor any other male to stay overnight in her home when the children were present. Mr. Wiggins testified that he had not spent the night with appellant in the presence of her children since prior to March 11, 1985. He stated he had taken appellant and her children on a camping trip that spring but he slept in a tent while appellant and

her children stayed in the trailer. Both appellant and Mr. Wiggins testified that they did not plan to discontinue their relationship; however, neither made known any plans for marriage in the future. Both appellant and appellee had at one time smoked marijuana but alleged that activity had ceased. There was some testimony establishing that appellee and the children had spent an evening at the home of appellee's former girlfriend. Although appellee admitted to a former sexual relationship with her, there was no testimony that he cohabitated with her when his children were in the home. Relative to the general care of the children, the evidence reveals that both parties were adequately responsive to the general care of the minor children, although appellant did not believe that appellee looked after them as closely as she did.

Appellant raises six points for reversal. All six assignments of error concern either the legal basis of the custody award to appellee or the sufficiency of the evidence supporting the award.

It is well settled that this court will not reverse the findings of a chancellor unless they are clearly erroneous or clearly against the preponderance of the evidence. ARCP Rule 52(a). Where the credibility of witnesses appearing before the chancellor is concerned, this court attaches substantial weight to the chancellor's findings on material issues of fact. *Digby* v. *Digby*, 263 Ark. 813, 567 S.W.2d 290 (1978). The primary consideration in awarding the custody of children is the welfare and best interests of the children involved, and other considerations are secondary. *Id.* These same standards are applicable in a change of custody case. *Sweat* v. *Sweat*, 9 Ark. App. 326, 659 S.W.2d 516 (1983). As noted in *Ketron* v. *Ketron*, 15 Ark. App. 325, 692 S.W.2d 261 (1985), our courts have never condoned a parent's promiscuous conduct or life-style when such conduct has been in the presence of the child. The supreme court has held in *Johnson* v. *Arledge*, 258 Ark. 608, 527 S.W.2d 917 (1975), that the child's welfare is the controlling consideration and custody is not awarded as a reward to, or punishment of, either parent.

In reaching his decision in the instant case, the chancellor cited applicable case law and detailed his findings of fact in a memorandum letter opinion. The chancellor determined that, but for the adulterous affair between appellant and Mr. Wiggins,

both parties were essentially equivalent as far as their ability to care and provide for the children. He concluded that appellant's ongoing relationship with Mr. Wiggins was immoral, failed to set a proper example for the minor children and resulted in harm to the children. We believe the chancellor's decision was consistent with case law, and his findings concerning the facts and circumstances in this case are not clearly against the preponderance of the evidence. From our *de novo* review of the evidence adduced and the chancellor's detailed findings, we cannot say that the trial court allowed the adulterous conduct of appellant to so overshadow the proven facts and circumstances that it failed to consider the best interests of the children; that the chancellor's decision was exclusively based on his own personal religious beliefs; that the award of custody to appellee was so made as to punish appellant; or that the chancellor placed a biblical standard on appellant to repent and reform rather than considering whether appellant's conduct resulted in any harm to the children.

While we do not necessarily agree with the chancellor's reliance upon language utilized in *Polk* v. *State*, 40 Ark. 482 (1883), such reliance cannot be said to constitute reversible error. The trial court's memorandum letter opinion in the case at bar reflects that due consideration was given to the best interests of the children. Appellant relies upon our decision in a recent custody case, *Ketron* v. *Ketron*, 15 Ark. App. 325, 692 S.W.2d 261 (1985), as controlling here. We do not agree inasmuch as custody cases present different factual situations and none of them represents a direct precedent which is absolutely controlling in another. *See Harris* v. *Gillihan*, 226 Ark. 19, 287 S.W.2d 569 (1956).

Affirmed.

CLONINGER and MAYFIELD, JJ., agree.

Ollie Frances JARED *v.* STATE of Arkansas

CA CR 85-191 707 S.W.2d 325

Court of Appeals of Arkansas
Division I
Opinion delivered April 2, 1986

Larry Dean Kissee, for appellant.

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

TOM GLAZE, Judge. On December 1, 1982, appellant pled guilty to the charge of felon in possession of a firearm. The trial judge fined her $750.00 and suspended imposition of sentence for four years, subject to the condition that appellant not commit an offense punishable by imprisonment during the suspension period. On January 3, 1985, the State filed a revocation petition, alleging that appellant, on or about November 8, 1984, committed the offenses of theft by receiving and contributing to the delinquency of a minor. After a revocation hearing on April 3, 1985, the trial judge found that appellant had violated the terms of her suspended imposition of sentence, and sentenced her to a four-year term in the Arkansas Department of Correction. Appellant raises four points on appeal, but we find none of them require a reversal.

In her first point, appellant argues that the evidence was not sufficient to justify the revocation. To revoke a suspended sentence, the State must prove by a preponderance of the evidence that the defendant violated a condition of her suspension. *Smith* v. *State*, 9 Ark. App. 55, 652 S.W.2d 641 (1983). On

appellate review, this Court will not overturn the findings of the trial court unless they are clearly against a preponderance of the evidence. *Calvin* v. *State*, 11 Ark. App. 294, 669 S.W.2d 508 (1984).

In late October 1984, Sue Warner called the sheriff's office and reported several missing items: a saddle, trolling motor, and chainsaw. She later discovered and reported that some tools were missing as well. Mrs. Warner suspected that her thirteen-year-old son, Stephen, might be involved in the disappearance of the items. At the revocation hearing, several witnesses testified, indicating the appellant had sold the motor, saddle and missing tools.

Appellant first argues that the items were not stolen, that they belonged to Stephen, having passed to him by intestate succession upon his father's death. We find no merit in this argument because one item, the saddle, undisputedly belonged to Stephen's sister. Furthermore, the State presented testimony that Mrs. Warner—not Stephen—owned the other items, thus this factual issue was one for the trial judge to decide.

Concerning the charge of contributing to the delinquency of a minor, appellant next argues that there was no evidence proving she was an adult. That assertion is untrue since Stephen testified, without contradiction, that appellant was over twenty-one years of age. She also claims the evidence was insufficient to show she gave Stephen any contraband. Again, we disagree. According to Stephen Warner, he received liquor and marijuana from appellant in exchange for the items. He testified that appellant put the contraband in some weeds for him to retrieve. While appellant argues two witnesses contradicted Stephen's testimony, at most, that evidence presented a question of conflicting testimony which was resolved against the appellant.

Whether there is sufficient evidence to support the trial court's finding that appellant had violated conditions of her suspended imposition of sentence is purely a question which requires resolution of witnesses' credibility and is one within the sound discretion of the trial court. *Reynolds* v. *State*, 282 Ark. 98, 666 S.W.2d 396 (1984). Our study of the record reveals the trial court's decision is not clearly against the preponderance of the evidence.

For her second point, appellant contends that the trial court erred by refusing to grant her motion for a continuance. On March 12, 1985, appellant appeared in court and requested court-appointed counsel. That request was denied, and the court set a hearing date of April 3, 1985. Appellant contacted the court on March 28th or 29th, and again requested appointed counsel. It appears that the trial court appointed appellant's attorney on April 2, 1985, one day before the revocation hearing.

Appellant cites *Wolfs* v. *Britton*, 509 F.2d 304 (8th Cir. 1975), in support of her contention that the appointment of counsel one day before trial denied her effective assistance of counsel. However, that case is distinguishable from the one here. In *Wolfs*, the criminal conduct itself was characterized both as "bizarre" and "inexplicable." Here, the facts were uncomplicated and presented no unusual issue. Further, counsel in *Wolfs* argued that he had not been able to talk with all the witnesses before trial, that he learned just the night before that his client had psychiatric problems and that an insanity defense might be in order, and that the defendant's relatives and other character witnesses were unavailable. In the present case, appellant's counsel was familiar with the events which led to the charges against appellant because the month before, he had represented Ricky Mellon, who had transacted business with Stephen Warner and was charged with the same offenses as appellant. According to appellant's counsel, Mellon's case involved the same facts, individuals and State witnesses. There is no indication that the late appointment precluded counsel or appellant from having any witnesses present or that she was prejudiced in the presentation of her case.

Whether to grant a continuance is a matter lying within the sound discretion of the trial court and will not be overturned absent a showing of clear abuse of discretion. *Berry* v. *State*, 278 Ark. 578, 647 S.W.2d 453 (1983); *Parks* v. *State*, 11 Ark. App. 238, 669 S.W.2d 496 (1984). It is also settled law that in the absence of a showing of prejudice, we cannot say the refusal of a continuance is error. *Beck* v. *State*, 12 Ark. App. 341, 676 S.W.2d 740 (1984). In the instant case, appellant simply failed to demonstrate that the court abused its discretion or that she was prejudiced by the denial of a continuance.

Appellant's third point for reversal is that the revocation petition should be dismissed based upon collateral estoppel. A petition to revoke had been filed against Mellon, alleging that he had violated the terms of his suspension by receiving stolen property and contributing to Stephen Warner's delinquency. Appellant argues that because the State was unsuccessful in proving the charges against Mellon, the doctrine of collateral estoppel requires that the revocation petition against her be dismissed.

Acknowledging that the revocation hearings did not involve the same parties, appellant nevertheless urges us to apply collateral estoppel to situations where the same victim is involved under identical circumstances. In support of her argument, she cites *People* v. *Taylor*, 117 Cal. Rptr. 70, 527 P.2d 622 (1974). In *Taylor*, the defendant Taylor was an accomplice to a robbery during which one of the robbers was shot and killed. Taylor's surviving accomplice was convicted of robbery but acquitted of the murder charge. Taylor, who sat in the getaway car, argued that because the People failed to establish that his accomplices entertained the requisite malice aforethought, collateral estoppel should preclude the People from relitigating the same issue at his later murder trial. The court agreed, and concluded that the lack of identity of parties defendant did not preclude the application of the doctrine. It went on, however, to limit its holding to the circumstances of the case "where an accused's guilt must be predicated on his vicarious liability for the acts of a previously acquitted confederate." *Id.* at 79, 525 P.2d at 631.

The rule in *Taylor* simply is contrary to that which governs in Arkansas. Under Ark. Stat. Ann. § 41-304(2) (Repl. 1977), in any prosecution for an offense in which the liability of the defendant is based on conduct of another person, it is no defense that the other person has been acquitted. *See Roleson* v. *State*, 277 Ark. 148, 640 S.W.2d 113 (1982) and *Blann* v. *State*, 15 Ark. App. 364, 695 S.W.2d 382 (1985). Therefore, we must reject appellant's collateral estoppel argument.

Finally, appellant contends the trial court erred in denying her motion *in limine* to prevent the State, on cross-examination, from questioning her about her past convictions. We do not agree.

Appellant's counsel apparently intended to put her on

the stand, and accordingly, sought an advance ruling that she not be examined about her prior convictions. Appellant argued at trial that her convictions had no probative value and would have only a prejudicial effect.[1] She argues on appeal that she did not take the stand because she did not want to risk impeachment by the State's use of these prejudicial convictions. Appellant's argument ignores the rule adopted by the Arkansas Supreme Court in *Simmons* v. *State*, 278 Ark. 305, 645 S.W.2d 680 (1983), and restated by this Court in *Lincoln* v. *State*, 12 Ark. App. 46, 51, 670 S.W.2d 819, 821 (1984):

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

There is nothing in the record to show that appellant followed either of the steps noted above, and while *Simmons* and *Lincoln* involved criminal trials, there is no reason the rule should not apply with equal force to revocation hearings. We find no error in the court's denial of appellant's motion.

Affirmed.

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

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[1] While appellant argues on appeal that her motion was to prohibit the State from cross-examining into the details of the convictions, the abstract of record reflects she moved to exclude any reference to the prior convictions whatsoever.

M.S. DELONE, DELONE OPERATING CO., and MAXWELL DRILLING COMPANY, INC. *v.* UNITED STATES FIDELITY & GUARANTY COMPANY

CA 85-346 707 S.W.2d 329

Court of Appeals of Arkansas
En Banc
Opinion delivered April 9, 1986

Michael R. Landers and *Friday, Eldredge & Clark*, by: *Donald H. Bacon*, for appellants.

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

GEORGE K. CRACRAFT, Chief Judge. M. S. Delone, Delone Operating Company, and Maxwell Drilling Company, Inc. appeal from an order of the chancery court denying their petition to reform an insurance policy issued by United States Fidelity & Guaranty Company. We find no error.

Appellant companies were involved in producing oil on lands owned by appellant Delone and in drilling wells for others under contract. For several years the appellants obtained automobile liability insurance coverage from the United States Fidelity & Guaranty Company through Bob Brown, president of United States Insurance Agency in El Dorado. Prior to 1980 appellants had in effect an automobile liability policy for a fleet of vehicles with limits of $500,000, for each occurrence.

In 1980 appellants entered into a contract with Branch Investment, Inc. for the drilling of a well. That contract specifically required appellants to keep in effect automobile liability coverage which afforded protection for personal injuries of $250,000 for each person, $500,000 for each occurrence, and $250,000 for personal property damage. Delone sent the contract to United States Insurance Agency with instructions to Brown to do what was necessary to make certain that appellants had the insurance coverage required by that contract. U.S.F. & G. issued an endorsement which provided automobile liability coverage of $250,000/$500,000/$250,000 which was not limited to the Branch Investment contract, but afforded that reduced coverage to appellants' entire fleet without regard to any particular activity or job.

Delone testified that he was not aware of the extent of the change until April 28, 1981, when one of his vehicles was involved in a fatal collision. In September of 1982 a complaint was filed against appellants in the Circuit Court of Bradley County for wrongful death. The appellees assumed responsibility for the defense of that action under the policy. A settlement was

subsequently reached for $336,120, of which amount the appellee tendered $250,000, the limit of its policy. The appellants then brought this action in equity for reformation of the policy so as to provide limits of $500,000 and recovery of the amounts expended by them in settlement of the wrongful death claim. In the alternative, appellants prayed for judgment against United States Insurance Agency for failing to provide coverage of $500,000. The action against United States Insurance Agency was transferred to circuit court and the claim for reformation proceeded to trial. The chancellor found there was no mutual mistake which would warrant reformation and dismissed the plaintiff's petition. Appellant brought this appeal contending that the trial court erred in so ruling. We agree with the chancellor that, based on the facts of this case, reformation was not an available remedy for appellants' loss.

In July of 1980 appellant entered into a written drilling contract with Branch Investment, Inc. which contained specific liability insurance requirements of $250,000/$500,000/ $250,000. Copies of the contract were sent to Brown with instructions that he do what was necessary to make sure that the appellants met the insurance requirements of the contract. Delone had no further conversation with Brown about the contracts or the insurance policies until after the fatal accident had occurred. Although Delone stated he had no intention of reducing his coverage from the $500,000 single limit other than for the Branch job, it is not clear that this intention was communicated to anyone.

Brown testified that when he received the contract from appellant, he was asked to obtain a certificate of insurance to reflect that the requirements of the contract had been met. He sent the contract to the appellee requesting an amendment of the general liability and automobile policy to conform to the requirement of that contract. The appellee responded, asking Brown whether he wanted to change the limits to $250,000/$500,000/ $250,000 or increase to a $750,000 single limit policy. Brown circled the $250,000/$500,000/$250,000 and returned the letter to appellee. He testified that in doing so he intended to change the policy only as to the particular drilling contract but not for appellants' entire fleet of vehicles. He stated that he had no intention of reducing the $500,000 single limit coverage other

than as to that specific contract at that time.

Brown admits, however, that he was informed by appellee that it could not, and would not, write a policy of insurance which afforded one coverage limit for vehicles while engaged in a particular activity and another limit for those same vehicles while engaged in other activities. When the policy was delivered to the agency, there was a notation typed on it that the policy limits were changed from $500,000 combined single limits to split limits of $250,000/$500,000/$250,000 because of the contract requirements, but that the same limits would apply to *all* activities. When the policy was delivered to the appellants, the notation had been removed. Appellant Delone admitted receiving the endorsement, but stated that it was not examined. Brown testified:

> As of September 19, 1980, I knew that what I thought I was doing in July couldn't be done and as of then I would have to say that it was my intention that the policy limits be $250,000/$500,000/$250,000 for all risks. U.S.F. & G. issued exactly what I asked on the Branch contract. There was no mistake on the part of U.S.F. & G. . . . I made a mistake. I did change to the $250,000/$500,000 without discussing it with him. It was my intent . . . to change to the split limits of $250,000/$500,000/$250,000. Nancy Brown advised me that if the Branch job was finished we needed to change the limit back to the $500,000. I did not do anything to change the Branch contract. . . .
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> . . . I was not notified when the Branch contract was complete. There was no arrangement for me to be advised when the Pickens contract was undertaken or completed. . . . After September, 1980, there was never any request made to U.S.F. & G. to change [the] endorsement . . . to $500,000 single limit. When I responded to Nancy Brown I requested $250,000/$500,000 and that is what U.S.F. & G. issued. . . .
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> . . . .
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> . . . There is no doubt in my mind that if I had been in contact with Mr. Delone and found the Branch contract had been completed I would have done whatever was

necessary to make sure full coverage was restored.

It is clear that at the time the policy was issued it contained precisely what the appellee intended it to contain. Brown knew at that time that he did not have authority to bind the company to a contract other than the one delivered to him and he accepted it without communicating those facts to the appellants, even though he might have had the intention of reestablishing the prior limit when the current contract was completed. Under these circumstances reformation is not an available remedy.

Reformation is an equitable remedy which is available when the parties have reached a complete agreement but, through mutual mistake, the terms of their agreement are not correctly reflected in the written instrument purporting to evidence that agreement. A mutual mistake is one shared by both parties at the time their agreement is reduced to writing and it must be shown clearly and decisively that the parties intended their written agreement to say one thing and, by mistake, it expressed a different thing. *Yeargan* v. *Bank of Montgomery County*, 268 Ark. 752, 595 S.W.2d 704 (Ark. App. 1980); *Corey* v. *Mercantile Ins. Co. of America*, 205 Ark. 546, 169 S.W.2d 655 (1943). An order reforming a written instrument cannot be based upon a unilateral mistake unless there is a mistake on one side and fraud or inequitable conduct on the other. *Arnett* v. *Lillard*, 245 Ark. 939, 436 S.W.2d 106 (1969). It is apparent from the evidence in this case that any misconception on the part of the appellants as to what the policy contained was a unilateral mistake on the part of appellants and was not shared by the appellee. There is no basis for reformation.

Appellants argue in the alternative that, if there was no mutual mistake at the time the policy was issued, it should be reformed because of the second mutual mistake—Brown's failure to reinstate the higher limits when the Branch contract was completed. The record reflects that appellee had informed Brown that when the Branch contract was completed the limits could and would be increased if requested. Brown testified that he was aware of this and intended to have the limits increased, but did not because he did not know when the Branch contract was completed and had not discussed it with appellants. We do not construe this as an agreement on the part of the appellee to do anything. It was

only a suggestion of what might be done by appellee and of intention on the part of Brown. Furthermore, reformation deals with the reforming of written instruments to conform to the intent of the parties at the time they are executed. There was no second written instrument to reform. Nor could it relate back to the original writing for purposes of reformation because it was not part of the agreement at the time that agreement was reduced to writing.

Our decision in *Equity General Agents, Inc.* v. *O'Neal*, 15 Ark. App. 302, 692 S.W.2d 789 (1985) discusses the decisions relied upon by appellants. However, that decision is clearly distinguishable. In *O'Neal*, the insured owned two automobiles which were insured under a policy issued through a local agency. When that policy was cancelled and coverage placed with another company, both the insured and the agency intended for the new policy to provide coverage for both vehicles. Through an admitted error of the agency, one of the vehicles was omitted from that policy. We held that reformation of the policy was warranted because: (1) the insured and agency both intended that the policy cover both vehicles; (2) the failure to provide that coverage was due to an admitted error of the agency; (3) the agency had the authority to bind the insurer on both vehicles; and (4) the risk was of the type the insurer would normally accept. Here, although both the appellant and the agent testified that they intended the policy change to affect only the one activity, failure to provide separate coverage was not due to a mutual error. The policy was issued precisely as the agent had ordered and after any misconception on his part had been corrected by U.S.F. & G. In this case, the agent did not have authority to bind the appellee to issue the intended contract and the company would not normally have accepted such a risk.

Affirmed.

CORBIN, J., dissents.

CITY OF HELENA, ARKANSAS *v.* R.L. CHRESTMAN, Jr.

CA 85-207 707 S.W.2d 338

Court of Appeals of Arkansas
Division I
Opinion delivered April 9, 1986

Porter & King, by: *Durwood W. King*, for appellant.

Reuben L. Chrestman, Jr., M.D., for appellee.

JAMES R. COOPER, Judge. This is an appeal from an award of $13,875.00 to the appellee in Phillips County Circuit Court for property taken in a condemnation proceeding. The appellant condemned 4.93 acres of the appellee's land in 1980 to build Newman Drive within the City of Helena. On March 15, 1985, a jury trial was held to determine the amount of compensation, if any, to which the appellee was entitled for the taking. The appellant contended at trial that the value of the remaining 35.07

acres exceeded the value of the entire tract prior to the construction of the road, and therefore, the appellee was entitled to no compensation. The appellant's expert testified to that effect, stating that, prior to the taking, the land was worth $160,000.00 and that, after the taking, the remaining land was worth $173,500.00. The appellee testified that he did not feel that the property had increased in value, questioned the expert's comparing the large tract of property to sales of small tracts of frontage on the new road, and testified that the city had offered him $13,874.00 for the property, but withdrew the offer before he had accepted it.

The appellant's sole contention on appeal is that the jury's verdict is not supported by substantial evidence. However, we need not reach this argument because the appellant did not move for a directed verdict, nor did it move for judgment notwithstanding the verdict. Rule 50(e) of the Arkansas Rules of Civil Procedure requires that one of the above motions be made to challenge the sufficiency of the evidence to support a jury verdict; by its failure to do so, the appellant waives the right to challenge the sufficiency of the evidence. *B.J. McAdams, Inc.* v. *Doggett Leasing Co.*, 13 Ark. App. 162, 861 S.W.2d 406 (1984).

Even had the appellant preserved the right to challenge the sufficiency of the evidence, substantial evidence was presented to support the jury's verdict. The appellee testified that the appellant had offered him $13,874.00 for the condemned land. While the appellant had previously objected to evidence of compromise during the cross-examination of its expert witness, as being inadmissible under Ark. Stat. Ann. § 28-1001, Unif. R. Evid. 408 (Repl. 1979), it was not a continuing objection. The appellant did not object to the evidence at the time of the appellee's testimony, nor did it ask the court to admonish the jury. By its failure to renew the objection, the appellant waived the error. *New Empire Insurance Co.* v. *Taylor*, 235 Ark. 758, 362 S.W.2d 4 (1962). In *New Empire Insurance Co.*, the Supreme Court stated:

> In McCormick on Evidence (1954), we find,
>
> "A failure to make a sufficient objection to evidence which is incompetent waives as we have seen any ground of complaint of the admission of the evidence. But it has another effect,

> equally important. If the evidence is received without objection, it becomes part of the evidence in the case and is usable as proof to the extent of whatever rational persuasive power it may have. *The fact that it was inadmissible does not prevent its use as proof so far as it has probative value. Such incompetent evidence, unobjected to, may be relied on in argument, and in whole or in part may support a verdict or finding.* This principle is almost universally accepted, and *it applies to any ground of incompetency under the exclusionary rules.*"

Our own court has so held on numerous occasions.

235 Ark. at 764-65. (Emphasis added.) *Accord, McWilliams* v. *R & T Transport, Inc.*, 245 Ark. 882, 435 S.W.2d 98 (1968). We find that, because the error was not properly preserved, the appellee's testimony provides substantial evidence to support the jury's verdict.

Affirmed.

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

David Lynn HARPER *v.* STATE of Arkansas

CA CR 85-189 707 S.W.2d 332

Court of Appeals of Arkansas
En Banc
Opinion delivered April 9, 1986

Robert E. Irwin, for appellant.

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

JAMES R. COOPER, Judge. The appellant was convicted by a Boone County Circuit Court jury of possession of marijuana, second offense, and of being a felon in possession of a firearm. He was sentenced to serve six years on each charge in the Arkansas Department of Correction, with the sentences to run consecutively. On appeal, he alleges three points of error: (1) the court erred in admitting evidence relevant to a charge of possession of marijuana with intent to deliver, claiming that the evidence is irrelevant to his charge of simple possession; (2) the court erred in failing to direct a verdict of acquittal on the charge of being a felon in possession of a firearm; and (3) the court erred in failing to suppress the items seized in the search of the appellant's home, claiming that the affidavit provided an insufficient basis for the issuance of a search warrant. We find no merit in any of the appellant's contentions.

The appellant first contends that the court erred in admitting evidence of drug paraphernalia found during the search. He argues that this evidence is irrelevant to a charge of simple possession, second offense, as described by Ark. Stat. Ann. § 82-2617(c) (Supp. 1985). (The appellant had originally been charged with possession with intent to deliver, under Ark. Stat. Ann. § 82-2617(a)(iv) (Supp. 1985), but because of some confusion as to whether that crime constituted a felony or misdemeanor, the information was amended to charge him with possession.) The evidence to which the appellant objected consisted of testimony, photographs, and a hypodermic syringe and needle. Lieutenant Riggs, of the Harrison Police Department, testified that:

> [w]hen we entered the room, we discovered sheets spread over the floor in the room and mounds of vegetable material, there was quite a bit and it was apparent that it was Marijuana; three large grow lights; an electric heater; an electric box fan and other Marijuana paraphrenalia [sic] . . . . We also seized a large set of scales . . . We found the scales, as I recall in that [master] bedroom . . . It's a wooden box we found in the . . . master bedroom and

> . . . contains a couple different items. One is a small pipe that Marijuana is smoked in and the same here [another pipe], also a syringe, a needle and its got a few other little items in it.

During Lt. Riggs's testimony, pictures of the lights, heater, fan, scales, and box (along with pictures of the marijuana) were introduced into evidence, as were the hypodermic syringe and needle. Mr. James, a chemist for the State Crime Laboratory, testified that the needle and syringe contained *no* controlled substances and that the wooden pipes found in the box tested positive for Tetrahydracannabol (THC—the active ingredient in marijuana), although he could find no identifiable traces of marijuana on them under the microscope.

While evidence of other crimes not charged in the indictment or information is generally inadmissible, evidence of other criminal activity is admissible under the *res gestae* exception to that general rule, in order that the facts and circumstances of the offense may be established. *Young* v. *State*, 269 Ark. 12, 598 S.W.2d 74 (1980). Therefore, the Supreme Court in *Young* found testimony by an undercover officer, that the defendant had told him during a sale of phencyclide (PCP) (the basis of the charge against the defendant) that he had already sold thirty hits of PCP that night, admissible as part of the *res gestae* of the transaction. In so doing, the Court noted that this evidence was not necessary to establish identity, plan, or intent of the defendant as to the offense charged, as that had been established by the officer's testimony. Likewise, in *Thomas* v. *State*, 273 Ark. 50, 615 S.W.2d 361 (1981), the Court held that evidence of a rape committed during an aggravated robbery was admissible in a trial concerned solely with the charge of aggravated robbery, even though the aggravated robbery could be proven without evidence of the rape. The Court stated that "all of the circumstances of a particular crime are part of the 'res gestae' of the crime [and] . . . that *all of the circumstances* connected with a particular crime may be shown to put the jury in possession of the entire transaction." 273 Ark. at 54 (emphasis in original).

> "*Res gestae* are the surrounding facts of a transaction, explanatory of an act, *or showing a motive for acting.* They are proper to be submitted to a jury, provided they can be

> established by competent means, sanctioned by law, and afford any fair presumption or inference as to the question in dispute . . . . Now circumstances and declarations which were contemporaneous with the main fact under consideration or so nearly related to it as to illustrate its character and the state of mind, sentiments or dispositions of the actors are parts of the *res gestae*."

Freeman v. *State*, 258 Ark. 496, 503, 527 S.W.2d 623, 627 (1975)(quoting *Carr* v. *State*, 43 Ark. 99 (1884))(emphasis added). *Accord*, *Turner* v. *State*, 258 Ark. 425, 527 S.W.2d 580 (1975).

Here, all of the evidence objected to was found at the same time as the marijuana, most of it in close proximity thereto. The only exception is the syringe and needle, which were found in close proximity to pipes with traces of THC on them. This evidence, in addition to being part of the *res gestae* of the crime of possession, is also relevant in determining the motive of the appellant for possession of marijuana.[1] "Even if motive is not an element of the crime charged, it may be proven." *Lackey* v. *State*, 288 Ark. 225, 229, 703 S.W.2d 858, 861 (1986). *See also Synoground* v. *State*, 260 Ark. 756, 543 S.W.2d 935 (1976).

Furthermore, there is overwhelming evidence in this case that the appellant possessed marijuana. The State proved the appellant's possession by the testimony of the officers and the introduction of the 2.4 pounds of marijuana seized from the appellant's home. Additionally, the appellant told the officers, after waiving his *Miranda* rights, that he owned the marijuana. Determining whether the probative value of the evidence is outweighed by its prejudicial impact is within the sound discretion of the trial court, and we will not reverse its decision absent a showing of an abuse of that discretion. *Pruitt* v. *State*, 8 Ark. App. 350, 652 S.W.2d 51 (1983). Because the evidence is part of the *res gestae* of the crime and is relevant in determining the

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[1] While the hypodermic syringe and needle are arguably not probative of the appellant's motive for possession of marijuana, the chemist did indicate that he would not have been surprised to find THC in them. Furthermore, they are part of the *res gestae* of the crime, and any prejudicial impact that they would have is minimal, as the evidence indisputedly showed that there were *no* controlled substances in them.

motive of the appellant, and in light of the overwhelming evidence of possession in this case, we do not find any abuse of the trial court's discretion in admitting the evidence.[2]

The appellant next claims that the court erred in failing to direct a verdict of acquittal on the charge of being a felon in possession of a firearm (Ark. Stat. Ann. § 41-3103 (Repl. 1977)). A directed verdict is only proper if there is no issue of fact for the jury to decide; in reviewing this issue we look at the evidence in the light most favorable to the appellee and affirm if there is any substantial evidence to support the verdict. *Mooring* v. *State*, 11 Ark. App. 119, 666 S.W.2d 720 (1984). The appellant states there is no evidence to show that he either owned or possessed the weapon. However, the evidence shows that the gun, a .357 Magnum, was found in the appellant's bedroom, directly under a window in which the police officers had observed the appellant looking out when they drove up. The officers saw no other person in that room. While one of the officers testified that he saw the appellant fumbling around with something that could have been a gun, it is undisputed that no one ever saw the gun in the appellant's hand or on his person. However, actual physical possession is not necessary for conviction, nor is ownership. While Ark. Stat. Ann. § 41-3103 does not define possession, Ark. Stat. Ann. § 41-115(15) (Repl. 1977) states that " 'Possess' means to exercise actual dominion, control, or management over a tangible object." The Arkansas Supreme Court has construed this statute:

> Dominion implies wide latitude and is defined as including even the "right to possession." . . . Nor does the word "actual" reduce the usage to one of literal or physical possession . . . *Cary* v. *State*, 259 Ark. 510, 534 S.W.2d 230 (1976), [held] that actual, physical possession is not required, but that "constructive possession of a controlled substance means *knowledge of its presence and control over it*." [Quoting] *People* v. *Williams*, 95 Cal. Rptr. 530, 485 P.2d 1146 (1971), . . . [*Cary*] states:

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[2] Therefore, we need not reduce the appellant's sentence to the minimum allowed by law, as would have been the case, in light of the overwhelming evidence of possession, if we had found the evidence to be irrelevant and so improperly admitted. *See Philmon* v. *State*, 267 Ark. 1121, 593 S.W.2d 504 (Ark. App. 1980).

> * * * 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 subject to his dominion and control, or to the joint dominion and control of the accused and another.

Glover v. *State*, 273 Ark. 376, 380, 619 S.W.2d 629, 631 (1981). The evidence is sufficient if it is shown, by either direct or circumstantial evidence, that the appellant had the right to exercise control over the object. *Cary*, 259 Ark. at 518. Where possession is shown by joint occupancy only, an additional link between the accused and the object must be shown. *Osborne* v. *State*, 278 Ark. 45, 643 S.W.2d 251 (1982). That additional link is provided here by the appellant's appearance in the window, below which the gun was found, just minutes before the search took place, together with the fact there was no other person seen in the room. We find that there is substantial evidence from which a jury could infer that the appellant had knowledge of the gun's presence and a right to control it.

The appellant's final contention is that the court erred in not suppressing the evidence seized under the search warrant, as the affidavit, based on information from a confidential informant, does not provide any legal justification for the issuance of the warrant. We do not agree.

The Arkansas Supreme Court, in *Thompson* v. *State*, 280 Ark. 265, 658 S.W.2d 350 (1983), adopted the more flexible totality of the circumstances test, set forth in *Illinois* v. *Gates*, 462 U.S. 213 (1983), for use instead of the previously used two-prong test of *Aguilar* v. *Texas*, 378 U.S. 108 (1964), in judging the sufficiency of an affidavit based on information received from an informant. Under the new test

> the magistrate issuing the warrant must make a practical, common sense decision based on all the circumstances set forth in the affidavit. . . . "the duty of the reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . concluding' that probable cause existed" to issue the warrant. . . . However, conclusory statements in affidavits which give no substantial basis for determining

> the existence of probable cause will not be accepted. There must still be enough information presented to the magistrate to allow him to determine that there exists probable cause.

Wolf v. *State*, 10 Ark. App. 379, 381, 664 S.W.2d 882, 883 (1984) (quoting *Gates*, 462 U.S. at 238-9). Probable cause for the issuance of the search warrant can only be determined upon the basis of the information given, under oath, to the issuing judicial officer. *Baxter* v. *State*, 262 Ark. 303, 556 S.W.2d 428 (1977). Therefore, we cannot take into account the fact that the identity of the confidential informant was revealed in an *in camera* hearing to the trial judge, as it was not revealed to the municipal court judge who issued the warrant.

The affidavit in this case states that the affiant, Lieutenant Riggs, was contacted by a confidential informant whom the affiant had known for five years. This person was described as a citizen and business person in the community of Harrison, without any known ties to drug trafficking or use. The officer stated that he believed that the informant wished to remain confidential solely out of fear that the identification of the informant could jeopardize the well-being of the informant or the informant's family. The affiant stated that he knew of no reason that the informant would have for giving him false information.

Lieutenant Riggs related that the informant told him that on October 15, 1984, the informant had a legitimate reason for going to the appellant's residence. The informant said that, upon entering the lower level of the house, the informant noticed an unsavory odor, which became stronger upon opening a door to a room directly across from the outside entrance to the lower level. Upon entering this room, the informant found sheets spread upon the floor with a large quantity of green vegetable material on top of the sheets. The informant described the material as partially leafy and partially ground up, dried, and tobacco-like (only greener), and as not appearing to contain any stalks or stems. The informant further stated that, upon observing this material, the informant concluded that it was marijuana, became frightened, and left without ever going upstairs. The informant stated familiarity with most of the vegetation grown in the region, and based on the material's appearance and odor, it was not any of the

legitimate materials grown in the area. In addition to the above, the informant described in detail how to get to the appellant's residence and the layout of the lower level of the house.

The officer stated that, in order to corroborate this information, he contacted the real estate agency renting the house and determined that the appellant and his family were the current tenants and were in the process of moving, their lease having expired on the first of October. The realtor told Lt. Riggs that she thought the appellant travelled for a living. Riggs said in the affidavit that, after receiving this information, he checked the appellant's prior criminal history, which revealed four prior marijuana-related arrests (three in Arkansas and one in Colorado). He stated that, of the two most recent arrests, a conviction was obtained in one case and charges were pending as a result of the other. Riggs stated he then contacted Sergeant Combs of the Arkansas State Police, who confirmed the status of the last two arrests. In addition, Sgt. Combs informed Lt. Riggs that, within the last ninety days, he had received independent information from authorities in Nebraska and Illinois, who informed him that, after raids on marijuana fields in those states, some of the persons arrested told them that a David Harper of Arkansas was the planner of the operation.

We find this affidavit sufficient under the totality of the circumstances test. The informant's information that the appellant was involved with marijuana was corroborated in part by the two independent reports from Illinois and Nebraska, both of which implicated the appellant as the planner of marijuana growing operations. It is unnecessary that every detail of an informant's tip, particularly a non-professional informant as we have here, to be corroborated, even under the more stringent *Aguilar* two-prong test. *See United States* v. *Ward*, 703 F.2d 1053 (8th Cir. 1983). In *Ward*, the court found that the police's observation of Ward entering into a barn, whose windows had been covered with black paper, described by the informant as the place he saw Ward growing marijuana, was sufficient corroboration to demonstrate the reliability of the informant's tip under the *Aguilar* test. Here, the house is not only independently determined to be occupied by the appellant, as the informant stated, but the appellant's current involvement with marijuana was independently shown. Probable cause requires only enough

evidence to show circumstances indicating there is a probability of criminal activity; a *prima facie* showing of such activity is not necessary, nor is it necessary to show such by evidence beyond a reasonable doubt or even by a preponderance of the evidence. *Gates*, 462 U.S. at 235. The informant's personal observation of the vegetable matter, standing in the community as a business person with no known ties to drugs, and the independent corroboration of the appellant's current involvement with marijuana, are sufficient under the totality of the circumstances test, or even under the old *Aguilar* test, to support a finding of probable cause.

The appellant makes much of the fact that the informant apparently entered the house when no one was at home, alleging that such an entrance could not be on legitimate business. The affidavit does not indicate whether anyone was at home. However, even if the informant had entered the house illegally, that fact cannot be used to strike down the warrant, as the constitutional safeguards of the fourth amendment do not apply to the actions of private citizens. *Smith* v. *State*, 267 Ark. 1138, 594 S.W.2d 255 (Ark. App. 1980).

The appellant has failed to demonstrate any reversible error, and therefore, we affirm his conviction.

Affirmed.

GLAZE, J., disagrees with point one of the majority opinion and, therefore, dissents.

Allen WILLIAMS and Chris WILLIAMS *v.* CHARLES SLOAN, INC. and Charles SLOAN, Individually

CA 85-392 706 S.W.2d 405

Court of Appeals of Arkansas
Division I
Opinion delivered April 9, 1986

Quiggle & Thompson, by: *John C. Wisner, III*, for appellants.

Rowland & Templeton, by: *Randell Templeton*, for appellees.

DONALD L. CORBIN, Judge. This case involves an appeal of a judgment notwithstanding the verdict or a judgment n.o.v. Appellants, Allen and Chris Williams, brought suit against appellees, Charles Sloan, Inc. and Charles Sloan, individually, for breach of contract. Appellants sought $92,000 for breach of express and implied warranties, $15,000 damages for misrepresentations, and $50,000 punitive damages. The case went to a jury which found in favor of appellants and awarded them $28,000. Appellees submitted a motion for a judgment n.o.v. arguing that there was no substantial evidence of the proper measure of damages. The motion was granted by the court on the ground that there was not substantial evidence to support the jury's verdict. Appellants appeal the judgment n.o.v. and assert that the jury's verdict was supported by substantial evidence. We reverse and remand.

Appellants entered into a contract with appellees for the sale of a new house. The house was to be constructed by appellees and completed by December of 1977. The house was not ready for occupancy at that time. Appellants, in reliance on appellees' representations, had informed their landlord that they would be moving out of their home. Although construction was not completed, appellants moved into the house sometime around the end of December. Before the sale of the house was closed,

appellants made a list of defects which they wanted appellees to fix and appellee signed this list at the time of the closing. In October of 1979 appellants filed this suit against appellees alleging that the listed defects and other latent defects had not been corrected by appellees.

Appellants presented testimony indicating that there were numerous defects in the construction of the house. Appellants testified that, among other things, the foundation was "wavy", there were hills and valleys in the floors, the walls and ceiling were cracking in places, the cabinets in the kitchen were coming off the walls, and there were cracks in the porch and driveway. The only evidence that appellant presented as to actual damages was the testimony of an appraiser who said that, in 1978, the difference in market value of the house as constructed with defects and the house as contracted for was $6,500. The appraiser also testified that it would cost more than $6,500 to repair the defects in the house. Specifically, James T. Johnson, the appraiser testified as follows: "I estimated that the house was worth $6,500 less than its fair market value in 1978. But I am not of the opinion that plaintiffs (appellants here) could spend $6,500 on the house and clear up the defects." The appraiser testified that the difference in market value at the time of trial was $8,150. This was the only evidence presented by appellants pertaining to actual damages. Appellees presented no evidence on the cost of repairing the defects nor on the difference in market value.

There are two methods of determining damages where the breach of a construction contract results in incomplete or defective construction. The Restatement (Second) of Contracts, § 348(2) (1979), defines these methods as follows:

> § 348. Alternatives to Loss in Value of Performance
>
> . . . .
>
> (2) If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on
>
> (a) the diminution in the market price of the property caused by the breach, or
>
> (b) the reasonable cost of completing performance or

of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him.

There are cases which indicate that the preferred measure of damages in breach of construction contract cases is cost of repairs, except in those cases where cost of repairs is unreasonable. The classic case is *Jacob & Youngs, Inc.* v. *Kent*, 230 N.Y. 239, 129 N.E. 889 (1921). There the buyer requested "Reading" pipe and another brand of pipe was used in the building. The court found that it would be unreasonable to tear down the building to install "Reading" pipe when the pipe used was of comparable quality. In that case the court allowed the difference in market value measure of damages.

The question in this case is whether the judgment n.o.v. can stand on the basis that appellants failed to present evidence of actual estimates of the cost of repairs. We find that the judgment n.o.v. cannot stand on that basis.

Appellees are arguing that appellants should not be permitted to recover damages computed by the difference in market value measure because appellants did not put on testimony estimating the exact cost of repairing the defects. However, we find that the courts' preference for the cost of repairs measure and the economic waste exception are devices to avoid the situation where the contractor is required to tear down a structure, or otherwise commit economic waste, to correct a defect that does not detract from the market value as much as it would cost to repair it. The preference for the cost of repairs measure and the exception do not limit the injured buyer to only one measure of damages. The court would be correct in applying the cost of repairs measure to determine the damages where the injured buyer asserts damages based on the difference in market value and the contractor presents evidence that the cost of repairing the defects would be less than the difference in market value. This was not done in the case at bar. In this case the injured buyers, appellants, presented evidence that the contract had been breached, that they had suffered damages as a result of that breach, and asserted, through the appraiser's testimony, that it would cost more to repair the defects than it would cost to compensate them for the difference in market value of the house as contracted for and with defects. Appellees did not present

evidence at the trial that cost of repairs was the correct measure of damages. Instead, appellees moved for a judgment n.o.v. following the presentation of evidence on the grounds that the proper measure of damages had not been used. Appellants presented evidence that the contract had been breached and utilized the difference in market value method of assessing the damages suffered because of the breach. If appellees believed that the difference in market value was not the proper measure of damages they had an opportunity to present evidence of cost of repairs. Appellees did not present evidence that appellants were not correct in their assertion that the difference in market value was the correct measure of damages in this case. Therefore, we find that appellees were not entitled to a judgment notwithstanding the verdict.

The jury awarded appellants damages of $28,000. We find that this amount was not supported by the evidence. The evidence presented at trial supported an award of $6,500, which is the difference in the market value in 1978, the time of the breach, between the house as constructed with defects and the house constructed in accordance with the contract. Implicit in ARCP Rule 59 is the trial court's power to order a new trial where the damages are excessive, unless the party in whose favor the damages were awarded agrees and consents to a remittitur. While this power is not specifically expressed in the rule, the court has this inherent authority. *Dierks Lumber & Coal Co.* v. *Noles*, 201 Ark. 1088, 148 S.W.2d 650 (1941).

For the reasons stated above we reverse the trial court's judgment n.o.v. and remand with instructions to reduce the jury's verdict to conform to the evidence, if appellants agree. If appellants do not agree to a remittitur we remand for a new trial.

Reversed and remanded.

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

Danny Ray WATTS *v.* Janice C. WATTS

CA 85-446 707 S.W.2d 777

Court of Appeals of Arkansas
Division I
Opinion delivered April 16, 1986

Highsmith, Gregg, Hart, Farris & Rutledge, by: *Josephine L. Hart*, for appellant.

Bennett & Purtle, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Danny Ray Watts and Janice C. Watts were divorced in August of 1984 by a decree which awarded custody of their minor child to the father with specific visitation rights in the mother in accordance with a property settlement agreement. In July of 1985, the chancellor entered an order modifying that decree, finding that the mother's petition for a change of custody should be granted because of a change in circumstances since the date of the original divorce decree which affected the best interest of the child. The appellant contends on appeal that the finding of the chancellor that there had been such a change in circumstances affecting the welfare of the child as would justify a modification of the custodial order is clearly against the preponderance of the evidence. We find no merit to this contention.

The principles governing the modification of custodial orders are well settled and require no citation. In all such cases the primary consideration is the best interest and welfare of the child and all other considerations are secondary. Custody awards are not made or changed to gratify the desires of either parent, or to reward or punish either of them. In determining

matters of child custody, a chancellor has broad discretion, which will not be disturbed unless manifestly abused. While the chancery court retains continuing power over the matter of child custody which has been awarded to one of the parents, it does not follow that changing that status should be made without proof of a subsequent material change in the circumstances affecting the welfare of the child. The original decree is a final adjudication that one parent or the other was a proper person to have care and custody of the child and before that order can be changed there must be proof of material facts which were unknown to the court at that time or that the conditions have so materially changed as to warrant modification and that the best interest of the child requires it. The burden of proving such a change is on the party seeking the modification. *Sweat* v. *Sweat*, 9 Ark. App. 326, 659 S.W.2d 516 (1983).

It is also well settled that although this court reviews chancery cases *de novo* on the record, the findings of the chancellor will not be disturbed unless clearly against a preponderance of the evidence. Since the question of preponderance of the evidence turns largely on the credibility of the witnesses, we defer to the superior position of the chancellor. ARCP Rule 52(a); *Callaway* v. *Callaway*, 8 Ark. App. 129, 648 S.W.2d 520 (1983). This deference to the chancellor is even greater in cases involving child custody. In those cases a heavier burden is placed on the chancellor to utilize to the fullest extent all of his powers of perception in evaluating the witnesses, their testimony, and the child's best interest. We have often stated that we know of no cases in which the superior position, ability, and opportunity of the chancellor to observe the parties carry as great a weight as those involving minor children. *Calhoun* v. *Calhoun*, 3 Ark. App. 270, 625 S.W.2d 545 (1981).

Appellant first contends that the chancellor erred in finding a material change in circumstances warranting a change of custody. The appellee testified that, although the decree awarded her rights to visit the child at specific times and during the summer months, the appellant had systematically interfered with and refused her the enjoyment of her rights of visitation. She testified that when she threatened to seek enforcement of those rights, the appellant moved the child to the State of Arizona without informing her of his intentions or whereabouts. She was

unable to see the child for a period of four or five months and even had difficulty communicating with the child by telephone. In *Phelps* v. *Phelps*, 209 Ark. 44, 189 S.W.2d 617 (1945) our court recognized that a substantial denial of court-awarded visitation was a factor to consider in such cases and might constitute the required material change in circumstance.

The appellee also offered testimony that, although the appellant had been entrusted with the primary care of the child, he had not fulfilled that obligation. There was testimony that appellee's mother primarily cared for the child until she was removed to Arizona. The child corroborated that testimony and stated that while in Arizona she was primarily in the care of other relatives. Failure to discharge court-entrusted care and custody of a minor child is also a factor which a chancellor might consider in determining whether there was a material change in circumstances as well as whether a change in custody was required in the best interest of the child.

The appellee further testified that at the time the original decree was entered she agreed to the custodial order because she had not yet completed her course of studies at Arkansas State University. She stated she agreed to that order only for such time as required to obtain her degree and find suitable employment.

The appellant denied any interference with the visitation rights, that the agreement for custody was temporary, and that he had not cared for the child. The evidence on these issues was in sharp conflict, as was the evidence of the suitability of the surroundings in which each party would place the child, their respective past and present abilities to properly care and provide for the child, and which parent would be better able to foster the child's welfare.

The main thrust of appellant's argument, however, is that the chancellor erred in finding that the change of custody was in the best interest of the child because of appellee's immorality. He argued that, at the time the decree was entered, the appellee had lived with one man and, at the time of the hearing to modify the order, was cohabiting with another. He argues that she had been so sexually promiscuous during the entire period that it was inconceivable that placing the child in her custody would foster the best interest of the child, citing *Digby* v. *Digby*, 263 Ark. 813,

567 S.W.2d 290 (1978). The only evidence on that issue was appellee's candid admission that at or about the time the divorce was granted she had an adulterous affair with a person named Don. She further testified, however, that within a week of the date the decree was entered she had realized her mistake and broken off that affair. The evidenced introduced at the hearing included a letter from appellee to appellant, dated September 10, 1984, in which she asked his forgiveness, stating, "None of it was worth it. I've made a big mistake. I swear that Don has been the only one. I've prayed to God everyday to take my life—to ease the pain of what I have done." She expressed those same sentiments to the court, stating, "I have regretted it sorely and will all my life. I can't go back and change it, but I can go back and change some things and I can try." She also admitted that she began sharing an apartment with a person named Charles the week before the hearing, but stated, "[W]e plan to be married the end of this week or next week. He is in the process of getting a divorce and it should be final either the fifth of the month or soon thereafter." She denied involvement with any other men and there was no proof to the contrary.

The decision in *Digby*, and those in *Bone* v. *Bone*, 12 Ark. App. 163, 671 S.W.2d 217 (1984) and *Scherm* v. *Scherm*, 12 Ark. App. 207, 671 S.W.2d 224 (1984), are distinguishable from the present case in several material respects. In those cases the appellants had casual sexual relationships with a number of different men over short periods of time, none of them saw anything morally wrong with their conduct, and none intended to change their lifestyle. Also in those cases the court relied on additional facts which indicated that the custodial parent had otherwise failed to properly care for the children. The custodial awards in those cases were not intended as punishment for an erring parent, but based on a determination that the conduct of a custodial parent was detrimental to the best interest of the child. Although our courts have never condoned such conduct, it has always recognized a distinction between human weakness leading to isolated acts of indiscretion, which do not necessarily adversely affect the interest of a child, and that moral breakdown leading to promiscuity and depravity, which render one unfit to have custody of a minor. *Harris* v. *Gillihan*, 226 Ark. 19, 287 S.W.2d 569 (1956); *Blain* v. *Blain*, 205 Ark. 346, 168 S.W.2d

807 (1943). The chancellor was in a superior position to assess the sincerity of appellee's atonement, her intent to immediately marry Charles, and the effect of these transgressions on the welfare of the child. With his continuing jurisdiction, he is in a position to, and should, verify those expressions of sincerity by monitoring future conduct. Based on our review of the record and giving due deference to the chancellor's superior position, we cannot conclude that the action taken is against a clear preponderance of the evidence or that there was an abuse of discretion.

Affirmed.

CLONINGER and CORBIN, JJ., agree.

Clifton and Beatrice BROWN *v.* ARKANSAS PUBLIC SERVICE COMMISSION

CA 86-82 707 S.W.2d 780

Court of Appeals of Arkansas
En Banc
Opinion delivered April 16, 1986

Greg Stephens, for appellant.

Art Stuenkel and *Gilbert L. Glover*, for appellee, Public Service Commission.

PER CURIAM. On March 6, 1986, this court denied appellants' petition for immediate consideration of an appeal from orders of the Arkansas Public Service Commission, which denied appellants' request to intervene in Commission Docket No. 85-

299-U. This court left pending appellee's Motion to Dismiss the appeal in order to allow all parties the opportunity to respond thereto.

The notice of appeal of Commission Orders No. 3 and No. 4 was filed even though appellants had not sought a rehearing of Order No. 3 pursuant to Ark. Stat. Ann. Section 73-229.1(a) (Supp. 1985). Further, appellants' notice of appeal was filed prior to a decision by the Commission on appellants' petition for rehearing of Order No. 4.

Ark. Stat. Ann. Section 73-229.1 (Supp. 1985) is mandatory, and strict compliance with its provisions is necessary before any order of the Public Service Commission may be reviewed by this court. Accordingly, the appellee's motion to dismiss is granted.

Appeal dismissed.

WALNUT HILL TELEPHONE COMPANY *v.* ARKANSAS PUBLIC SERVICE COMMISSION

CA 85-176 709 S.W.2d 96

Court of Appeals of Arkansas
En Banc
Opinion delivered April 23, 1986

[redacted]

[redacted]

James M. Caplinger, Chartered, by: *James M. Caplinger* and *James M. Caplinger, Jr.*; and *Prince & Ivester, A Professional Corporation*, by: *Hermann Ivester*, for appellant.

Lee McCulloch, for appellee.

LAWSON CLONINGER, Judge. This is an appeal from orders of the Arkansas Public Service Commission dated October 25,1983, and April 10, 1985, in Commission Docket No. 83-010-U.

On January 17, 1983, Walnut Hill Telephone Company filed with the Commission an application requesting authority to increase its existing rates for intrastate telephone services. The total increase in annual revenues requested in the Company's application was $596,913.00, later reduced to $580,886.00 by amended application.

Pursuant to Ark. Stat. Ann. § 73-217(b) (Supp. 1985), the Company petitioned for an interim rate increase, which the Commission initially denied. On April 27, 1983, the Commission approved an interim increase of $145,321.00 in annual revenues. The case proceeded to full hearing on the merits before the Commission. The parties stipulated that Walnut Hill's rate base was $6,021,879.00. The Commission awarded the Company an overall rate of return on that rate base of 11.68%. One unique aspect of the method employed to derive that return is that, instead of utilizing the Company's actual capital structure, which is 13.8% common equity and just over 85% long-term debt, the PSC used a hypothetical capital structure suggested by the Company consisting of 51% long-term debt, 41% common equity, and the remainder in preferred stock and customer deposits. Utilizing the upper end of the PSC staff's common equity cost calculation and the Company's hypothetical capital structure, Walnut Hill's overall rate of return was derived as follows:

Capital Component	Capitalization Ratio	Cost	Weighted Cost
Long-term Debt	51.00%	11.14%	5.68%
Preferred Stock	7.90%	6.00%	.47%
Common Equity	41.00%	13.30%	5.45%
Customer Deposits	.10%	6.00%	.01%
Totals	100.00%		11.68%

The Company's required earnings on its rate base were calculated to be $703,355.00. Based upon the Commission's calculation of test year net operating income of $646,596.00, the Commission found that the Company had a gross revenue deficiency of $112,540.00 and an overall revenue requirement of $1,639,949.00.

On October 25, 1983, the Commission issued Order No. 9 denying the Company's requested increase of $580,886.00 and rejecting the PSC staff's recommendation of an increase of $74,331.00, but approving an annual rate increase of $112,540.00. Following a rehearing, the Commission issued Order No. 18 affirming the findings of Order No. 9. Walnut Hill brings this appeal from Orders 9 and 18.

Our review of this matter is limited and is governed by Ark. Stat. Ann. § 73-229.1 (Repl. 1979), which states:

> The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. The review shall not be extended further than to determine whether the Commission's findings are so supported by substantial evidence, and whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violated any right of the petitioner under the laws or Constitution of the United States or of the State of Arkansas.

Therefore, this court can only determine whether: (1) the Commission's findings as to the facts are supported by substantial evidence; (2) the Commission has regularly pursued its authority; and (3) the order or decision under review violated any right of the petitioner under the laws or constitutions of the United States or the State of Arkansas. *Southwestern Bell Telephone Co.* v.

Arkansas Public Service Commission, 267 Ark. 550, 593 S.W.2d 434 (1980). In reviewing an order of the Public Service Commission, the court may not pass upon the wisdom of the Commission's actions or say whether the Commission has appropriately exercised its discretion; however, it is for the court to say whether there has been an abuse of discretion, even though considerable judicial restraint should be observed in finding such abuse. *Russellville Water Co.* v. *Arkansas Public Service Commission*, 270 Ark. 584, 606 S.W.2d 552 (1980). This court on appeal is not concerned with the methodology used by the Commission in arriving at the result as long as its finding is based on substantial evidence. *General Telephone Co.* v. *Arkansas Public Service Commission*, 272 Ark. 440, 616 S.W.2d 1 (1981). The court must determine whether the Commission's order violates appellant's constitutional rights by fixing a rate which is so low as to amount to confiscation of its property. *Arkansas Public Service Commission* v. *Continental Telephone Co.*, 262 Ark. 821, 561 S.W.2d 645 (1978); *City of Fort Smith* v. *Southwestern Bell Telephone Co.*, 220 Ark. 70, 247 S.W.2d 474 (1952). The result reached in utility rate cases, not the method employed, controls; and judicial inquiry is concluded if the decision is supported by substantial evidence and the total effect of the rate order is not unjust, unreasonable, unlawful or discriminatory. *Southwestern Bell, supra*; *Arkansas Public Service Commission* v. *Lincoln-Desha Telephone Co.*, 271 Ark. 346, 609 S.W.2d 20 (1980).

■ In *Smyth* v. *Ames*, 169 U.S. 466 (1898), the United States Supreme Court established the minimum due process requirements for state regulation of utility rates. In that decision the Court stated that a state's utility commission must first determine the fair value of the property being used by the utility for the convenience of the public. The Court held that after determining a percentage "fair return" on the rate base the commission must calculate a rate schedule that will allow the company to realize revenues sufficient to earn that fair return. However, *Smyth* gave little guidance to state utility commissions on the difficult question of what factors should be considered in computing the rate base or, important to the case before us, in establishing a fair return.

■ In 1923, the Supreme Court enumerated a number of

factors regulatory commissions should consider in determining a rate of return. In general, the Court found that a utility was entitled to a return "equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties . . . ." *Bluefield Water Works & Improvement Co.* v. *Public Service Commission of West Virginia*, 262 U.S. 679, 692 (1923). These guidelines were refined in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944). Significantly, the standard of regional or geographical comparisons set out in *Bluefield* was omitted, and the Court stated that comparisons should be made with other companies having corresponding risks. In so doing, the Court stated:

> From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. [citation omitted] By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. [citation omitted] The conditions under which more or less might be allowed are not important here. Nor is it important to this case to determine the various permissible ways in which any rate base on which the return is computed might be arrived at. For we are of the view that the end result in this case cannot be condemned under the Act as unjust and unreasonable from the investor or company viewpoint.

Hope, *supra*, at 603.

On January 28, 1982, Walnut Hill entered into a Telephone Loan Contract with the Rural Electrification Administration ("REA") and the Rural Telephone Bank ("RTB"), the latter being a federal agency providing financing for rural telephone companies under the direction of the REA. The loan contract enabled Walnut Hill to refinance existing indebtedness, which carried with it interest rates in excess of twenty percent, at more

reasonable rates in the eleven percent range. The loans also have enabled the Company to commence or complete much-needed improvements in service.

One specific provision of the loan contract has given rise to the controversy addressed by the first point of appellant's brief, specifically section 4.16, which reads as follows:

> *Obligation to Seek Recommended Tariff.* The Borrower shall, as soon as possible after the construction of any major portion of the facilities financed by the Loan is completed, or sooner, if requested by the Administrator, (a) seek and use its diligent best efforts to obtain all necessary regulatory body approvals for a tariff which (1) will provide for all one-party service, (2) does not include mileage or zone charges, and (3) is designed to produce net income or margins before interest at least equal to 150 per centum of the interest requirements on all of the Borrower's outstanding and proposed loans, and (b) to place such tariff into effect as soon as permitted by applicable laws and regulations.

Walnut Hill contends, for its first point for reversal, that subsection (a)(3) requires that the Commission set rates sufficient to produce a times interest earned ratio ("TIER") of at least 1.5. Simply put, a TIER is an indicator of a borrower's ability to meet interest expenses. A TIER is a measure of interest coverage reflective of how many times interest obligations are covered by funds available to pay that interest. Therefore, a company with a TIER of 1.0 theoretically has earnings sufficient to meet its interest expenses and nothing more. It follows that the higher a company's TIER, the better able it is to meet its obligations. Walnut Hill requested that the Commission set rates sufficient to produce a TIER of 1.75, and contends that the Commission was bound by the aforementioned provision of the loan contract between Walnut Hill and the REA to set rates sufficient to produce a TIER of at least 1.5. The Commission refused to set rates designed to accomplish any specific TIER and rejected the argument that the Commission was legally bound to set rates because of the terms of section 4.16 of the loan contract.

Both the Company and the Commission agree that use of a TIER as a rate-making device is virtually unprecedented

in the case of an investor-owned utility. The testimony tended to show, and our research indicates, that use of a TIER by which rates may be set is most common in the cases of cooperative associations, which are by definition owned by their rate-payers and to whose benefit any excess revenues recovered through rates would accrue. It is notable that the parties agree that rates producing a TIER of 1.5 for Walnut Hill would yield a return on equity to Company stockholders of 51.5%. The record reflects that a TIER is simply one aspect of a utility company's financial health and does not take into account all aspects of a company's costs of delivering utility service to its customers. Use of a TIER as a ratemaking tool is not a common practice in cases of investor-owned utilities, and any method used to set rates should account for all aspects of a public utility's costs of delivering utility service to its customers. The Public Service Commission has wide discretion in choosing its approach to rate regulation, and the PSC is not bound to any particular formula. *Southwestern Bell, supra.* We cannot say that the Commission's refusal to set rates based on a TIER, or designed to yield a TIER of at least 1.5 as requested by the Company, was arbitrary, unreasonable, or unsupported by substantial evidence.

Walnut Hill also contends that the Commission is pre-empted in this matter by both federal and state law. We do not agree.

In support of its position that the PSC is bound to set rates based on the contract between the Company and the REA, Walnut Hill relies on Ark. Stat. Ann. § 73-202.2 (Supp. 1985), which provides in pertinent part as follows:

> Jurisdiction of the said Commission shall not extend to loans made or guaranteed by the Rural Electrification Administration of the United States Department of Agriculture, the Federal Financing Bank, or such other agency or instrumentality as may be established by the United States Government for these purposes. . . .

Walnut Hill cites the following language from 7 U.S.C. § 948(b)(4) (1976) in further support of its position:

> Loans shall not be made under this section unless the Governor [the administrator of REA] of the telephone

> bank finds and certifies that in his judgment . . . the borrower has the capability of producing net income or margins before interest at least equal to 150 per centum of the outstanding interest requirements on all of its outstanding and proposed loans, or such higher per centum as may be fixed from time to time by the Telephone Bank Board. . . .

A fair reading of Section 4.16 of the loan contract is that Walnut Hill simply obligated itself to *seek* rates designed to achieve a TIER of 1.5. The evidence shows that, in the view of the REA, the Company had fulfilled its obligation. We cannot say that the Commission was in any manner attempting to exercise jurisdiction over the loan agreement in question. Instead, the record is clear that the PSC was not dictating the terms, conditions, or performance of any party to the contract. We cannot read Ark. Stat. Ann. § 73-202.2 (Supp. 1985) as broadly as urged by Walnut Hill; were the Company's view of 73-202.2 correct, any utility could, by simply contracting with the REA, divest the PSC of control over utility rates.

Neither are we persuaded that 7 U.S.C. § 948(b)(4) mandates that the PSC set rates based upon a contract between an Arkansas utility and an agency of the federal government. The language of the Act speaks of the RTB's assessment of the borrower's *ability to achieve* a 1.5 TIER. In refusing to utilize a TIER as a method by which to set rates, the Commission was not interfering with Walnut Hill's relationship with the Federal agency. Bryan Howerton, a spokesman for the governor or administrator of the REA, testified that, in the view of that agency, Walnut Hill had fulfilled its contractual obligation to the agency.[1] While the governor of the Telephone Bank may not advance funds at some time in the future to Walnut Hill, the record does not demonstrate that he will not because of a perceived inability on the part of the Company to achieve an acceptable TIER. The evidence does not demonstrate that the Company's access to REA funds will be foreclosed unless the Commission sets rates specifically designed to achieve a TIER of

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[1] Howerton testified that the governor of the RTB and the administrator of the REA are the same person.

at least 1.5. Moreover, we do not see that the Commission's refusal to set rates specifically designed to allow the Company to achieve a TIER of 1.5 renders the Company incapable of achieving that TIER.

Walnut Hill's second point for reversal is that the rate of return authorized by the PSC is unreasonable, confiscatory, arbitrary, and not based upon substantial evidence or sufficient findings of fact. Specifically, the Company objects to the return on the equity component of the overall rate of return as being too low and not reflective of Walnut Hill's peculiar circumstances. The Company argues that, if a TIER is deemed inappropriate as a means by which its rates should be set, the application of a more traditional rate-making formula by the Commission would also be inappropriate.

The Commission adopted the rate of return methodology proposed by staff, which is known as the weighted cost of capital approach. In this methodology, the various components of a company's capital structure (here, long-term debt, preferred stock, common equity, and customer deposits) are weighted as to their costs with respect to their relative proportions in the total capital structure and then added together to obtain an overall cost figure for the entire capital structure. The Company's actual capital structure is not in dispute. Both the staff and the Company agree on the cost of all elements of the capital structure except the common equity component. The Commission set the return on equity at 13.3%, the high end of a range suggested by staff witness Joseph Chrisman.

Chrisman arrived at his return on common equity recommendation by use of what is known as the "discounted cash flow" ("DCF") model, which attempts to derive an allowable return on equity based upon an estimate of investors' expectations.[2] The DCF formula involves a mathematical computation which takes into account current dividends per share, current market price per share, and the expected growth rate in dividends per share;

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[2] The DCF model is mathematically expressed as follows: $K = (D/P) + g$, where "K" is the investors' required rate of return (cost of equity), "D" is the expected dividend, "P" is the current market price of the stock, and "g" equals investors' long-term growth expectation.

the result is a percentage figure representing the required return on equity for the particular utility under consideration.

The DCF formula depends on market information for its application. This presents a problem with companies such as Walnut Hill, whose stock is not market-traded. Common regulatory practice in situations such as this is to utilize information from other market-traded companies engaging in the same type of utility business as a model or proxy. It is the execution of this practice in these circumstances about which Walnut Hill complains.

The staff witness utilized eight large, market-traded companies, none of which provide telephone utility service in Arkansas.[3] Utilizing information from financial publications, the staff witness suggested that the Commission allow Walnut Hill a return on equity of 13.1%, which was the midpoint of a range derived from the eight market-traded companies' returns of 12.92% to 13.3%. The PSC made a finding of fact that Walnut Hill is "more risky than some but less risky than none" of the proxy companies and, based on that determination, set Walnut Hill's return on equity at the top end of the range derived from the calculation.

The Company contends that the adoption by the PSC of the top end of the staff's suggested return on equity range is not justified, pointing out that there are wide disparities between Walnut Hill and the eight market-traded companies from which witness Chrisman derived his return on equity component. The Company contends that the common equity cost component should be 17.25%, as suggested by its witness, Dr. Kenneth Hubbell. Use of this figure instead of the 13.3% figure employed by the Commission would result in a calculation of Walnut Hill's overall rate of return to be 13.23% rather than the 11.68% allowed by the Commission. Company witness Hubbell, however, presented very little data justifying his suggested return on equity, but instead stated simply that his figure was based on his perception of Walnut Hill's risk position.

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[3] The companies were: Bell Canada, Cincinnati Bell, Continental Telephone, GTE, Mid-Continent Telephone, Rochester Telephone, Southern New England Telephone, and United Telecommunications.

Walnut Hill forcefully argues that other Arkansas companies similarly situated to Walnut Hill should be utilized in determining Walnut Hill's return on equity, and it presented in its post-hearing brief to the Commission a list of eight small investor-owned utilities in Arkansas which are quite similar in many respects to Walnut Hill. However, there is no evidence that these companies' stocks are market-traded or that there are any market data available for them. Likewise, there is no evidence in the record as to which particular methodology was utilized in determining those companies' returns on equity or whether those figures listed by Walnut Hill were simply calculated or were actually awarded by the PSC. For these reasons alone, the Commission did not err in declining to utilize the evidence offered by Walnut Hill to determine the Company's rate of return. The methodology as utilized in this case is appropriate under the circumstances, and we cannot say that the result it yields is confiscatory, because the orders provided for rates designed to produce sufficient revenues to cover debt service, meet legitimate operating expenses, and provide a return on the shareholders' investment.

Following the principles set forth in the *Smyth*, *Bluefield*, and *Hope* decisions, the primary objective in ratemaking is to set rates so that the utility will be able to meet its legitimate operating expenses as well as to pay creditors and provide dividends to shareholders. The utility's return should be sufficient to maintain its financial integrity so that it might attract new capital. *Hope*, *supra*. There is substantial evidence in the record before us that this primary objective was met in this case.

In its third point, the Company correctly directs our attention to the fact that the Commission utilized an erroneous intrastate income tax expense in calculating the revenue requirement. The Commission concedes that an erroneous calculation was utilized, and the Commission agrees that the correct tax expense calculation is that urged by the Company. We therefore modify, pursuant to Ark. Stat. Ann. § 73-229.1(b) (Supp. 1985), the revenue requirement calculation as follows to include an allowance for the correct income tax expense:

Description	Corrected Amounts
Total Rate Base	$6,021,879
Operating Revenues	1,527,409
Operating Expenses	894,180
Net Operating Income	$ 633,229
Required Return on Rate Base	11.68%
Required Earnings on Rate Base	703,355
Earnings Deficiency	70,126
Gross Revenue Conversion Factor	1.98275
Gross Revenue Deficiency	139,042
Revenue Requirement	1,666,451

The Arkansas Public Service Commission shall permit Walnut Hill Telephone Company to file tariffs reflecting rates designed to produce revenues of $1,666,451.00.

Finally, the Company urges that, because a hypothetical capital structure was utilized, a "synchronizing" hypothetical income tax expense adjustment should be made. As noted previously, the Commission adopted a hypothetical capital structure for calculating revenues for Walnut Hill. The use of a hypothetical capital structure was found by the Commission to be reasonable "[i]n order to blunt the revenue impact of the Company's massive borrowing." The practical effect of this action is to generate a portion of the overall rate of return by imputing a larger common equity component (which is higher in cost than debt) into the weighted cost of capital calculation. In turn, this raises the overall cost of capital (and hence the overall rate of return) from 11.39%, utilizing the actual capital structure, to 11.68% with the hypothetical structure. As stated by the Commission, one reason for this action was to "provide incentive for the Company to restructure its capital sources to increase the amount of equity."

The record reflects that a hypothetical capital structure is normally utilized in instances where a company has a relatively low ratio of debt to equity, with a hypothetical interest expense being included in the revenue requirement calculation. Since debt is generally lower in cost than equity and carries with it the benefit

of lowering income tax expense (because interest expense is deductible), this action arbitrarily lowers the amount of income tax expense which must be borne by ratepayers. The actual tax still must be paid by the company; however, it is not recognized as a recoverable expense. Here, the reverse is true: a hypothetical capital structure was utilized to benefit the Company by artificially increasing the amount of revenues recoverable from consumers by overstatement of the equity component of the Company's capital structure. The hypothetical overstatement of the equity component results in the hypothetical understatement of the debt component of the capital structure. The resulting hypothetical understatement of interest expense would increase the hypothetical tax liability of the Company. The problem arises with regard to the amount of income tax expense to be included in the revenue requirement calculation.

The question is whether a hypothetical lower interest expense should be imputed to Walnut Hill, resulting in a higher hypothetical tax liability, which is in turn included in the revenue requirement recoverable from ratepayers. We think not. The PSC can adjust virtually any expense in setting rates which are just and reasonable for both a utility and its customers. The use of a hypothetical capital structure should not foreclose the Commission's duty to utilize whatever reasonable figures, actual or hypothetical, it deems necessary in appropriately exercising its discretion. The PSC is free, within the ambit of its statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. *Southwestern Bell*, *supra*, at 567, citing *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575 (1942). This is especially appropriate where, as here, the hypothetical capital structure was used as a tool by which additional revenues could be generated for the benefit of the Company. Walnut Hill's actual low income tax expense, which results from its high interest expense, was properly utilized as a known component of the revenue requirement calculation and is supported by substantial evidence.

The decision of the Commission is modified with respect to utilization of the correct income tax expense in calculating the revenue requirement of the Company, as noted above, and the orders appealed are in all other respects affirmed.

Affirmed as modified.

GLAZE, J., concurring.

CORBIN, J., not participating.

TOM GLAZE, Judge, concurring. As stated in the majority opinion, the United States Supreme Court has given guidance as to the considerations regulatory commissions should take into account when determining a just rate of return for a public utility. *Bluefield Water Works & Improvement Co.* v. *Public Service Commission of West Virginia*, 262 U.S. 679, 692 (1923); *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944). Forty-two years after the *Hope* decision, however, it is unclear whether the *Bluefield* standard that a utility should be given a return generally equal to that being made by similarly risky businesses "in the same general part of the country" remains applicable. As the majority opinion points out, *Hope* did not mention the standard of regional or geographical comparison as a consideration, perhaps because of ambiguities in the *Bluefield* decision.

I am of the opinion that it would be a reasonable and logical consideration for public utilities and the PSC alike to find regional comparables in determining an appropriate return on equity for a public utility. To me, it is an unwieldy approach to utilize companies like those used in this case because they are giants in the telephone industry and are located in distant parts of this country and beyond. Except for the fact that they provide telephone service to the public, those companies share very few similarities with Walnut Hill.

If the *Bluefield* requirement of regional or geographical comparison is the rule today, Walnut Hill makes a good argument that the PSC failed to comply with *Bluefield*. But even if the *Bluefield* standard continues to be one of the factors to be considered, the record before this Court is not sufficient to show the Company met its burden in giving the Commission valid alternatives from which a return on equity could be computed. The Arkansas companies presented by Walnut Hill in its post-hearing brief to the Commission were not shown to be relevant or workable alternatives to those used by the Commission, because the record does not reflect *how* those Arkansas companies'

returns on equity were derived. Logically, it could well be that the same methodology used in the instant case was used when those Arkansas companies' rates were determined. In this respect, the proof falls short in revealing how their returns on equity were calculated by the Commission. Indeed, we cannot be certain from the evidence that those returns were actually awarded by the Commission or simply achieved by those companies through good management economies and efficiencies.

The Arkansas cases cited by the majority are clear as to the limited scope of our inquiry in reviewing a decision of the Public Service Commission. So long as the result achieved is supported by substantial evidence and cannot be said to be unjust, unreasonable, unlawful or discriminatory, or violative of the utility's rights under the laws or Constitutions of the United States or State of Arkansas, judicial inquiry is at an end. *Arkansas Public Service Commission* v. *Lincoln-Desha Telephone Co.*, 271 Ark. 346, 609 S.W.2d 20 (1980); *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission*, 267 Ark. 550, 593 S.W.2d 434 (1980). However, even under this limited scope of review, our appellate courts would be bound by U.S. Supreme Court case law that has articulated and established guidelines to follow when, as here, a fair rate of return for a public utility must be determined. Clearly, if the regional or geographical comparison standard of *Bluefield* is still viable, the Commission did not follow it. Nevertheless, Walnut Hill had the burden of offering valid geographical comparisons if such existed and, from my review, the Company failed to do so. As I previously indicated, I am somewhat doubtful concerning whether the regional or geographical comparison standard of *Bluefield* remains viable after the *Hope* decision.[1] While it may be argued that the *Bluefield* geographical standard is no longer required, I believe that standard employs a common sense approach and should be a part of any rate-making consideration whenever possible.

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[1] At least one writer is of the opinion that the *Hope* decision represents a restatement of the *Bluefield* decision, and he notes specifically that the *Bluefield* standard of regional comparisons was omitted by the U.S. Supreme Court in *Hope*. Charles F. Phillips, Jr., *The Regulation of Public Utilities* (Arlington, Va.: Public Utilities Reports, Inc., 1985), p. 336.

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