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Bridgette Ann KENNEDY *v.* Jerry Millard KENNEDY

CA 86-181 715 S.W.2d 460

Court of Appeals of Arkansas
Division I
Opinion delivered September 17, 1986

Skokos, Simpson, Buford, Graham & Rainwater, P.A., for appellant.

Hubert W. Alexander, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Bridgette Ann Kennedy Van Nostrand appeals from an order of the chancery court enlarging the visitation rights of Jerry Millard Kennedy with their minor child. She contends that the order was an unauthorized change of permanent custody. We agree.

Jerry Millard Kennedy and Bridgette Ann Kennedy were divorced in 1981 by a decree which awarded permanent custody of a five-month-old child to its mother with defined reasonable visitation in the father. The custodial order was modified by agreement twice in 1982. By an order dated December 14, 1982, permanent custody of the child was placed in the mother subject to the father's visitation on alternate weekends and during a six-week period during the summer. The father was ordered to pay $30.00 per week for support of the child.

In April of 1985 the father filed a petition seeking a change of permanent custody based on allegations of material changes in circumstances which affected the best interest of the child. After a hearing on that petition the chancellor expressly found that there had been no such material change in circumstances as would warrant a change in custody but that the child's best interest required an enlargement of the father's visitation to Monday through Friday for three weeks plus one weekend each month. The mother's period of custody was reduced to Monday through Friday one week per month and three weekends per month.

There was no evidence that the mother was not adequately tending to the child's physical and emotional needs or that her home was not stable and financially secure. Both parties agreed that the mother's arrangements for the child's kindergarten and day care were satisfactory and that the child was well cared for while in her custody. There was evidence that the appellee had remarried and divorced twice since 1981, that he had slept with women in his home while the child was present and permitted

others to do so. The appellee asserted that due to his vastly improved financial condition he was able to hire additional employees, work less himself, and therefore spend more time with the child than the mother was presently able to spend.

The appellant brings this appeal relying on our well-settled rule that a change of custody cannot be ordered unless there had first been established a material change in the circumstances which affects the child's best interest or a showing of facts affecting that best interest which were not presented to or known by the court at the time the custodial custody order was entered. *Watts* v. *Watts*, 17 Ark. App. 253, 707 S.W.2d 777 (1986); *Greening* v. *Newman*, 6 Ark. App. 261, 640 S.W.2d 463 (1982); *Harris* v. *Tarvin*, 246 Ark. 690, 439 S.W.2d 653 (1969). She argues that the court's order is in fact a change in permanent custody contrary to our announced rule rather than a mere modification of visitation rights. The appellee does not contend that the chancellor's finding that there was not such a material change affecting the interest of the child which would warrant a change in custody was erroneous. He contends that the court was merely exercising its discretion to make such adjustments in visitation as recent circumstances may have indicated. *Robbins v. Robbins*, 231 Ark. 184, 328 S.W.2d 498 (1959); *Myers v. Myers*, 226 Ark. 632, 294 S.W.2d 67 (1956). The narrow issue for us to decide is whether the order appealed from constitutes an impermissible change of permanent custody or a mere clarification or modification of visitation rights.

We agree with the statement of the Texas court in *Leaberton* v. *Leaberton*, 417 S.W.2d 82 (Tex. Civ. App. 1967), that it is as impossible to draw an exact line marking a change from one color to another in a rainbow as it is to draw an exact line marking the change from visitation to a modification of custody in cases involving children. There is a time, however, when the difference is apparent and must be recognized. We shall not attempt to point out the exact dividing line distinguishing the two but have no doubt that this case involves a change in permanent custody and not a mere change in visitation privileges regardless of the terminology used in the order.

Nor can we conclude that the finding that the welfare of the child would be served by increasing the appellee's visitation is

well founded. The main thrust of appellee's testimony was that he had recently made such an advantageous contract with the Little Rock Air Force Base that he was now able to hire others to do much of the work he once did. This he testified would permit him to spend more time with the child in the afternoons than the mother now does. The mother was working at two jobs to supplement the $30.00 per week the father contributed to the child's support. There was no criticism of the kindergarten and day care she provided for the child at her church. If it was deemed better for the child not to be in a day care, which no one contended, that result could as readily have been obtained by ordering an increase in child support in lieu of hiring the additional workers at the father's place of business.

In view of the evidence and the chancellor's finding that there had been no material change in circumstances warranting a change in custody, we hold that the order of the court was an unauthorized change of custody which should be reversed.

Reversed.

GLAZE and MAYFIELD, JJ., agree.

Darwin T. HALL and Mary M. HALL *v.* HAWKINS OIL & GAS, INC.

CA 85-321 715 S.W.2d 462

Court of Appeals of Arkansas
Division II
Opinion delivered September 17, 1986
[Rehearing denied October 22, 1986.]

Loh, Massey & Yates, Ltd., by: *Howard C. Yates*, for appellant.

Dorsey Ryan, for appellee.

TOM GLAZE, Judge. Appellee, Hawkins Oil & Gas, Inc., brought suit against the appellants for recovery of money paid by mistake in excess of an agreed per-acre price for an oil and gas lease. The trial court found that the overpayment was not intentional but was the result of a mistake in the calculation of the number of acres and accordingly granted judgment for the appellee. We find the chancellor's ruling was in error and reverse.

Natural Energy Research, Inc., through its president, procured the subject oil and gas lease from the appellants. Natural Energy later assigned the lease to Hawkins Oil & Gas in consideration of the sum of money Natural Energy had paid appellants for it. The written lease agreement prepared by Natural Energy and executed by appellants recited that the land contained 390 acres when in fact it contained only 273.05 acres. The agreed price was $50.00 per acre.

The president of Natural Energy, a former abstracter and legal secretary, was familiar with legal descriptions. She initially had the real estate records checked by an employee, who discovered that the subject land contained 273.05 acres. Even though the correct acreage (273.05) was known, that same employee personally supervised the preparation of the lease which erroneously reflected 390 acres. After Natural Energy assigned the lease to appellee, the appellee discovered the error in acreage, causing it to file this lawsuit. At trial, the parties stipulated that appellants received $5,847.50 more than the

agreed consideration because of the error.[1] The trial court rendered judgment in that amount to appellee.

Appellants argue that, although they were unaware of the mistake, appellee had the opportunity to discover the error; therefore, appellee should bear the loss of the overpayment, because appellee's assignor and predecessor in title (Natural Energy) had full knowledge of the correct amount when the incorrect acreage was inserted in the lease. In *Northcross* v. *Miller*, 184 Ark. 463, 43 S.W.2d 734 (1931), and *Blackburn* v. *Texarkana Gas & Electric Co.*, 102 Ark. 152, 143 S.W. 588 (1912), the supreme court adopted the rule that one voluntarily paying a claim with knowledge of the facts or under such circumstances that he is affected with such knowledge cannot recover the payment on the ground that the claim was unenforceable. Although appellants argue otherwise, we believe the holdings in *Blackburn* and *Northcross* are controlling and the facts here fall squarely within the rule set out in those cases. In sum, the critical evidence in the present appeal is that Natural Energy had not only constructive but also actual knowledge of the correct acreage. Accordingly, we must reverse and dismiss this cause.

Reversed.

COOPER and CORBIN, JJ., agree.

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[1] We note that Natural Energy Research, Inc., was not joined as a party below.

CLEVELAND CHEMICAL COMPANY OF ARKANSAS, INC. *v.* M.G. KELLER

CA 86-107 716 S.W.2d 204

Court of Appeals of Arkansas
Division II
Opinion delivered September 24, 1986

Shaver, Shaver & Smith, by: *Tom B. Smith*, for appellant.

No brief filed.

LAWSON CLONINGER, Judge. Appellant, Cleveland Chemical Company of Arkansas, Inc., brought suit against the appellee, M. G. Keller, for $235,597.76, based on a guaranty signed by appellee to secure a corporate line of credit. The lower court dismissed the appellant's complaint, finding that the appellee signed the guaranty in a corporate capacity and not individually. From that ruling appellant brings this appeal, arguing that the lower court erred in failing to find appellee individually liable on the guaranty. We agree and reverse.

Appellee, M. G. Keller, is the primary shareholder and president of Keller Chemical Company; the only other shareholder and officer of the corporation is appellee's wife. Appellee

purchased various chemical products from the appellant for resale, and on July 30, 1974, appellee signed a guaranty in order for appellee's corporation to receive a line of credit from appellant. The guaranty was executed as follows: "KELLER CHEM. CO., BY: s M. G. Keller". It appears that the lower court incorrectly applied the law, and the order dismissing appellant's claim should be reversed.

Arkansas Statutes Annotated Section 85-3-403(2)(b) (Add. 1961) provides:

> An authorized representative who signs his own name to an instrument, except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity. . . .

The Arkansas Supreme Court in *Fanning* v. *Hembree Oil Co.*, 245 Ark. 825, 434 S.W.2d 822 (1968) held that a corporate secretary's typing the name of the corporation above his signature on a note without anything to indicate his office or the capacity in which he signed was insufficient to avoid personal liability on the part of such officer. A similar holding was reached in *United Fasteners, Inc.* v. *First State Bank of Crossett*, 286 Ark. 202, 691 S.W.2d 126 (1985), where the Supreme Court held that a signature is only in a representative capacity if the name of the organization is preceded or followed by the name *and* office of an authorized individual. Here, as in *United Fasteners*, there is no evidence, other than the guarantor's own statement, that he intended to sign in a representative capacity and that his failure to indicate "President" after his name "was probably an oversight."

Additionally, the definition of a guaranty would indicate appellee signed in an individual capacity. A guaranty is a collateral undertaking by one person to answer for payment of a debt of *another* and the undertaking of the principal debtor is independent of the promise of the guarantor. *First American National Bank* v. *Coffey-Clifton, Inc.*, 276 Ark. 250, 633 S.W.2d 704 (1982). If the appellee had signed in a corporate capacity, appellant would have had the guaranty of the corporation to pay its own debt for which it was already obligated; if such were the case, there would have been no need for the guaranty, nor would it

have met the standard definition of a guaranty.

Reversed.

COOPER and CORBIN, JJ., agree.

William STALLNACKER *v.* STATE of Arkansas

CA CR 86-68 715 S.W.2d 883

Court of Appeals of Arkansas
Division II
Opinion delivered September 24, 1986

Ray A. Waters, Jr., and *Fred M. Pickens, Jr.*, for appellant.

Steve Clark, Att'y Gen., by: *Lee Taylor Franke*, Asst. Att'y Gen., for appellee.

LAWSON CLONINGER, Judge. Appellant, William H. Stallnacker, was charged with raping his daughter on November 25, 1983, in violation of Ark. Stat. Ann. § 41-1803 (Supp. 1985). A jury found him guilty and sentenced him to a term of ten years imprisonment.

The sole issue in this appeal is whether the trial court erred in

admitting a physician's testimony that the alleged victim told the physician that her father, appellant, had intercourse with her. Appellant contends that the doctor's testimony was hearsay not excepted by Rule 803(4) of the Arkansas Uniform Rules of Evidence. We do not agree, and we affirm the judgment of the court below.

Appellant argues that the trial court erred in permitting Dr. Janet Cathey, an examining physician who specializes in obstetrics and gynecology, to testify that appellant's twelve-year-old daughter had said, when asked whether she had ever had sexual intercourse, "Only when my father made me." Such a statement, appellant asserts, cannot be considered an exception to the hearsay rule under URE Rule 803(4) because the identification of appellant had no bearing on his daughter's medical history or treatment.

[redacted] Rule 803(4) of the Arkansas Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979), provides an exception to the hearsay rule for

> Statements made for the purpose of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The child had been admitted to the emergency room at University Hospital in Little Rock for low abdominal pain. Dr. Cathey saw her in her capacity as a gynecological consultant and sought a menstrual and sexual history "because," she said, "there are certain diseases that can cause pain in young women that are not possible unless the woman has had intercourse before." The relevance of the physician's inquiry is clear.

Appellant concedes that, for the purposes of Dr. Cathey's examination, it may have been relevant that his daughter had had sexual intercourse. He insists, however, that the identification of the person with whom she had sexual relations was not relevant to her medical history. To support his thesis, appellant cites *Shields* v. *State*, 281 Ark. 420, 664 S.W.2d 866 (1984), for dicta suggesting disapproval by the Arkansas Supreme Court of the admission by a trial court of testimony by a psychologist offering

an opinion that children she had interviewed truthfully stated that they had been molested by their stepfather. Apart from the fact that the physician in the present case offered no opinion on the veracity of the child's statement implicating her father in the crime of rape, *Shields* is inapplicable because the Supreme Court never reached the issue of admissibility, as it had not been preserved for appeal.

The Eighth Circuit Court of Appeals has recently ruled on this issue. In *United States* v. *Renville*, 779 F.2d 430 (8th Cir. 1985), the defendant also argued that the hearsay exception embodied in Fed. R. Evid. 803(4), the test of which is identical to the Arkansas rule, did not encompass statements of fault or identity made to medical personnel. The Eighth Circuit noted that the central question under Rule 803(4) is "whether the out-of-court statement of the declarant was 'reasonably pertinent' to diagnosis or treatment."

Although acknowledging that they had recognized in *United States* v. *Iron Shell*, 633 F.2d 77 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981), that a declarant's statements disclosing the identity of the person said to be responsible for his injuries "would seldom, if ever," be reasonably pertinent to treatment or diagnosis, the Eighth Circuit saw a distinguishing factor in cases such as *Renville, supra*:

> We believe that a statement by a child abuse victim that the abuser is a member of the victim's immediate household presents a sufficiently different case from that envisaged by the drafters of rule 803(4) that it should not fall under the general rule. Statements by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household *are* reasonably pertinent to treatment. [Emphasis in original.] *Renville*, at 436.

Statements of identification in child abuse cases, the court said, are "reasonably relied on by a physician in treatment or diagnosis." *Id.*, at 437. In the first place, child abuse extends further than physical injury, and the "physician must be attentive to treating the emotional and psychological injuries which accompany this crime." *Id.* The psychological impact upon the

child in the instant case is of special importance, inasmuch as the mother of the child testified that the doctors at University Hospital testified that the source of the abdominal pain was nerves.

Prevention of recurrence of the injury is a paramount consideration in the treatment of children who have been sexually abused in the home. This is not, however, merely an aspect of medical or psychological treatment. As the Eighth Circuit put it, "physicians have an obligation, imposed by state law [Ark. Stat. Ann. § 42-808 (Repl. 1977) is cited by the court in a footnote as an example], to prevent an abused child from being returned to an environment in which he or she cannot be adequately protected from recurrent abuse. This obligation is most immediate where the abuser is a member of the victim's household, as in the present case." *Id.*, at 438. The court therefore concluded that information that the abuser is a household member is " 'reasonably pertinent' to a course of treatment which includes removing the child from the home." *Id.*

In the instant case, moreover, testimony was given without objection by appellant's daughter concerning the conversation with the physician that corresponded to the doctor's account. The child's mother, a defense witness, confirmed on direct testimony that she was informed at University Hospital that her daughter had stated that her father had sexually abused her. We do not see how Dr. Cathey's testimony could have done any greater harm than that of the other witnesses who testified without objection.

Affirmed.

CORBIN and MAYFIELD, JJ., agree.

AMERICAN GENERAL LIFE INSURANCE COMPANY *v.* FIRST AMERICAN NATIONAL BANK

CA 85-400 716 S.W.2d 205

Court of Appeals of Arkansas
En Banc
Opinion delivered September 24, 1986

Wright, Lindsey & Jennings, for appellant.

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

DONALD L. CORBIN, Judge. This appeal comes to us from Pulaski County Circuit Court, Second Division.[1] The trial court found in favor of appellee, First American National Bank. Appellant, American General Life Insurance Company, raises two points on appeal. We reverse the decision of the trial court and dismiss appellee's complaint.

Young Electric Company purchased a life insurance policy on the life of Robert Reynolds Young from appellant, American General Life Insurance Company, in 1974. A supplementary agreement to this policy contained a premium waiver disability benefit. In 1976, Young Electric Company assigned its interest in this policy to appellee, First American National Bank. Appellee made premium payments by utilizing the automatic premium loan provision of the policy. Approximately every six months from December, 1976, through June, 1980, appellee made premium payments and the balance of the payments were made pursuant to the automatic premium loan provision. Appellee defaulted on its premium payments in June, 1980, when the cash value of the policy diminished to such an extent that it could no longer be used to pay premiums. Appellee was unaware both that there was no remaining cash value in the policy and that the insured had suffered a heart attack on May 1, 1980. On December 31, 1980, appellee tendered its cash premium check in accordance with its established practice of paying one monthly premium every six months. On January 30, 1981, appellant returned the check to appellee and advised it that the policy had lapsed for nonpayment of premium and had been placed on extended term insurance which would expire on May 24, 1981. After the return of the premium check, communication and correspondence between the parties was initiated but efforts to resolve the dispute concerning the force and effect of the policy were unsuccessful.

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[1] This case has been delayed by reassignment because of the differing views as to how it should be written. The court regrets this necessary delay.

In June, 1981, appellee contacted Mr. Young's wife and learned that the insured was totally disabled as defined in the premium waiver supplementary agreement of the policy. On July 24, 1981, counsel for appellee sent a letter to appellant demanding reinstatement of the policy based on Young's total disability and the premium waiver disability benefit provision of the policy. On July 30, 1981, appellant received notice that Young was disabled. On August 14, 1981, appellee sent proof of the disability of Robert Reynolds Young to appellant and appellee made demand upon appellant under the premium waiver disability provisions of the contract to reinstate the policy.

The pertinent provision of the premium waiver disability benefit provides as follows:

> PREMIUM WAIVER DISABILITY BENEFIT
>
> Benefit. The Company, upon receipt of due proof that the Insured is totally disabled, as defined below, will waive premiums under the policy as follows.
>
> . . . .
>
> No premium which fell due more than one year before written notice of claim is received by the Company at its Home Office will be waived unless it is shown that it was not reasonably possible to give such notice within one year after total disability began and that notice was given as soon as was reasonably possible.
>
> . . . .
>
> Notice of Proof of Disability. The Company must receive at its Home Office written notice of claim and proof of total disability:
>
> a. While the Insured is living and totally disabled;
>
> b. Not later than one year after the policy anniversary nearest the Insured's 65th birthday; and
>
> c. Within one year after the due date of the first premium in default, if any.
>
> Failure to give the written notice and proof of claim

> described above shall not invalidate any claim if it is shown that such notice and proof were given as soon as was reasonably possible.

Appellant refused to reinstate the policy because appellee had failed to furnish written notice of claim and proof of total disability within one year after the due date of the first premium in default.

Appellee brought suit seeking declaratory judgment and reinstatement of the policy along with statutory penalty and attorney's fees. In its complaint appellee asserted that the written notice and proof requirement was not a condition precedent to waiver of the premiums and that the disability and not notice and proof of the disability created the insured's duty to waive premiums. Appellee also relied upon the clause of the supplementary agreement which stated that failure to give the written notice and proof of claim would not invalidate any claim if it was shown that notice and proof were given as soon as reasonably possible. Appellant answered asserting that appellee had a duty to give notice of claim and proof of disability within one year after the due date of the first premium in default and that, because appellee failed to give due notice of claim and proof of disability, appellant's obligation to waive premiums never arose.

The case was decided based upon the stipulated facts and the briefs of the parties. The trial court found that under the language in the supplementary agreement providing for premium waiver disability benefit, the existence of disability fixed liability and not the notice and proof of claim. The court also found that the notice of claim and proof of total disability were given within a reasonable time. Judgment was awarded in favor of appellee.

Appellant raises two points for reversal: (1) The trial court erred in finding that the language of the premium waiver disability benefit agreement creates a condition subsequent; and (2) the trial court erred in finding that notice of claim and proof of total disability were given as soon as was reasonably possible under the circumstances.

It is well-settled that, unless notice of disability and proof thereof are made conditions precedent to recovery under disability clauses by the inescapable language of the policy, it is

the existence of disability that fixes liability and not proof thereof. *J.C. Penney Life Insurance Co.* v. *Warren*, 268 Ark. 1132, 599 S.W.2d 415 (Ark. App. 1980). The general rule is that the failure to give notice or make proof within a specified time in accordance with the terms of the policy does not operate as a forfeiture of the right to recover, unless the policy in express terms or by necessary implication makes notice of claim and proof of disability a condition precedent to recovery. *New York Life Insurance Co.* v. *Moose*, 190 Ark. 161, 78 S.W.2d 64 (1935). Therefore, the first issue to be addressed in this appeal is whether the language of the premium waiver disability benefit agreement creates a condition subsequent or a condition precedent.

In the case at bar, the provision requiring notice of claim and proof of disability within one year is conditional, i.e., notice and proof within one year from the due date of the first premium in default are required in those cases where it is reasonably possible to give such notice and proof. If it is not reasonably possible to give notice and proof within one year after disability began then notice and proof must be given as soon as reasonably possible. Under Arkansas case law this is not "inescapable language" making receipt of notice and proof of disability a condition precedent to recovery under disability clauses.

In *J.C. Penney Life Insurance Co.* v. *Warren*, the pertinent provisions of the policy in question provided as follows:

> The Company will waive the payment of all premiums becoming due upon this policy during the continuance of total and permanent disability as herein defined upon receipt of its home office or administrative office of due proof that the insured has suffered such disability. . . .
>
> . . . .
>
> NOTICE AND PROOF OF CLAIM — A written notice of claim of such disability and proof of such disability must be presented to the home office or administrative office of the company (a) during the lifetime of the insured, (b) during the continuance of total disability, and (c) within six months of the due date of the first premium in default, if there be default. Failure to give such notice and such proof within such times shall not invalidate any claim if it shall

> be shown that it was not reasonably possible to give such notice and such proof within such times, and that such notice and such proof were given as soon as reasonably possible.

Upon reading the above-stated provisions, this court found in *J.C. Penney* that it was the existence of disability that fixed liability and not the proof thereof. In essence, this court held that the rights under the policy were not forfeited by a nonpayment of premiums subsequent to the disability, construing notice and proof to be in the nature of a condition subsequent. The provisions of the policy in question here are materially indistinguishable from those in *J.C. Penney*. Therefore, we agree with the trial court's finding that the language of the premium waiver disability benefit agreement creates a condition subsequent to liability in this case.

The second issue to be addressed by this court is whether notice of claim and proof of disability were given within a reasonable time. The policy provides that failure to give notice and proof will be excused if it was not reasonably possible to give such notice and proof.

It is well-settled that an assignee can receive by way of assignment no better rights than the assignor had. *Union Planters National Bank of Memphis, Tenn.* v. *Moore*, 250 Ark. 272, 464 S.W.2d 786 (1971). Therefore, appellee, as assignee of the rights under the life insurance policy, stands in the shoes of Young Electric Company, assignor of that interest.

In *J.C. Penney* this court found that the failure to give notice and proof within six months of the due date of the first premium in default was reasonable under the circumstances. In that case this court found the following facts to be relevant to this determination:

> The evidence clearly shows that Mr. Warren suffered from kidney failure in February of 1976 and from that time until the date of his death he was on dialysis, at first two or three times a week in a hospital at Memphis and then beginning in December of 1976, two or three times a week in his home at Hughes, Arkansas. The testimony shows that during Mr. Warren's entire illness, and up until the time of his

> death on November 1, 1977, Mrs. Warren was employed full time in Memphis, Tennessee. During the entire time of Mr. Warren's illness, Mrs. Warren was apparently working at her job or with her husband, on an average of approximately 16 hours a day. The testimony further shows that Mr. Warren was gravely ill and was barely able to take care of his day to day needs.

Id. at 1136-1137, 599 S.W.2d at 418. The jury in *J.C. Penney* found that it was not reasonably possible for notice and proof to be given within the time provided by the policy and this court affirmed that judgment.

In *Barnett* v. *Southwestern Life Insurance Co.*, 269 Ark. 940, 601 S.W.2d 604 (Ark. App. 1980), the appellant in that case claimed that he had become totally disabled before he defaulted on his premium payments and that he had failed to give notice of claim or proof of disability because his disability involved his mind and mental alertness. Appellant in that case asserted that his mental disability came under the savings clause in the policy, much the same as the clause in question in the case at bar, which provided that a failure to give notice of disability is excused if it is shown that it was not reasonably possible to give such notice within the time required. This court rejected that argument, holding that the evidence of mental disability fell short of proving that the disability was of such degree as to excuse the failure of timely notice under the clause. *Id.* at 944, 601 S.W.2d at 606. This court stated the following in *Barnett*:

> It is regrettable that Appellant failed to avail himself of the opportunity to have premiums waived, but that failure was the result of his own omission and it would be an inequity of somewhat greater proportions, we conclude, to transfer the burden of the omission to the opposing party, where to do so would require a wholesale rewriting of language of the policy. The many precedents on that general subject require that policy language, if plain, be adhered to.

Id. at 945, 601 S.W.2d at 607 (citation omitted).

In *Mutual Life Insurance Co.* v. *Morris*, 191 Ark. 88, 83 S.W.2d 842 (1935), the Arkansas Supreme Court held that the failure to give notice and proof of disability within the time

required was excused where, from the time the condition of the insured was discovered until his death, the insured was critically ill and in no condition to look after his business affairs.

In the case at bar the policy provided that notice and proof must be given within a year after the due date of the first premium in default. The parties stipulated that on June 15, 1980, the first payment in default came due. On December 31, 1980, appellee tendered its cash premium check in accordance with the agreed practice. On January 30, 1981, appellant returned the check and notified appellee that the policy had been placed on extended term. Appellee first learned that Young was totally incapacitated on June 22, 1981. (Young had been disabled since May 1, 1980.) On July 24, 1981, counsel for appellee sent a letter to appellant notifying it that Young was disabled and requesting reinstatement of the policy. Appellant received this letter on July 30, 1981, and this was the first notice appellant received that Young was disabled. Therefore, the first payment in default came due on June 15, 1980, and appellant received notice of claim on July 30, 1981. Appellant did not receive proof of Young's disability until August 14, 1981.

The question is whether notice and proof were given as soon as reasonably possible. The trial judge found that they were. Appellee did not prove to the trial court why it was incapable of communicating with Young during that period nor that Young was incapable of informing appellee of his disability. Appellee presented no evidence which would explain why it was not reasonably possible to give notice and proof of disability to appellant within one year. The cases cited above indicate that the courts are reluctant to excuse the failure to give timely notice and proof of disability. Failure has been excused only in those cases where there were grave and extenuating circumstances prohibiting timely notification of claim and proof of disability. We find that appellee failed to prove that notice and proof of disability were given as soon as was reasonably possible under the circumstances. We find that to excuse the failure to give timely notice and proof in this case, where there has been no showing that it was unreasonable to give timely notice and proof, would require "a wholesale rewriting" of the terms of the policy. For this reason we reverse the trial court's decision and dismiss appellee's complaint.

CRACRAFT, C.J., concurs.

COOPER and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. It is not uncommon for the judges of an appellate court to agree upon the same result although based upon different reasons. The present case, however, is an extreme example of this decisional process because it reverses the trial judge for reasons agreed upon by no more than three of the six judges of this court. I think the prevailing opinion is correct when it agrees with the trial court's finding that the language of the premium waiver disability agreement creates a condition subsequent to liability in this case. However, I think the opinion reaches that result for reasons that are wrong and that this causes it to be wrong in regard to the issue of whether notice of claim and proof of disability must be given within a reasonable time.

To properly decide this case, careful attention must be given to the exact language used in the "Supplementary Agreement Providing Premium Waiver Disability Benefit." Indeed, the appellant's brief states that the court should avoid giving greater significance to a single provision or sentence than is intended but should look to the entire contract and all its provisions to ascertain its meaning, citing *Witherspoon* v. *The Lumbermen's Mutual Ins. Co.*, 211 Ark. 844, 203 S.W.2d 185 (1947). The agreement involved constitutes an entire separate page of the policy. The left-hand column of this page contains the following provisions applicable to the insured, Robert Young, who was 37 years of age when the policy was issued in 1974.

> Benefit. The Company, upon receipt of due proof that the Insured is totally disabled, as defined below, will waive premiums under the policy as follows.
>
> . . . .
>
> Disability Beginning Between Ages 15 and 60. If such disability begins on or after the policy anniversary nearest the Insured's 15th birthday and before the policy anniversary nearest the Insured's 60th birthday, each premium which becomes due under the policy during the continuance of total disability shall be

waived.

. . . .

No premium which fell due more than one year before written notice of claim is received by the Company at its Home Office will be waived unless it is shown that it was not reasonably possible to give such notice within one year after total disability began and that notice was given as soon as was reasonably possible.

Following the above is a provision that defines total disability. This definition continues to the bottom of the left-hand column of the page, and the right-hand column contains the following provisions applicable to this case.

Notice of Proof of Disability. The Company must receive at its Home Office written notice of claim and proof of total disability:

a. While the Insured is living and totally disabled;

b. Not later than one year after the policy anniversary nearest the Insured's 65th birthday; and

c. Within one year after the due date of the first premium in default, if any.

Failure to give the written notice and proof of claim described above shall not invalidate any claim if it is shown that such notice and proof were given as soon as reasonably possible.

. . . .

Premiums. Any premiums becoming due after total disability commences, but before such disability has continued for 6 consecutive months, are payable in accordance with the terms of the policy. The Company will refund to the Owner any premiums which have been paid and are subsequently waived.

The trial court made the following findings of fact and conclusions of law:

3. The language of the policy in the premium waiver disability benefit which is Exhibit B to the Stipulation of Fact creates a condition subsequent to the recovery in the following language:

> 'Each premium which becomes due under the policy during the continuation of the total disability shall be waived.'
>
> 'Any premium becoming due after total disability has continued for six consecutive months are payable in accordance with the terms of the policy. The company will refund to the owner any premiums which have been paid and are subsequently waived.'

The court finds that this language is not inescapable language of the policy which makes the notice of disability and proof thereof conditions precedent to recovery under the disability clause, and therefore the court finds that the existence of the disability fixes liability and not the proof thereof. The court finds specifically that the language is a condition subsequent.

The court also made a finding that notice of the total disability of Robert Young was given by the bank to the insurance company as soon as was reasonably possible under the circumstances.

The appellant insurance company contends that notice and proof of Young's disability had to be given within one year after the due date of the first premium in default in order to trigger the obligation to waive premium payments. In other words, it says that notice and proof were conditions precedent and the trial court was wrong in finding them to be conditions subsequent. With commendable candor, the appellant admits that the Arkansas cases have analyzed the language in each disputed policy in order to determine whether the notice and proof were conditions precedent or conditions subsequent. Appellant cites three cases in support of its contention that the policy in this case makes the notice and proof of disability conditions precedent: *New York Life Ins. Co.* v. *Jackson*, 188 Ark. 292, 65 S.W.2d 904 (1933); *New York Life Ins. Co.* v. *Moose*, 190 Ark. 161, 78 S.W.2d 64

(1935); *Barnett* v. *Southwestern Life Ins. Co.*, 269 Ark. 940, 601 S.W.2d 604 (Ark. App. 1980). Appellant also tells us to see the case of *General American Life Ins. Co.* v. *Yarbrough*, 360 F.2d 562 (8th Cir. 1966), and to compare *J.C. Penney Life Ins. Co.* v. *Warren*, 268 Ark. 1132, 599 S.W.2d 415 (Ark. App. 1980), which quotes *Mutual Life Insurance Co.* v. *Morris*, 191 Ark. 88, 83 S.W.2d 842 (1935), for the proposition that before notice of disability and proof thereof are considered to be conditions precedent the language of the policy "must be inescapable."

Appellant's leading case, *New York Life Ins. Co.* v. *Moose, supra*, was concerned with a policy that contained the following provision.

> In the event of default in payment of premium after the insured has become totally disabled as above defined, the policy will be restored and the benefits shall be the same as if said default had not occurred, *provided due proof* that the insured is and has been continuously from date of default so totally disabled and that such disability will continue for life or has continued for a period of not less than three consecutive months, *is received by the company not later than six months after said default.* (Emphasis added.)

The court in *Moose* said: "This proviso simply states the conditions under which disability benefits will be granted. It necessarily excludes all others." 190 Ark. at 166. The court explained further:

> The general rule is that the failure to give notice or to make proof within a specified time in accordance with the terms of the policy does not operate as a forfeiture of the right to recover, unless the policy in express terms or by necessary implication makes same a condition precedent to recovery. . . . Here the requirement is condition precedent in express terms, as it is the condition on which the benefits are granted. (Citations omitted.)

190 Ark. at 166-67.

In the case of *New York Life Ins. Co.* v. *Jackson, supra*, the waiver of premium provision stated, "Whenever the company receives due proof, before default in the payment of premium,

that the insured, . . . has become wholly disabled" the company will waive the premiums. The trial court had instructed the jury that the insured could recover if he had become totally and permanently disabled prior to the lapse of the policy and had explained his condition to the insurance company's special agent and asked him to take the matter up with the company. The appellate court reversed the judgment for the insured, holding that it was "quite obvious" that the discussion with the agent, "more or less casual," did not meet the requirement of proof of disability to the company.

In *General American Life Ins. Co.* v. *Yarbrough, supra*, the certificate of insurance before the Eighth Circuit Court of Appeals expressly stated:

> As a *condition precedent* to any liability of the Company on account of the total and permanent disability of any employee, written proof . . . must be furnished to the company at its Home Office in St. Louis, Missouri, within twelve months after the termination of such employee's insurance. (Emphasis added.)

In *Barnett* v. *Southwestern Life Ins. Co., supra*, the Arkansas Court of Appeals affirmed the trial court's holding that the insurance policies involved had terminated because of the failure to furnish proof of disability to the insurance company in accordance with premium waiver provisions. Both policies carried a premium waiver rider and each rider provided it would *automatically terminate* on the policy anniversary nearest the insured's 60th birthday *unless* the insured is "then totally disabled" and the required proof of disability "shall have been furnished not later than nine months after such policy anniversary." In addition, each rider contained the same provisions under a paragraph entitled "Proof of Total Disability" and this paragraph made furnishing of the proof a "condition precedent" to any liability under the rider.

I think there is a real distinction between the above cases and the cases relied upon by the appellee. The case of *J.C. Penney Life Ins. Co.* v. *Warren, supra*, which the appellant suggested that we compare with the above cases, is relied upon by the appellee to support its position that the notice and proof of disability requirement in the case at bar is a condition subsequent. That

case is procedurally confusing but involved an insurance policy issued on the life of Albert Warren. The company refused to pay Mrs. Warren, the named beneficiary, the amount of the policy because it claimed the policy had lapsed due to nonpayment of premium. Mrs. Warren brought suit and tried to prove that all the premiums had been paid. The trial court, however, directed a verdict against her on that point. She also claimed that the policy was in force because of a waiver of premium upon disability clause. The case was submitted to the jury on that issue only, and the jury found for her. On appeal, the insurance company contended that it was entitled to a directed verdict on both points. The court of appeals did not agree and the jury verdict was affirmed.

The appellate court's opinion in *Warren* sets out the disability portion of the policy which provided that the company would waive the payment of all premiums during the continuance of disability *upon receipt* by its home office of due proof of such disability. The policy also contained a provision entitled "Notice and Proof of Claim." This provision stated that written notice of claim and proof of disability "*must* be presented to the home office" (emphasis added) (a) during the lifetime of the insured, (b) during the continuance of the disability, and (c) within six months of the due date of the first premium in default. In explaining why the insurance company was not entitled to a directed verdict on the waiver of premium issue, the court said that the notice and proof requirement did not create conditions precedent. The court said the verdict of the jury should also be affirmed because a jury question existed as to whether notice and proof of claim was given within a reasonable time. In regard to whether the notice and proof provisions were conditions precedent, the court quoted from the case of *Mutual Life Insurance Co.* v. *Morris, supra,* as follows:

> It is the settled doctrine of this court that, unless, by the inescapable language of the policy, notice of disability and proof thereof are made conditions precedent to recovery under disability clauses, it is the existence of disability that fixes liability and not proof thereof.

191 Ark. at 94. Furthermore, the *Warren* opinion said, "In the case before us there is absolutely no question about the matter of

disability and the appellant company can be prejudiced in no way by the lapse of time or the failure to receive notice prior to the death of Mr. Warren." 268 Ark. at 1137.

The case of *Mutual Life Insurance Co.* v. *Morris, supra,* (which we will refer to as the *Ben Morris* case to distinguish it from the *Moose* case relied upon by appellant) also stated:

> That the time of the happening of the total disability was the commencement of the insurer's obligation to waive payment of premiums, and not the receipt of the proof thereof, is indicated by the provision to the effect that, after the proof has been received, any payment of premiums made after disability shall be refunded where such payments occurred within a year before the receipt at the home office of written notice of claim for waiver of premium.

191 Ark. at 95.

Applying the teachings of the cases relied upon by the appellant to the case at bar, I note that *New York Life Ins. Co.* v. *Moose, supra,* dealt with a policy provision that waived premiums *provided* due proof as required was made. The court's opinion held that the policy provision made proof as provided a condition precedent, and stated unless the policy expressly states such a condition, or does so by necessary implication, failure to give notice or make proof within a specified time does not operate as a forfeiture. The *Jackson* case dealt with a situation where *no* notice or proof was furnished to the *company* before the lapse of the policies, but was made only to an agent. In the *Barnett* case, the Arkansas Court of Appeals found that proof of disability was a condition precedent where the policy provisions stated the policy would automatically terminate *unless* the required proof was made. Moreover, in that case, the section pertaining to proof of disability *expressly* provided that furnishing of the required proof was a condition precedent. And in *Yarbrough,* the federal appellate court also dealt with a case that *expressly* made the furnishing of *written* proof of claim a condition precedent.

On the other hand, in the case at bar, the very first sentence of the premium waiver disability agreement provides: "The company upon receipt of due proof that the insured is totally

disabled, as defined below, will waive premiums under the policy as follows." Very clearly, there is no time limit set out in this provision for making the proof of disability. Then follows the provision applicable to the insured's age and it simply states that if total disability begins after the insured's 15th birthday and before his 60th birthday, "each premium which becomes due under the policy during the continuance of total disability shall be waived." Then, under "Notice of Proof of Disability" there is the requirement that the company "must receive at its Home Office written notice of claim and proof of total disability . . . within one year after the due date of the first premium in default, if any." The word "must" was also used in *J.C. Penney Life Ins. Co.* v. *Warren, supra*, and was not found to create a condition precedent there. Certainly "must" is not as strong as "provided," or as strong as a provision for automatic termination "unless" notice of claim is given, and obviously not as strong as it would be if the notice and proof were *expressly* made a condition precedent. And the last applicable provision of the premium waiver disability agreement is similar to the one found in the *Ben Morris* case and provides for a refund of premiums paid after total disability commences but which "are subsequently waived." This provision was set out in the trial court's findings and is obviously in harmony with the view that it is the disability that fixes the insurance company's liability to waive premiums and pay benefits, not the notice or proof thereof.

The trial court held that the provisions for notice and proof of claim in the policy in this case created conditions subsequent because the insurance company had not made them conditions precedent by "inescapable language." Both of the appellate courts of this state have said that unless such "inescapable language" is used it is the existence of the disability that fixes the liability, not the proof thereof. This is in keeping with the cardinal rule of insurance law that policies will be interpreted and construed strictly against the insuror. *Cooper Tire & Rubber Co.* v. *N. W. National Casualty Co.*, 268 Ark. 334, 595 S.W.2d 938 (1980). I think it is also proper to note that this suit was filed within the statutory period of limitations, that the insured's total disability was admitted, that notice of that disability was made only slightly more than a month after the premium waiver agreement called for it to be made, and that no prejudice has been

shown or suggested by this short delay.

Taking all the matters I have discussed into consideration, I think the trial court was correct in finding that the notice and proof of claim provisions were not conditions precedent. However, even though the prevailing opinion agrees that these provisions were not conditions precedent, the opinion holds that the trial court's judgment should be reversed because notice and proof of disability were not given as soon as was "reasonably possible." As stated in the opening paragraph of this dissent, I think this holding is caused by the incorrect reasoning used to reach the conclusion that the notice and proof provisions were not conditions precedent. The incorrect reason given for the correct conclusion is that the one-year time period provided for giving notice and proof of disability is not a condition precedent because it is "conditional" as it is only required in those cases where it is reasonably possible to give notice and proof within that period.

This reasoning completely misses the purpose and function of the "reasonably possible" provision. That provision is a savings clause. The insurance company assumes that it has made the giving of notice and proof of disability conditions precedent, but it has to sell its policies, and to make them more palatable the savings clause is placed in the policy so that failure to give the notice and proof within the time provided may be excused if it was not reasonably possible to give them within that period. Even the appellant insurance company agrees with this proposition. At page 44 of its brief, the appellant states: "Savings clauses are created to protect the insured from loss of benefits for non-compliance with contractual conditions in the extreme situation." *J.C. Penney Life Ins. Co.* v. *Warren* and the *Ben Morris* case are cited by appellant in support of the above statement. The proposition is reinforced by the *Barnett* v. *Southwestern Life Ins. Co.* case, *supra*, where both the trial and appellate courts found it necessary to decide whether notice of disability had been given as soon as reasonably possible even though the courts also found that furnishing evidence of disability was a condition precedent to liability. Another case that makes this issue clear is *Equitable Life Assurance Society* v. *Felton*, 189 Ark. 318, 71 S.W.2d 1049 (1934), where the court found the evidence sufficient to support a finding that the insured's mental incompetence excused him from giving the notice and proof of disability required by the policy.

The court said that even if it was in error on that point the trial court's judgment should still be affirmed because "the requirement for proof of loss or notice under this contract, being a condition subsequent, suit might be maintained for the liability at any time until barred by the statute of limitations." 189 Ark. at 324.

The prevailing opinion overlooks the fact that the policy in this case does not contain a provision requiring that notice or proof of disability *must* be given as soon as reasonably possible. There is a provision that no premium, which fell due more than one year before written notice of claim of disability is received by the company, will be waived unless it is shown that it was not reasonably possible to give such notice within one year after total disability began and notice was given as soon as was reasonably possible. But, as pointed out, this is a savings clause; a statement of intention. It is incorrect to treat the clause as a condition precedent to liability or hold that it prevents other policy provisions from operating as a condition precedent. Moreover, to treat it as a condition of liability will cause it to be in conflict with other provisions in the "Supplementary Agreement" page and, of course, all the provisions in the agreement must be considered together.

In summary, I would affirm the trial court's judgment in this case because I think the provisions for notice and proof of disability were not made conditions precedent by inescapable language. However, even if this view is wrong, I would still affirm based upon the trial court's finding that the bank gave notice and proof of disability to the insurance company as soon as was reasonably possible.

The prevailing opinion holds that this issue is tested by the conduct of the named insured, Robert Young. But the evidence is clear that the insurance company regarded the appellee bank as the insured. This case was submitted upon a stipulation of facts. That stipulation states that, beginning in December 1976, the bank made premium payments directly to the insurance company every six months and that these payments, along with the automatic premium loan provisions of the policy, kept the policy in force until June 15, 1980. Then, on January 30, 1981, the insurance company returned the bank's last premium check,

dated December 31, 1980, and told the bank the policy had lapsed for failure to pay the July premium. The letter conveying that information was addressed to the bank and said "Dear Policy Owner." It also offered to reinstate the policy if the bank would pay the amount of $1,478.91 for the premiums and loan interest due.

Under the above stipulated facts, I do not believe the bank had only the rights of its assignor Robert Young. I believe the conduct of the bank and the insurance company created a direct relationship between them. Thus, I think the issue of whether notice and proof of disability were given as soon as was reasonably possible should be based upon the conduct of the bank and not the conduct of Robert Young. Tested by this standard, I think there is sufficient evidence to affirm the trial judge's finding that notice and proof of disability were given as soon as was reasonably possible. That finding was not, in my view, clearly against the preponderance of the evidence.

COOPER, J., joins in this dissent.

Ernest P. JOSHUA, d/b/a TONY'S DOGHOUSE
v. Ronnie McBRIDE

CA 85-497 716 S.W.2d 215

Court of Appeals of Arkansas
Division I
Opinion delivered September 24, 1986

Andrew L. Clark, for appellant.

Mays & Crutcher, P.A., by: *Zimmery Crutcher, Jr.*, for appellee.

MELVIN MAYFIELD, Judge. In this appeal from the Pulaski County Circuit Court the question is whether an employment contract for a definite term may be terminated by the employer because of the employee's short-term illness.

Appellee, Ronnie McBride, is a bandleader and entered into

a verbal agreement with appellant, Ernest Joshua, whereby appellee would perform at appellant's nightclub six nights per week (Monday through Saturday) from May 7, 1984, through August 25, 1984. Appellee was to be paid $1,300.00 per week. Appellee obtained permission from the nightclub's manager, Richard Smith, to be absent from work on Saturday, June 2, 1984, so that he could get married that day. It was agreed that the club would find a replacement band and that appellee would not be paid for that night.

On Monday, June 4, 1984, appellee became ill with food poisoning and was unable to perform. His wife informed Richard Smith that appellee would be unable to perform that night and that he would be at work the next day. On June 5, 1984, appellee received a telephone call from Smith telling appellee to take two weeks off. Appellee attempted to resolve the matter with appellant, but they could not reach an agreement as to the amount due appellee and the contract was terminated. The appellant's son, Michael Joshua, testified that appellee was terminated because he was not at work on June 4, 1984. This was not denied by the appellant or his manager, Smith.

Appellee filed suit against appellant for damages for breach of contract in the amount of $14,300.00. After a trial before the circuit judge sitting as a jury, a judgment in the amount of $12,600.00 was entered in favor of appellee. In the judgment, the court made the following findings:

1. There was a verbal contract of employment between the parties;

2. There was no dispute as to the period of the contract; and

3. A personal service contract will allow for illness.

Findings of fact of a circuit judge sitting as a jury will not be reversed on appeal unless clearly against a preponderance of the evidence, and in making that determination, we give due regard to the superior opportunity of the trial court to judge the credibility of the witnesses and the weight to be given to their testimony. *Jones* v. *Innkeepers, Inc.*, 12 Ark. App. 364, 676 S.W.2d 761 (1984); ARCP Rule 52(a).

On appeal, appellant does not question the amount of

damages allowed but does argue that the court erred in holding that the contract involved would "allow for illness." It is appellant's contention that the parties had an "implied contract" which would include the requirement that appellee supply a replacement band during his absence on June 4, 1984. We do not agree that the contract between the parties was "implied," but think it was an express, verbal agreement that did not expressly include the requirement that appellee furnish a replacement band when he was absent. Parties, by their conduct, can enable a court to give substance to an indefinite term of a contract. "In essence, the court looks to the conduct of the parties to determine what they intended." *Welch* v. *Cooper*, 11 Ark. App. 263, 268, 670 S.W.2d 454 (1984).

In this case, there was testimony that in the past, when appellee and his band performed at appellant's club, appellee had been required to supply a replacement band when he was absent. However, there was no evidence that this obligation had ever been placed upon appellee in the event of an unforeseeable, short-term illness. Appellee was not required to supply a replacement band on June 2, 1984, when he got married and his absence on that night was a foreseeable event for which plans for an alternate band could have been made by appellee if appellant had so required. In light of these facts, we cannot say the circuit judge was clearly erroneous in failing to find an implied requirement that appellee supply a replacement band in the event of illness.

The appellant cites the cases of *Newton* v. *Brown & Root*, 280 Ark. 337, 658 S.W.2d 370 (1983) and *M.B.M. Co.* v. *Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980) for the proposition that he had the right to terminate appellee's employment without cause. However, in those cases, the employment relationships were terminable at will. Here, the contract was for a definite term and was not terminable at will. In *Griffin* v. *Erickson*, 277 Ark. 433, 436-37, 642 S.W.2d 308 (1982), the Arkansas Supreme Court stated:

> Generally, a contract of employment for an indefinite term is a "contract at will" and may be terminated by either party, whereas a contract for a definite term may not be terminated before the end of the term, except for cause or by mutual agreement, unless the right to do so is

reserved in the contract.

Thus, the issue presented here is whether appellee's one-day absence due to food poisoning provided appellant with good cause to terminate appellee.

It is true, as a general rule, that "[c]ontracts to perform personal acts are considered as made on the implied condition that the party shall be alive and capable of performing the contract, so that death or disability, including sickness, will operate as a discharge, termination of the contract, or excuse for nonperformance. . . ." 17A C.J.S. *Contracts* § 465, at 623 (1963). Temporary illnesses of short duration, however, are not usually cause for termination:

> Whether the employment of one engaged for a definite term may be terminated by the employer because of illness of the employee depends on all the circumstances, including the nature of the business and the employee's duties, the character and possible duration of the illness, the necessities of the employer, the effect on him of a cessation of the employee's services, and whether the employee's duties may be reasonably and substantially performed for a time by another. Generally an employer may, in the absence of a stipulation to the contrary, treat an employment contract as terminated by illness or injury of the employee for all or a substantial part of the term whereby the purpose of the employment contract is frustrated or substantial performance becomes impossible, thereby materially affecting the employer's interests. On the other hand, a brief or temporary illness or disability which does not prevent substantial performance of the contract by the employee does not justify termination of the contract of employment.

53 Am. Jur. 2d *Master and Servant* § 50 (1970). *See also Hortis* v. *Madison Golf Club, Inc.*, 92 A.D.2d 713, 461 N.Y.S.2d 116 (1983); *Fisher* v. *Church of St. Mary*, 497 P.2d 882 (Wyo. 1972); *Growers Outlet, Inc.* v. *Stone*, 131 N.E.2d 210 (Mass. 1956); *Citizens Home Ins. Co.* v. *Glisson*, 61 S.E.2d 859 (Va. 1950).

Whether justification exists for termination of the contract under the facts and circumstances of a particular case is

usually a question of fact. *Citizens Home Ins. Co.* v. *Glisson, supra.* By terms of the contract in the present case, appellee was to perform at appellant's nightclub for over three months; his absence because of illness, however, lasted only one day. It is our conclusion that the trial judge's decision in this case was not clearly against the preponderance of the evidence.

Affirmed.

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

William Christopher MILLER, a/k/a Ennis Stanley BLANKENSHIP *v.* STATE of Arkansas

CA CR 86-40 715 S.W.2d 885

Court of Appeals of Arkansas
Division I
Opinion delivered September 24, 1986

Sallie L. Stroud, for appellant.

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

TOM GLAZE, Judge. Appellant appeals from a conviction for driving while intoxicated. He was fined $2500 and sentenced to three years in the Department of Correction. For reversal, he contends that the trial court erred by (1) overruling his motion for a directed verdict based on the State's failure to prove certification of the arresting officer, (2) admitting into evidence a breathalyzer log, and (3) admitting into evidence a docket entry of a prior DWI conviction. We affirm.

Appellant was arrested on February 12, 1985, after Officer McFadden of the Springdale Police Department observed appellant's car straddling the eastbound lanes of Highway 68. Appellant drove his car into a parking lot, and McFadden followed. As appellant got out of his car, he staggered and fell against it. McFadden detected a strong odor of alcohol, and appellant held onto the car to maintain his balance. Appellant's eyes were "bloodshot" and his speech was slurred. McFadden arrested appellant and took him to the Springdale Police Department. Appellant was given a breathalyzer test which showed his blood alcohol content was .22.

Appellant first argues the State failed to prove McFadden was a certified police officer. Appellant contends that, because the State failed to introduce McFadden's certificate reflecting McFadden had completed statutorily-required police training, the State's evidence based on his testimony should be disallowed. We disagree. Appellant failed to object to McFad-

den's testimony or question his status upon cross-examination. Instead, appellant first raised the issue in his motion for directed verdict at the close of the State's case. This case is distinguishable from *Brewer* v. *State*, 286 Ark. 1, 688 S.W.2d 736 (1985), wherein the appellant, prior to trial, moved to dismiss the charges because the arrest was made by an unauthorized auxiliary officer. Because appellant failed to raise the issue in a timely and proper manner before the trial court, we cannot consider it on appeal. *Holt* v. *State*, 15 Ark. App. 269, 692 S.W.2d 265 (1985).

Appellant next argues that the trial court erred by admitting into evidence a breathalyzer log showing all tests performed on the machine from February 8-12, 1985. The log reflects test results of other people and appellant's result is located at the bottom. Immediately above appellant's entry is the daily check on the machine. Under Rule 403 of the Uniform Rules of Evidence, appellant argues that the introduction of the entire log was unfair, prejudicial, confusing, and misleading to the jury because appellant's blood alcohol content was the highest one recorded on it.

The trial judge, in overruling appellant's objection, stated that he believed the log was admissible to show that the machine had been calibrated and to show appellant's test result. He offered, however, to instruct the jury to disregard the other results, or to admit the log with the other results excluded. Appellant stated that he objected to the admission of the log in any form, and that the judge's instruction would not correct the problems with the document.

Determining whether the probative value of the evidence is outweighed by its prejudicial impact is within the sound discretion of the trial judge, and we will not reverse his decision absent a showing of an abuse of that discretion. *Harper* v. *State*, 17 Ark. App. 237, 707 S.W.2d 332 (1986). Here, the log was clearly admissible for the purpose of showing calibration of the machine and appellant's test result. The judge, properly we believe, offered to admonish the jury to disregard the other test results or delete them, but appellant rejected this offer. It is well settled that a proper admonition by the trial judge to the jury cures prejudice. *Tiggs* v. *State*, 16 Ark. App. 241, 700 S.W.2d 65 (1985). On these facts, we cannot say the judge abused his discretion by admitting the log in its entirety.

Finally, appellant argues that the trial court erred by considering a prior DWI conviction in setting sentence. On August 25, 1983, appellant was issued a ticket for DWI. On the back of the ticket, a note reflects the appellant was found guilty, ordered to pay a fine and costs, and had his driver's license suspended. Under a section labeled "Court's Orders or Notes," the municipal judge wrote "Rights Explained & waived, Sept. 29, 1983/O.G.L." Appellant contends that this conviction should not have been used to enhance his sentence because the municipal judge did not specifically state that the right to counsel had been knowingly and intelligently waived. We believe the waiver has been sufficiently demonstrated.

It is well established that if the record is silent as to representation or waiver, the conviction cannot be used as evidence that the offense charged is the fourth DWI offense, and thus a felony under the statute. *Burgett* v. *Texas*, 389 U.S. 109 (1967); *Peters* v. *State*, 286 Ark. 421, 692 S.W.2d 243 (1985). Here, however, the record is not silent. The municipal judge, in his own handwriting, noted that appellant's rights had been explained and waived. We cannot accept appellant's argument that such a notation was afoul of the rule in *Burgett* merely because the judge inadvertently failed to include the words "right to counsel" when indicating the appellant's rights had been explained and waived. We therefore hold that the trial court properly considered the prior conviction in setting sentence.

Affirmed.

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

Leonard F. PICKLE, Jr. and DELTA PECAN, INC.
v. Simon ZUNAMON, et al.

CA 85-326 716 S.W.2d 770

Court of Appeals of Arkansas
Division I
Opinion delivered October 1, 1986
[Rehearing denied October 22, 1986.]

Stanley R. Langley and *W.H. Drew*, for appellant.

Daggett, Van Dover, Donovan & Cahoon, by: *W.H. Daggett*, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Leonard F. Pickle, Jr., and Delta Pecan, Inc., appeal from an order of the chancery court of Phillips County, Arkansas, holding that they are barred by a decree of the chancery court of Coahoma County, Mississippi, and our opinion in a former appeal in this case from asserting their claim of title to lands lying in Arkansas claimed by Simon Zunamon. The sole issue on the first appeal was whether the Phillips County Chancery Court erred in holding that a former decree entered by the chancery court of Coahoma County, Mississippi, was entitled to full faith and credit and constituted a bar to appellants' claim in the Arkansas proceedings. The issue here in whether our decision affirming that determination barred

further assertion of that claim under the rule of the "law of the case." We agree with the chancellor that the action is barred.

A detailed recitation of the facts presented in the record would serve no useful purpose and unduly lengthen this opinion. Only a brief mention of the factual and procedural background is required to bring the narrow issue we decide into focus. At the time Arkansas was admitted into the Union the main channel of the Mississippi River marked the boundary line between the States of Arkansas and Mississippi in the area in which this controversy arose. Arkansas lands, now known and designated on charts as "Island Sixty-Four," lay on the left descending bank opposite Mississippi lands designated as "Jackson Point." Due to the process of erosion and accretion many changes in the channel occurred in subsequent years. Each state lost some territory to erosion and each gained some at the other's expense by accretion. In some places lands once originally surveyed in one state had been completely lost to it by erosion and their geographic situs occupied by accretions to lands of the other states. So long as the river maintained its main channel through the area, these changes marked no change in the state boundary or the boundaries of private owners as these boundaries followed the changing course of the channel. *Arkansas* v. *Tennessee*, 246 U.S. 158 (1918); *Uhlhorn* v. *U.S. Gypsum Co.*, 366 F.2d 211 (8th Cir. 1966).

In 1941 the U. S. Corp of Engineers effected a cut-off across the neck of Jackson Point causing the river to abandon its old channel and adopt a new one. The abandoned channel between "Jackson Point" and "Island Sixty-Four" subsequently stagnated and ceased to flow. The boundary line between the States of Arkansas and Mississippi and of private ownership in each state then became fixed in the thalweg of the old channel, no longer subject to changes by erosion and accretion. *Arkansas* v. *Tennessee, supra*; *Missouri* v. *Nebraska*, 196 U.S. 23 (1904); *Uhlhorn* v. *U.S. Gypsum Co., supra.* Although subject to accurate location, the boundary between Island Sixty-Four and Jackson Point has never been established by an original action or compact between the two states and has been shown on all subsequent maps and charts of the Mississippi River Commission as "indefinite." In any litigation involving lands in this area the location of that fixed boundary and hence the territorial jurisdiction of courts

in the sister states was, and is, a question of fact.

Zunamon claims title to lands on both Island Sixty-Four and Jackson Point, deraigning his title to the former from the State of Arkansas and the latter from the State of Mississippi. In 1982 Zunamon brought an action in the chancery court of Coahoma County, Mississippi, to quiet his title to lands lying on Jackson Point as against the claims and purported interests of named defendants who were asserting title to that land under tax deeds executed by the Arkansas Commissioner of State Lands. The appellees contended that the area described in the Arkansas tax deeds had been lost to the State of Arkansas by erosion prior to the 1941 avulsion and that the geographic situs once occupied by those lands was now occupied by accretions to Mississippi lands on Jackson Point. By subsequent amendment, the appellants, Pickle and Delta Pecan, Inc., were made parties to that suit and served under process authorized by the State of Mississippi. The appellants did not answer and a decree, which recited that the claim of the appellee Zunamon was superior to any claims of the defendants to all lands described in his complaint, was entered against them by default. No appeal was taken from that decree.

Shortly thereafter Zunamon brought this action against appellants in the chancery court of Phillips County alleging that they were conducting activities on his lands on Island Sixty-Four which interfered with his use and quiet enjoyment, and prayed that they be enjoined from conducting those activities and that his title be quieted against them. The appellants answered, asserting their tax deed from the State of Arkansas, and counterclaimed for the quieting of that title against the claims and purported interests of Zunamon. Zunamon moved to strike the counterclaim, asserting that the geographic situs of the lands described in appellants' tax deed had been held by the Mississippi court to be now occupied by lands within the territorial jurisdiction of Mississippi and the Arkansas deed could not now be asserted as the basis of a claim adverse to Zunamon's title.

Appellants answered contending that they had never been served with summons in the Mississippi action and were not subject to the Mississippi court's jurisdiction. They further asserted that no land described in their counterclaim constituted a part of the State of Mississippi, nor was included in the

description of lands described in the complaint of the plaintiff filed in Coahoma County, and, as it did not lie within the State of Mississippi, the court had lacked subject matter jurisdiction. The chancellor granted the motion to strike the counterclaim, holding that the Mississippi court did have jurisdiction to enter the decree, that it was entitled to full faith and credit in this state, and was *a bar to the action asserted in the counterclaim.*

The court of appeals affirmed the ruling of the chancellor in an unpublished opinion in *Leonard F. Pickle, Jr., et al.* v. *Simon Zunamon*, CA 83-289 (June 13, 1984). In that opinion we upheld the chancellor's finding that the Mississippi law regarding service of process was complied with and that the appellants additionally had actual notice of the action. We also rejected the appellants' contention that the Mississippi decree was subject to collateral attack in the Arkansas court because it purported to affect title to lands which were actually within the territorial jurisdiction of the State of Arkansas. We recognized that a court in one state cannot directly adjudicate or operate upon title to lands located in another, *Tolley* v. *Tolley*, 210 Ark. 144, 194 S.W.2d 687 (1946), but concluded, however, that the Mississippi court was not attempting to directly operate on the title to Arkansas lands. It merely determined the extent of its territorial jurisdiction and purported to operate only on the title to those lands it found to be within the State of Mississippi and thus within its jurisdiction. We also held that the court had the authority to determine the extent of its territorial jurisdiction. *Uhlhorn* v. *U.S. Gypsum Co., supra.* Although we recognize that a determination of a court as to the extent of its jurisdiction is subject to appellate review, it is not subject to collateral attack in subsequent proceedings. *Durfee* v. *Duke*, 375 U.S. 106 (1963). *See also* Leflar, *American Conflicts Law*, § 79 (1977). In *Durfee* it was held that the constitutional command for full faith and credit requires that judicial proceedings be given the same full faith and credit in every court within the United States as they have by law or usage in the courts of such states from which they are taken. It is clear to us that the Mississippi courts would give full *res judicata* effect to the decree of the Coahoma County Chancery Court in quieting the appellees' title. The Mississippi court gives the same effect and legal consequences to a default judgment as it does to a jury verdict. *McGee* v. *Griffin*, 345 So.2d

1027 (Miss. 1977); *Strain* v. *Gayden*, 20 So.2d 697 (Miss. 1945). The courts of Mississippi give that effect not only to those matters which were actually litigated but those which could and therefore should have been litigated in the prior proceedings. *Id.* We concluded that the chancellor's determination that the Mississippi court had jurisdiction over both the parties and the subject matter and entitled to full faith and credit was not clearly erroneous and against the preponderance of the evidence and affirmed his order.

Subsequent to that opinion the appellants amended their complaint, deraigned their title, and offered to prove by expert testimony that the lands described in their deed had never been lost by the State of Arkansas by erosion. They proffered proof that the property which they claimed originated in part as an island which was never eroded away and had always remained intact. They also contended that the Mississippi decree was not broad enough to encompass the lands then in issue. In the order now subject to our review the chancellor held that, since his initial decree had been fully affirmed by the appellate court, evidence tending to show that he had been in error in those determinations on which it had been based could not then be received. We agree.

Our court has long adhered to the rule that when a case has been decided by it, and after remand returned to it on a second appeal, nothing is before the court for adjudication except those proceedings had subsequent to its mandate. Matters decided in the first appeal are the law of the case and govern the action of the trial court on remand and our actions on a second appeal to that extent, even if we were now inclined to say that we were wrong in the earlier decision. This rule is based on the fundamental concept that judgments must at some point become final and departure from that rule would result in only uncertainty, confusion, and incalculable mischief. *International Harvester Co.* v. *Burks Motors, Inc.*, 252 Ark. 816, 481 S.W.2d 351 (1972); *Ouachita Hospital* v. *Marshall*, 2 Ark. App. 273, 621 S.W.2d 7 (1981).

On the first appeal we affirmed the chancellor's findings and conclusions that the Mississippi decree was entitled to full faith and credit and was a bar to the claims of the appellants in the Phillips County action. Our mandate neither directed nor authorized further proceedings. It "in all things" affirmed the decree

appealed from. That opinion and our mandate became the law of the case and the issues of whether the Mississippi court had territorial jurisdiction to enter the decree and whether the decree actually encompassed the lands in question or otherwise did not bar the counterclaim, were foreclosed.

Affirmed.

COOPER and GLAZE, JJ., agree.

Roger Dale SIMS *v.* STATE of Arkansas

CA CR 86-46 716 S.W.2d 774

Court of Appeals of Arkansas
Division II
Opinion delivered October 1, 1986
[Rehearing denied November 5, 1986.]

Richard B. Adkisson and *John W. Achor*, for appellant.

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

LAWSON CLONINGER, Judge. Appellant raises four points for reversal in this appeal from his conviction on a charge of second degree murder under Ark. Stat. Ann. § 41-1503 (Repl. 1977). We find error in one of the points and accordingly reverse and remand this matter to the lower court for a new trial.

Testimony at trial indicated that appellant, Roger Dale Sims, was returning to his home in Conway on February 22, 1985, after making a business trip to North Little Rock. He stopped at Kelly's Bar on the Morgan Interchange to invite the owner, Edna Hicks, to a barbeque. On entering the bar, appellant was approached by Charlie Parker, who began verbally abusing him, calling him a "punk" and threatening to beat him up.

Appellant testified that he had feared Parker since 1972 or 1973, and that Parker had made threats against his life since 1978 or 1979. He stated that he knew that Parker habitually carried a knife and was said to have carried a gun. Moreover, appellant recounted several instances of Parker's violent behavior of which he was aware, including stabbing a man in the throat, striking two men on the head with heavy objects and rendering them unconscious and, in the case of one, in need of hospitalization, and kicking a felled opponent in the mouth and rubbing his face on a concrete surface.

According to appellant, he left the bar, headed for his pickup truck, and then realized he had forgotten to invite Hicks to the cookout. Hicks testified that appellant had, in fact, invited her when he first came in to the bar. Appellant returned to the bar and

ordered a beer. Parker, who had gone outside at the same time, also reappeared. He once again approached appellant and renewed his vituperative attack.

At this point, it becomes unclear exactly what was said and what ensued. In appellant's version, Parker said to him, "It's pistola time, Dale," and then thrust his hand in his pocket and turned away. Appellant said that he drew his own gun, which he wore continually, because he feared Parker was preparing to attack him with a knife. He claimed that Edna Hicks grabbed him and his gun fired. Hicks, as well as another witness, denied that she touched appellant, although yet another witness supported appellant's account. In any event, a bullet struck Parker in the head, and he fell, mortally wounded. After a few moments, appellant left the bar. Parker died the next day.

The case was submitted to a jury on first and second degree murder and manslaughter charges. Appellant was convicted of the offense of second degree murder and was sentenced to fifteen years imprisonment. From that judgment, this appeal arises.

The point on which we reverse is appellant's second, in which he argues that the trial court erred in allowing the State to put on evidence in rebuttal that could have been submitted in the case in chief. The rebuttal witness, Alan Washam, was named on appellant's list of witnesses. The list was not made available to the State until the morning of the day of the trial. At the noon recess in the trial, the prosecutors interviewed some of the witnesses on the list, including Washam. When the trial resumed in the afternoon, the State concluded its case, calling two scientific witnesses and resting, "subject to rebuttal," without calling Washam.

When appellant testified, he was asked on cross-examination if, after Parker had fallen to the floor, he had advanced toward him pointing his gun and saying, "Crawl like a dog." Appellant stated that he had not. Defense counsel objected that evidence of such a statement was part of the res gestae and should have been presented as part of the State's case in chief but was purposely withheld to set up rebuttal evidence under the guise of testing appellant's credibility. An unfair advantage was thereby gained for the State, the defense contended, through varying the prescribed order of proof.

The trial court agreed that the evidence was available to the State before it rested, that it was indeed res gestae evidence, and that the State could have presented it in its case in chief. Nonetheless, the court held that it had discretion to admit such evidence in rebuttal and would do so under the circumstances. Later, the court allowed Washam to testify in rebuttal over defense objections, noting that the State had been unaware of the witness until noon. On the witness stand, Washam testified that appellant, after shooting Parker, had said something to the effect of "Crawl, you dog."

Ark. Stat. Ann. § 43-2114 (Repl. 1977) sets forth the limitations upon the offering of rebuttal evidence: "The parties may then [after the State's and the defendant's evidence have been offered as prescribed at Ark. Stat. Ann. §§ 43-2112, 2113 (Repl. 1977)] respectively offer rebutting evidence only, unless the court for good reason, in furtherance of justice, permit them to offer evidence upon their original case." The Arkansas Supreme Court has held that it is generally in the sound discretion of the trial court to allow rebuttal testimony which might have been properly introduced in the State's case in chief. *Birchett* v. *State*, 289 Ark. 16, 708 S.W.2d 625 (1986); *see also Kellensworth* v. *State*, 275 Ark. 252, 631 S.W.2d 1 (1982). Genuine rebuttal evidence, however, is not simply a reiteration of evidence in chief, but consists of evidence offered in reply to new matters. *Birchett, supra.*

In the *Birchett* case, the Arkansas Supreme Court ruled that a witness for the prosecution should not have been given rebuttal status by the trial court when she could have been presented during the State's case in chief. Moreover, her testimony impeached responses drawn from the defendant during his cross-examination by questions which seemed to the court "clearly designed to manufacture a rebuttal situation for a presentation of . . . evidence that was not genuinely in response to anything presented by appellant in his defense." *Id.*

As in the present case, the State contended in *Birchett* that it did not know about the rebuttal witness until the day of the trial. The Arkansas Supreme Court dismissed the matter as one of "no great importance," noting that, perhaps a month before the trial, the police had taken a statement from the witness, the knowledge

of which was imputed to the prosecutor's office. While the same circumstances do not obtain in the instant case, the fact that the prosecutors actually interviewed Washam before they had finished calling their witnesses is of considerable significance.

Appellee argues that, within its "proper context," the trial court's action in admitting the rebuttal witness's testimony was not an abuse of discretion. According to appellee's brief, Washam was unknown until the day of the trial, the State did not know what his testimony would be "until most of their witnesses had testified," and the prosecution "did not intentionally lay a trap for appellant." Appellee concedes that the State had not rested until after it interviewed Washam and appears to acknowledge that a trap, albeit an *unintentional* trap, had been laid for appellant in his cross-examination. It requires little imagination to gauge the impact upon a jury of the State's question on cross-examination and the subsequent introduction of the rebuttal witness's testimony.

The Supreme Court noted, in dicta, in *Birchett, supra*, that if the State had found itself unexpectedly with a witness for its case in chief *after* it had rested, the trial court could have granted a motion to reopen the State's case for the presentation of new evidence. Such circumstances were not present in either that case or this. Instead, in the instant case, the State had the opportunity, before it had completed its case in chief, to incorporate Washam's testimony into its trial strategy. The result of the State's tactics was to gain an unfair advantage over appellant and to prejudice his cause. The trial court in this instance abused its discretion in permitting the introduction of evidence that belonged properly in the State's case in chief.

The other issues raised by appellant are rendered moot by our decision. We address them, however, in the event that they should arise again.

In his first point for reversal, appellant argues that the court below erred in not allowing testimony by a police officer that he had searched Charlie Parker's vehicle in April, 1983, in connection with a DWI arrest and had found a revolver, which Parker later claimed at the sheriff's office as his own. He relies on *Britt* v. *State*, 7 Ark. App. 156, 645 S.W.2d 699 (1983), and attempts to distinguish *Halfacre* v. *State*, 277 Ark. 168, 639

S.W.2d 734 (1982), cases which stand for the proposition that evidence of specific bad acts of a victim directed at the defendant or within his knowledge before the commission of the crime is admissible as probative of what the defendant reasonably believed.

Here, however, as the trial court ruled, appellant did not know about the discovery of the gun in Parker's vehicle almost two years before the shooting. Evidence of bad acts not within a defendant's knowledge cannot reasonably be construed as probative of the defendant's belief. The trial court thus acted properly in refusing to admit the officer's testimony.

Appellant contends in his third point that the trial judge erred in refusing to give his requested instruction on accident. The requested instruction, however, relates to the issue of whether appellant had the requisite culpable mental state for the crimes charged. That mental state was defined in each of the charges: purposefully or premeditated and deliberated for murder in the first degree, Ark. Stat. Ann. § 41-1502(1) (Repl. 1977); knowingly for murder in the second degree, Ark. Stat. Ann. § 41-1503(1) (Repl. 1977); and recklessly for manslaughter, Ark. Stat. Ann. § 41-1504(1) (Repl. 1977). The trial court also gave the jury an instruction on self-defense.

Appellant's requested instruction embodied his theory of the case:

> If the defendant was justified in pulling his weapon, and having done so, the gun discharged accidentally, then the jury should find him not guilty.

In other words, according to appellant's premise, if a shooting is an accident then it is a defense to any charge. The concept of accident, however, in the sense of an unforeseen contingency (*see* the *Oxford English Dictionary*), naturally pertains to one's mental state. Appellant's argument that the shooting was accidental could have been, and was, addressed to each charge and its appropriately defined mental state. All requisite mental states were before the jury in proper instructions. Where the subject matter is fully covered by instructions already given, it is not error for the trial court to refuse a certain requested instruction. *Cobb* v. *State*, 265 Ark. 527, 579 S.W.2d 612 (1979).

Finally, appellant urges that the trial court erred in refusing to give an instruction on negligent homicide. Ark. Stat. Ann. § 41-1505(1) (Repl. 1977) provides: "A person commits negligent homicide if he negligently causes the death of another person." Appellant was found guilty of second degree murder. It is not error to refuse to give an instruction on one lesser included offense if other lesser offenses were covered by the instructions given and the jury returned a verdict for the greater offense. *Sherron* v. *State*, 285 Ark. 8, 684 S.W.2d 247 (1985).

Reversed and remanded.

MAYFIELD and CORBIN, JJ., agree.

DEL MONTE FROZEN FOODS, INC. *v.* HARMON

CA 85-462 716 S.W.2d 784

Court of Appeals of Arkansas
En Banc
Opinion delivered October 1, 1986
[Rehearing denied October 22, 1986.*]

*Cloninger and Glaze, JJ., would grant rehearing.

Hardin, Jesson & Dawson, for appellant.

Laws & Swain, P.A., by: *William S. Swain*, for cross-appellant and appellee Limmel W. Harmon.

Thomas J. O'Hern, for appellee Second Injury Fund.

DONALD L. CORBIN, Judge. Appellant, Del Monte Frozen Foods, Inc., appeals the decision of the Workers' Compensation Commission which awarded Limmel W. Harmon, cross-appellant and appellee in this case, benefits based on a 70% permanent partial disability rating. Appellant argues on this appeal that the Second Injury Fund, appellee, should bear a portion of the expense of Harmon's injury due to a prior impairment. We affirm the Commission's finding on this point.

In the cross-appeal, Limmel Harmon, cross-appellant and appellee, appeals the finding of the full Commission which reduced the permanent total disability rating awarded to Harmon by the Administrative Law Judge to 70% permanent partial disability. We affirm the full Commission's finding on this point as well.

On July 15, 1982, Harmon sustained an injury consisting of a lumbosacral strain arising out of and occurring in the course of his employment by Del Monte. On July 9, 1954, Harmon sustained a non-compensable fracture of his pelvis while engaged in military service. As a result of the fractured pelvis, Harmon received a permanent disability rating of 10% to the body as a whole. On or about February 21, 1963, Harmon was diagnosed as having spondylolisthesis at L5 with left hip pain secondary thereto. On April 18, 1963, surgery was performed to effect a lateral lumbosacral fusion. Following the lumbosacral fusion, Harmon experienced a two-year period during which he remained in a back brace. He was practically asymptomatic from the spondylolisthesis from that time up until the July 15, 1982, lumbosacral strain arising out of his employment at Del Monte. Harmon was relatively asymptomatic from the July 9, 1954, pelvis fracture after 1963.

Following the July 15, 1982, compensable injury, Harmon attempted to return to work for Del Monte but was unable to endure extended periods of work activity. He has been advised by his physicians to limit lifting, bending and twisting. He was under no such limitations prior to July 15, 1982. As a result of the July 15, 1982, lumbosacral strain, Harmon sustained an actual anatomical impairment of 5% to the body as a whole. The Commission found that the lumbosacral strain aggravated Harmon's pre-existing condition of spondylolisthesis. The full Commission made the following conclusion in its opinion:

> Harmon did not have an impairment prior to July 15, 1982, within the meaning of Ark. Stat. Ann. § 81-1313(i) (Supp. 1983) as that statute has been construed by the Arkansas Court of Appeals. *See Osage Oil Company* v. *Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985).
>
> Harmon is disabled as a result of the July 15, 1982 lumbosacral strain which aggravated his pre-existing back

> condition. Since his pre-injury condition did not independently operate to affect his ability to work this case does not properly present an issue of apportionment. Rather, the preponderance of the evidence shows that Harmon is disabled from the aggravating effects of the July 15, 1982, lumbosacral strain upon his pre-existing and asymptomatic back condition of spondylolisthesis.

The issue raised on the appeal by Del Monte Frozen Foods is whether liability for benefits resulting from the disability rating over the 5% attributed to the 1982 Del Monte injury should be the sole and separate responsibility of the Second Injury Fund, hereinafter referred to as "SIF". In *Osage* this court held that "impairment" in Ark. Stat. Ann. § 81-1313(i) means loss of earning capacity due to a non-work related condition. *Id.* at 324, 692 S.W.2d at 789. The question before us is whether Harmon's pre-existing injuries constituted an "impairment" under Ark. Stat. Ann. § 81-1313(i) (Supp. 1985).

On appellate review the evidence and all inferences deducible therefrom must be viewed in the light most favorable to the finding of the Commission. We give the testimony its strongest probative force in favor of the finding of the Commission, whether it favored the claimant or the employer. *Id.* at 322, 692 S.W.2d at 788. We must affirm if the Commission's finding is supported by substantial evidence; even when a preponderance of the evidence might indicate a contrary result, we affirm if reasonable minds could reach the Commission's conclusion. *Id.* at 322, 692 S.W.2d at 788. Questions of credibility and the weight and sufficiency of the evidence are matters for determination by the Commission. The Commission is better equipped, by specialization and experience, to analyze and translate evidence into findings of fact than we are. *Id.* at 322, 692 S.W.2d at 788.

The evidence in the record illustrates that Harmon did not experience a decrease in his capacity to earn wages as a result of either the congenital condition of spondylolisthesis or the 1954 pelvis fracture. Therefore, we find that there was substantial evidence to support the Commission's findings that Harmon did not have an "impairment" within the meaning of Ark. Stat. Ann. § 81-1313(i) prior to July 15, 1982 and that, under *Osage*, the SIF is not liable for any of the benefits which are a consequence of the

July 15, 1982, injury. We affirm the Commission's findings on this point.

The question raised by Harmon's cross-appeal is whether Harmon proved by a preponderance of the evidence that he is permanently and totally disabled. Dr. Austin Grimes stated in his April 14, 1983, report that Harmon's lumbosacral strain should not have increased his permanent anatomical impairment by more than 5% over the pre-employment status. By letter dated September 6, 1983, to Crawford and Company, Dr. Grimes estimated Harmon's combined permanent partial physical impairment from all sources, including the compensable injury, to be 30% to the body as a whole. Dr. Grimes and Dr. Ted Honghiran concurred that Harmon could return to work but also agreed that he should curtail activities involving lifting, bending, and twisting his back. The evidence indicated that Harmon's vocational history is that of a manual laborer. He has a fourth grade education. His employment potential lies in work settings that will not require sustained physical exertion that may expose his back to new injury. Harmon testified that he planned to go back to work and stated that he felt he could work a 40-hour week.

Based on this evidence the Commission reversed the ruling of the ALJ holding Harmon permanently and totally disabled. The Commission awarded permanent disability benefits of 70% to the body as a whole. Giving the testimony its strongest probative force in favor of the findings of the Commission we find that there was substantial evidence presented to support the Commission's conclusion. Therefore, we affirm the Commission's finding on the point raised in the cross-appeal.

Affirmed.

MAYFIELD, J., concurs.

CLONINGER and GLAZE, JJ., dissent.

MELVIN MAYFIELD, Judge, concurring. I concur in the majority opinion in this case. The Commission has simply applied the law as declared by a panel of this court in *Osage Oil Co.* v. *Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985), and by the unanimous opinions of this court sitting en banc in the cases of *Second Injury Fund* v. *Girtman*, 16 Ark. App. 155, 698 S.W.2d 514 (1985), and *Second Injury Fund* v. *Fraser-Owen, Inc.*, 17

Ark. App. 58, 702 S.W.2d 828 (1986).

While one might differ in judging the preponderance of the evidence in the instant case, the law applied by the Commission has been settled and the Commission's factual finding is clearly supported by substantial evidence.

Moreover, the opinion of the Commission demonstrates that it thoroughly understands the law set out in the above cases and that it will not hesitate to hold the Second Injury Fund liable in a proper case.

TOM GLAZE, Judge, dissenting. The majority decision rings the "death knell" for the Second Injury Fund (SIF). The majority claims our holding in *Osage Oil Company* v. *Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985) dictates the result it reached here, but such an assertion is clearly erroneous. In *Osage*, we did—as the majority here points out—hold that before the SIF can become liable, the claimant must have suffered a pre-existing injury which resulted in a loss of earning capacity, not a mere anatomical loss. There, the claimant presented *no* evidence of loss in earning capacity that resulted from an earlier injury, so we determined the SIF was not involved. Here, I submit, the evidence is overwhelming that the claimant, Harmon, sustained substantially limiting injuries prior to his July 15, 1982, compensable injury.

In 1954, Harmon first was hurt in a truck accident and received a permanent partial disability in the amount of ten percent to the body as a whole. In 1963, he received an additional fifteen percent permanent partial rating resulting from a spinal fusion. When Harmon sustained his July 15, 1982, injury, which resulted in his receiving a rating of five percent to the body as a whole, he was fifty-two years old, had a fourth grade education, and had worked only on jobs which might be described as general labor (with the exception of a mechanics job he once held). Under the rationale of *Glass* v. *Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961), I believe the evidence in the instant case clearly requires a finding that Harmon suffered a wage-loss in *some degree*, at least, from the pre-existing injuries he sustained in 1954 and 1963. To find otherwise, I believe, is clearly erroneous. If the SIF had not been involved, I feel the Commission surely would agree with my analysis of Harmon's prior condition.

The majority justifies its position on the basis that the record revealed that Harmon did not experience a decrease in his capacity to earn wages. Of course, it is established Workers' Compensation law that a claimant's earning of increased wages after an injury is not determinative of whether that claimant has suffered a loss in earning capacity. Here, Harmon obviously experienced a decrease in his capacity to earn wages. In fact, the administrative law judge determined that the combined effect of all Harmon's injuries caused Harmon to be totally and permanently disabled, and the Commission only disagreed with the *extent* of disability found by the law judge, finding Harmon's permanent disability to be seventy percent to the body as a whole. The Commission's final award reveals its true underlying view of the severe limitations Harmon sustained by his pre-existing injuries, since the evidence reflects he received no more than a five percent disability attributable to his present or July 15, 1982, injury. Given the evidence and the Commission's analysis of it in making its final award, I believe it is incredulous that SIF was not liable for a portion of Harmon's benefits. If the SIF is not liable on these facts, doubtless it ever will be liable.

CLONINGER, J., joins in this dissent.

Marion GIBSON, Dale GIBSON, S.E. DECKER and Hazel DECKER *v.* Shelby CRAIN and Nan CRAIN

CA 85-306 716 S.W.2d 782

Court of Appeals of Arkansas
Division II
Opinion delivered October 1, 1986

Donald E. Bishop and *Johnny L. Nichols*, for appellants.

Smith & Kelly, by: *Michael E. Kelly*, for appellees.

DONALD L. CORBIN, Judge. In this case involving a boundary line dispute, appellants, Marion Gibson, Dale Gibson, S.E. Decker and Hazel Decker, attempt to appeal from an order dated July 18, 1985, overruling their motion for new trial. We hold that appellants' motion was deemed to have been disposed of thirty days after December 31, 1984, in accordance with Ark. R. App. P. 4(c). Inasmuch as appellants did not file their notice of appeal within ten days of the deemed disposal of the motion for new trial as provided in Rule 4(d), we are required to dismiss appellants' appeal.

Following the entry of the adverse judgment, appellants filed a timely motion for new trial on December 31, 1984, alleging that there was newly discovered evidence material to their case which they could not have discovered and produced at trial with reasonable diligence. ARCP Rule 59(a)(7). As additional grounds for new trial, appellants contended that the decision of the trial court was contrary to the preponderance of the evidence and was contrary to the law. ARCP Rule 59(a)(6). The record reflects that appellants' motion for new trial was not heard within thirty days from its filing, and that appellants did not, within that time frame, present it to the trial court and obtain a ruling either taking the motion under advisement or setting a definite date for the motion to be heard. Approximately seven months later, the trial court overruled appellants' motion for new trial after considering it upon its merits.

The sequence of the pertinent filings are set out for clarity:

1984

December 21—Judgment filed.

December 31—Motion for new trial filed.

1985

July 18—Order entered overruling motion for new trial.

July 25—Notice of appeal from denial of new trial filed.

In *Smith* v. *Boone*, 284 Ark. 183, 680 S.W.2d 709 (1984), the supreme court dismissed the appellants' attempted appeal from a judgment because the notice of appeal was not filed within the time permitted by law. The court in *Smith* followed Ark. R. App. P. 4(c), which provides as follows:

> It shall be the duty of the party filing any of the motions mentioned in section (b) of this rule to present the same to the trial court within thirty (30) days from the date of filing, and if the matter cannot be heard within those thirty (30) days, the moving party shall, within those thirty (30) days, request the court to set a definite date for hearing said motion. Unless the motion shall have been presented to the trial court and taken under advisement within the thirty (30) days, or the court shall have set a

> definite date for the hearing, it shall be deemed that the motion has been finally disposed of at the expiration of thirty (30) days from its filing, and the time for filing notice of appeal shall commence to run from the expiration of the thirty (30) days. If, within the thirty (30) days, the motion shall have been presented to the court and taken under advisement, or the court shall have fixed a definite date for a hearing, the motion shall not be deemed to have been disposed of until the court shall enter its order granting or denying the motion.

In *Smith* the court noted that a written record of the trial court's action in taking the motion under advisement or setting a date for its hearing is mandatory.

Ark. R. App. P. 4(d) provides that:

> If the motion is denied by the court or is deemed to have been disposed of at the expiration of thirty (30) days from its filing, any party desiring to appeal from the judgment, decree or order originally entered shall have ten (10) days from the entry of the order denying the motion or from the date of its disposition as herein provided, within which to give notice of appeal; but this rule does not shorten the time for filing notice of appeal to less than thirty (30) days from the date of entry of the original judgment, decree or order.

In *Reynolds* v. *Spotts*, 286 Ark. 335, 692 S.W.2d 748 (1985), the supreme court applied Rule 4(c) and (d) to bar an attempted notice of appeal filed on August 30, 1984, with respect to a case in which a new trial motion was deemed disposed of on April 25, 1984. The court there held that the time for filing a notice of appeal ran out ten days from April 25, 1984.

In a *per curiam* decision, *Monk* v. *Farmers Insurance Co.*, 290 Ark. 38, 716 S.W.2d 201 (1986), the supreme court reaffirmed this position and granted the appellee's motion to dismiss the appeal for the appellant's failure to file a timely notice of appeal pursuant to Rule 4(c) and (d). The appellant's motion for new trial was deemed to have been disposed of and appellant did not appeal within ten days of the deemed disposal of the motion for new trial.

In the case at bar appellants did not obtain a written record of the trial court's action in taking their motion for new trial under advisement or setting a date for its hearing. Accordingly, appellants' motion was deemed to have been disposed of thirty days after December 31, 1984. Appellants did not file their notice of appeal within ten days of that date and it was therefore untimely. Assuming arguendo that appellants had in fact followed Rule 4(c), the trial court nevertheless lost jurisdiction to rule on appellants' motion ninety days after the judgment was filed pursuant to ARCP Rule 60(b). *Mullen* v. *Couch*, 288 Ark. 231, 703 S.W.2d 866 (1986).

Dismissed.

CLONINGER, J., agrees.

MAYFIELD, J., concurs.

MELVIN MAYFIELD, Judge, concurring. I concur in the majority opinion, but I want to emphasize the danger that may exist for any who misinterprets the holdings in the cases of *Mullen* v. *Couch*, 288 Ark. 231, 703 S.W.2d 866 (1986), and *Reynolds* v. *Spotts*, 286 Ark. 335, 692 S.W.2d 748 (1985).

In *Mullen*, the court held that a trial court loses jurisdiction to rule on a timely motion for new trial 90 days after the judgment is filed with the clerk. In *Reynolds*, as clarified by the court's per curiam opinion, issued September 22, 1986, in *Monk* v. *Farmers Ins. Co.*, the court held that a timely motion for new trial is *deemed* denied 30 days from the day it is filed unless within that period it has been taken under advisement or set for a hearing.

However, it is not clear to me whether an order (filed within 30 days after a timely motion for new trial is filed) taking the motion under advisement or setting it for hearing will extend the time the court has to act upon it so that the court does not lose jurisdiction to grant the motion at the end of 90 days after it is filed.

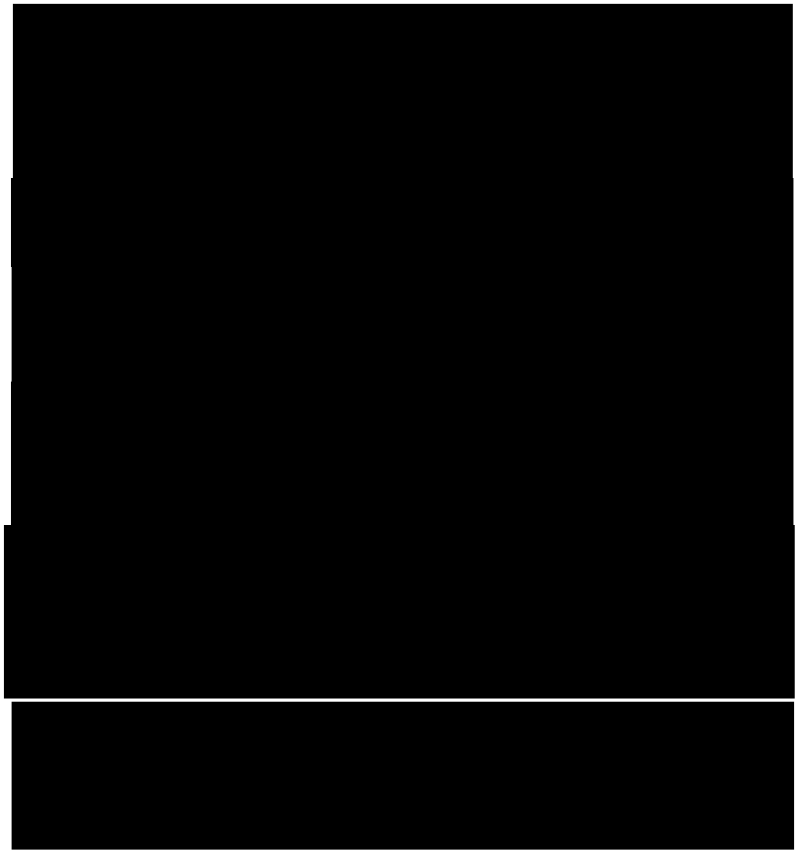
Of course, under the Supreme Court and Court of Appeals Rule 29(1)(c), this court *applies* rules of court but does not *interpret* or *construe* those rules, but I feel compelled to mention the question that appears to exist under the circumstances

discussed above.

James ULRICH and Olivia KANDUR *v.* STATE of Arkansas

CA CR 86-73 716 S.W.2d 777

Court of Appeals of Arkansas
Division II
Opinion delivered October 1, 1986



Young & Finley, for appellants.

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

DONALD L. CORBIN, Judge. This case comes to us from the Yell County Circuit Court. Appellants, James Ulrich and Olivia Kandur, appeal their convictions for possession of a controlled substance with intent to deliver. We reverse the trial court's decision.

Appellants raise the following seven points for reversal:

I.

THE AFFIDAVIT FOR SEARCH WARRANT WAS DEFECTIVE IN THAT IT DID NOT REVEAL THE TIME WHEN THE OBSERVATIONS OF THE INFORMANT WERE MADE.

II.

PROBABLE CAUSE FOR THE SEARCH WAS LACKING IN THAT THE INFORMATION WAS SUPPLIED BY AN ANONYMOUS INFORMANT.

III.

THE MOTION TO SUPPRESS AS TO APPELLANT ULRICH SHOULD HAVE BEEN GRANTED.

IV.

THE MOTION FOR DIRECTED VERDICT AS TO APPELLANT ULRICH SHOULD HAVE BEEN GRANTED.

V.

THE SEARCH WARRANT WAS ISSUED IN VIOLATION OF THE RULES OF CRIMINAL PROCEDURE AND THE EVIDENCE SHOULD HAVE BEEN SUPPRESSED.

VI.

THE EVIDENCE WITH REGARD TO APPELLANT OLIVIA KANDUR WAS INSUFFICIENT TO SUPPORT A CONVICTION OF THE OFFENSE ALLEGED.

VII.

THE FORFEITURE OF CONFISCATED FUNDS WAS UNTIMELY AND IMPROPER.

The Arkansas Supreme Court's decision in *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), requires that, where the sufficiency of the evidence is challenged on appeal of a criminal conviction, we must review the sufficiency of the evidence, including the inadmissible evidence, prior to consideration of trial errors. At the close of the State's case, appellant Ulrich moved for a directed verdict. The trial court denied the motion. Appellant Ulrich argues on appeal that it was error for the trial court to deny his motion.

A motion for directed verdict is a challenge to the sufficiency of the evidence. *Glick* v. *State*, 275 Ark. 34, 627 S.W.2d 14 (1982). In reviewing the sufficiency of the evidence on appeal, this court will affirm if there is substantial evidence to support the verdict. *Pickens* v. *State*, 6 Ark. App. 58, 638 S.W.2d 682 (1982). Substantial evidence is evidence 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 the mind to pass beyond conjecture. *Jones* v. *State*, 269 Ark. 119, 598 S.W.2d 748 (1980).

On November 9, 1984, a search warrant was obtained to search the premises of Joe Kandur. When officers arrived at the premises, both appellants were present. Appellant Ulrich was working on a car and remained outside during the search of the premises. Inside the trailer located on the property, the officers found marijuana. Inside one bedroom, officers found marijuana on the bed, a set of balance scales on a dresser, and $9,680 in cash in a laundry bag in a corner of the room. The evidence, along with that found in another bedroom, a hall, and the kitchen, was introduced into evidence at appellants' trial. Appellant Ulrich argues that there was insufficient evidence of his connection with

the marijuana to warrant his conviction for its possession.

At the time of the search on November 9, in a "patdown" for weapons, officers found $2,920 in Ulrich's back pocket. In a statement given to the officers on November 9, Ulrich stated he spent the night of November 8 and the day of November 9 at the Kandur residence, that the money found in his pocket had been earned in the bee-keeping business, and that he had not seen any marijuana.

We find that the evidence presented at the trial was insufficient to force the mind to pass beyond a suspicion or conjecture as far as appellant Ulrich is concerned. Therefore, we reverse Ulrich's conviction and dismiss the charges against him. Of course, the money confiscated pursuant to his prosecution should be returned.

Appellant Kandur also argues that the evidence was insufficient to sustain her conviction. Appellant Kandur was a joint occupant of the trailer in which the marijuana was found. She ran inside the trailer when the police drove up.

The possession required by Ark. Stat. Ann. § 82-2617 (Repl. 1976) need not be actual, physical possession, but may be constructive, as when one controls a substance or has the right to control it. *Osborne* v. *State*, 278 Ark. 45, 643 S.W.2d 251 (1982). Where there is joint occupancy of premises, mere occupancy is insufficient unless there are additional factors linking the accused with the contraband. *Blair* v. *State*, 16 Ark. App. 1, 696 S.W.2d 755 (1985). After the marijuana had been found one of the officers, after advising appellant Kandur of her rights, asked if the officers had found everything. She replied that they had. We find that there was sufficient evidence presented at the trial court to support the jury's conviction.

Appellants assert that the affidavit for the search warrant was defective in that it did not reveal the time when the observations of the anonymous informant were made. On November 9, 1984, the municipal judge issued a search warrant authorizing the seizure of illegal drugs, marijuana and equipment from the residence of appellant Kandur. The warrant was based upon the affidavit of Sheriff Denver Dennis. The facts stated in the affidavit to support the issuance of the warrant are as follows:

> Sheriff Denver Dennis on 11-9-84 received a telephone call from an unidentified female citizen apprising him that located on the premises above described was illegal drugs, marijuana and illegal drug equipment for process, manufacturing and distribution of illegal drugs. That this female had observed such contraband on the Kandur property and premises. Sheriff Dennis has personal knowledge of prior drug convictions for manufacturing and selling by Joe Kandur in Yell County and in the state of New Jersey. Sheriff Denver Dennis has personal knowledge of unusual vehicle traffic.

The court held a hearing on appellants' motion to suppress the evidence seized pursuant to the search warrant. At the hearing, the municipal judge testified that he took no formal testimony from Sheriff Dennis and that he issued the warrant based on the information in the affidavit, i.e., the information from the anonymous informant and the sheriff's knowledge of Mr. Kandur's prior drug convictions and of unusual vehicular traffic around the house. Our review of the probable cause for the issuance of the warrant is confined to the information contained in the affidavit as that was the only information before the municipal judge when he issued the warrant. *Herrington* v. *State*, 287 Ark. 228, 697 S.W.2d 899 (1985).

Warrants obtained on the basis of informant's tips must satisfy a "totality of the circumstances test." *Collins* v. *State*, 280 Ark. 453, 658 S.W.2d 877 (1983). The Arkansas Supreme Court set out the following rules to be applied:

> It is the uniform rule that some mention of time must be included in the affidavit for a search warrant. *See* 100 A.L.R.2d 525 (1965). The only softening of this position occurs when time can be inferred from the information in the affidavit. For example, where an affidavit recited that the contraband was "now" in the suspect's possession and that the search was urgent, that was found to be adequate to satisfy the time requirement. *Coyne* v. *Watson*, 282 F.Supp. 235 (D.C. Ohio 1967). In another case where the affidavit said that contraband was "recently" seen, coupled with the use of present tense as to the location of the contraband, that was held to be sufficient. *Sutton* v. *State*,

> 419 S.W.2d 857 (Tex. Crim. 1967). There is no clue whatsoever given in the affidavit in this case of when the informant saw the growing marijuana. Time is crucial because a magistrate must know that criminal activity or contraband exists where the search is to be conducted at the time of the issuance of the warrant, not that it may have been there weeks or months before. Otherwise, officials could use such information like blank checks to conduct searches at will, contrary to the purpose for which, and certainly not in the way, searches are permitted by our constitution. Searches of persons and places, especially residences, have to be one of the most serious undertakings of the law. And while legal technicalities cannot obstruct the right of the State to maintain order and bring about justice, neither can form be abandoned at the whim of law enforcement officials. Time is also important because we all have the unfettered right to know when we are accused of doing an illegal act. That is not an unreasonable nor technical demand of the law. Before a search is ordered it must be shown or be easily discernible when the contraband was seen or the illegal activity occurred.
>
> We use a practical, common sense approach to examine search warrants but that approach cannot cure omissions of facts that are undisputedly necessary. This is especially true where great leeway is already given to authorities to use undisclosed informants and pure hearsay as a reason to search a person's home.

Id. at 456-457, 658 S.W.2d at 879.

In the case at bar the affidavit fails to state any sort of time frame in which the suspected criminal activity was observed. There are no words in the present tense as to the location of the drugs, no grounds for the inference that the contraband was "recently" seen, nor any words such as "now."

In *Herrington* v. *State*, 287 Ark. 228, 687 S.W.2d 899 (1985), the Arkansas Supreme Court was faced with a similarly defective warrant. The appellant in *Herrington* argued that the trial court erred by denying his motion to quash the search warrant since the supporting affidavit did not mention the time during which the criminal activity was observed. In *Herrington*

the court noted the holding by the United States Supreme Court in *United States* v. *Leon*, 468 U.S. 897 (1984), which held that objective good faith reliance by a police officer upon the acceptance of his affidavit by a detached, neutral magistrate will avoid application of the exclusionary rule in the event the magistrate's assessment is found to be in error. *Herrington*, 287 Ark. at 230, 697 S.W.2d at 899-900.

The affidavit in *Herrington* provided as follows:

> *David M. Foy, ASP Investigator*, having been duly sworn in the form and manner required by law, on oath states:
>
> I have probable cause to believe that on or in the *residence, grounds and out-buildings located at Rt. 4, Box 405, Crossett, or the 1981 Chev. Pickup w/AR veh lic IWE-892* in the charge or possession of *Michael Herrington* the following items or property is contained or concealed *marijuana and other controlled substances* and that such items or property (is) (are) *contraband*
>
> The facts upon which I base my request for a Search Warrant are:
>
> *An informant whom I have used several times and whose information has been accurate advised me that he had seen marijuana and other controlled substances in the house and on the premises occupied by Herrington.*

Id. at 231; 697 S.W.2d at 900.

The Arkansas Supreme Court found the warrant to be defective and announced the following rules and conclusions:

> Pursuant to *Leon* and *Collins*, we do not hold that the absence of a reference to time in an affidavit makes the subsequent warrant automatically defective. Rather, in such a situation, we look to the four corners of the affidavit to determine if we can establish with certainty the time during which the criminal activity was observed. If the time can be inferred in this manner, then the police officer's objective good faith reliance on the magistrate's assessment will cure the omission.

> Here, however, the omission of any reference to time is so complete that none can be inferred. The only statements that are in the present tense are those pre-printed on the form. The information supplied by the affiant is imprecise ("I have probable cause to believe that *on or in*" (emphasis added)) and is worded in the past tense. There are no terms such as "recently" or "now" and no reference to an urgent situation as mentioned in *Collins, supra*, which would enable the court to ascertain the time factor. Accordingly the affidavit is defective and the warrant invalid.
>
> In *Leon*, the Supreme Court not only announced the good faith exception to the exclusionary rule, it also delineated four errors which an officer's objective good faith cannot cure. These occur (1) when the magistrate is misled by information the affiant knew was false; (2) if the magistrate wholly abandons his detached and neutral judicial role; (3) when the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable", quoting *Brown* v. *Illinois*, 422 U.S. 590, 610-11 (1975); and (4) when a warrant is so facially deficient "that the executing officers cannot reasonably presume it to be valid", *Leon*, supra, at pp. 3421-22. In its discussion of the third exception, the Court explained, "sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others," quoting *Illinois* v. *Gates*, 103 S.Ct. 2317 (1983).
>
> An affidavit such as this, with absolutely no reference to a time frame, does not provide sufficient information upon which a probable cause determination can be made. The issuance of a warrant on such an affidavit accordingly violates Ark. Const. art. 2, § 15 and results in an unreasonable search and seizure. The evidence obtained in this manner should have been suppressed.

Id. at 232-233, 697 S.W.2d at 900-901.

We find that the warrant in the case at bar fails to mention time and fails to establish a basis upon which a time

frame can be inferred. Therefore, we reverse the decision of the trial court on this point.

We find that our disposition of the issues discussed above make it unnecessary to address the other points raised by appellants. The trial court's decision pertaining to appellant Ulrich's conviction is reversed and the charges dismissed. The trial court's conviction of appellant Kandur is reversed and the case is remanded for further proceedings in accordance with this opinion.

Reversed and dismissed in part; reversed and remanded in part.

CLONINGER and MAYFIELD, JJ., agree.

Larry HAYNES *v.* DIRECTOR OF LABOR

E 86-8 719 S.W.2d 437

Court of Appeals of Arkansas
Division I
Opinion delivered October 1, 1986

Kirby Riffel, for appellant.

Gary Williams, for appellee.

MELVIN MAYFIELD, Judge. Larry Haynes has appealed from the Board of Review's denial of unemployment benefits. The denial was made pursuant to Section 5(a) of the Arkansas Employment Security Law, Ark. Stat. Ann. § 81-1106(a)(Supp. 1985), based upon a finding that appellant voluntarily left his last work without good cause connected with the work.

The appellant had been employed at Food-4-Less in Giddings, Texas, for several months when he quit about September 15, 1985, and moved to Arkansas. Upon arriving in Arkansas, he applied for unemployment compensation by filing a form, which he signed, containing a statement that he had been living with friends in Texas who moved, and he was not making enough to get out on his own, so he was forced to quit work. Later, he signed another form, also filed with the agency, which contained a statement that he quit work because he was moving back to Arkansas where he had acquired a better paying job, but when he got here the manager had changed his mind about hiring him. The appellant's employer responded with a statement signed by its manager. It stated that the manager found out the appellant's

friends were moving and he asked the appellant if he was moving also; that the appellant said he was staying there to work; but that appellant did not show up for work the next Monday and never called.

The employment security agency denied appellant's application for benefits and he appealed to the appeal tribunal. At the hearing before the tribunal, the appellant testified that his reason for quitting the job was that his brother, who had been taking care of their disabled father, had called and said he was getting married and was leaving Arkansas, so appellant had felt it necessary to return to Arkansas to care for their father. He also testified that he had explained this to his manager and was told that he could go back to work anytime he could come back to Texas. This testimony was taken by telephone, as the referee was in Little Rock and the claimant was then in Pocahontas.

The appeal tribunal and the Arkansas Board of Review affirmed the agency's denial of benefits. On appeal to this court, the appellant argues that there is no competent evidence in the record to contradict his testimony that his leaving work was the result of a personal emergency and that he made reasonable efforts to preserve his job rights. Therefore, appellant claims, he was entitled to benefits under Ark. Stat. Ann. § 81-1106(a) (Supp. 1985).

We must affirm the Board's decision if it is supported by substantial evidence. *Harris* v. *Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978). Neither the appeal tribunal nor the Board of Review is bound by common law or statutory rules of evidence. Ark. Stat. Ann. § 81-1107(d)(4)(Supp. 1985); *see also Bockman* v. *Ark. State Medical Board*, 229 Ark. 143, 313 S.W.2d 826 (1958). Hearsay evidence can constitute substantial evidence in unemployment compensation cases, but the claimant must be given the opportunity to subpoena and cross-examine adverse witnesses at some stage of the proceedings. *Leardis Smith* v. *Everett, Director*, 276 Ark. 430, 637 S.W.2d 537 (1982). However, when the claimant does not request another hearing in order to cross-examine witnesses whose hearsay statements have been received in evidence, he effectively waives his right of cross-examination and due process requirements are not violated. *Farmer* v. *Everett, Director*, 8 Ark. App. 23, 648 S.W.2d 513

(1983); *Swan* v. *Stiles, Director*, 16 Ark. App. 27, 696 S.W.2d 765 (1985).

The record in this case contains three conflicting statements made by appellant himself and a fourth version of the facts made by the manager of the grocery store where appellant was employed. One of the statements made by appellant was made in the sworn testimony taken by the appeals referee. The other two statements by the appellant were signed by him and furnished to the employment security agency in the course of applying for unemployment compensation. These were clearly admissible, even in a court of law, as admissions by a party. Unif. R. Evid. 801(d)(2)(i); *see First National Bank of Brinkley* v. *Nash*, 2 Ark. App. 135, 140, 617 S.W.2d 24 (1981); *accord Roberson* v. *State Dept. of Employment Security*, 295 So. 2d 190 (La. App. 1974).

As to the statement signed by the appellee's manager and filed with the employment security agency, the record shows that it was read to the appellant by the appeals referee when appellant's testimony was taken by telephone. Thus, appellant was aware of this statement but made no request to cross-examine the manager. Therefore, under the *Farmer* and *Swan* cases, *supra*, the statement was properly before the referee for consideration. *See also, Brunello* v. *Mill City Auto Body*, 348 N.W.2d 409 (Minn. App. 1984)(holding written statements by both sides admissible in unemployment compensation cases).

Resolving the conflicts in the evidence was for the Board of Review and it is not required to accept a party's testimony as undisputed. *Butler* v. *Director of Labor*, 3 Ark. App. 229, 624 S.W.2d 448 (1981). We find that the Board's decision in this case is supported by substantial evidence.

Affirmed.

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

Lynette McDONALD *v.* Joe Edward McDONALD, Sr.

CA 85-338 716 S.W.2d 788

Court of Appeals of Arkansas
Division II
Opinion delivered October 1, 1986

Henry C. Morris, for appellant.

Mickey Buchanan, for appellee.

TOM GLAZE, Judge. The issue in this divorce case involves the settlement proceeds resulting from the appellee's injury when he was employed by Kansas City Southern Railway Company. Appellant and appellee were married at the time of appellee's injury and settled their claim with appellee's employer for $250,000.00. At the time of the divorce, $110,000.00 of the initial lump-sum payment was in a certificate of deposit in the names of "Mr. or Mrs. Joe McDonald, Sr.," and two additional separate installments of $50,000.00 each were to be subsequently paid.

The chancellor found that the certificate of deposit and the two future installments were marital property within the meaning of Ark. Stat. Ann. Section 34-1214 (Supp. 1985), but he divided these proceeds unequally. He awarded appellant $25,000.00 of the certificate of deposit, and appellee was given the balance of the certificate of deposit as well as the two installments. In making the division, the chancellor stated that he considered all the factors set out in Section 34-1214(A)(1) and specifically looked at the severity of appellee's injury and the unlikely prospects for his future employability compared with the health and ability of appellant to work.

We disagree with the chancellor with respect to the question of the division of the $110,000.00 certificate of deposit. Ark. Stat. Ann. Section 67-552(C) (Supp. 1985) provides that, if a certificate of deposit is in the names of persons who denominate themselves to the banking institution as husband and wife, then such certificate of deposit and all additions thereto shall be the property of such persons as tenants by the entirety. As previously

noted, that was the situation here since the parties' certificate of deposit was titled in the names of "Mr. or Mrs. Joe McDonald, Sr." Because the parties' certificate of deposit was held as tenants by the entirety, it was required to be divided pursuant to Ark. Stat. Ann. Section 34-1215 (Supp. 1985). That statute provides that, when any chancery court renders a final decree of divorce, any estate by the entirety in real or personal property held by the parties to the divorce shall be automatically dissolved, and parties shall be treated as tenants in common.

The supreme court, in *Warren* v. *Warren*, 273 Ark. 528, 623 S.W.2d 813 (1981) set out the rule for the division of property held as tenants by the entirety. The court stated:

> We have traditionally recognized two categories of property in divorce cases. One category has been divided pursuant to the general property division statute which has been codified as Ark. Stat. Ann. Section 34-1214 in the 1947 publication, the 1962 replacement and the various supplements prior to 1979. The other category, property held in tenancies by the entireties, has never been divided pursuant to the general property division statute.
>
> . . .
>
> By Act 340 of 1947, Ark. Stat. Ann. Section 34-1215 (Repl. 1962), the General Assembly gave courts the authority to convert marital survivorship estates to a tenancy in common. . . .
>
> . . .
>
> This statute is the only authority for dividing estates by the entirety, and it provides for the equal division of property without regard to gender or fault. . . .
>
> . . .
>
> We hold that Act 705 of 1979, Section 34-1214 (Supp. 1979), is not applicable to property owned as tenants by the entirety.

Id. at 530-34. *See also Bramlett* v. *Bramlett*, 5 Ark. App. 217, 636 S.W.2d 294 (1982); *Askins* v. *Askins*, 5 Ark. App. 64, 632 S.W.2d 249 (1982).

[redacted] On *de novo* review in chancery cases we do not reverse unless we find the chancellor's findings of fact and conclusions of law to be erroneous, and when we do find error and the record is fully developed where we can plainly see where the equities lie, we do not remand for further proceedings but enter here the decree which ought to have been entered by the chancellor. *Beeson* v. *Beeson*, 11 Ark. App. 79, 667 S.W.2d 368 (1984); *see also Ferguson* v. *Green*, 266 Ark. 556, 587 S.W.2d 18 (1979). In accordance with the clear directives in *Warren*, we hold that the $110,000.00 certificate of deposit should have been divided equally and modify the decree to direct the equal division of that certificate between the parties.

Appellant contends that she also is entitled to half of the two installments of $50,000.00 remaining to be paid on the parties' claim for appellee's injury. We hold that *Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986) is controlling here. In *Liles*, the appellant argued that the chancellor erred in classifying appellant's personal injury settlement as marital property. As in the present case, a portion of the award in *Liles* had been paid to appellant at the time of the divorce, and the remainder was to be received in future installments. The Arkansas Supreme Court, in upholding the chancellor's decision that such funds constitute marital property, stated:

> The appellant contends we should be guided by our decision in *Lowery* v. *Lowery*, 260 Ark. 128, 538 S.W.2d 36 (1976), in which we held that a Jones Act claim was not "personal property" and thus was not subject to division pursuant to the predecessor of the current Ark. Stat. Ann. Section 34-1214 (Supp. 1985). In *Goode* v. *Goode*, 286 Ark. 463, 692 S.W.2d 757 (1985), we noted that *Lowery* v. *Lowery, supra*, no longer governs with respect to the question whether a personal injury judgment could be marital property, as it was decided long before the landmark case of *Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984), where we emphasized that all property acquired by either spouse subsequent to marriage becomes marital property unless it is specifically excepted by the statute. Moreover, in *Lowery* v. *Lowery, supra*, we were considering whether a wholly unliquidated Jones Act claim was subject to the marital rights of the spouse of the

> claimant upon divorce. Here, the claim is liquidated, but part of the judgment is to be received in the future pursuant to the structured settlement. The amount to be received from Aetna is more "liquidated" than was the workers' compensation claim we held to have been marital property in *Goode* v. *Goode, supra.*
>
> Nor does it concern us that some of the money comprising the judgment may have been to compensate Tommy for the harm to his body, as opposed to lost wages and medical expenses. We pointed out in *Goode* v. *Goode, supra*, that the chancellor may take into consideration the health of the parties in dividing marital property in accordance with the statute.

Id. at 168-69.

In view of *Liles*, the chancellor here clearly was correct in finding the two future installments marital property, which leads us to appellant's final argument: whether the chancellor properly considered the factors under Section 34-1214(A)(1) in awarding those installments unequally, *i.e.*, entirely to appellee. We hold that he did.

In *Jones* v. *Jones*, 17 Ark. App. 144, 705 S.W.2d 447 (1986), we upheld when the chancellor, in dividing marital property unequally, stated he was relying on the reasons cited in Section 34-1214(A)(1), and stated the main reasons were that it was appellee who contributed to the acquisition of her own pension plan and individual retirement account, and appellant was able to support himself. Here, as pointed out earlier, the chancellor recited the factors set forth in Section 34-1214(A)(1), and particularly mentioned the severity of appellee's injury and the likelihood he would not work again while appellant maintained her ability to work. We believe the chancellor's analysis was sufficient, and his refusal to award appellant any portion of the two installments is not against the preponderance of the evidence. *Warren* v. *Warren, supra.*

Affirmed as modified.

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

John MINCY *v.* STATE of Arkansas

CA CR 86-79 717 S.W.2d 213

Court of Appeals of Arkansas
Division I
Opinion delivered October 8, 1986

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

Steve Clark, Att'y Gen., by: *Lee Taylor Franke*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was convicted on two counts of delivery of amphetamines by a Poinsett County Circuit Court jury and was sentenced to serve two concurrent ten-year terms in the Arkansas Department of Correction. From that decision, comes this appeal.

The appellant first argues that the trial court erred in denying the appellant the right to dismiss his attorney of record on the morning of trial and obtain other counsel. We find no error. A request to change counsel at such a late date would have necessitated the granting of a continuance; therefore, such a motion is treated as a motion for a continuance. *Leggins* v. *State*, 271 Ark. 616, 609 S.W.2d 76 (1980); *Pickens* v. *State*, 6 Ark.

App. 58, 638 S.W.2d 682 (1982), *aff'd*, 279 Ark. 457, 652 S.W.2d 626 (1983). Determining whether a continuance should be granted is a matter in the discretion of the trial court, and the appellant has the burden of showing that the court abused that discretion. *Berry* v. *State*, 278 Ark. 578, 647 S.W.2d 453 (1983); *Phillips* v. *State*, 17 Ark. App. 86, 703 S.W.2d 471 (1986). A defendant cannot be permitted to use a change of lawyers as a device to delay trial. *Collins* v. *State*, 276 Ark. 62, 632 S.W.2d 418 (1982). When making its decision whether to grant the continuance, the court must look at the particular circumstances of each case, considering the request for a change of counsel in the context of the public's interest in the prompt dispensation of justice. *Clay* v. *State*, 290 Ark. 54, 716 S.W.2d 751 (1986); *Leggins* v. *State*, 271 Ark. 616, 609 S.W.2d 76 (1980). In *Thorne* v. *State*, 269 Ark. 556, 601 S.W.2d 886 (1980), the Supreme Court set forth some of the factors to be considered:

> [W]hether there was adequate opportunity for the defendant to employ counsel; whether other continuances have been requested and granted; the length of the requested delay; whether the requested delay is for legitimate reasons; whether or not the motion for continuance was timely filed; whether or not the defendant contributed to the circumstances giving rise to the request for the continuance; whether or not the reason for the discharge of existing counsel was solely for the purpose of obtaining a continuance; whether the request is consistent with the fair, efficient and effective administration of justice; [and] whether denying the continuance resulted in identifiable prejudice to the defendant's case of a material and substantial nature; . . . No one of these factors is a prerequisite to the granting of a continuance, but these and other factors are the legitimate subject of the court's attention when a continuance is requested.

269 Ark. at 561.

Here, the appellant informed the court on the morning of trial that he wished to change attorneys. Upon inquiry by the court, he admitted that he had no funds of his own to hire a new attorney, but that his parents, who were over-the-road truckers and were currently out of town, had been talking of hiring him a

new attorney. He admitted that he did not know for sure when his parents would be back in town. When asked by the court why he wanted to change attorneys, the appellant responded that his attorney had recommended within the last week that the appellant change his defense. The appellant did not say that his attorney was forcing him to change his defense or refusing to defend him if he did not do so. The court found that the appellant's attorney was ready, willing, and able to defend him. The appellant here learned of the disagreement in trial tactics the week before the trial, but did not bring it to his attorney's attention until the night before the trial. Under these circumstances, we cannot say the court erred in refusing to grant the continuance.

The appellant next contends that he was improperly sentenced under Ark. Stat. Ann. § 82-2617(a)(1)(i) (Supp. 1985) and requests that we reduce his sentence to the minimum under the proper statute, Ark. Stat. Ann. § 82-2617(a)(1)(ii) (Supp. 1985) (having been sentenced to the minimum under the statute actually used). The State concedes that the appellant was sentenced under the wrong statute, but contends that the appellant cannot now raise the issue, as he did not object to the jury instructions setting forth the range of punishment. The State does request that, if we reach the issue, we reduce the appellant's sentence to the five year minimum set forth in the statute instead of remanding it to the lower court. Because we agree with both parties that the sentencing was in error, and because both parties agree on what the sentence should have been, we reduce the appellant's sentence to five years on each count, to be served concurrently. *See Abbott* v. *State*, 256 Ark. 558, 508 S.W.2d 733 (1974); Ark. Stat. Ann. § 43-2725.2 (Repl. 1977).

The appellant also contends that the trial court erred in admitting taped telephone conversations between him and a confidential informant. He contends that their introduction violated state law, specifically Ark. Stat. Ann. § 41-4501, *et seq.* (Supp. 1985). At trial, however, the appellant objected to the admission of the tapes on the ground that they violated federal law. It is settled law that the appellant cannot change the grounds for his objection on appeal. *Vasquez* v. *State*, 287 Ark. 468, 473-A, 702 S.W.2d 411 (1986) (supp. op. on denial of rehearing). Only the specific objections made at trial are available on appeal;

all others are deemed waived. *Biniores* v. *State*, 16 Ark. App. 275, 701 S.W.2d 385 (1985). However, even if the appellant had properly preserved his objection below, we find no error in the admitting of the tapes, as they were made before the effective date of the statute. At that time, neither the consent of both parties nor a court order was required by law.

The appellant's last argument is that the judge erred in failing to quash the jury panel because the jury from his trial was present for the trial of his codefendant, Bo Denton. The appellant fails to cite to us any convincing argument or authority on this point. We do not consider such points unless it is apparent without further research, which is not the case here, that they are well taken. *Satterlee* v. *State*, 289 Ark. 450, 711 S.W.2d 827 (1986); *Reynolds* v. *State*, 18 Ark. App. 193, 712 S.W.2d 329 (1986).

Affirmed as modified.

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

Anthony Paul FREE *v.* STATE of Arkansas

CA CR 85-205 717 S.W.2d 215

Court of Appeals of Arkansas
En Banc
Opinion delivered October 8, 1986

Darrell E. Baker, Jr., Deputy Public Defender, and *Francis D. Crumpler, Jr.*, for appellant.

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

LAWSON CLONINGER, Judge. Appellant, accused of engaging in deviate sexual activity with a person under the age of eleven, was charged with five counts of rape. The jury found appellant guilty of three of the charges and appellant was sentenced to ten years on each charge with two of the sentences to run concurrently. For his appeal, appellant argues four points for reversal: 1) that his confession was not voluntary and should have been suppressed; 2) that the trial court unduly restricted examination of a witness and the victim; 3) that it was error for the trial court to allow the victim to testify about other wrongs committed by appellant; and 4) that the state improperly questioned appellant about prior acts and the trial court should have declared a mistrial. We do not agree with any of appellant's arguments and affirm.

Appellant's nephew, aged nine, called the police and told them that he had been raped by his "Uncle Andy." Several days later Floyd J. Hancock, a detective sergeant with the Springdale, Arkansas, police department, went to appellant's residence and asked appellant to come to the station and answer some questions regarding his nephew's complaint. Appellant replied that he had a job interview and would come in later, which he did. Sergeant Hancock, testifying at a *Denno* hearing, stated that he read appellant his Miranda rights and recorded appellant's responses. To test appellant's literacy, he asked appellant to read one of the questions out loud, which appellant was able to do. Appellant then initialed each of the questions and signed the form. Sergeant Hancock also signed the form.

The interview with appellant took approximately one hour. During that time, Sergeant Hancock discussed with appellant a seminar he had attended. He told appellant that he had learned at the seminar that adult males who have a sexual preference for young males were extremely difficult to help and that the first step towards getting help was to admit that they had a problem to begin with. Sergeant Hancock also told appellant that it was possible for the court to order counseling and there might be counseling at the penitentiary. Appellant then gave a statement in which he admitted he had allowed his nephew to perform oral sex on him on five different occasions, but he alleged that it was his nephew who always initiated it. It is appellant's contention that Sergeant Hancock's statements about counseling amounted to promises of leniency and therefore his statement was not given voluntarily and should have been suppressed.

There is a presumption that an in custody confession is involuntary and the burden is on the state to show the statement to have been voluntarily, freely and understandably made, without fear or hope of reward. *Tatum* v. *State*, 266 Ark. 506, 585 S.W.2d 957 (1979). The appellate court makes an independent determination based upon the totality of the circumstances, with all doubts being resolved in favor of individual rights and safeguards, and the court will not reverse the trial court's holding unless it is clearly erroneous. *Harvey* v. *State*, 272 Ark. 19, 611 S.W.2d 762 (1981). Any conflict in the testimony of different witnesses is for the trial court to resolve. *Harvey, supra.*

When we consider the totality of the circumstances we consider both statements the police made to the accused and how vulnerable the accused is. *Davis* v. *State*, 275 Ark. 264, 630 S.W.2d 1 (1982). We find that no promises were made to appellant for leniency. In fact, Sergeant Hancock's statements implied that appellant would be punished. Nor do we think appellant was particularly vulnerable. The questioning lasted about one hour, he was read his rights, and Sergeant Hancock took particular care to make sure appellant understood them. There was no indication that appellant was not sober, and appellant was allowed to come to the police station at his own convenience. We believe the trial court's finding that appellant's confession was made voluntarily is not clearly erroneous. *See Davis, supra.*

Appellant next argues that the trial court unduly restricted his right to examine witnesses. Robert Tomlinson was called as a defense witness to testify about a conversation he had with the victim prior to appellant's arrest. The state objected on the grounds that it was hearsay and the court sustained the objection. Appellant then made a proffer of Mr. Tomlinson's testimony. Tomlinson was expected to testify that while the victim was angry with Tomlinson he threatened to call the police and tell them that Tomlinson had raped him. Appellant then called the victim and attempted to elicit testimony about the threat to Tomlinson. The trial court found that the testimony would be irrelevant to the issue of appellant's guilt. It is appellant's contention that the evidence is relevant to show that the victim may have had a motive for his accusations and that they may not have any basis in reality. We agree with the trial court's ruling.

The alleged threat would be a collateral matter and a witness cannot be impeached on a collateral matter by calling another witness to contradict the testimony of the first witness. *Kellensworth* v. *State*, 275 Ark. 252, 631 S.W.2d 1 (1982). An issue that cannot be independently proven is collateral. *Kellensworth, supra.* The proper time to raise the matter was on cross examination of the victim, and appellant failed to do this. In his ruling, the trial judge specifically stated that the victim was expected to deny making the threat. At that point, it would become improper to allow Tomlinson to testify that the threat was made. Such a tactic would have distracted the jury from the main issue and wasted time. *Kellensworth, supra.*

Appellant also contends that it was error for the trial court to refuse to exclude the victim's testimony of other wrongs committed by appellant. By agreement, the state was confined to charging appellant with only the five instances of oral sex to which appellant had confessed. At a pre-trial hearing the court declined to rule on the admissibility of evidence regarding instances of anal sex. During the trial the victim was allowed to testify about the instances of anal sex.

U.R.E. Rule 404(b) makes admissible evidence of other crimes, wrongs or acts for the purpose of proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The evidence must have relevancy

independent of a mere showing that the defendant is a bad character. *Collins* v. *State*, 11 Ark. App. 282, 669 S.W.2d 505 (1984).

In appellant's confession he denied that he was the one that made sexual overtures to the victim; he claimed that it was the victim who initiated any sexual contact. At trial, appellant denied that there had been any sexual contact at all. He alleged that he made the statement he did only because he was "ready to get out of there and go home."

In trials for incest or carnal abuse the state may show other acts of intercourse between the same parties to show the relation and intimacy of the parties, their disposition and antecedent conduct toward each other. *Collins, supra.* We believe the evidence complained of by appellant was relevant to show that appellant's participation was not just passive acceptance of his nephew's advances, as he alleges.

Appellant's last argument regards the court's refusal to grant a mistrial after the state had alluded to prior similar conduct. During cross examination of appellant, the state asked him if he had ever been offered therapy. Appellant denied it and then the state asked if he had ever done anything like this before. Again appellant's response was no. The state then asked, "Wasn't there a time, three years ago, when something like this happened and you had a chance to get some therapy?" Appellant then objected and requested a mistrial. The trial court refused the request but did admonish the jury to disregard the statement. It is appellant's argument that the admonishment did not erase the prejudice formed in the minds of the jury. We disagree.

Appellant relies on the case of *Maxwell* v. *State*, 279 Ark. 423, 652 S.W.2d 31 (1983), in which the prosecutor asked the defendant if he had previously pled guilty to raping an eleven-year-old girl and been sentenced to thirty years. In that case, the Arkansas Supreme Court found that a mistrial should have been granted. However, that case can be distinguished from the one at bar. Here appellant was given a chance to deny the statement, appellant did not previously plead guilty nor was he convicted, and the allusion to previous misconduct was not specific. In *Maxwell, supra*, the court noted that it was obvious that the prosecutor's remarks were deliberate. There was no evidence of

any deliberate misconduct in this case.

The granting of a mistrial is a drastic remedy and should be resorted to only when justice cannot be served by continuing with the trial. *Avery* v. *State*, 15 Ark. App. 134, 690 S.W.2d 732 (1985). The trial court is vested with considerable discretion because of his superior position to determine the possibility of prejudice, and that discretion will not be reversed in the absence of manifest abuse. *Avery, supra.*

We do not think that the state's remarks were prejudicial in light of the fact that appellant was charged with five counts of rape and only convicted of three. The trial court's admonition was sufficient. An admonition from the presiding judge to the jury cures the prejudicial statement unless the error is so prejudicial that justice could not be served by continuing the trial. *Brewer* v. *State*, 269 Ark. 185, 599 S.W.2d 141 (1980). We do not find any abuse of the trial court's discretion.

Affirmed.

GLAZE, CORBIN, and COOPER, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. Because I believe that the trial court erred in failing to grant the appellant's request for a mistrial, based on the State's improper questioning of the appellant, I must respectfully dissent.

While the State was cross-examining the appellant, the following exchange took place:

> Q. Have you ever had a chance for therapy before, Mr. Free?
>
> A. No.
>
> Q. Have you ever done anything like this before?
>
> A. No.
>
> Q. Are you positive about that?
>
> A. I am positive.
>
> Q. *Wasn't there a time*, three years ago, *when something like this happened* and you had a chance to get some therapy.

A. *I was accused of it, yes*, but . . .

(Emphasis added.) At this point the appellant's attorney objected and requested a mistrial, claiming that the last question was an improper inquiry into a prior bad act. The court sustained the objection and denied the motion for mistrial, saying:

> I think the question was—this witness testified on direct, or on cross, I guess it was, that he didn't feel like there was any need for therapy, although he thought that might be one possibility that Officer Hancock was extending to [him] after he confessed. He thought Officer Hancock was offering him possible therapy. He then testified he didn't think he needed therapy because he didn't think he had a problem. *Now, [the prosecutor's] question was getting to the point that some time in the past he had been offered therapy, and that is about as far as it went.* I understand your concern but *there has been no allegation, and I don't think there should be, of prior bad acts.*

(Emphasis added.) The court went on to give a cautionary instruction, in lieu of the mistrial, telling the jury to disregard totally any reference to any offer of therapy being extended to the appellant in the past.

The trial court erred in finding that there was no allegation of any prior bad acts and in denying the mistrial. While the State could question the appellant about his past possibilities for therapy, without bringing in the prior bad acts, it crossed the line with its last question, when it asked, "wasn't there a time, . . . when something like this happened," particularly in light of the appellant admitting in his answer that he had been accused of it. Furthermore, the admonition to the jury does not cure this error.

In *Maxwell* v. *State*, 279 Ark. 423, 652 S.W.2d 31 (1983), the Supreme Court held that no less than a mistrial could cure the error caused by the prosecutor deliberately asking Maxwell if he had been convicted of raping an eleven-year-old girl. The majority claims that *Maxwell* can be distinguished from the case at bar because here the appellant was given the chance to deny the statement, the appellant had not pled guilty, nor was he convicted of the crime, and the allusion to the prior act was not specific. I find no substantial difference between this case and *Maxwell*. It is

inconsequential whether the appellant had the chance to deny participation in the prior act, had not pled guilty to the act, or had not been convicted of the act. As previously stated, the appellant's answer to the last question clearly infers that the appellant had been involved in a prior case involving rape of a child, at least as a suspect. The Uniform Rules of Evidence do not provide that evidence of prior bad acts are inadmissible only if the appellant had been convicted of or pled guilty to the act. *See generally* Unif. R. Evid. 403-404, 608-9, Ark. Stat. Ann. § 28-1001 (Repl. 1979). Furthermore, I disagree that the allusion was not specific. While the State did not directly ask the appellant in this case if "wasn't there a time, . . . when you raped an eleven-year-old child," it came as close as one could without actually using those words, when, in a trial for the rape of a nine-year-old child, the State asked the appellant if there wasn't a time "when something like this happened."

The majority says there is no evidence of any deliberate misconduct by the prosecution in this case. I again must disagree. The record indicates that the prosecuting attorney knew of the prior incident, and then, at the very end of cross-examining the appellant, threw in a reference to "something like this happening" three years ago, in an attempt to impeach the appellant's testimony as to therapy. I find, as did the Supreme Court in *Maxwell*, that the prosecutor's conduct must have been deliberate, as he could not have reasonably expected the appellant to admit he had been involved in the rape of another child three years ago.

Finally, the mistrial should have been granted even if there is no evidence of deliberate misbehavior on the part of the prosecutor. In *Lackey* v. *State*, 283 Ark. 150, 671 S.W.2d 757 (1984), the Supreme Court reversed the trial court for failure to grant a mistrial after admission of evidence that the defendant in a rape case had offered drugs to the victim's cousins and sister, ages five, six, and eleven, respectively. Unlike *Maxwell*, and like here, the prosecutor had contended that the evidence was admissible (there to show the cause of friction between the defendant and the victim's family brought out by the defense). The Supreme Court stated:

> Evidence of other crimes has long been considered the type

> that has no place in a trial. . . . [W]e have consistently held that admission of such evidence is cause for a new trial. . . . The admonition in this case was useless, the damage having been done. *See Maxwell* v. *State*, 279 Ark. 423, 652 S.W.2d 31 (1983). The mere mention of "friction" by the defense was no reason to allow this type of evidence before the jury. . . . The error can only be cured by a new trial.

283 Ark. at 152-3; *accord, Allard* v. *State*, 283 Ark. 317, 675 S.W.2d 829 (1984). In *Lackey*, there was no evidence to show that the prosecutor deliberately asked inadmissible questions or that the defendant had been convicted of those crimes. It simply did not figure in the Court's decision. Instead, in both *Lackey* and the case at bar, the prosecution argued that the line of questioning had been opened up by the defense. The Court in *Lackey* rejected that argument, and we should reject it here. The error here is even more prejudicial than the error in *Lackey* and *Maxwell*, as it not only involves a terrible crime against a child, it is a crime similar to the one for which the appellant stood trial.

I am authorized to say that Corbin and Glaze, JJ., join in this dissent.

Carroll GILBERT *v.* GILBERT TIMBER COMPANY, et al.

CA 86-102 717 S.W.2d 220

Court of Appeals of Arkansas
Division I
Opinion delivered October 8, 1986
[Rehearing denied November 26, 1986.*]

*Cracraft, C.J., concurs; Cloninger, Corbin and Mayfield, JJ., would grant rehearing.

The McMath Law Firm, by: *Art Anderson*, for appellant.

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

TOM GLAZE, Judge. Appellant, the owner of appellee-employer, appeals from a Workers' Compensation Commission decision which reversed the administrative law judge's award of benefits on the basis that appellant had failed to file a written notice that he intended to be included in the definition of an

employee for the purposes of coverage under the Workers' Compensation Act. For reversal, appellant contends that he was not statutorily required to file such notice. We affirm.

At the hearing, the parties stipulated that appellee-employer is a sole proprietorship. Appellant was injured on January 23, 1985, when a tree limb fell, striking him on the head. At the time of the injury, a Workers' Compensation policy issued by CIGNA to appellee-employer was in effect. At issue before us is whether appellant, as owner, was covered under the policy.

Appellee contends that appellant was not covered because he failed to comply with Ark. Stat. Ann. § 81-1302(b) (Supp. 1985), which provides, in pertinent part:

> The term "employee" shall also include a sole proprietor or a partner who devotes full time to the proprietorship or partnership and who elects to be included in the definition of "employee" by filing written notice thereof with the Division of Worker's [sic] Compensation.

The notice required under § 81-1302(b) is filed with the Commission on a form known as an A-18. Appellant never filed an A-18, either at the time of or subsequent to the issuance of the policy. However, he contends that he was not required to file the form because of the following language contained in Ark. Stat. Ann. § 81-1320(a) (Supp. 1985):

> Provided, however that any *officer of a corporation or self-employed employer* who is not a subcontractor and who owns and operates his own business may by agreement or contract exclude himself from coverage or waive his right to coverage or compensation under the Act. [Emphasis added.]

Therefore, under § 81-1302(b), a "sole proprietor" must file written notice with the Commission to be included in the definition of an "employee," while under § 81-1320(a), a "self-employed employer" may agree or contract to exclude himself from coverage. Both parties' arguments in this case are, to a considerable extent, premised on the notion that there is a conflict in the statutes. However, in construing seemingly contradictory statutes, it is our duty, so far as practical, to reconcile different provisions so as to make them consistent, harmonious, and

sensible. *Southern Wooden Box Co.* v. *Smith*, 5 Ark. App. 14, 631 S.W.2d 620 (1982). Here we simply fail to find a conflict, and we make this assessment on a fundamental basis, *viz.*, the terms "sole proprietor" and "self-employed employer," as used in the Workers' Compensation Act, are neither synonymous nor interchangeable.

Our research reveals only two cases which have applied § 81-1320(a) since it was added by the General Assembly in 1971 Ark. Acts 162. They are *Prudential Insurance Co. of America* v. *Jones*, 1 Ark. App. 51, 613 S.W.2d 114 (1981), and *Queen* v. *Royal Service Co.*, 6 Ark. App. 149, 645 S.W.2d 343 (1982). In both cases, the employers were corporations in which the appellants and their wives owned all of the stock. In no case has the pertinent language of § 81-1320(a) been applied to anything other than a corporation.

We conclude that § 81-1320(a) clearly applies only to corporations, and therefore, "self-employed employers" must be corporate officers. To interpret it otherwise would result in an ambiguity. The supreme court has held that it is permissible to read the word "or" as "and" when the context in which it is used requires that it be done to effectuate a manifest intention or when not to do so would render the meaning of the clause ambiguous or result in an absurdity. *Pickens-Bond Construction Co.* v. *North Little Rock Electric Co.*, 249 Ark. 389, 459 S.W.2d 549 (1970). Here, the obvious intention is that § 81-1320(a) apply to persons who are both officers of corporations *and* self-employed employers.

In the instant case, it was stipulated that appellee-employer is a sole proprietorship. We therefore hold that § 81-1302(b) is applicable, and that appellant was required to file an A-18 to be included within the definition of an "employee" under the Act. Since he did not do so, he is not covered, and we must affirm the Commission.

Affirmed.

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

Rehearing Denied November 26, 1986

719 S.W.2d 284

PER CURIAM. Rehearing is denied.

CRACRAFT, C.J., concurs.

CLONINGER, CORBIN, and MAYFIELD, JJ., would grant rehearing.

GEORGE K. CRACRAFT, Chief Judge, concurring. I would deny the petition for rehearing because I think that the result reached in the original opinion was correct.

As originally enacted, our statute defined "employees" as those persons "employed in the service of an employer under any contract of hire or apprenticeship. . . ." *See* Ark. Stat. Ann. § 81-1302(b) (Repl. 1976). That definition of employee did not include a sole proprietor. By amendment in 1979, that definition was expanded to include "sole proprietors and partners who devote full time to the proprietorship. . . ," but *only* if they elect in writing to be so included. Ark. Stat. Ann. § 81-1302(b) (Supp. 1985). It is clear from this section that only those sole proprietors who elect to be considered employees and file their election with the Commission are to be considered "employees."

That section in no way conflicts with provisions of Ark. Stat. Ann. § 81-1320(a) (Supp. 1985), which, as originally enacted, provided that no agreement by any employee to waive his right to compensation should be valid and that no contract should operate to relieve the employer or carrier from any liability created by the Act. *See* Ark. Stat. Ann. § 81-1320(a) (1947). The purpose of this section was to protect employees against employers who were able to avoid liability by simply having the employee sign a contract waiving rights to compensation in consideration of being employed. *Bryan* v. *Ford, Bacon & Davis*, 246 Ark. 327, 438 S.W.2d 472 (1969). By amendment in 1971, a proviso was added to this section which would permit a "self-employer" who was also an "employee" to exclude himself from coverage.

When the two sections and their amendments are read together, it is apparent to me that a self-employer cannot *become* an "employee," who would be required to exclude himself, until he has first *elected* to become one in writing. If he does not so elect, he is not an employee within the meaning of § 81-1302(b) and the

provisions of § 81-1320(a) cannot possibly become applicable to him.

I realize that in *Queen* v. *Royal Service Co.*, 6 Ark. App. 149, 645 S.W.2d 343 (1982), this distinction was not recognized, but this is simply because it was not argued as an issue in that case. In my opinion, the decision in *Queen* was clearly wrong and to apply it here would simply compound the error we fell into then. I would deny the petition for rehearing because the self-employer had never elected in writing to become an "employee" and therefore was not required to "exclude" himself from coverage. He was simply not covered in the first place.

MELVIN MAYFIELD, Judge, dissenting. The court has today denied rehearing in the above case. The original opinion, by a three-judge panel, denied workers' compensation coverage to the appellant. *See Gilbert* v. *Gilbert Timber Co.*, 19 Ark. App. 93, 717 S.W.2d 220 (1986). Petitions for rehearing are determined by the full court, Ark. Stat. Ann. § 22-1211 (Supp. 1985), and although three judges would grant the petition, three would not, so this dissenting opinion is written for the three judges who would grant the petition for rehearing.

We think the appellant's injury was covered by the compensation act. The Commission's opinion stated it was "undisputed" that appellant was the "self-employed sole proprietor" of Gilbert Timber Company at the time of his injury on January 23, 1985, and that his injury "admittedly" occurred within the scope and course of his employment. It was also undisputed that appellant had three employees, in addition to himself. However, the Commission held that appellant was not covered by the act because he had not elected coverage by filing the written notice referred to in Ark. Stat. Ann. § 81-1302(b) (Supp. 1985). That provision was made a part of the compensation act by Act 119 of 1979, and reads as follows:

> The term "employee" shall also include a sole proprietor or a partner who devotes full time to the proprietorship or partnership and who elects to be included in the definition of "employee" by filing written notice thereof with the Division of Worker's Compensation.

We do not agree that appellant's failure to file the notice

referred to in the above provision prevents his coverage by the compensation act. Another section of the act, Ark. Stat. Ann. § 81-1320(a) (Supp. 1985), reads as follows:

> (a) [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. *Provided however, that any officer of a corporation or self-employed employer who is not a subcontractor and who owns and operates his own business may by agreement or contract exclude himself from coverage or waive his right to coverage or compensation under this act.* Provided further, if the exclusion from coverage of the officer or officers or self-employed employer or employers reduces the number of employees of the business to less than three (3) the employer shall nevertheless continue to provide Workers' Compensation Coverage for such employees. (Emphasis added.)

In a unanimous opinion, with one judge not participating, this court held in *Queen* v. *Royal Service Co.*, 6 Ark. App. 149, 645 S.W.2d 343 (1982), that the above section furnished coverage to Mr. Queen even though he and his wife owned all of the stock in the corporation for which he worked. In that decision we recognized the rule set out in 1C Larson, *The Law of Workmen's Compensation* § 54.22 (1980), that employee status will often be denied where preponderant stock ownership is so used that the claimant is for practical purposes the alter ego of the corporation, but held that the above section, Ark. Stat. Ann. § 81-1320(a), made the law in Arkansas different from the general rule set out by Larson. We said:

> The Appellant, Ted Queen, had not elected to exclude himself from coverage. It matters not whether Ted Queen was the "alter ego" of Royal Service Company because if he was then he would become a "self-employed employer" and therefore entitled to coverage unless "by agreement or contract" excluded from coverage.
>
> *Arkansas Law simply allows a self-employed em-*

> *ployer or an officer of the corporation by not contractually excluding himself from coverage to be covered under our compensation law.* (Emphasis added.)

Thus, we do not believe the Commission's decision was correct, if for no other reason, because the Commission simply failed to follow the plain language of our decision in *Queen.* Even the three judges of this court who affirmed the Commission's holding did not agree with its reasoning. The judges' opinion recognized the force of this Court's holding in *Queen,* but said the language in Ark. Stat. Ann. § 81-1320(a) applied "only to corporations, and therefore 'self-employed employers' must be corporate officers," for the statute to apply. Therefore, since Gilbert Timber Company was not a corporation, it was held that the statute did not apply in this case. But we do not agree with that reasoning either.

In the first place, it takes the word "or" out of the provision we are concerned with and changes it to "and." It is said that this is permissible in order "to effectuate a manifest intention" of the legislature or "when not to do so would render the meaning of the clause ambiguous or result in an absurdity." The opinion then states: "Here, the obvious intention is that § 81-1320(a) applies to persons who are both officers of corporations *and* self-employed employers." As the appellant's petition for rehearing states, this reading of the statute is inherently inconsistent. The employer of an officer of a corporation is the corporation. Consequently, an officer of a corporation cannot also be a self-employed "employer." Moreover, if an officer of a corporation is also a self-employed "employer," then the term "self-employed employer" is redundant and superfluous. We are not willing to say that the legislative choice of words is meaningless or useless or to ascribe a meaning to the language that renders the provision inherently inconsistent.

It may be, however, that the provision we are concerned with in Ark. Stat. Ann. § 81-1320(a) is ambiguous or that it conflicts with the requirement of Ark. Stat. Ann. § 81-1302(b). In that case, this court has said, "The provisions of our workers' compensation act are to be construed liberally in favor of the claimant whenever 'obscurity of expression or inept phraseology appears.' " *Crain Burton Ford Co.* v. *Rogers,* 12 Ark. App. 246,

250, 674 S.W.2d 944 (1984), citing and quoting from *International Paper Co.* v. *Tidwell*, 250 Ark. 623, 466 S.W.2d 488 (1971). In *International Paper Co.* v. *McGoogan*, 255 Ark. 1025, 504 S.W.2d 739 (1974), the Arkansas Supreme Court said the compensation act "was enacted for beneficent and humane purposes and in giving effect to these purposes, we construe the statutory provisions liberally in favor of the claimant." And in *Massey* v. *Poteau Trucking Co.*, 221 Ark. 589, 594, 254 S.W.2d 959 (1953), the Arkansas Supreme Court quoted with approval from another case as follows:

> If a statutory provision is plain and unambiguous, it is the duty of the court to enforce it as it is written. If it is ambiguous or doubtful, or susceptible of different constructions or interpretations, then such liberality of construction may be indulged in as, within the fair interpretation of its language, will effect its apparent object and promote justice.

In the instant case, the appellant owned his own business but was injured while working in the woods with his employees. Under the plain provisions of Ark. Stat. Ann. § 81-1320(a), he was a "self-employed employer" who owned and operated his own business and had not by agreement or contract excluded himself from coverage or waived his right to coverage or compensation under the compensation act. Therefore, under our decision in *Queen* v. *Royal Service Co., supra*, he was covered by the act. Even if this section of the act is ambiguous or conflicts with Ark. Stat. Ann. § 81-1302(b), we should construe the act liberally in appellant's favor and allow compensation.

One of the judges who joined in the original opinion, which affirmed the Commission's denial of compensation to the appellant, has written an opinion in response to the petition for rehearing and now takes the position that there is no conflict between Ark. Stat. Ann. § 81-1320(a) and Ark. Stat. Ann. § 81-1302(b). His opinion would explain the meaning and relationship of these two sections by holding that a sole proprietor or a partner, who devotes full time to the proprietorship or partnership, is not an employee unless he elects to be regarded as one by filing the written notice provided in section 81-1302(b), and *after* he has done this, he may exclude himself from coverage as an employee

by agreement or contract as provided in section 81-1320(a).

We find it difficult, however, to reconcile this view with the historical development of the sections involved. That portion of section 81-1320(a) which allows an officer of a corporation or self-employed employer who owns and operates his own business to exclude himself from coverage by contract or agreement, was added to that section by Act 162 of 1971. But it was not until the enactment of Act 119 of 1979 that section 81-1302(b) contained the provision that authorized a sole proprietor or a partner, who devotes full time to the proprietorship or partnership, to elect to be included in the definition of "employee" by filing written notice thereof. Thus, from the passage of Act 162 of 1971, until the passage of Act 119 of 1979, the provision allowing a self-employed employer who owns and operates his own business to exclude himself from coverage stood without the provision that allows a sole proprietor who devotes full time to the proprietorship to elect to be covered as an employee. During that period, we think the employer who owned and operated his own business was clearly covered *unless* he excluded himself. Whether there is any difference now, between the self-employed employer who owns and operates his own business and the sole proprietor who devotes full time to the proprietorship, does not have to be determined in this case because, even if there is a conflict between the two provisions, we should construe the act in favor of coverage.

It is also argued by the insurance company which had issued the policy covering workers' compensation on appellant's business, that the coverage did not apply to him as an employee because he had answered "no" to a question on the insurance application asking whether, as the sole proprietor of the business, he wanted to elect coverage for himself. But the evidence is undisputed, and the law judge found it to be a fact, that the appellant did not check the "no" box appearing after this question and did not authorize the insurance agent to check that box. The Commission did not reach this issue but we do not think there is any substantial evidence in the record to support a decision contrary to the one made by the law judge.

For the reasons stated above, the Commission's decision should be reversed and this matter remanded for a determination of the compensation due to appellant.

CLONINGER and CORBIN, JJ., agree.

HOLLEY ENTERPRISES v. Fred NICHOLLS and SECOND INJURY FUND

CA 86-29 717 S.W.2d 495

Court of Appeals of Arkansas
Division I
Opinion delivered October 15, 1986

Elcan Law Firm, by: *Frank C. Elcan*, II, for appellant.

David L. Pake, for Second Injury Fund.

GEORGE K. CRACRAFT, Chief Judge. Holley Enterprises appeals from an order of the Arkansas Workers' Compensation Commission holding that it was solely liable for permanent total disability benefits payable to Fred Nicholls and that the benefits were not apportionable to the Second Injury Fund under the provisions of Ark. Stat. Ann. § 81-1313(i) (Supp. 1985). We find no error and affirm.

The facts are not in dispute. Fred Nicholls suffered from a congenital defect known as dyslexia. It is difficult if not impossible for one inflicted with dyslexia to learn to read or write. This congenital condition made it impossible for Nicholls to work in any employment other than as an unskilled manual laborer. He entered the work force in that capacity and never possessed the capacity to perform any other type of work. He had worked as a laborer to the full satisfaction of all of his employers and there was no evidence that at anytime he was incapable of earning wages appropriate for that type of employment. While working in that employment and without diminished earning capacity he sustained a compensable injury for which he was given an anatomical disability rating of five percent to the body as a whole.

On undisputed evidence the administrative law judge found that after the injury Nicholls was no longer able to perform manual labor and, due to his learning deficiency, it was not possible for him to acquire new skills. He found that the claimant's anatomical disability, when coupled with his learning deficiency, had rendered him permanently and totally disabled. The administrative law judge further ruled that, under the provisions of § 81-1313(i), the liability for benefits should be apportioned between the employer and the Second Injury Fund in accordance with that statute. On appeal, the Full Commission adopted the administrative law judge's findings of fact, affirmed his finding of total disability, but, following our decisions in *Osage Oil Co.* v. *Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985), and *Second Injury Fund* v. *Coleman*, 16 Ark. App. 188, 699 S.W.2d 401 (1985), reversed the ruling of the administrative law judge and declared that there could be no liability imposed on the Second Injury Fund under § 81-1313(i) and directed that the full benefits be paid by the appellant/employer. We agree and affirm.

The appellant argues that the Commission erred in holding

that the congenital dyslexia was not "a previous disability or impairment" which gives rise to a claim against the Second Injury Fund under our statute. This argument was previously rejected by this court in *Masonite Corporation* v. *Mitchell*, 16 Ark. App. 209, 699 S.W.2d 409 (1985), (decided six days after the opinion of the Commission was handed down in this case). The *Masonite* case cannot be distinguished from the one at bar in any material respect. There the claimant suffered from congenital mental retardation which limited his job opportunities to those involving unskilled manual labor. The claimant sustained a traumatic amputation of three fingers on his right hand in a job-related accident for which he was given an anatomical rating of seventy-five percent disability to his right arm. The Commission found that, as a result of the claimant's anatomical disability, coupled with his earning disabilities, he was rendered totally disabled, but that the disability was not subject to apportionment pursuant to § 81-1313(i). Following the decision in *Rooney* v. *Travelers Ins. Co.*, 262 Ark. 695, 560 S.W.2d 797 (1978), and our recent opinion in *Osage Oil Co., supra*, we affirmed the ruling of the Commission.

In *Rooney* our court recognized that our compensation act defines disability as "incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury," Ark. Stat. Ann. § 81-1302(e) (Repl. 1976), and that mental retardation existing at the time a worker initially enters the job market cannot constitute disability in the sense our act uses that word because compensation entitlement is based on previous earning capacity and measured by loss of that capacity. In *Masonite Corporation* v. *Mitchell, supra*, it was argued that *Rooney* was no longer applicable because of the wording of our present Second Injury Fund statute which uses the phrase "previous disability *or impairment*." Applying our decision in *Osage Oil Co., supra*, we held that the inclusion of the word "impairment" was intended only to make it clear that the first impairment did not have to be one which would be compensable under the act, but included non-work-related ones. We further held that the test was and is whether the prior impairment was effectively producing disability, in the sense our act defines that word, before the accident. We concluded in *Masonite* that although it was proper to consider the

congenital impairment as a work loss factor under the doctrine announced in *Glass* v. *Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961), it was an inappropriate consideration on the question of apportionment because the dyslexia was not independently producing disability before the accident.

Here, as in *Rooney* and *Masonite*, the worker entered the labor market as an unskilled manual laborer. He was pursuing that employment without diminished earning capacity at the time of his injury. There was no evidence that the claimant could not have continued in the same or similar employment at the same wage he had always earned had it not been for his injury. We find no error in the Commission's conclusion that on these facts there was no Second Injury Fund liability and affirm its conclusion.

Affirmed.

GLAZE and COOPER, JJ., agree.

Miguel RIVERA v. STATE of Arkansas

CA 85-383 717 S.W.2d 493

Court of Appeals of Arkansas
Division I
Opinion delivered October 15, 1986
[Rehearing denied November 12, 1986.]

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

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

GEORGE K. CRACRAFT, Chief Judge. Miguel Rivera appeals from an order dismissing his petition for writ of habeas corpus testing the validity of a governor's warrant for his extradition to the State of New York. He contends that the trial court erred in its order by admitting and considering written hearsay statements of the officials of the State of New York and testimony of a police officer as to statements made by the appellant to him prior to appellant receiving his *Miranda* warnings, and that the competent evidence was insufficient to prove he was the person named as the fugitive in the warrant issued out of the State of New York. We find no error.

The conditions and circumstances under which our

governor may issue a warrant for extradition are set forth in Ark. Stat. Ann. § 43-3001 et seq. (Repl. 1977). The act of honoring a requisition from a foreign state by the executive branch of this state is a summary one conditioned on the governor finding that the documents presented by the demanding state meet the requirements of our statute. Once the governor has honored the requisition, the circuit court can consider a petition for habeas corpus for only two purposes—to establish the identity of the accused and to determine whether he is a fugitive. *Wilkins* v. *State*, 258 Ark. 578, 528 S.W.2d 382 (1975). The appellant does not contend that the documents forwarded from the State of New York did not meet our statutory requirements. He contends that his fugitive status was established by inadmissible hearsay and that the competent evidence was insufficient to prove the fact that he was the person named in the New York documents. We find no error.

On August 22, 1984, a police officer stopped the appellant on the streets of Fort Smith, Arkansas, to inquire of him about matters unrelated to these proceedings. After determining that the appellant was not the party he sought, the officer returned to the police station and ran a computer check on him. From this source it was learned that there were outstanding warrants for appellant in the State of New York and that he had been declared a fugitive. The computer readout furnished a physical description of the appellant and a nickname by which he had been known in New York. The officer again stopped the appellant and informed him of the information he had received. He asked appellant if he had ever been known by the nickname contained in the computer readout. Appellant acknowledged that he had been known by that name and admitted that he was from the State of New York. He stated that he had at one time been involved in narcotics, but had not been so engaged in recent years. He was taken into custody and the statutory documents were forwarded from New York to the State of Arkansas where the warrant for extradition was issued.

At the habeas corpus hearing, the police officer testified as to the circumstances under which the arrest was made, the information received on the computer readout, and his conversation with the appellant at the time of his arrest. There were also introduced copies of sworn and unsworn statements of the New York police

officers who identified a photograph of the appellant as the person named in the indictment and outlined the circumstances leading up to appellant's arrest in New York and his flight from that state. There was also a statement from a fingerprint expert in the State of New York that he had compared appellant's fingerprints forwarded to him from Fort Smith with those on file in New York and found that the appellant and the person named in the New York indictment were one and the same. The statement also confirmed that the person named in the New York indictment had the same tatoos and other identifying body marks as the person in custody in Fort Smith.

The appellant argues that the statements of the police officer of the evidence surrounding his arrest violated his Fifth Amendment right against self-incrimination, and that the consideration by the court of hearsay testimony denied him the rights of confrontation and due process. We do not agree.

[redacted] The Uniform Rules of Evidence do not apply to proceedings for extradition or rendition. Unif. R. Evid. 1101(b)(3). An extradition proceeding is not a criminal trial in which the guilt or innocence of an accused is adjudicated. The purpose of the hearing is simply to determine whether the evidence of the fugitive's criminal conduct is sufficient to justify his extradition and strict rules of evidence are not applicable. Unsworn statements of an absent witness may be considered and there is no inherent right to confrontation and cross-examination of witnesses. The exclusionary rule is not applicable in such proceedings. *Collins* v. *Loisel*, 259 U.S. 309 (1922); *Bingham* v. *Bradley*, 241 U.S. 511 (1916); *Simmons* v. *Braun*, 627 F.2d 635 (2nd Cir. 1980); *Gibson* v. *Beall*, 249 F.2d 489 (D.C. Cir. 1957). We find no error.

Affirmed.

COOPER, J., and WRIGHT, Special Judge, agree.

Mary Lois (Taylor) WHITE v. James E. TAYLOR

CA 86-175 717 S.W.2d 497

Court of Appeals of Arkansas
Opinion delivered October 15, 1986

Gibson, Gibson & Hashem, by: *John F. Gibson, Jr.*, for appellant.

Paul Petty, for appellee.

DONALD L. CORBIN, Judge. This appeal comes to us from the Jefferson County Chancery Court. Appellant, Mary Lois (Taylor) White, appeals the decision of the chancellor denying her petition for change of custody. We affirm.

Appellant petitioned the court to hold appellee, James E. Taylor, in contempt for failing to comply with appellant's visitation rights and for a change of custody. Appellant alleged in her petition for change of custody that appellee had subjected the child to immoral and indecent behavior in that he had resided with a married woman in the presence of the child. Appellant also asserts on appeal that the only reason the court changed custody of the child from the mother to the father in a previous proceeding was because appellant failed to comply with the property settlement provisions in the divorce decree.

On August 1, 1984, an order was filed in the Chancery Court of Jefferson County which held that the parties continued to have joint custody of the child; however, it changed primary custody of the child from appellant to appellee. Appellant filed a notice of appeal August 24, 1984, on the August 1, 1984, order changing custody to the father. However, on February 11, 1985, appellee filed a motion to dismiss the appeal for failure to file the record on appeal within 90 days, a violation of Arkansas Rules of Appellate Procedure Rule 5(a). On February 15, 1985, this motion was granted and the appeal was dismissed. Therefore, appellant has lost her right to appeal the August, 1984, decision changing custody.

Appellant's petition for modification of custody decree and for order of contempt were properly made. The trial court made the following findings:

> The Court finds that Mr. Taylor has violated the order concerning visitation. If either party has any problem in exercising any visitation or exchange they should contact the Court immediately, through their attorneys if possible, and the Sheriff will be requested to assist. Neither Mrs. Dew [appellant's mother] nor Mrs. White have been very diligent in attempting to exercise visitation in the past but the Court wishes to assure both of them that the Court will assist in any way possible when and if any problems are brought to its attention.
>
> Mary Lois Taylor White remains in flagrant and willful contempt of the orders of this Court pertaining to the division of property and has been since it was entered. The failure to pay the sums owing Plaintiff has been solely the fault of Mrs. White and she has had ample time, means, and opportunity to correct this situation. She has exasperated this Court in her refusal to comply with its orders (or to even bother to read the Court's orders according to her testimony). Her present financial condition, even if her testimony is completely believed, which it is not, is not a sufficient excuse as she has had ample funds to pay during the past two years. She may purge herself yet of this contempt by paying to the Clerk the sum of $6,983.51 on or before November 20, 1985. If payment has

> not been made in full by that time then the Sheriff of any County wherein Mrs. White may be located is ordered to incarcerate her promptly notifying the Court of such action and to hold her until further order of this Court or the receipt of $18,775.00, the total sum ordered previously. As a further condition to Mrs. White's purging herself of this contempt, she shall within 180 days of this order, have established and made all contributions due the trust fund for her son.

This order was dated October 18, 1985. Appellant raises the following points on appeal: (1) The trial judge erred in refusing to recuse from the case; (2) the court erred in denying appellant's petition for change of custody; and (3) the court erred in denying appellant any reasonable means to purge herself of contempt of court.

Appellant alleges that it was error for the chancellor to refuse appellant's motion for change of judge. Appellant's mother testified at the hearing on the motion that appellee had bragged to her about knowing all the judges and that he could "put them in his hip pocket." Another witness, James Merritt, testified that appellee's girlfriend, Merritt's wife, told him that appellee had worked for the judges, done favors for them, and that "it was time for a payback."

In *Matthews* v. *Rodgers*, 279 Ark. 328, 651 S.W.2d 453 (1983), the Arkansas Supreme Court set out the following standard of review:

> The fact that a judge may have, or develop during the trial, an opinion, or a bias or prejudice does not make the trial judge so biased and prejudiced as to require his disqualification in further proceedings. *Walker* v. *State*, 241 Ark. 300, 408 S.W.2d 905 (1966). Whether a judge has become biased to the point that he should disqualify himself is a matter to be confined to the conscience of the judge. *Narisi* v. *Narisi*, 229 Ark. 1059, 320 S.W.2d 757 (1959). The reason is that bias is a subjective matter peculiarly within the knowledge of the trial judge. We find no Arkansas case where a trial judge has stated that he was without prejudice and could hear a case and, without more,

> we reversed that decision. Thus, absent some objective demonstration of prejudice, it is a communication of bias which will cause us to reverse a judge's decision on disqualification.

Id. at 331, 651 S.W.2d at 455. It appears that we cannot say that there was an objective demonstration of prejudice by the judge in the case at bar. We cannot hold that the judge should have recused merely because of allegations of prejudice by a concerned party. There must be an objective demonstration of prejudice by the judge and none was proven here.

It is well-settled that the paramount and controlling consideration in custody cases is the welfare of the child. *Bond* v. *Rich*, 256 Ark. 51, 505 S.W.2d 488 (1974). The decree fixing custody of the child is final on conditions then existing and should not be changed afterwards unless on conditions altered since the decree was rendered or on material facts existing at the time of the decree, but unknown to the court, and then only for the welfare of the child. *Id.* at 53, 505 S.W.2d at 489. The evidence appellant presented as to change of conditions was the following: Testimony that appellant had remarried and was a permanent resident of Alabama and testimony that a married woman had resided in appellee's home for approximately four weeks while the child lived there also. Evidence indicated that the woman no longer lived there.

In cases involving child custody a heavier burden is cast upon the chancellor to utilize to the fullest extent all of his powers of perception in evaluating the witnesses, their testimony and the child's best interest. This court has no such opportunity. We know of no case in which the superior position, ability, and opportunity of the chancellor to observe the parties carry as great weight as one involving minor children. *Calhoun* v. *Calhoun*, 3 Ark. App. 270, 625 S.W.2d 545 (1981). In custody matters, the chancellor's finding of facts will not be overturned on appeal unless they are clearly erroneous. ARCP Rule 52; *Calhoun* v. *Calhoun*, 3 Ark. App. 270, 625 S.W.2d 545 (1981). In the case at bar, the chancellor's finding of no material change in circumstances substantial enough to justify change of custody is not clearly erroneous. Therefore, we find no merit in appellant's second point for reversal.

As her third point for reversal appellant alleges that the court erred by denying appellant any reasonable means to purge herself of contempt. The record indicates that since October 19, 1983, appellant has been held in contempt for failure to comply with the October 7, 1983, order. On August 1, 1984, appellant was found in willful contempt. It appears to this court that the chancellor in this case has made numerous attempts to allow appellant opportunities to purge herself of contempt.

The disobedience of any valid judgment, order, or decree of a court having jurisdiction to enter it is such an interference with the administration of justice as to constitute contempt. *Henderson* v. *Dudley*, 264 Ark. 697, 574 S.W.2d 658 (1978). Punishment for contempt is an inherent power of the court. *Id.* at 710, 574 S.W.2d at 666. On appeal from a finding of contempt this court will reverse only where the finding of the chancellor is against the preponderance of the evidence. *C.R.T., Inc.* v. *Brown*, 269 Ark. 114, 602 S.W.2d 409 (1980). We find that the chancellor's finding is not against the preponderance of the evidence.

For the reasons stated above we affirm the decision of the trial court.

Affirmed.

CLONINGER, J., agrees

MAYFIELD, J., concurs.

MELVIN MAYFIELD, Judge, concurring. I concur in the majority opinion with one reservation. The trial judge's order holding the appellant in contempt provides:

> She may purge herself yet of this contempt by paying to the clerk the sum of $6,983.51 on or before November 20, 1985. If payment has not been made in full by that time then the Sheriff of any County wherein Mrs. White may be located is ordered to incarcerate her promptly notifying the Court of such action *and to hold her until further order of this Court or the receipt of $18,775.00*, the total sum ordered previously. (Emphasis added.)

The trouble with this provision is that, unless she pays $6,983.51 by November 20, 1985, appellant is ordered confined

until she pays the total sum of $18,775.00, but the court makes no finding, and the record does not show, that the appellant has, or will ever have, the ability to pay either amount.

This point is specifically raised by the appellant and is not responded to by the appellee. Apparently, the exact point has not been decided in Arkansas but the law is clear. In *Mays* v. *Mays*, 193 Conn. 261, 476 A.2d 562 (1984), the court said:

> It is clear that the court could reasonably have found the defendant's failure to make any substantial payments upon the support order for four years was inexcusable and constituted a contempt. The punishment imposed of incarceration "until such time as the defendant purges himself," however, would exceed the court's authority under the circumstances of this case if it is construed to mean that the defendant must remain in confinement until such time as the arrearage of $5220 is paid. Such an interpretation of the order would appear to deprive the defendant of liberty for his lifetime, since the only evidence presented on the subject indicated that his assets were minimal and that he had no available means of paying the large sum required to discharge his obligation. Nothing in the record warrants an assumption that his financial situation was likely to improve during his imprisonment.
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> . . . .
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> "[I]n civil contempt proceedings, the contemnor must be in a position to purge himself." 17 Am. Jur. 2d, Contempt § 4; see *Morelli* v. *Superior Court of Los Angeles County*, 1 Cal. 3d 328, 332, 82 Cal. Rptr. 375, 461 P.2d 655 (1969). Otherwise the sanction imposed would cease to be remedial and coercive but would become wholly punitive in actual operation. The order of confinement until purged entered in this case does not specify what the defendant must do in order to purge himself, except to pay the entire $5220 arrearage, a feat which the evidence does not even remotely suggest he was able to perform. The case, therefore, must be remanded to the trial court so that the court may set forth in the order the conditions under which the defendant may be deemed to have purged himself and to be entitled to his release from imprison-

> ment. Those conditions, of course, must be reasonably within the power of the defendant to meet. An order of confinement upon an adjudication of civil contempt must provide the contemnor with the key to his release in terms which are not impossible for him to satisfy.

In *Bowen* v. *Bowen*, 471 So. 2d 1274 (Fla. 1985), the court said:

> As this Court has previously stated, the purpose of a *civil* contempt proceeding is to obtain *compliance* on the part of a person subject to an order of the court. Because incarceration is utilized solely to obtain compliance, it must be used only when the contemnor has the ability to comply. This ability to comply is the contemnor's "key to his cell." *Pugliese*. The purpose of *criminal* contempt, on the other hand, is to *punish*. Criminal contempt proceedings are utilized to vindicate the authority of the court or to punish for an intentional violation of an order of the court. *Andrews; Pugliese; Demetree* v. *State ex rel. Marsh*, 89 So. 2d 498 (Fla. 1956); *In re S.L.T.*, 180 So. 2d 374 (Fla. 2d DCA 1965). Because this type of proceeding is punitive in nature, potential criminal contemnors are entitled to the same constitutional due process protections afforded criminal defendants in more typical criminal proceedings. *See Aaron* v. *State*, 284 So. 2d 673 (Fla. 1973); *see also* Fla. R. Crim. P. 3.830, 3.840. We continue to adhere to the view that incarceration for civil contempt cannot be imposed absent a finding by the trial court that the contemnor has the present ability to purge himself of contempt. Without the present ability to pay from some available asset, the contemnor holds no key to the jailhouse door. (Emphasis in the original.)

See also Barrett v. *Barrett*, 368 A.2d 616 (Penn. 1977); *Sword* v. *Sword*, 249 N.W.2d 88 (Mich. 1976); *Ex parte Cummings*, 610 S.W.2d 238 (Tex. Civ. App. 1980).

It is true that the court's order in the instant case does direct the sheriff to hold appellant until further order of the court *or* until the money due is paid. Therefore, I concur in affirming this case based on the assumption that the court has not, and will not, leave the appellant incarcerated for civil contempt without an

order, supported by proper evidence, providing the key to her release in terms that are not impossible for her to satisfy.

Isa HAMMONS *v.* The PRUDENTIAL INSURANCE COMPANY OF AMERICA

CA 85-317 717 S.W.2d 819

Court of Appeals of Arkansas
Division I
Opinion delivered October 22, 1986

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

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

JAMES R. COOPER, Judge. The appellant, widow of John Hammons, brings this appeal from summary judgment granted the appellee in the Sebastian County Circuit Court. The appellant claims that the trial court erred in determining that Oklahoma law controlled in this case and in granting summary judgment based on that finding. We think the trial judge was correct and therefore we affirm.

The facts are not in material dispute. John Hammons, a long-time employee of Griffin Grocery Company and resident of Fort Smith, Arkansas, died on an Oklahoma interstate highway in January of 1984 of a heart attack, after the truck he was driving for his employer jackknifed on icy roads during frigid weather. Hammons had suffered a heart attack about a year previously, but returned to work after a recuperating period. The appellant claims the stress of the accident and sudden exposure to cold weather caused the heart attack. The appellee claims the heart attack was a result of a pre-existing bodily infirmity, and Oklahoma law bars recovery. The appellee paid life insurance benefits to the appellant as a result of the death but refused to pay an additional amount pursuant to the accidental death provisions of the policy. This suit followed.

It is undisputed that Griffin Grocery Company, an Oklahoma corporation, contracted with the appellee in Tulsa, Oklahoma, for the undisputed insurance policy. It is also undisputed that all premiums were paid by Griffin Grocery Company and that the only dealings between the appellee and the appellant's decedent involved annual mailings from the appellee to the decedent certifying the terms of the insurance policy. The parties agree that, under Arkansas law, the appellee would not be entitled to summary judgment. The appellant claims that, even under Oklahoma law, summary judgment would not be appropriate.

■ Under Oklahoma law, the insurance contract alone is the measure of liability. *Minyen* v. *American Home Insurance Company*, 443 F.2d 788 (10th Cir. 1971). Here, the policy provided that all the following conditions must be met in order to entitle the employee to the accidental death benefit: (1) the

employee sustained an accidental injury while a covered individual; (2) the injury, directly and independently of all other causes, resulted in the loss; (3) the loss occurred within ninety days after the injury was sustained. Therefore, under Oklahoma law, no coverage is provided if Hammons' death was caused at least in part from a bodily infirmity. *See Minyen, supra.*

"It is well settled in this State that the nature, validity and interpretation of contracts are to be governed by the law of the place where they are made. . . ." *Lawler* v. *Lawler*, 107 Ark. 70, 73, 153 S.W. 1113, 1114 (1913); *see also* R. Leflar, *American Conflicts Law*, Sec. 153 (3d Ed. 1977). It is clear from the record that the insurance contract in issue was made in Oklahoma and that all significant events in connection with it occurred in that state. Accordingly, the conclusion of the trial judge that the law of Oklahoma governed was not against the clear preponderance of evidence and is affirmed.

Summary judgment is an extreme remedy and should only be granted when it is clear that there is no question of fact in issue. *Johnson* v. *Stuckey & Speer, Inc.*, 11 Ark. App. 33, 665 S.W.2d 904 (1984). Based upon the supporting documents attached to the affidavits of the parties in this case, it is clear that there is no question but that the unfortunate death was caused at least in part from bodily infirmity or the concurrence of his heart condition with an accidental injury, if there were any such injury. Since Oklahoma law absolutely bars recovery in cases such as this, the trial judge was correct in granting summary judgment.

Affirmed.

CLONINGER and MAYFIELD, JJ., agree.

ARKANSAS REAL ESTATE COMMISSION *v.* Jasper O. HOGGARD

CA 85-421 717 S.W.2d 822

Court of Appeals of Arkansas
Division I
Opinion delivered October 22, 1986

Steve Clark, Att'y Gen., by: *Thomas S. Gay*, Asst. Att'y Gen., for appellant.

James O. Strother, for appellee.

LAWSON CLONINGER, Judge. Appellant Arkansas Real Estate Commission raises three points for reversal of a circuit court ruling overturning a Commission decision. Under our standard of review for administrative proceedings, we find no error in the court's determination, and we accordingly affirm its order.

On March 11, 1985, the Commission heard evidence on whether to suspend or revoke appellee Jasper Hoggard's real estate broker's license. Appellee had been charged with failing to supervise the activities of real estate salesmen licensed under him as the principal broker at SMI Investments, failing to notify appellant of his changing addresses, and failing to return his and his salesmen's licenses upon leaving SMI Investments. The Commission found appellee guilty of failing to supervise properly and of failing to return the licenses in violation of the law and revoked his license.

On April 8, 1985, the Commission heard further evidence at appellee's request. Subsequently, appellant affirmed its earlier decision but ordered that appellee could be relicensed upon successful completion of the broker's examination after one year.

Appellee filed an appeal with the Circuit Court of Washington County. The circuit judge found that appellee had substantially complied with the requirements of the law in returning his license. Moreover, the court found that there was no evidence of record that appellee had actual knowledge that a suspended broker had undertaken to sell real estate or that appellee had engaged in any sort of arrangement, conspiracy, or understand-

ing with the suspended broker to sell real estate or had knowledge of such conduct. Holding that the evidence of record fell short of being substantial, the circuit court reversed the decision of the Commission. From that ruling, this appeal arises.

The Commission argues, in its first point for reversal, that the trial court erred in holding that appellee had to have actual knowledge of improper acts in order for appellant to impose disciplinary action. Appellant contends that such a requirement negates the principal broker's supervisory responsibility emphasized by Ark. Stat. Ann. § 71-1306(e) (Supp. 1985) and Arkansas Real Estate Commission Regulation 33.

In reviewing the actions of an administrative commission or agency, a circuit court's review of the evidence is limited to a determination of whether there was substantial evidence to support the action taken. On appeal, we are similarly limited to a determination of whether the action of the commission or agency is supported by substantial evidence. *Arkansas Real Estate Commission* v. *Hale*, 12 Ark. App. 229, 674 S.W.2d 507 (1984). *See also Black* v. *Arkansas Real Estate Commission*, 275 Ark. 55, 626 S.W.2d 954 (1982). Substantial evidence has been defined as valid, legal, and persuasive evidence that a reasonable mind might accept as adequate to support a conclusion; it must force the mind to pass beyond conjecture. *Arkansas Real Estate Commission* v. *Hale, supra.*

On the basis of the record, we cannot see how a reasonable mind could have reached the conclusion that appellee was guilty of wrongdoing in the supervision of Robert Eckels, a broker whose license had been revoked and who had offered to sell real estate to a Commission investigator. Eckels had placed an advertisement in a Fort Smith newspaper on November 27, 1984, that prompted an investigation. Appellee was in Dallas from Wednesday through Sunday of that week, and was unaware of the listing. The circuit court found that there was no substantial evidence that appellant had actual knowledge of Eckels's action. Nothing in either the statutes or the Commission Regulations imposes the burden of constructive knowledge upon brokers. We therefore believe the court was correct.

Appellant's second point for reversal is merely an elaboration of the theme stated in its first point—*i.e.*, that the circuit

court erred in reversing the Commission's finding that sufficient evidence existed to find that appellee had failed strictly to supervise the salesmen associated with his firm. Putting the actual knowledge argument aside, appellant contends that appellee's failure to review the newspaper real estate advertisements on his return from Dallas, which presumably would have led to the detection and possible prevention of Eckels's unlawful conduct, constituted a failure strictly to supervise the broker's activities.

Arkansas Real Estate Commission Regulation 33 states that "It shall be the duty of a broker to instruct his salesmen to regard the fundamentals of real estate practice and the ethics of the profession and to exercise strict supervision of their real estate activities." Although it was appellee's customary practice to review all real estate advertisements in the local paper, we do not see how his act of omission in this instance amounts to substantial evidence of a violation of Regulation 33. In any event, the advertisement was listed under a business heading, and Eckels had permission from the Commission to continue to sell non-residential property. Eight of the nine listings in the ad were for business real estate; the ninth, which brought about the investigation, was an apartment listing. Appellee was not a target of the investigation and did not learn about the advertisement until the Commission notified him in advance of the March 11, 1985, hearing. This does not, in our view, constitute substantial evidence of a failure strictly to supervise sales personnel.

In its third point for reversal, appellant argues that the circuit court erred in holding that there was no substantial evidence to support the Commission's finding that appellee failed to return all licenses under Regulation 13(b), which requires a broker, upon closing his firm or place of business, to return all licenses and pocket cards to the Commission for cancellation. Appellee had begun moving from Fort Smith to Springdale on January 3, 1985. He submitted his broker's license and pocket cards to appellant on January 15, 1985, almost two weeks later.

Appellant contends that appellee did not surrender his license as principal broker until the commission's staff contacted him at Springdale and speculates that he intended to leave his license with the firm he had left until the suspension imposed on Eckels was lifted in February. We do not, however, sit as a

factfinder, and such conjecture is beyond the scope of our review.

The record indicates that, in the process of relocating, appellee made frequent trips between Fort Smith and Springdale during the period in question. He was in the Fort Smith office on January 7, 11, and 12, winding down business. Appellee received a phone call from the Commission on January 14, 1985, and mailed in his license the following day. There is no substantial evidence to indicate that he was engaged in any business transactions during the time in which he was moving, and nothing in the record justifies appellant's speculation regarding his motives for delay.

Affirmed.

COOPER, J.. and WRIGHT, Special Judge, agree.

Arthur RUSSELL *v.* Helen RUSSELL

CA 85-349 717 S.W.2d 820

Court of Appeals of Arkansas
Division I
Opinion delivered October 22, 1986

Wooten, Glover, Sanders, Slagle, Parkerson & Hargraves, P.A., by: *Richard L. Slagle*, for appellant.

Callahan, Crow, Bachelor, Lax & Newell, P.A., by: *C. Burt Newell* and *George M. Callahan*, for appellee.

LAWSON CLONINGER, Judge. This is a divorce case in which the appellee was granted a divorce from the appellant. Appellant alleges four points for reversal: insufficient proof of grounds for divorce; inadequate corroboration of those grounds; error in awarding judgment for temporary alimony; and that the award of alimony was improper or, in any event, excessive. The question we will resolve on this appeal is whether the appellee's grounds for divorce were sufficiently corroborated. We agree with appellant's contention that appellee's grounds were inadequately corroborated and reverse on that point.

We review chancery cases *de novo* on the record and do not reverse a decree unless the chancellor's findings are clearly

erroneous or clearly against a preponderance of the evidence. *Andres* v. *Andres*, 1 Ark. App. 75, 613 S.W.2d 404 (1981); ARCP Rule 52(a).

Divorce is a creature of statute and can only be granted when statutory grounds have been proved and corroborated. *Copeland* v. *Copeland*, 2 Ark. App. 55, 616 S.W.2d 773 (1981); Ark. Stat. Ann. Section 34-1202 (Supp. 1979). "In order to obtain a divorce based upon indignities, the plaintiff must show a habitual, continuous, permanent and plain manifestation of settled hate, alienation, and estrangement on the part of one spouse, sufficient to render the condition of the other intolerable." *Anderson* v. *Anderson*, 269 Ark. 751, 753, 600 S.W.2d 438, 440 (Ark. App. 1980).

In a contested divorce case, the required corroboration of grounds for divorce may be slight. *Hilburn* v. *Hilburn*, 287 Ark. 50, 696 S.W.2d 718 (1985). This court has defined corroboration as testimony of some substantial fact or circumstance independent of the statement of a witness which leads an impartial and reasonable mind to believe that the material testimony of that witness is true. *Anderson, supra.* "It is not necessary that the testimony of the complaining spouse be corroborated on every element or essential in a divorce suit." *Sowards* v. *Sowards*, 243 Ark. 821, 825, 422 S.W.2d 693, 696 (1968). Corroboration is required in order to prevent the parties from obtaining a divorce by collusion, and where there is no evidence of collusion, the corroboration may be comparatively slight. *Anderson, supra.*

In *Harpole* v. *Harpole*, 10 Ark. App. 298, 664 S.W.2d 480 (1984), this court quoted with approval the early Supreme Court case of *Bell* v. *Bell*, 105 Ark. 194, 195-96, 150 S.W. 1031, 1032 (1912):

> It is for the court to determine whether or not the alleged offending spouse has been guilty of acts or conduct amounting to rudeness, contempt, studied neglect or open insult, and whether such conduct and acts have been pursued so habitually and to such an extent as to render the condition of the complaining party so intolerable as to justify the annulment of the marriage bonds. *This determination must be based upon facts testified to by wit-*

> *nesses, and not upon beliefs or conclusions of the witnesses. It is essential, therefore, that proof should be made of specific acts and language showing the rudeness, contempt and indignities complained of. General statements of witnesses that defendant was rude or contemptuous toward the plaintiff are not alone sufficient. The witness must state facts — that is, specific acts and conduct from which he arrives at the belief or conclusion which he states in general terms — so that the court may be able to determine whether those acts and such conduct are of such a nature as to justify the conclusion or belief reached by the witness.* The facts, if testified to, might show only an exhibition of temper or of irritability probably provoked or of short duration. The mere want of congeniality and the consequent quarrels resulting therefrom are not sufficient to constitute that cruelty or those indignities which under our statute will justify a divorce.

10 Ark. App. at 302-303 (emphasis in original). *See also Hair* v. *Hair*, 272 Ark. 80, 613 S.W.2d 376 (1981); *Welch* v. *Welch*, 254 Ark. 84, 491 S.W.2d 598 (1973).

With these considerations in mind, our review of the evidence reveals that there was not sufficient corroboration of appellee's grounds for divorce to entitle her to a divorce from appellant. Without reaching the merits of appellee's testimony as to grounds, we observe that the only possible corroborating evidence of any of appellee's grounds was the testimony of her sister, Glenna Bradley, who could not testify from any personal knowledge or observations to specific acts or language. Appellee's sister testified that she did not believe that she had seen anyone live quite like appellant and appellee lived with the assets they had available and that she would not live that way herself. The only substantive testimony was that the appellee had been unhappy and depressed but was a "much happier person" since the separation of the parties. Although it is obvious that there was no collusion between the parties to this action, the testimony of Ms. Bradley was not sufficient in light of the authorities cited above. The decision of the chancellor in this regard is clearly erroneous, and we reverse.

Since we reverse the decree of divorce because of insufficient

corroboration of grounds, we do not reach the remaining issues concerning alimony.

Reversed and dismissed without prejudice.

COOPER and MAYFIELD, JJ., agree.

Conrad T.E. BEARDSLEY and Lillemor W. BEARDSLEY
v. Kathleen PENNINO

CA 85-449 717 S.W.2d 825

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

Honey & Rodgers, by: *Charles L. Honey*, for appellants.

Kaplan, Brewer & Miller, P.A., by: *Joann C. Maxey*, for appellee.

DONALD L. CORBIN, Judge. This case comes to us from Nevada County Chancery Court. Appellants, Conrad T.E. Beardsley and Lillemor W. Beardsley, appeal the chancellor's decision that granted a set-off to appellee, Kathleen Pennino, for losses she incurred due to appellants' breach of a settlement agreement, entered into by appellants and appellee, and restructured the note payments appellee owes appellants. We affirm.

The parties to this action entered into a settlement agreement which was dictated into the record on January 24, 1984. Under the terms of the settlement agreement, both parties were to perform certain obligations. Appellee was to bring current her debt on a $300,000 note to appellants and appellants were to assume the financial responsibility on certain debts of appellee's. However, appellee's obligation to pay was conditioned on appellants first assuming the financial obligation on her debts. Appellants failed to do so. Consequently, appellee went into default on

some of the debt.

Appellee filed a motion in chancery court to enforce the settlement agreement of January 24, 1984. In her motion appellee also asked that she be allowed a set-off for the amounts she was held in default as well as for other costs incurred by her because of appellants' failure to act. Appellee also asked that she be awarded $49,780.80, which represented the additional costs of financing, at current interest rates, a note on her default judgments and other related costs totalling $155,497.21, as opposed to paying that same amount to appellants at a lower interest rate. By stipulation of the parties, the court determined that the current interest rate in that community was set at thirteen percent (13%). The note to appellants had been set at ten percent (10%). Using an amortization schedule, the court determined that appellee would incur $49,780.80 in additional interest over the next eighteen years, which was the remaining time on the note.

Appellants argue the following two points for reversal:

I.

THE CHANCERY COURT ERRED BY ALLOWING APPELLEE A SET-OFF OF $49,780.80 FOR THE ESTIMATED ADDITIONAL COST OF SECURING A LOAN TO SATISFY OTHER SET-OFFS ALLOWED.

II.

THE CHANCERY COURT ERRED BY RESTRUCTURING APPELLEE'S NOTE PAYMENTS TO APPELLANTS SO AS TO REDUCE APPELLEE'S MONTHLY PAYMENTS FROM $3,000.00 PER MONTH TO $1,798.00 PER MONTH.

The record indicates that under the terms of the settlement agreement, appellee was to pay appellants $18,000, the amount she was in arrears on a note to appellants, in addition to an amount she owed appellants on an inventory. Appellee was to make payment to appellants on February 17, 1984. On the same date, appellants were to have assumed the obligations on properties upon which appellee is now obligated.

On February 17, 1984, appellee notified plaintiff that she

was ready, willing, and able to perform under the terms of the parties' agreement. Appellants, however, failed to assume the obligations on the properties as agreed upon. Appellee continued to communicate to appellants her readiness to perform according to the terms of the settlement agreement, but appellants failed to carry out the agreement. In June of 1984, a partial foreclosure decree was entered against appellee for property concerned in the settlement agreement.

Appellee filed a motion in chancery court to enforce the January 24, 1981, settlement agreement. The chancellor enforced the settlement agreement, finding that all the parties knew what was required of them under the terms of the agreement. The court specifically found that appellee did not frustrate appellants in their effort to perform their duty under the agreement. The chancellor found that, as a result of appellants' continued refusal to carry out the agreement, appellee suffered losses entitling her to relief in the form of a set-off against the amount she owed to appellants.

As their first point for reversal appellants argue that the court erred by allowing appellee a set-off of $49,780.80 for the estimated additional cost of securing a loan to satisfy other set-offs allowed. Appellants argue that the additional cost of securing a loan to satisfy the other set-offs is an expense which may never be incurred by appellee. In support of their argument appellants cite *Harris Construction Co., Inc.* v. *Powers*, 262 Ark. 96, 554 S.W.2d 332 (1977), in which the Arkansas Supreme Court discussed the doctrine of avoidable consequences:

> The doctrine of avoidable consequences limits the amount of recoverable damages in that a party cannot recover damages resulting from consequences which he could reasonably have avoided by reasonable care, effort or expenditure. [citations omitted] The doctrine appears equally applicable to damages caused by breach of contract and those caused by negligence. [citation omitted]
>
> . . .
>
> The burden of proving that a plaintiff could have avoided some or all of the damages by acting prudently rests on the defendant [citations omitted], not only on the question of causation of damages for failure to avoid

> harmful consequences [citation omitted], but also on the question of the amount of damage that might have been avoided. [citation omitted] But whether one had acted reasonably in minimizing, mitigating or avoiding damages is, in most cases, a question of fact.

Id. at 104-105, 554 S.W.2d at 336 (citations omitted).

We find that the *Harris* case cited by appellants does not require reversal of the chancellor's decision. The $49,780.80 set-off is not a recovery for damages resulting from consequences that appellee reasonably could have avoided by reasonable care, effort or expenditure. Appellants failed to abide by the settlement agreement and consequently default judgments were filed against appellee. The chancellor allowed appellee a set-off for the amount of the unpaid deficiency judgment, the unpaid mortgage principal and the interest. In addition, the chancellor awarded appellee a set-off for reimbursement of expenses incurred resulting from appellants' failure to abide by the agreement and for the estimated additional cost of her securing a loan to satisfy the indebtedness caused by appellants' failure.

While chancery cases are tried *de novo* on appeal, the findings of a chancellor will not be reversed unless clearly against a preponderance of the evidence; and since the question of the preponderance of the evidence turns largely on the credibility of the witnesses, the appellate court defers to the superior position of the chancellor. *Stover* v. *Stover*, 287 Ark. 116, 696 S.W.2d 750 (1985); ARCP Rule 52(a).

The underlying purpose in awarding damages for breach of contract is to place the injured party in as good a position as he would have been in had the contract been performed. *Bowman* v. *McFarlin*, 1 Ark. App. 235, 615 S.W.2d 383 (1981). In matters of equity the court is one of conscience which should be ever diligent to grant relief against inequitable conduct, however ingenious or unique the form may be. *Holland* v. *Walls*, 3 Ark. App. 20, 621 S.W.2d 496 (1981). We find that the chancellor's findings are not clearly against the preponderance of the evidence. Therefore, we find no merit in appellant's first point for reversal.

As their second point for reversal appellants assert that the

chancellor erred by restructuring appellee's note payments to appellants so as to reduce appellee's monthly payments from $3,000 per month to $1,798 per month. The chancellor found that appellee owed appellants the total sum of $351,319.07, less a set-off of $205,278.10, for a net amount of $146,040.97. The court then restructured the amount of the monthly payments from $3,000 to $1,798.

Appellee argues that the purpose of reducing the monthly payments was to place appellee in as good a position as she would have been in had appellants carried out their obligations under the settlement agreement. Appellee notes that if the reduction had not been allowed, appellee would have been unduly burdened by having to make her $3,000 monthly payments to appellants as well as payments to satisfy the default judgments caused by appellants' breach of the agreement. If the chancellor had not reduced the monthly payments, the number of payments to be made would have been reduced. The chancellor found that reducing the amount of the payments, instead of reducing the number of payments, was equitable to all parties. Appellee also notes that the chancellor, in determining the amount of the monthly payments, found that appellants were entitled to the benefit of the current interest rates, thereby increasing the interest appellants received on the balance of the note.

We do not find that the chancellor's findings on this point are erroneous or contrary to the law. As stated above, the damage rule for breach of contract is to place the injured party in as good a position as he would have been in had the contract been performed. A court of equity may mould any remedy that is justified by the proof. *Cox* v. *Cox*, 17 Ark. App. 93, 704 S.W.2d 171 (1986). Appellants breached the contract and the chancellor's order increased the interest rate applied on the balance of the note due them from appellee. We do not believe that appellants should be permitted to complain on this point.

For the reasons stated above we affirm the decision of the chancellor.

Affirmed.

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

Mable JACKS, et al. *v.* Dewey STILES, Director of Labor, and GEORGIA-PACIFIC CORPORATION

E 86-20 717 S.W.2d 828

Court of Appeals of Arkansas
Division I
Opinion delivered October 22, 1986

Cross, Kearney & McKissic, by: *Jesse L. Kearney*, for appellant.

Ramsay, Cox, Lile, Bridgforth, Gilbert, Harrelson & Starling, for appellee, Georgia-Pacific Corp.

George Wise, Jr., for appellee, Director of Labor.

ERNIE E. WRIGHT, Special Judge. This is a multi-claimant appeal from the Board of Review. The Board, reversing the Appeal Tribunal decision, found that appellants left their employment by reason of a labor dispute, and denied them benefits under Ark. Stat. Ann. § 81-1105(f) (Repl. 1976). For reversal, appellants contend that the Board's decision is against the weight of the evidence and contrary to the law. We disagree and affirm.

Appellants are members of the United Paperworkers' International Union, Local 844. In August 1982, the union and the employer entered into a labor agreement to be in effect through July 31, 1985. Section 18 of the agreement provides:

> At any time after the anniversary date, if no agreement on the questions at issue has been reached, either party may give written notice to the other party of intent to terminate the agreement in ten (10) days. All the provisions of the agreement shall remain in force and effect until the specified time has elapsed. During the period attempts to reach an agreement shall be continued.

By August 1, 1985, negotiations between the union and the employer for a new agreement were at a standstill. On that day, the employer made its final offer to the union, and on August 9, the employer gave the union its ten days notice for termination of the agreement. The union gave its ten days notice to the employer on August 12 to terminate the labor agreement.

The testimony is conflicting as to the events of August 22,

1985. Edgar Lewis, the plant manager, testified that on the morning of August 22, he met with Lindell Hale, the local union president. He stated that he was confused by the union's notice of August 12, and he wanted clarification of it. Lewis testified that Hale stated that "at 3:00, we're going on strike." Lewis also testified that during negotiations, statements were made to the effect that "this was not going to be fun and games . . . ," and he thought that meant violence. Lewis testified that, in light of these statements, the company decided to let the workers go home early.

At 1:00 p.m. on August 22, the employees were called to a meeting, and Lewis read a statement that the union had given notice of intent to terminate the contract at 3:00 p.m., that the company chose to end the shift ending at 3:00 p.m. at the time of the meeting, that the action was not a lockout, and that the employees would be paid for the remainder of the shift.

Mr. McFalls, international representative for the union and the local bargaining agent, testified that when he arrived at the plant at about 2:00 p.m. the workers were outside the plant, and that the gates were locked and workers had been told they could not go in. He further testified that the employer had stated that union members would have to resign their union membership before they could return to work.

Lewis testified the gates were not locked, and that guards had been posted, not to keep workers out, but to protect the property from any violence. Lewis stated that union members were not required to resign their membership before returning to work. He stated that workers who had inquired about returning were told that they could work, but they could be subject to a fine or punishment from the union for crossing the picket line.

McFalls testified that, at the time the union issued its ten days notice to the employer, it meant that if, at the end of that period, there was no agreement, "we would be on strike." It is undisputed that the union did began striking at about 3:00 p.m. on August 22.

Ark. Stat. Ann. § 81-1105(f) (Repl. 1976) provides, in pertinent part:

> If so found by the Director no individual may serve a

> waiting period or be paid benefits for the duration of any period of unemployment if he lost his employment or has left his employment by reason of a labor dispute other than a lockout at the factory, establishment, or other premises at which he was employed . . .

On appeal, the findings of the Board of Review are deemed conclusive if they are supported by substantial evidence. Ark. Stat. Ann. § 81-1107(d)(7) (Repl. 1976); *Feagin* v. *Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983). 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. *Shipley Baking Co.* v. *Stiles*, 17 Ark. App. 72, 703 S.W.2d 465 (1986). Therefore, at issue before us is not whether the decision of the Board of Review is against the weight of the evidence but whether there is substantial evidence to support the Board's finding that claimants left their employment because of a labor dispute and not a lockout.

The term "lockout" is not defined in the statute, nor do we find a definition in our cases. *Black's Law Dictionary* 848 (rev. 5th ed. 1979) defines "lockout" as "cessation of furnishing of work to employees or withholding work from them in effort to get for employer more desirable terms. . . ." We conclude this is the meaning to be ascribed to the word as used in the statute.

In the instant case, we believe there is substantial evidence to support the Board's decision. Lewis met with the local president on the morning of August 22, and he was told that absent an agreement, there would be a strike that afternoon. They discussed ground rules for the strike, and health insurance coverage for union members during the strike. The statement Lewis read during the 1:00 p.m. meeting with the workers specified that the employer was not staging a lockout. Although the testimony conflicted, there was evidence presented that the gates were not locked, and work was available for members who wanted to work. The workers were advised that there could be repercussions from the union if they crossed the picket line, but they were not denied work.

Appellants argue that we should give greater weight to the decision of the Appeal Tribunal referee who actually conducted the hearing, rather than to the Board, which made its decision based on the written record. We dispose of this argument by simply restating the familiar rule that the credibility of witnesses and the weight to be accorded their testimony are matters to be resolved by the Board of Review. *Grigsby* v. *Everett*, 8 Ark. App. 188, 649 S.W.2d 404 (1983).

Affirmed.

COOPER and CLONINGER, JJ., agree.

ARKANSAS STATE HIGHWAY COMMISSION *v.* SECURITY SAVINGS ASSOCIATION

CA 86-119 718 S.W.2d 456

Court of Appeals of Arkansas
Division I
Opinions delivered October 29, 1986

Ted Goodloe and *Thomas B. Keys*, for appellant.

Hubbard, Patton, Peek, Haltom & Roberts, by: *William G. Bullock*, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Appellant condemned a total of 4.38 acres of land owned by appellee and, pursuant to Ark. Stat. Ann. Section 76-538 (Repl. 1981), deposited into escrow $32,500 as estimated just compensation for such taking. Appellant entered the land on July 22, 1983, and a trial on the issue of damages was held on October 2, 1985. The jury returned a verdict of $60,000. The trial court set the interest rate at 11.77% on the amount of the judgment in excess of the original deposit into escrow. Appellant's sole point on appeal is that the 11.77% interest rate set by the court is excessive and should be set aside. We do not agree and therefore we affirm the lower court's award.

In *Arkansas State Highway Commission* v. *Stupenti*, 222 Ark. 9, 257 S.W.2d 37 (1953), the court held that

even though at trial a landowner is given judgment for the present value of his land taken, he has been deprived of its use and rents from the date of entry by the condemning authority until the date of judgment, and the State should be obligated to pay the landowner for this. In ruling that interest should be paid from the date of taking, the court stated:

> To allow the State to escape this liability would be contrary to our State Constitution. Art. 2, section 22, reads:
>
> > "Section 22. *Property Rights — Taking Without Just Compensation Prohibited.* — The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor."
>
> Just compensation means full compensation. While the real loss to appellee might well be described as the denial of the use of his land for the time stated, yet the universally recognized rule for measuring this loss is by calculation of interest on the value of the land.

Id. at pp. 12-13.

The court recently expanded on what constitutes full compensation in *Arkansas State Highway Commission* v. *Vick*, 284 Ark. 372, 682 S.W.2d 731 (1985), which appears to be controlling here. In *Vick*, the trial court allowed the appellee landowners interest at the statutory rate of 6% per annum on the difference between the appellant's deposit and the amount of the verdict. Ark. Stat. Ann. Section 76-536 (Repl. 1981). Appellees argued that a 6% rate of interest was so inadequate as to amount to an unconstitutional taking of their property without just compensation. To support their contention, the landowners proved that, during the period between the Commission's entry on the land in 1981 and the return of the verdict in 1984, money could be invested in bank certificates of deposit at a rate of 11.5% interest and borrowers were required to pay interest at rates ranging from 13.5% to 18%. The court agreed with the landowners, and stated that as a matter of just compensation and due process under the federal and state constitutions, a landowner should be allowed interest on the unpaid part of the award "at a

proper rate" during the time he is deprived both of the use of the land and of the money representing its value and that the statutory limitation on interest rate could not constitutionally be applied in the circumstances.

Here, the president of a local savings and loan testified that the interest payable on a 12-month certificate of deposit averaged 11.77% from July 22, 1983, to September 30, 1985. A witness for appellant who invests funds on behalf of appellant testified that a proper rate of interest would be 7.32% to 9.2%. These figures were based on risk-free United States Treasury bill rates from July, 1983, to September, 1985. The Highway Commission thus contends that the "proper" rate of interest paid should be one representative of risk-free investments backed by the government. We conclude that this view is too narrow.

Here, the trial court found that the proper rate of interest on the amount of the judgment over and above the initial deposit was 11.77%, which was an average of rates paid on certificates of deposit at a local financial institution. In determining whether evidence is sufficient to support the verdict, the appellate court will view the testimony in the light most favorable to appellees and will indulge all reasonable inferences in favor of the judgment. *Arkansas Power and Light Company* v. *Melkovitz*, 11 Ark. App. 90, 668 S.W.2d 37 (1984). The lower court's award of a 11.77% interest rate on the unpaid portion of the condemnation award is fully supported by the evidence and is affirmed.

Affirmed.

COOPER and CORBIN, JJ., agree.

Dr. David DUFFNER *v.* Dr. Joe Paul ALBERTY and Dr. John WIDEMAN

CA 96-156 718 S.W.2d 111

Court of Appeals of Arkansas
En Banc
Opinion delivered October 29, 1986
[Rehearing denied November 26, 1986.*]

*Glaze, J., not participating.

Harper, Young, Smith & Maurras, by: *S. Walton Maurras*, and *House, Wallace, Nelson & Jewell, P.A.*, by: *Philip Dixon*, for appellant.

Sexton, Nolan, Robb & Caddell, P.A., by: *Sam Sexton, Jr.*, for appellees.

GEORGE K. CRACRAFT, Chief Judge. David Duffner appeals

from an order of the Sebastian County Chancery Court enforcing a covenant not to compete and enjoining him from the practice of medicine within a radius of thirty miles from the offices of Joe Paul Alberty and John Wideman for a period of twelve months from the date of entry of the order. The appellant contends that the covenant is void and unenforceable because it violates the public policy of this state which prohibits unreasonable restraints of trade. We agree.

Covenants not to compete are not looked upon with favor by the law. In order for such a covenant to be enforceable, three requirements must be met: (1) the covenantee must have a valid interest to protect; (2) the geographical restriction must not be overly broad; and (3) a reasonable time limit must be imposed. *Rebsamen Ins.* v. *Milton*, 269 Ark. 737, 600 S.W.2d 441 (Ark. App. 1980). It is not argued that the geographic restriction was overbroad or that the time limitation was unreasonable. Appellant contends only that there was not a sufficient interference with appellees' business interests to warrant enforcement of the covenant. It is clear that such covenants will not be enforced unless a covenantee had a legitimate interest to be protected by such an agreement and that the law will not enforce a contract merely to prohibit ordinary competition. *Import Motors, Inc.* v. *Luker*, 268 Ark. 1045, 599 S.W.2d 398 (1980). The test of reasonableness of contracts in restraint of trade is that the restraint imposed upon one party must not be greater than is reasonably necessary for the protection of the other, and not so great as to injure a public interest.

Contracts in partial restraint of trade, where ancillary to a sale of a business or profession with its goodwill, are valid to the extent reasonably necessary to the purchaser's protection, and are looked upon with greater favor than such an agreement ancillary to an employer-employee or professional association relationship. *Madison Bank & Trust* v. *First National Bank of Huntsville*, 276 Ark. 405, 635 S.W.2d 268 (1982); *Marshall* v. *Irby*, 203 Ark. 795, 158 S.W.2d 693 (1942); *Easley* v. *Sky, Inc.*, 15 Ark. App. 64, 689 S.W.2d 356 (1985). Where the covenant grows out of an employment or other associational relationship, the courts have found an interest sufficient to warrant enforcement of the covenant only in those cases where the covenantee provided special training, or made available trade secrets, confi-

dential business information or customer lists, and then only if it is found that the associate was able to use information so obtained to gain an unfair competitive advantage. *See Orkin Exterminating Co., Inc.* v. *Weaver*, 257 Ark. 926, 521 S.W.2d 69 (1975); *Rector-Phillips-Morse, Inc.* v. *Vroman*, 253 Ark. 750, 489 S.W.2d 1 (1973); *All-State Supply, Inc.* v. *Fisher*, 252 Ark. 963, 483 S.W.2d 210 (1972); *Girard* v. *Rebsamen Ins. Co.*, 14 Ark. App. 154, 685 S.W.2d 526 (1985). The validity of these covenants depends upon the facts and circumstances of each particular case. *Evans Laboratories, Inc.* v. *Melder*, 262 Ark. 868, 562 S.W.2d 62 (1978).

Here, Dr. Joe Paul Alberty and Dr. John Wideman were orthopedic surgeons who had been engaged in the practice of their profession in Fort Smith, Arkansas, as partners for many years. Appellant completed his residency training in orthopedic surgery in June of 1984, at a clinic in Temple, Texas, and afterwards determined to locate in Fort Smith and associate himself with the appellees. The terms and conditions of appellant's association with the appellees' practice was reduced to a letter agreement. It is not questioned that all of those involved were fully aware of the document's provisions. Under the terms of the agreement the appellees agreed to pay all general expenses and certain specific expenses listed in the agreement were to be paid by the physician who incurred them. Each physician was assigned a private office and paid rent to the Alberty-Wideman partnership. Certain portions of the office and the medical equipment owned by the partnership were to be used in common and the practice would be organized as an association of individual professional associations, but appellant would initially practice as a sole proprietorship. Call schedules would be shared equally. At the end of one year the appellant would arrange financing to buy his share of the equity in the furniture and equipment and would have an option to purchase an interest in the condominium offices. The agreement contained a covenant that should the appellant desire to leave the group he would not practice within a radius of thirty miles of the offices of the appellees for a period of one year from the date of termination. It was agreed that the appellant would be furnished rent and overhead at no expense for the first three months, at one-third the normal rate during the fourth month, and two-thirds that rate in the fifth month. Appellant would begin

paying his equal share beginning with the sixth month. There was no agreement to share income or new patients with the appellant and individual billings were made and collected for services rendered by each physician. Appellant practiced with appellees under this arrangement until late in the spring of 1985, when he joined another orthopedic clinic which conducted its practice in the same building in which the appellees' offices were located.

During the twelve-month period following the commencement of the association, the appellant treated 1207 patients and it was undisputed that during the first nine months of that association his personal receipts were in excess of $300,000.00. After leaving the association with appellees, the appellant requested of them the files on twenty-eight patients, which he testified had been treated by him while the association continued and were receiving follow-up medical attention only. The chancellor specifically found that during the continuance of the agreement the appellant "had access to the confidential patient files of the plaintiffs, had use of plaintiffs' office furniture and equipment, and utilized for his own benefit the good professional reputation and goodwill of the plaintiffs." The chancellor found the restrictive covenant to be reasonable and that the appellees had a valid and enforceable right to protect their substantial investment in their medical practice, and to protect their established medical clientele. An injunction was entered restraining the appellant from engaging in the practice of medicine within a radius of thirty miles from appellees' offices for a period of twelve months commencing on the date of the decree.

Although contracts between individuals ought not to be entered into lightly, all other considerations must give way where matters of public policy are involved. From our review of all the facts and circumstances, we are of the opinion that the contract provision prohibiting appellant from practicing medicine within thirty miles of the City of Fort Smith constitutes an undue interference with the interests of the public right of availability of the orthopedic surgeon it prefers to use and that the covenant's enforcement would result in an unreasonable restraint of trade.

Here the contract did not relate to the sale of a business and its goodwill. The appellees' goodwill remained with them.

The benefits which the appellant obtained from the reputation and goodwill of his former associates would be no greater than that of an employee in any other established business. It is only in those instances where goodwill has, for valid consideration, been transferred that the purchaser has a legitimate pecuniary interest in protecting against its being drained by competition from the seller.

Nor were any trade secrets, formulas, methods, or devices which gave appellant an advantage over the appellees involved here. At the time he joined the association he had received his training and skills elsewhere and brought them with him. There is nothing in the record to indicate that he learned any trade secret or surgical procedures from the appellees which were not readily available to other orthopedic surgeons. To the contrary, the record reflects that while in the association he performed some orthopedic surgical procedures which the appellees did not perform.

Although the chancellor found that the appellant had access to appellees' confidential patient files, there was no evidence that he attempted to memorize them or use information from those files to entice any of their former patients to become patients of his new association. Although there was evidence that he obtained the files on twenty-eight persons from the appellees, it was explained that these were not new patients but those who were receiving follow-up medical attention after having undergone surgery by the appellant during his association with the appellees. Other than those twenty-eight persons receiving post-operative care, he testified that he had not seen more than two of appellees' former patients.

[redacted] We cannot conclude from the evidence that appellant maintained a personal relationship or acquaintance with appellees' patients or that their "stock of patients" was appropriated by the appellant when he left their offices. There was also evidence that appellees' income increased after appellant left the association. We conclude that the enforcement of this covenant would do no more than prohibit ordinary competition.

Reversed.

Nonie PERRY *v.* LEISURE LODGES, INC.

86-128 718 S.W.2d 114

Court of Appeals of Arkansas
Division I
Opinion delivered October 30, 1986

Don G. Gillaspie, for appellant.

Gerald D. Lee, for appellee.

LAWSON CLONINGER, Judge. This appeal arises from the Workers' Compensation Commission's finding that appellant's second gastric bypass surgery was not compensable. Appellant argues that the Commission's decision was barred by *res judicata* and, in the alternative, that the Commission's findings were not supported by substantial evidence. Although we disagree with appellant's first argument we do find that the Commission's findings are not supported by substantial evidence and reverse and remand.

Appellant, Nonie Perry, sustained a compensable injury while employed as a licensed practical nurse with appellee, Leisure Lodges. On June 12, 1981, appellant was assisting a patient to the dining room when the patient became violent and pushed appellant over a wheelchair, causing appellant to injure her back. At the time appellant was five feet four inches tall and weighed about 294 pounds. Because of her obesity, appellant's back injury was difficult to diagnose and treat, and her physician recommended that she undergo surgery which would greatly decrease the size of her stomach. The surgery was performed in January of 1982, and in October of 1982 the surgery was found to be necessary and reasonable and appellant was awarded benefits.

Appellant lost approximately 99 pounds as a result of the surgery. In July of 1984, appellant began gaining back some of the lost weight and having problems with her stomach. An x-ray revealed that some of the staples used in the gastric bypass

surgery had become loose. Her doctor, Dr. Harold Chakales, felt that appellant should have surgery again to correct the problem with the gastric bypass. Appellant returned to the doctor who had done the first surgery, Dr. Moises Menendez, but he felt that there were too many complications to risk surgery. Dr. Chakales then sent appellant to Dr. William F. Hayden, who recommended that the gastric bypass be revised and that appellant have a vagotomy and pyloroplasty, which would help prevent ulcers. Appellant had both of these procedures done plus Dr. Hayden corrected an incisional hernia.

In its opinion, the Commission found that appellant's volitional overeating caused the disruption of the staples and was an independent and intervening cause. The Commission found that appellant's second surgery was not compensable and that her first healing period had ended on July 12, 1982. The Commission did award appellant a four week period of temporary total disability covering the period of time she was hospitalized for epidural injections.

Appellant's first argument, that the Commission's finding is barred by *res judicata*, is without merit. It is appellant's contention that, since the first gastric bypass surgery was found to be compensable, then the law of the case requires a finding that the second surgery is also compensable.

Generally speaking, *res judicata* applies where there has been a final adjudication on the merits of an issue by a court of competent jurisdiction on all matters litigated and those matters necessarily within the issue which might have been litigated. *Gwin* v. *R.D. Hall Tank Co.*, 10 Ark. App. 12, 660 S.W.2d 947 (1983). Even though the Workers' Compensation Commission is not a court, its awards are in the nature of judgments, and the doctrine of *res judicata* applies to its decisions. *Gwin, supra.*

Since it would have been impossible at the first hearing on compensability in October of 1982 to determine that appellant would need a second bypass, this is not an issue that could have been litigated at that time. Even though the surgical procedures are similar and the purpose was appellant's weight reduction, the issues were entirely different. The first time the issue was whether the procedure was reasonable and necessary medical treatment in light of appellant's injury. At the hearing which is now before us

on appeal the issue was whether the second procedure was a natural and incidental consequence of the first procedure.

Appellant's next argument concerns whether the Commission's finding that appellant's volitional overeating caused the failure of the first surgery is supported by substantial evidence. We agree with appellant's contention that it is not.

On appeal, it is the duty of the appellate court to review the evidence in the light most favorable to the Commission's decision and uphold that decision if supported by substantial evidence. *Black* v. *Riverside Furniture Co.*, 6 Ark. App. 370, 642 S.W.2d 338 (1982). Before the appellate court may reverse a decision of the Commission, the court must be convinced that fairminded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Black, supra.*

The Commission based its decision, that appellant's overeating caused the rupture in the staple line, on the testimony of Dr. Menendez and Dr. Hayden. Both of the doctors testified that the most common reason that the staples fail is overeating by the patient. However, both of these doctors were testifying in generalities. Neither doctor specifically stated that the cause of appellant's ruptured staples was overeating. In fact, Dr. Hayden stated that he did not know what caused appellant's staples to loosen. He further stated that the staples can come out from vomiting or from a fall. Appellant testified that both of these things had happened to her several times. The only medical evidence in the record pertaining to appellant's eating habits is from Dr. Hayden, who stated that appellant told him she didn't eat very much.

These generalities that the Commission relied on are not sufficient to support its finding that appellant's overeating was an independent, intervening cause. The Commission has taken the statements the doctors gave about common causes of staple disruption and speculated that this is what caused appellant's staples to loosen. Based on this evidence we do not think that fairminded persons would reach the Commission's conclusion.

Appellant next argues that the Commission's finding that the second surgery was not made necessary by complications

of the first surgery is not supported by substantial evidence and again we agree.

The Commission apparently based this finding on the fact that Dr. Menendez refused to perform the procedure the second time and on Dr. Hayden's testimony that the first procedure was technically correct.

Again, the Commission seems to ignore other evidence that the second surgery was necessary because of complications from the first. When Dr. Hayden performed the surgery a second time, he not only redid the gastric bypass, but also performed a procedure designed to control ulcers and corrected an incisional hernia. Dr. Hayden stated unequivocally that he would have performed surgery to correct the hernia even if the other procedures were not involved. He continued, stating that in obese people, the tissue becomes weakened and hernias are more likely to occur along the lines of surgical incisions, and that it is the weakened tissue pulling apart, not overeating, that causes these hernias. Even though Dr. Menendez testified that he would not have performed surgery to correct appellant's hernia, in an earlier deposition he stated that such hernias should always be repaired, and in fact, he had performed surgery on appellant to correct other hernias.

Dr. Hayden also explained that he performed the procedure to prevent ulcers because of the staple line disruption. He stated that when the staples became loose, the increased acid in the closed off area was allowed to free flow from that part of the stomach to the other and could erode the mucosa, causing an ulcer. Although appellees attempted to show that the ulcer condition existed before the first surgery, the report of an EGD performed by Dr. Jones for Dr. Menendez did not disclose the existence of any ulcerated areas.

Dr. Chakales, the physician treating appellant's back, felt that the control of appellant's weight was imperative to her back condition. Appellant conceded that the weight loss she attained had not cured her back, but that it did lessen the pain and made it possible for her to function without narcotic pain medication. Appellant's obesity was a preexisting infirmity and the Commission's finding that appellant's overeating caused her subsequent problems is not supported by substantial evidence. *See Conway*

Convalescent Center v. *Murphree*, 266 Ark. 985, 588 S.W.2d 462 (1979).

We remand this case to the Commission with directions to enter an order not inconsistent with this opinion and to accordingly set the healing period and determine the issue of disability.

Reversed and remanded.

WRIGHT, Special Judge, and COOPER, J., agree.

BI-STATE ENERGY, INC. *v.* TIDEWATER COMPRESSION, INC.

CA 85-463 718 S.W.2d 117

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

Everett & Whitlock, for appellant.

Estes, Estes & Gramling, by: *J. Douglas Gramling*, for appellee.

DONALD L. CORBIN, Judge. Appellant, Bi-State Energy, Inc., appeals from an order of the Washington County Circuit Court registering appellee's foreign judgment. We find merit to appellant's argument that the trial court erred in determining appellant was afforded due process by service of process upon the

Texas Secretary of State and reverse.

The record reflects that appellee, Tidewater Compression, Inc., a Texas corporation, obtained a default judgment against appellant on February 9, 1984, in the District Court of Harris County, Texas, in the amount of $10,525.28 plus interest, attorney's fees in the sum of $2,630 and court costs of $117. Appellee filed an Application for Registration of Judgment in Arkansas pursuant to Ark. Stat. Ann. § 29-801 *et seq.* (Repl. 1979). Appellant, an Arkansas corporation, defended on the basis that service of notice of the Texas complaint was defective.

Appellee had filed suit against appellant in Texas on a lease agreement and sent the summons to a West Fork, Arkansas, address, which appeared on the lease and which appellee contended was the address where it had sent its invoices. The summons was returned stamped "moved, left no forwarding address." Appellee then served the summons upon the Texas Secretary of State pursuant to the Texas "Long-Arm Statute," Tex. Rev. Civ. Stat. Ann. art. 2031b (Vernon 1964). The Texas Secretary of State mailed the summons to the West Fork, Arkansas, address and the summons was again returned marked "moved, left no address." Without any further notice to appellant, appellee obtained a default judgment. Appellant subsequently received notice of the default judgment from the Harris County Circuit Clerk's office. The clerk's office sent the notice to appellant in care of its agent for service of process at its Prairie Grove, Arkansas, address, which was listed in appellant's articles of incorporation.

It is well settled that statutes providing for service of process upon nonresidents must be strictly construed, reasonable notice to the defendant in a lawsuit being essential to due process of law. *Brace* v. *Concours Auto Market*, 261 Ark. 556, 549 S.W.2d 802 (1977), citing *Kerr* v. *Greenstein*, 213 Ark. 447, 212 S.W.2d 1 (1948). In Texas, there must be strict compliance with statutes dealing with service on foreign corporations. *Texaco, Inc.* v. *McEwen*, 356 S.W.2d 809 (Tex. Civ. App. 1962). A record showing of jurisdiction upon substituted service must meet two major requirements: (1) The pleadings must allege facts which, if true, would make the defendant responsible to answer, or contain allegations making the defendant amenable to process by the use

of the long-arm statute; and (2) there must be proof in the record that the defendant was, in fact, served in the manner required by statute. *Whitney* v. *L & L Realty Corp.*, 500 S.W.2d 94 (Tex. 1973). The defendant's actual knowledge of the suit, absent proper service, does not put him in court. *Scucchi* v. *Woodruff*, 503 S.W.2d 356 (Tex. Civ. App. 1973).

Service of process upon foreign corporations is governed in Texas by Tex. Rev. Civ. Stat. Ann. art. 2031b and sections 3 and 5 provide as follows:

> Sec. 3. Any foreign corporation, association, joint stock company, partnership, or non-resident natural person that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such foreign corporation, joint stock company, association, partnership, or non-resident natural person of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such corporation, joint stock company, association, partnership, or non-resident natural person is a party or is to be made a party.
>
> Sec. 5. Whenever process against a foreign corporation, joint stock company, association, partnership, or non-resident natural person is made by delivering to the Secretary of State duplicate copies of such process, the Secretary of State shall require a statement of the name and address of the home or home office of the non-resident. Upon receipt of such process, the Secretary of State shall forthwith forward to the defendant a copy of the process by registered mail, return receipt requested.

In the case at bar appellee furnished the following name and address to the Texas Secretary of State: Bi-State Energy, Inc., P. O. Box 369, West Fork, Arkansas, 72774. As previously noted, the summons was returned to the Secretary of State

marked "moved, left no address." When the Texas court entered the default judgment against appellant there was no indication whatever that appellant had received the registered mail or had any reason at all to know that it had been sued in the Texas court. Therefore, it cannot be seriously argued that the record affirmatively showed, as required by Texas law, that the court had personal jurisdiction over appellant. The Texas long-arm statute was not strictly complied with and appellant was not subject to the personal jurisdiction of the Harris County District Court. Accordingly, the trial court erred in permitting the registration of appellee's foreign judgment and this cause is reversed.

Reversed.

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

FARMERS & MERCHANTS BANK *v.* James L. POE, et al.

CA 85-414 718 S.W.2d 457

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

Ponder & Jarboe, by: *Dick Jarboe*, for appellant.

Kirby Riffel, for appellee.

DONALD L. CORBIN, Judge. Appellant, Farmers and Merchants Bank, appeals a decision of the Randolph County Chancery Court, cancelling and releasing a promissory note. Appellee, James L. Poe, cross-appeals the decision of the chancellor awarding appellant the expenses related to collection of the note in question in a bankruptcy action. We affirm.

There were two notes involved in this litigation. The "Coy Rogers" note involved a secured real estate loan from appellant to appellee James Poe in 1979. In January of 1980, appellee James Poe and another individual obtained a loan from appellant on the security of two certificates of deposit to start a retail clothing store in Memphis, Tennessee. In January of 1981, the business was incorporated as Studio One, Inc., and the second note in question, known as the "Studio One" note, was made with Studio One, Inc., as a maker. This note was secured by the inventory of Studio One, Inc. It is disputed by the parties whether appellee James Poe was a co-maker or guarantor of this note.

In April of 1981, a fire destroyed the inventory of Studio One, Inc.; however, it was insured in a sufficient amount to discharge the indebtedness owed on the "Studio One" note. In July of 1981, Studio One, Inc., was placed in a Chapter Seven involuntary bankruptcy proceeding by its unsecured trade creditors. The trustee in bankruptcy challenged appellant's claim to a perfected security interest in the inventory of Studio One, Inc., because appellant did not perfect its security interest until July 1, 1981. As a result of this challenge by the trustee in bankruptcy, appellant only received $10,000 of the insurance proceeds paid into the bankruptcy estate of Studio One, Inc. The parties entered into an agreement on October 23, 1984, providing for the $10,000 payment on the "Studio One" note to appellant. This agreement contained specific reservation of rights provisions in favor of appellant and appellee James Poe. With respect to the "Studio One" note, the chancery court held that appellant was barred from proceeding on a collection of the balance of the "Studio One" note because of the settlement of the claim in the bankruptcy proceeding.

The "Coy Rogers" note, became involved in this suit because a tender of payment was made by appellee James Poe to appellant which did not match the balance due on it because appellant charged this note with the "Studio One" accrued interest. The chancellor ruled that the interest on the "Studio One" note could not be charged to the "Coy Rogers" note and granted judgment for a lesser amount. Appellant raises four issues and appellee James Poe cross-appeals. We will consider each issue in the order raised.

I.

THE COURT INCORRECTLY APPLIED THE LAW CONCERNING THE EFFECT OF THE SETTLEMENT AGREEMENT.

Appellant relies on the language in Ark. Stat. Ann. § 85-3-606 (Add. 1961) which states:

> Impairment of recourse or of collateral. — (1) The holder discharges any party to the instrument to the extent that without such party's consent the holder
>
> (a) without express reservation of rights releases or

agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any required presentment, protest or notice of dishonor with respect to any such person does not discharge any party as to whom presentment, protest or notice of dishonor is effective or unnecessary; or

(b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

(2) By express reservation of rights against a party with a right of recourse the holder preserves

(a) all his rights against such party as of the time when the instrument was originally due; and

(b) the right of the party to pay the instrument as of that time; and

(c) all rights of such party to recourse against others.

Appellant specifically relies on § 85-3-606(2)(a)(b) and (c), alleging that pursuant to the terms of the settlement agreement, it had preserved its rights to personally sue appellee James Poe for the deficiency on the "Studio One" note. However, appellant also admits that appellee James Poe preserved his rights to raise impairment of collateral as a defense. The evidence was uncontradicted that the collateral was impaired because of appellant's failure to properly file its security agreement with the Tennessee Secretary of State so as to perfect its security interest in the Studio One, Inc., inventory.

The loan to Studio One, Inc., was made on January 9, 1981; however appellant's financing statement was not filed until August 10, 1981. This was effected subsequent to the beginning of Studio One, Inc.'s bankruptcy action in July of 1981. Appellee James Poe adduced evidence that appellant not only impaired the collateral but also established the extent to which that impairment resulted in a loss. *See Van Balen* v. *Peoples Bank & Trust Co.*, 3 Ark. App. 243, 626 S.W.2d 205 (1981). The loss was easily

established by the fact that had the security interest been perfected, the proceeds from the insurance covering the loss of the Studio One, Inc., inventory would have covered the entire indebtedness owed appellant. Appellant failed to present proof to rebut the evidence that it had failed to perfect its security interest nor did it rebut the proof of the extent to which that impairment resulted in a loss.

In J. White and R. Summers, *Handbook of the Law under the Uniform Commercial Code*, § 13-15 (1980), it is noted that Section 3-606(1)(b) does not authorize the creditor to reserve his rights when he impairs the collateral. The evidence in the instant case supports the conclusion that appellant unjustifiably impaired the collateral and this act by appellant discharged appellee James Poe. Appellant could not reserve its rights by virtue of the settlement agreement of October 23, 1984, and we hold that the trial court's application of the law in respect to the settlement agreement was not in error.

II.

THE EVIDENCE IS NOT CLEAR, STRONG AND CONVINCING THAT APPELLEE JIM POE WAS A GUARANTOR OF THE NOTE RATHER THAN A CO-MAKER.

We agree with the chancellor's determination that the issue of whether appellee James Poe was a guarantor or maker on the "Studio One" note was immaterial. In construing the language of Ark. Stat. Ann. § 85-3-606, the Arkansas Supreme Court stated: " '[a]ny party to an instrument' as used therein is broad enough to include all makers and endorsers." *Rushton* v. *U.M.&M. Credit Corp.*, 245 Ark. 703, 707, 434 S.W.2d 81, 83 (1968). Accordingly, appellee James Poe could properly raise the defense of impairment of collateral either as a maker or a guarantor.

Appellant erroneously argues that appellee James Poe's status on the "Studio One" note is critical because if the trial court had determined appellee Poe's status to be a co-maker on the note, that determination would eliminate any question concerning impairment of the collateral. This argument is without merit inasmuch as the term "any party to an instrument" in §

85-3-606(1) includes makers and endorsers.

III.

THE COURT ERRED IN FAILING TO HOLD THAT PRINCIPLES OF ESTOPPEL SHOULD BE APPLIED AGAINST APPELLEE IN EXECUTING THE NOTE DATED DECEMBER 23, 1982.

The main thrust of appellant's contention here is that when appellee James Poe executed the renewal note on December 23, 1982, appellee Poe was aware that a serious question existed concerning appellant's perfection of its security interest in the Studio One, Inc., inventory. Appellant suggests that inasmuch as this note was executed and ratified with knowledge of this defect or defense, appellee James Poe is estopped from contending that the collateral was impaired. Appellant refers this court to 11 Am. Jur. 2d *Bills and Notes* § 391 (1964), pertaining to whether the execution of a renewal note cuts off defenses available against the original note. This section, however, provides that in a great many cases, it has been held on the grounds of either waiver or estoppel that the renewal of a note precludes defenses of which the *maker* has knowledge. *See The City National Bank of Fort Smith, Arkansas* v. *Vanderboom*, 290 F.Supp. 592 (W.D. Ark. 1968), *aff'd*, 422 F.2d 221 (8th Cir. 1970). Appellant also cites as authority a number of Arkansas cases for the general rule that as between the *maker* and the payee, any defense that would be good against the original note would be equally good against a note taken in renewal without additional consideration. *See Dodd* v. *Axle-Nut Sign Co.*, 126 Ark. 14, 189 S.W. 663 (1916).

In the instant case, the chancellor determined appellee James Poe was a guarantor on the "Studio One" note. We believe this finding is amply supported by the evidence. The renewal note dated December 23, 1982, established appellee James Poe's status as a guarantor. A memo from appellant's cashier to appellee James Poe dated March 18, 1982, was entered into evidence and requested appellee Poe to sign and return an attached Guaranty Agreement. The language of the settlement agreement dated October 23, 1984, reflects that appellee James Poe was considered by appellant as a guarantor on the "Studio One" notes. The notes which pre-dated the renewal note of December 23, 1982, also established appellee James Poe's status

as a guarantor. Correspondence between appellant and appellee James Poe's attorney reflected appellee Poe's guarantor status. Appellant's Extension Agreement dated March 26, 1984, referred to appellee James Poe's personal guaranty of the "Studio One" note. A proof of claim form filed by appellant on May 9, 1984, in the Studio One, Inc., bankruptcy action indicated appellant's claim was subject to the "endorsement of Jim Poe and Catherine M. Poe d/b/a."

In addition to the above documentary evidence supporting the conclusion that appellee James Poe was a guarantor on the "Studio One" note, there was also credible testimony by appellee Poe to this effect. Although we review chancery cases *de novo*, we will not set aside the chancellor's findings of fact unless they are clearly erroneous or against the preponderance of the evidence. *Cuzick* v. *Lesly*, 16 Ark. App. 237, 700 S.W.2d 63 (1985); ARCP Rule 52(a). We agree with the chancellor's finding that appellee James Poe was a guarantor and not a maker on the "Studio One" note. Accordingly, appellee James Poe's status on the "Studio One" note as a guarantor disposes of appellant's argument that appellee Poe was estopped from contending appellant unjustifiably impaired the collateral due to its failure to perfect a security interest in the collateral.

Appellant also argues that although appellee James Poe was aware of the problems with the bankruptcy proceedings, he nevertheless renewed the "Studio One" note on December 23, 1982. We find no merit to this contention for the same reasons we have enunciated in the issue concerning appellant's failure to perfect its security interest in the collateral and appellee James Poe's knowledge of this defect. Appellee James Poe's defense to the note was not precluded in view of his status as a guarantor on the "Studio One" note.

IV.

THE COURT SHOULD HAVE FOUND APPELLEE WAS ESTOPPED BY RIFFEL'S LETTER OF JULY 3, 1984.

Appellant has requested that we examine the letter of July 3, 1984, from appellee James Poe's attorney to appellant's president. The letter was written in reference to appellant's Extension

Agreement dated May 8, 1984, and provided in pertinent part as follows:

> I will contact the lawyer handling the bankruptcy matter in Memphis to find out to what extent, if any, this obligation is involved or affected by the bankruptcy proceedings and once that information is in hand, I will be in contact with Mr. Poe and will advise you as to what seems to be the best course to pursue at this time.
>
> We are, of course, counting on the fact that your efforts to have all or part of your obligation paid by the principal corporation will be successful thereby reducing Mr. and Mrs. Poe's individual liability. Therefore, we encourage you to make every effort to secure payment from the corporation. When that has been done, any personal guarantees will be honored.

Appellant argues that the purpose of the letter was to reaffirm appellee James Poe's guaranty of the "Studio One" note and that by doing so, appellee Poe waived his defenses to the enforcement of his guaranty. Appellant contends that appellee James Poe's conduct in this regard provided appellant with a separate basis for asserting estoppel. We do not agree with appellant's interpretation of the letter and find no merit to this argument.

The chancellor obviously considered the letter as a whole within the time and context in which it was written and concluded that appellee James Poe's attorney did not know the true state of affairs surrounding the bankruptcy action at the time the letter was written. It is well settled that whether estoppel is applicable is an issue of fact to be decided by the trier of fact. *Askew Trust* v. *Hopkins*, 15 Ark. App. 19, 688 S.W.2d 316 (1985). Furthermore, the party asserting estoppel must prove it strictly, there must be certainty to every intent, the facts constituting it must not be taken by argument or inference, and nothing can be supplied by intendment. *Ward* v. *Worthen Bank & Trust Co.*, 284 Ark. 355, 681 S.W.2d 365 (1984), citing *Martin, Inc.* v. *Indiana Refrigeration Lines, Inc.*, 262 Ark. 671, 560 S.W.2d 228 (1978). We cannot conclude the chancellor's finding that appellee James Poe was not estopped by his attorney's letter to appellant was clearly erroneous.

CROSS-APPEAL

APPELLEE SHOULD NOT BE REQUIRED TO PAY ATTORNEY'S FEES INCURRED EXCLUSIVELY FOR THE BENEFIT OF APPELLANT.

Appellee James Poe contends that if the chancellor properly determined appellant unjustifiably impaired the collateral, the legal expenses incurred by appellant were not expenses related to the collection of the note inasmuch as appellant's negligent actions rendered collection impossible. Appellee James Poe argues that appellant's legal fees were incurred in the furtherance of appellant's business and not appellee's.

The chancellor ordered appellee James Poe to pay appellant's legal fees incurred in the bankruptcy proceeding. It is well settled that the award of attorney's fees addresses itself to the sound discretion of the trial court and will not be reversed in the absence of an abuse of discretion. *Troutt* v. *First Federal Savings & Loan Association of Hot Springs*, 280 Ark. 505, 659 S.W.2d 183 (1983); *Pack* v. *Hill*, 18 Ark. App. 104, 710 S.W.2d 847 (1986). Appellee James Poe cites us to no authority on this point. Assignments of error presented by counsel in their brief, unsupported by convincing argument or authority, will not be considered on appeal unless it is apparent without further research that they are well taken. *Warner* v. *Warner*, 14 Ark. App. 257, 687 S.W.2d 856 (1985). We fail to find an abuse of discretion on the part of the chancellor here.

Affirmed on direct appeal; affirmed on cross-appeal.

CLONINGER and MAYFIELD, JJ., agree.

DIXIE FURNITURE CO. *v.* ARKANSAS POWER & LIGHT COMPANY

CA 85-279 718 S.W.2d 120

Court of Appeals of Arkansas
Division II
Opinion delivered October 29, 1986
[Rehearing denied November 26, 1986.]

W.G. Dinning, Jr., for appellant.

Janan E. Kemp, for appellee.

MELVIN MAYFIELD, Judge. Appellant, Dixie Furniture Company, has appealed a decision of the Phillips County Chancery Court granting partial summary judgment to appellee, holding that appellee had acquired a prescriptive easement over lands of the appellant and that the appellant and its predecessors in title knew or should have known the lands were being used adversely.[1]

Summary judgment is an extreme remedy and should be granted only when it is clear that there is no genuine question of fact in issue. *Johnson* v. *Stuckey & Speer, Inc.*, 11 Ark. App. 33, 665 S.W.2d 904 (1984). In the present case, oral testimony was taken in addition to the affidavits and pleadings; however, ARCP Rule 56 does not permit supplementation of the pleadings, depositions, answers to interrogatories, admissions and affidavits with oral testimony in considering whether summary judgment is appropriate. *Sikes* v. *Segers*, 263 Ark. 164, 563 S.W.2d 441 (1978). Therefore, in keeping with the procedure followed in *Montgomery Ward & Co.* v. *Credit*, 274 Ark. 66, 621 S.W.2d 855 (1981), we do not consider the oral testimony included in the record in this case.

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[1] Appellant's request for injunction to prevent appellee from using the property for any purpose was denied. This was an appealable order, Rules of Appellate Procedure, Rule 2(a)(6), even though the court's order stated that "a factual issue still remains as to the exact width of the defendant's prescription easement."

An affidavit filed in support of appellee's motion for summary judgment stated that appellee had constructed a transmission line across appellant's land in 1945 and that it had been maintained and operated by appellee since that time. The affidavit also stated that a support structure, presently in place and use, was installed in 1967, is over 90 feet tall, and is fairly obvious from the subject property. These allegations were not denied by the affidavit filed by appellant and it had the duty to meet them with sworn allegations of its own that showed there was a genuine issue of fact for trial. *Chick* v. *Rebsamen Insurance-Springdale*, 8 Ark. App. 157, 649 S.W.2d 196 (1983).

The chancellor's memorandum opinion relied upon *Hannah* v. *Daniel*, 221 Ark. 105, 252 S.W.2d 548 (1952), where the court stated:

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

In the case of *French* v. *Richardson*, 246 Ark. 497, 438 S.W.2d 714 (1969), the appellants had purchased a twenty-five acre tract of land which was burdened with a servitude represented by an unrecorded easement allowing appellees' radio station to maintain a tower on and transmission lines across the Frenchs' property. The Arkansas Supreme Court held:

> The law governing the respective rights of the parties in that situation is well settled. The prevailing rule is found in Am. Jur., Easements, § 156 (1957):
>
> > It has often been said that in order to affect the purchaser of a servient estate the easement if unrecorded, must be one that is apparent as well as necessary and continuous, or the marks of the servitude must be open and visible. Accordingly, it is held

> that if the servitude cannot be discovered by an inspection of the premises, the purchaser is not charged with notice of its existence, except in so far as he may be charged with constructive notice under the recording laws. On the other hand, the proposition that a purchaser of real estate is charged with notice of an easement where the existence of the servitude is apparent upon an ordinary inspection of the premises is sound beyond question.

246 Ark. at 499.

More recently, the Court of Appeals has reiterated these rules in *Childress* v. *Richardson*, 12 Ark. App. 62, 670 S.W.2d 475 (1984).

In *Sebastian Lake Development, Inc.* v. *United Telephone Co.*, 240 Ark. 76, 398 S.W.2d 208 (1966), the telephone company sought an injunction to prevent the construction of a dam which would result in the flooding of existing telephone poles and lines on appellant's property, claiming it held an easement by prescription. The court agreed that the evidence showed the land had been used adversely under claim of right for more than seven years and, under Ark. Stat. Ann. § 35-101 (Repl. 1962), compensation for the property taken was barred by the statute of limitations.

Under the law set out above, we believe the affidavits before the trial judge in the present case demonstrated that there was no genuine issue of fact to be tried concerning the existence of the appellee's prescriptive easement.

Appellant cites *LeCroy* v. *Sigman*, 209 Ark. 469, 191 S.W.2d 461 (1945), and *Bridwell* v. *Arkansas Power & Light Co.*, 191 Ark. 227, 85 S.W.2d 712 (1935), in support of its argument that, since its land was unenclosed, there is a presumption that the easement across the property was permissive. However, we cannot agree. The cases cited by appellant deal with passage over land and not with structures on land. Appellant's cases rely upon *Boullioun* v. *Constantine*, 186 Ark. 625, 54 S.W.2d 986 (1932), where the court cited 9 R.C.L., Easements, § 39, and said:

> [T]he rule that the use of uninclosed lands for passage is to be presumed permissive and not adverse is stated to be that

> supported by the weight of authority and based on the fact that it was not the custom in this country, or the habit of the people, to object to persons enjoying such privilege until there is a desire to inclose.

186 Ark. at 629.

Neither do we agree with appellant's argument that even if it had been aware of the existence of appellee's power lines and tower, it would have assumed them to be on adjacent property because there was no recorded easement, and because it was unaware of where its actual boundary lines were located. If, as stated in *Hannah* v. *Daniels*, and *French* v. *Richardson, supra*, a purchaser is charged with notice of an easement or encroachment where its existence is apparent upon an ordinary inspection of the property, it follows that a property owner is charged with knowledge of where his boundaries are located and whether the encumbrance is on his property or adjacent property. *See also Smotherman* v. *Blackwell*, 222 Ark. 526, 261 S.W.2d 782 (1953), in which it was held that the purchasers took subject to an equitable right of reformation by their neighbor who was in possession of part of the property purchased. There the court stated:

> Had the Blackwells taken the precaution of having a survey made before they bought Lot 1 they would have learned of Smotherman's hostile possession, and they are charged with knowledge of such facts as would have been disclosed by a diligent investigation of his claim. Such an investigation would have led to the discovery of the past events that now entitle him to the relief prayed.

We believe the chancellor was correct in granting the summary judgment in the instant case.

Affirmed.

CLONINGER and CORBIN, JJ., agree.

Luther SHAMLIN *v.* STATE of Arkansas

CA CR 86-166 718 S.W.2d 462

Court of Appeals of Arkansas
En Banc
Opinion delivered October 29, 1986

John Wesley Hall, Jr., for petitioner.

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

PER CURIAM. Luther Shamlin was convicted of arson and of conspiring with John I. Purtle and/or Linda Nooner to commit theft by deception in an amount exceeding $2500.00, growing out of alleged arsons of a car and a home for the purpose of collecting on fire insurance policies.

Petitioner perfected an appeal which is presently pending in this court. Purtle was subsequently acquitted of the alleged

conspiracy in a trial in which the testimony of some of the witnesses differed in some respects from that given in Shamlin's trial. Shamlin has filed a petition in the Court of Appeals requesting that we reinvest the trial court with jurisdiction and permission to entertain his petition for writ of error *coram nobis*. The petition is filed in this court because the trial court lost jurisdiction when the record was lodged here, and the court in which the conviction was obtained is the proper court to entertain a petition for a writ of error *coram nobis*.

When such a petition is directed to the appellate court, the burden on the petitioner is less than that imposed on him in the trial court where the merits of the petition are to be determined.

THE ROLE OF THE TRIAL COURT

In the trial court the writ is granted only when it is convincingly shown that there is an error of fact *extrinsic to the record* (such as insanity at the time of trial, a coerced plea of guilty, or material evidence withheld by the prosecutor) which would have prevented the rendition of the judgment had it been known to the court. *Penn* v. *State*, 282 Ark. 571, 670 S.W.2d 426 (1984). The rule stated in *Troglin* v. *State*, 257 Ark. 644, 519 S.W.2d 740 (1975), is as follows:

> (1) The function of the writ of *coram nobis* is to secure relief from a judgment rendered while there existed some fact which would have prevented its rendition if it had been known to the trial court and which, through no negligence or fault of the defendant, was not brought forward before rendition of judgment;
>
> (2) *Coram nobis* proceedings are attended by a strong presumption that the judgment of conviction is valid. The court is not required to accept at face value the allegations of the petition;
>
> (3) Due diligence is required in making application for relief, and, in the absence of a valid excuse for delay, the petition will be denied; and
>
> (4) The mere naked allegation that a constitutional right has been invaded will not suffice. The application should make a full disclosure of specific facts relied upon and not

merely state conclusions as to the nature of such facts.

257 Ark. at 645-646, 519 S.W.2d at 741.

It is not the function of such a writ to review the evidence presented at the trial or determine that it was improperly admitted. *Coram nobis* does not lie to review an issue of fact or to contradict an adjudicated issue. *Gross* v. *State*, 242 Ark. 142, 412 S.W.2d 279 (1967). Nor is newly discovered evidence a proper basis for the issuance of the writ except in the narrow circumstance recognized by the supreme court in *Penn* v. *State, supra*, (newly discovered confession of a third party that he, not the petitioner, had committed the crime).

THE ROLE OF THE APPELLATE COURT

In *Jenkins* v. *State*, 223 Ark. 245, 265 S.W.2d 512 (1954), the burden of one seeking permission from an appellate court to present the writ to the trial court was defined as follows:

> An application made to the appellate court for permission to proceed in the lower court should make a full disclosure of the specific facts relied on and not merely the conclusions of the party as to the nature and effect of such acts. In the exercise of its discretion as to whether the petition for leave should be granted the court should look to the reasonableness of the allegations of the petition and to the existence of the *probability* of the truth thereof, and grant leave only when it appears the proposed attack on the judgment is meritorious.

223 Ark. at 246, 265 S.W.2d at 513 (quoting 24 C.J.S. *Criminal Law* § 1606 (21) (1961) (emphasis added).

Jenkins also indicates that the allegation of those facts which the petitioner believes would lead to a different result should be supported by affidavit or other documentation. Here we are supplied only with portions of the record in the two separate trials of the alleged co-conspirators without affidavits or other documentation.

POINT I

Petitioner's Point I involves an exhibit and testimony received in his trial which he contends were shown in the Purtle trial

to have been withheld in violation of the discovery rules.

In petitioner's trial, an insurance adjuster introduced as a business record an inventory said to have been made after the fire at Nooner's home. Listed on the document were appliances which were claimed to have been destroyed in the fire and the time, place, and price of their purchase. He stated that the inventory was based on information furnished by Nooner.

In Purtle's subsequent trial, it was brought out on cross-examination that at the time the adjuster met with Nooner he only listed the items which she claimed had been destroyed in the fire. The adjuster stated that the documentation of the time, place, and price at which they were purchased was furnished at a later date and not inserted on the exhibit until immediately before petitioner's trial. The trial court ruled that, as the entries of value had not been made close in point of time to the events described, the document had lost its status as a business entry, at least to the extent of the recitation of value. The adjuster then introduced the document showing only the entries made at the time of the first interview and testified without objection to the items' values from the documents furnished him by Nooner. From the record it appears that only the copy of this instrument showing the list of destroyed appliances had been furnished to the prosecutor and released to petitioner on discovery.

There is no evidence that the prosecutor was any more aware of the sequence of these events than petitioner's counsel. Both had a copy of the instrument released on discovery and the opportunity to examine the exhibit introduced by the witness, but neither discovered the difference. It was not alleged or shown that the information contained on the admitted document was false, or known to have been false and willfully withheld. To the contrary, this information was presented to the jury at Purtle's trial from receipts and documents furnished the adjuster by Nooner. This does not establish a fact which, if known, would have prevented petitioner's conviction. It simply would establish a fact which, if known, would have at best required a different order of proof which was readily available at both trials.

POINT II

At petitioner's trial, Richard Walls, an insurance investiga-

tor with expertise in arson, testified that he made an examination of the car after the fire. From his examination he determined that the fire was of incendiary origin and that this opinion was confirmed by a chemical analysis of residue taken from the vehicle to a chemical laboratory. His written report of his observations and actions was then introduced into evidence.

In Purtle's trial, the same witness testified that after examining the vehicle he determined from the physical evidence that the heat generated by the fire was of such intensity that it could only have been reached by use of an accelerant. He stated that he had taken samples from the car for chemical analysis in order to confirm his opinion and that the analysis had so confirmed it. He testified on cross-examination, however, that he dictated his report on August 1st, but that the chemical analysis report was not dated until August 9th. It is not alleged or shown that the information contained in the report introduced in petitioner's trial was false or known to have been false and fraudulently presented. To the contrary, despite the discrepancy in the date on which the witness said he dictated the report, the report contained a verbatim recitation from the chemical analysis report he referred to and which was also in evidence.

Petitioner contends that "because this evidence adverse to the witness' credibility was exculpatory in nature the state had a duty to disclose it to the petitioner." Again there is nothing in the record to indicate that the State was any more aware of the discrepancies in the dates than was petitioner's counsel. Apparently the document had been furnished on discovery and the discrepancy was not discovered by the prosecution or the defense at petitioner's trial. The petitioner argues that had the State discovered the discrepancy and disclosed it to them, they might have successfully attacked the credibility of the witness by showing that "he relied in his report on an analysis which had not yet been made." The witness may have offered any one of a number of satisfactory explanations as to why he testified that he had dictated it on August 1st and fully rehabilitated himself. Furthermore, the failure to discover it in time to attempt impeachment is as attributable to the defense as to the prosecution. We conclude that this does not furnish any justification for a determination that the attack on the judgment of conviction is meritorious or that the defense was less at fault in not discovering

it than the prosecution.

POINT III

The petitioner next argues that as he was being tried for conspiring with Purtle to burn the car, Purtle's subsequent acquittal of participating in the conspiracy is a fact dehors the record which mandates a different result.

We find no merit in this argument. Ark. Stat. Ann. § 41-713(2)(c) (Repl. 1977) provides that it is not a defense to a prosecution for conspiracy to commit an offense that the person with whom the defendant is alleged to have conspired has not been charged, prosecuted, convicted, or has been acquitted of an offense based upon the conduct alleged.

POINT IV

At both trials, Homer Alexander testified that a few days before the fire he was with petitioner when he purchased seven containers of charcoal lighter fluid at a local hardware store at a price of $1.99 each. He stated that the purchase was made with cash. At petitioner's trial, the manager of that store testified for the defense that the cash register tapes for that date did not show that any sales of seven items at $1.99 had been recorded in the department where charcoal lighter fluid is sold. He admitted that the sales might have been rung up in some other department. Apparently in some other department the tapes did show such a transaction. In closing argument, the prosecutor held the register tapes in his hand but merely alluded to the witness's testimony.

In the subsequent trial, the same manager testified that he had made further inquiry since his testimony in petitioner's trial and discovered that the seven items had in fact been paid for by check rather than cash as Alexander testified. A check payable to the store in that amount was exhibited showing that it had been issued by a third party in payment for "building materials." Petitioner argues in his motion that the prosecutor misstated the evidence to petitioner's jury either "knowingly or by gross negligence." Nothing in the portions of the trial records submitted to us supports that allegation. According to the store manager, the rather conclusive evidence, that the tape entry referred to in petitioner's trial had nothing to do with petitioner,

was discovered by him *after* petitioner's trial. It was at best newly discovered evidence of a defense witness which does not form the basis for a writ of error *coram nobis*. Also, the issue of whether Alexander was with petitioner when he purchased seven quarts of charcoal lighter fluid was squarely before the trial court. *Coram nobis* does not lie to review or to contradict an adjudicated issue. *Gross* v. *State, supra.*

We cannot conclude that the allegation that these discrepancies in the evidence presented at the separate trials were known to the prosecutor and knowingly and fraudulently withheld on discovery is anything more than a conclusion drawn by petitioner. The supporting documents to his petition do not establish the probability of the truth of those assertions. Nor can we conclude that the attack on the judgment of conviction is meritorious. The petition is denied.

Denied.

Donnie L. LAIR *v.* STATE of Arkansas

CA CR 86-91 718 S.W.2d 467

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

Thomas E. Brown, for appellant.

Steve Clark, Att'y Gen., by: *William F. Knight*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with a violation of Ark. Stat. Ann. § 41-1602 (Supp. 1985). He was convicted of that charge after a jury trial but, upon the recommendation of the jury, the trial court imposed no sentence. From that conviction comes this appeal. For reversal, the appellant argues that his conviction was not supported by substantial evidence, and that the trial court erred in refusing to give the appellant's requested jury instruction on justification. We find the latter contention to be meritorious and we reverse.

As required by the Arkansas Supreme Court's decision in *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), we first consider the appellant's contention that the evidence was insufficient to support his conviction. Reviewing the evidence in the light most favorable to the appellee, we will affirm the judgment if the verdict is supported by substantial evidence. *Biniores* v. *State*, 16 Ark. App. 275, 701 S.W.2d 385 (1985). To be substantial, the evidence must be of sufficient force and character to compel a conclusion one way or the other with reasonable certainty; it must induce the mind to go beyond mere suspicion or conjecture. *Harris*, 284 Ark. at 252; *Jones* v. *State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984).

The evidence reflects that on September 20, 1985, the appellant was an inmate in the isolation punitive wing of the Tucker Maximum Security Unit, Arkansas Department of Corrections. Officer Mark Carnes was employed at that facility as a guard. While Officer Carnes and another officer were transporting the appellant and two other inmates back to their cells from the day room, an altercation took place between the appellant and Officer Carnes. The appellant raised his hand and a loose handcuff struck Officer Carnes on the left side of his head.

Arkansas Statutes Annotated § 41-1602(1)(d)(iv) (Supp.1985) provides that a person commits battery in the second degree if he intentionally or knowingly without legal justification causes physical injury to one he knows to be an officer or employee of the State while such officer or employee is acting in the course

of his or her lawful duty. "Physical injury" is defined as the impairment of physical condition or the infliction of substantial pain. Ark. Stat. Ann. § 41-115(14) (Repl. 1977). As his first point for reversal, the appellant contends that there was insufficient evidence of physical impairment or substantial pain to support a conviction for battery in the second degree. We do not agree.

At trial, Officer Carnes testified that, as a result of being struck with the loose handcuff, he received a laceration on the left side of his eye which required seven stitches, and that he still had a scar from this injury. A photograph of Officer Carnes, showing his injury, was introduced at trial and the following exchange took place:

> Q. Does that [photograph] accurately depict the way you looked?
>
> A. Well, that was after I had the stitches in me, Ma'am. I looked — I had a lot more blood. My eye was lot [sic] more swollen from when he hit me first. That was after I had my stitches put in.

In *Holmes* v. *State*, 15 Ark. App. 163, 690 S.W.2d 738 (1985), we held that the fact that the victim in that case did not verbally relate the extent of his pain was not controlling, and we stated that:

> In determining whether an injury inflicts substantial pain the trier of fact must consider all of the testimony and may consider the severity of the attack and the sensitivity of the area of the body to which the injury is inflicted. The finder of fact is not required to set aside its common knowledge and may consider the evidence in the light of its observations and experiences in the affairs of life.

15 Ark. App. at 166. Viewing the testimony in the light most favorable to the appellee, the injury in the instant case was a bloody, swollen wound, in close proximity to the eye, which required seven stitches. The jury was permitted to consider the sensitivity of the area surrounding the eye in making its determination. Under these circumstances, we cannot say that there was insufficient evidence of substantial pain to support a conviction under Ark. Stat. Ann. § 41-1602(1)(d)(iv).

As his second point for reversal the appellant contends that the trial court erred in not allowing the appellant's proffered jury instruction on justification, AMCI 4104. Where the defendant has offered sufficient evidence to raise a question of fact concerning a defense, the instructions must fully and fairly declare the law applicable to that defense. *Hill* v. *State*, 253 Ark. 512, 487 S.W.2d 624 (1972). In the instant case there was testimony from which the jury could find that there had been previous problems between the appellant and Officer Carnes; that the appellant had in the past been harrassed by Officer Carnes; that Officer Carnes had provoked the altercation by using abusive language to describe the appellant and the appellant's family; and that the appellant struck Officer Carnes in self-defense only after Officer Carnes had himself pushed and struck the appellant. Without commenting on the weight of this evidence or the credibility of the witnesses, we hold it to be sufficient to raise a question of fact regarding the defense of justification. Since the acts with which the appellant was charged would be violative of Ark. Stat. Ann. § 41-1602 (1)(d)(iv) only if they were performed without legal justification, we cannot say that no prejudice resulted because of the trial court's refusal to give the requested instruction.

Reversed and remanded.

CLONINGER, J., and WRIGHT, Special Judge, agree.

STROUT REALTY, INC., and H.F. McFARLAND and T.P. McFARLAND *v.* Ray BURGHOFF and Carolyn BURGHOFF

CA 85-376 718 S.W.2d 469

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

Gardner, Gardner & Hardin, by: *Stephen C. Gardner*, for appellant.

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

JAMES R. COOPER, Judge. This is an appeal from a decision of the Pope County Chancery Court granting the rescission petition of the appellees and requiring the appellants to pay $38,000.00 to the appellees as restitutionary damages. The appellant Strout Realty raises six points on appeal, and the appellants H.F. and T.P. McFarland raise six different points on appeal. We have consolidated several of these points for discussion of their merits. We find no prejudicial error on the part of the chancellor and affirm his decision.

The appellees, Ray and Carolyn Burghoff, sued to rescind a real estate contract and deed, whereby they purchased a resort known as Mack's Pines from the McFarlands. The Burghoffs also sought the return of their down payment from both the McFarlands and Strout Realty, the other appellant in this case. Strout Realty had advertised the property and acted as the agent for the seller in the transaction. The chancellor found that rescission was proper because of fraudulent misrepresentations concerning the availability of water, the income from the operation of the resort, and the amount of acreage involved in the transaction. He ordered the Burghoffs to reconvey the property back to the McFarlands and entered judgment against all the appellants in the amount of $38,000.00, determining that contribution between the parties should be in proportion to the amount each retained from the down payment.

We first discuss the McFarlands' contention that the Burghoff's complaint failed to plead facts sufficient to constitute fraud. The McFarlands objected to the pleadings below on the ground that, while the Burghoffs alleged misrepresentation as to specific items, they did not specifically plead fraud. The appellees

are required to set forth with particularity the facts and circumstances constituting fraud, *Jim Halsey Co.* v. *Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985); however, they are not required to set forth the *conclusion* of fraud. *Tucker* v. *Durham*, 285 Ark. 264, 686 S.W.2d 402 (1985). In other words, the word "fraud" need not be used, it is only necessary that facts set forth in the complaint lead to a conclusion of fraud. The complaint, as amended, alleges that the McFarlands and Strout Realty informed the Burghoffs that the water supply was sufficient to operate the business, that the Burghoffs relied upon these representations in purchasing the resort, and that, in fact, the water supply was insufficient. The appellees also alleged that the McFarlands "fraudently [sic] misrepresented the income of the business as an inducement" and that Strout Realty falsely represented that the plaintiffs were to purchase more than twenty-eight acres of land. The appellees allege reliance on the claims of the defendants in their complaint. We find these allegations sufficient to state a cause of action for fraud.

Next Strout Realty contends that the chancellor erred in allowing the appellees to proceed against them for damages (1) after the appellees had elected their remedy by attempting to rescind the contract and (2) when Strout Realty was not a party to the rescinded contract. Strout Realty first raised the issue of election of remedies at the close of the trial. This is an affirmative defense which must be raised in an answer. *Southern Farmers Association* v. *Wyatt*, 234 Ark. 649, 353 S.W.2d 531 (1962); *see also* Ark. R. Civ. P. 8(c). By failing to raise this issue then, Strout Realty waived the right to assert this defense at trial. Furthermore, the court did not err in holding Strout liable in a rescission action when it was not a party to the contract to be rescinded. The doctrine of election of remedies "applies only between the parties to a transaction so that one party may seek cancellation and then sue a third party for procuring the transaction through fraud." 12 S. Williston, *A Treatise on the Law of Contracts* § 1528 (3d ed. 1970); *accord, Cady* v. *Rainwater*, 129 Ark. 498, 196 S.W. 125 (1917). In *Cady*, a rescission action, the Supreme Court found both the broker and vendor liable for the amount of damages necessary to restore the purchaser to her status prior to entering into the transaction. Strout Realty could properly be held liable for restitutionary

damages.

Both Strout Realty and the McFarlands argue that there is insufficient evidence to show any fraudulent misrepresentations as to water, income, and acreage which would justify rescission. While we would agree if the decree were based solely on the representations regarding acreage, the chancellor's decree is not erroneous, as there is sufficient evidence of fraudulent misrepresentations regarding water and income to justify the rescission and the award of damages.

While we review chancery cases *de novo*, we will not reverse the chancellor unless his findings are clearly erroneous or against a preponderance of the evidence. *Morgan* v. *Morgan*, 8 Ark. App. 346, 652 S.W.2d 57 (1983); Ark. R. Civ. P. 52(a). Since the question of the preponderance of the evidence turns largely on the credibility of the witnesses, we defer to the superior position of the chancellor to determine the weight and credibility to be given the testimony. *Andres* v. *Andres*, 1 Ark. App. 75, 613 S.W.2d 404 (1981). A finding will be held clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that an error has been made. *RAD-Razorback, Ltd. Partnership* v. *Coney*, 289 Ark. 550, 713 S.W.2d 462 (1986).

When the plaintiff is attempting to overturn a solemn written instrument by proof which alters the written terms of the contract, he must prove the fraudulent misrepresentations by clear and convincing evidence, otherwise the fraud need only be proved by a preponderance of the evidence. *Clay* v. *Brand*, 236 Ark. 236, 365 S.W.2d 256 (1963). Here, the allegation of fraud as to the amount of land to be sold directly contradicts the amount of land set forth in the contract and deed. The other allegations contradict that clause in the contract which states that the appellees are relying on their own investigation of the matter. Therefore, the allegations must be proved by clear and convincing evidence. Clear and convincing evidence is that degree of proof which produces in the factfinder a firm conviction as to the allegation sought to be established; it is not necessary that the evidence be undisputed to be clear and convincing, so long as it imparts a clear conviction to the mind of the factfinder. *Kelly* v. *Kelly*, 264 Ark. 865, 575 S.W.2d 672 (1979).

In order to establish fraudulent misrepresentations, it must be shown by the party seeking rescission that the person making the representations knew them to be false or else, not knowing, asserted them to be true; that it was the first party's intent to have the other party rely on them to its injury; and that the representations were relied on. *Croley* v. *Baker*, 237 Ark. 136, 371 S.W.2d 830 (1963); *see also Kennedy* v. *E. A. Strout Realty Agency*, 253 Ark. 1076, 490 S.W.2d 786 (1973).

We will look first at the allegations concerning the sufficiency of the water supply. The testimony regarding this, like almost all the testimony, is conflicting. The Burghoffs testified that Mr. McFarland told them in 1983, when they first looked at the property, that the water was good. Mrs. Burghoff also testified that Terry Harris, the agent for Strout Realty, told her that the water was good; that, if there ever was a water problem, it was fixed now; and that they would always have good water. The Burghoffs testified that they would not have bought the property if they had not been assured the water was sufficient. The evidence also shows that the Burghoffs had difficulty with the water system the entire time they were in possession of the property.

The appellants denied ever telling the appellees that there was a good supply of water on the property. They also contend that any problem with the water supply was the result of the appellees' inexperience with the complicated water system, consisting of four wells interconnected by a series of shutoff valves. There was, however, evidence indicating that the wells were not as productive as they once had been and that measures to conserve water were taken each summer. Mrs. Burghoff testified that Mrs. McFarland had told her after the closing that people were not to take showers or do laundry because there was not enough water. Mrs. Burghoff also stated that the McFarlands knew that the Burghoffs were considering adding a swimming pool, which would increase the demand for water. Considering the conflicting testimony, we cannot say that the chancellor's decision was clearly erroneous.

There is also sufficient evidence to support the finding regarding the misrepresentation of income. It is settled law that false representations by the seller as to present or best

income of the property sold will, if relied upon by the purchaser, constitute actionable fraud. *Hegg* v. *Dickens*, 270 Ark. 641, 606 S.W.2d 106 (Ark. App. 1980). Mrs. Burghoff testified that Mr. McFarland had two sets of books. She stated that the first set did not show enough income to make the monthly payment, pay for improvements, and allow the family to live in the manner to which they were accustomed. Mrs. Burghoff stated that, when she pointed this out to Mr. McFarland, he brought out a second set of books which showed more income than the first set. She further testified that he gave her a statement saying that he had gross sales of $44,000.00 in 1982, but that, based on her observation of traffic on the highway, there was no way that the gross sales could have reached that amount. She added that, while he may have had that amount of gross sales, he could not have paid his expenses and still have had any money left over. Mr. McFarland testified that he told the Burghoffs that they could not make enough money to make the payments, but that they would be able to make a living. He admitted at trial that the best the resort could do was to generate a $12,000.00 loss, excluding annual depreciation. Representing a loss of $12,000.00 as being able to make a living constitutes a fraudulent misrepresentation of the income from the property.

The final allegation of misrepresentation concerns Strout Realty's representation of the acreage of the property. The property was marketed as 28 acres in the catalogue relied upon by the appellees and as 28 acres, more or less, in other brochures. The survey showed the property to contain 26.32 acres. The testimony was in conflict as to whether the Burghoffs had seen the survey prior to the closing: the Burghoffs testified that they had not seen the survey and Mr. McFarland and Mr. Harris testified that they had. Mr. Harris testified that he discussed the discrepancy with Mrs. Burghoff on the telephone prior to the closing. The real estate contract and deed did not specify twenty-eight acres; they merely contained a legal description. While Mrs. Burghoff testified that she would not have bought the property if she had known of the discrepancy in acreage, she also admitted that her family had an opportunity to inspect, and did inspect, the property in 1983. We do not believe that a discrepancy of 1.68 acres on rural resort property would be sufficient, standing alone, to justify rescission of the contract. *See Yeates* v. *Pryor*, 11 Ark.

58 (1850); *Baugh* v. *Johnson*, 6 Ark. App. 308, 641 S.W.2d 730 (1982). Therefore, we modify the decree to delete the reference to acreage.

Strout Realty contends that the chancellor erred in awarding judgment against it because (1) it was a known agent, acting in the scope of its agency, (2) all of its representations were derived from its principal, and (3) there was no evidence of independent fraud on its part. A real estate agent will not be held liable for constructive or legal fraud when "his representation to the buyer was only a repetition, in good faith, of a statement authorized by his principal." *Peek* v. *Meadors*, 255 Ark. 347, 352, 500 S.W.2d 333, 335 (1973). If the agent making the statement does not act in good faith, then he may be held liable, even when his agency is known and he acts under the authority granted him. *See Mayhue* v. *Matthews*, 174 Ark. 24, 294 S.W. 364 (1927); *Cleveland* v. *Biggers*, 163 Ark. 377, 260 S.W. 432 (1924). While a principal is liable for his agent's authorized statements, that liability does not absolve the agent of liability. *Ralls* v. *Mittlesteadt*, 268 Ark. 741, 596 S.W.2d 349 (Ark. App. 1980).

Here, testifying to what Mr. Harris told her prior to the closing, Mrs. Burghoff said,

> Mr. Harris informed me they [the McFarlands] had a problem with one of the wells on the property. That a local pump man . . . was installing a new well and a new pump and a holding tank. And at that time, there would be no water problem at all. . . . He told me at this time when the well was finished there would be no problems, you would always have good water.

Mr. Harris denied making any representation as to the quantity or quality of water on the property. He said that he would not have known about the water situation unless he had received the information from Mr. McFarland, but he stated that he assumed that there was plenty of water there. He further testified that he made no representations that were not authorized by the sellers, nor did he make any false representations. Mr. Harris stated that all he told Mrs. Burghoff was that the pump had been fixed. He testified that he never made any statements to the Burghoffs about water and that the McFarlands never said anything to him

about water. While the evidence is conflicting, we find there to be sufficient evidence to support a finding that Strout Realty informed the appellees that they would have plenty of water without any information on which to base their representation. Because there is undisputed testimony that the McFarlands told Strout Realty nothing about the water situation, it cannot be stated that the statements were merely a good faith repetition of statements made by the principal. Therefore, we find that the chancellor did not err in holding Strout Realty liable for damages.

The McFarlands argue that the court erred by not holding Strout Realty solely liable for the judgment, inasmuch as the misrepresentations regarding water were made by Strout Realty, not the McFarlands. Not only is there evidence that the McFarlands represented the water to be good in 1983, there is evidence that the McFarlands misrepresented the income of the property. The chancellor did not err in holding the appellants jointly liable.

The McFarlands additionally argue that the chancellor erred in finding fraudulent misrepresentations since the Burghoffs had ample opportunity to inspect the property. It is settled law that a purchaser may give credit to statements made by a seller who has peculiar knowledge of the subject matter, as the person who is the recipient of a fraudulent misrepresentation of fact in a business transaction is justified in relying on its truth, even when he might have determined its falsity had he made an investigation. *Fausett & Co.* v. *Bullard*, 217 Ark. 176, 229 S.W.2d 490 (1950). Here, the only matters which could constitute a basis for misrepresentations, the sufficiency of water and the amount of income, were matters within the peculiar knowledge of the appellants.

The McFarlands also claim that the appellees were not entitled to rescission of the contract because they failed to return the McFarlands to the status quo. As a rule, rescission will be granted only when the party asking for it restores to the other party substantially the consideration received; if he cannot do so he is remitted to an action for damages. *Sandford* v. *Smith*, 163 Ark. 583, 260 S.W. 435 (1924). Mr. McFarland testified that the appellees failed to return cigarettes, gas, candy, a Coke

dispenser, cans, bedspreads, twelve sets of brown towels, queen size bed sheets, twelve pillowcases, bowls, a pitcher, a music box, and some metal toys and rings. He testified that these items were worth approximately $4,000.00. Mrs. Burghoff denied taking anything when they left and testified that some revival singers, customers of the resort, had taken some items from one of the cabins. The evidence shows that the Burghoffs attempted to return the resort to the McFarlands for the return of their down payment. The resort sold to the appellees for the sum of $263,000.00. We find there is sufficient evidence to show that the Burghoffs were able to return substantially all of the consideration to the McFarlands.

The McFarlands finally contend that the chancellor erred in rescinding the contract because the Burghoffs had an adequate remedy at law. In furtherance of this argument, they point to testimony that the water supply problem could be rectified by improvements to the system, ranging in price from $1,200.00 to $4,000.00. They do not take into account their misrepresentation as to the ability to make a living on the property. Money damages would be inadequate to remedy this misrepresentation. We find no error in the chancellor awarding rescission.

The appellants have failed to show any reversible error, and therefore, we affirm the chancellor's decision, as modified.

Affirmed as modified.

CRACRAFT, C.J., and WRIGHT, Special Judge, agree.

Willie Jackson SMITH *v.* STATE of Arkansas

CA CR 86-86 718 S.W.2d 475

Court of Appeals of Arkansas
En Banc
Opinion delivered November 5, 1986
[Rehearing denied December 3, 1986.*]

*Glaze, J., not participating.

Gerald A. Coleman, for appellant.

Steve Clark, Att'y Gen., by: *William F. Knight*, Asst. Att'y Gen., for appellee.

LAWSON CLONINGER, Judge. Following a jury trial, appellant was convicted of burglary and sentenced to seven years in prison. For his appeal, appellant argues that the trial court erred in allowing the state to cross-examine appellant about his 1971 felony conviction for burglary and grand larceny. We agree with appellant's arguments and reverse and remand.

At the trial, Meyer Brick testified that on December 18, 1984, he was awakened by the alarm system he had set up at his store. He and his wife went immediately to the store, which was near his home. When he got there he saw two figures inside the store, but could not positively identify either of them. He then walked around to the alley and saw two people running. Mr. Brick shot at the fleeing figures, but did not know whether anyone had been hit.

Appellant was found about one hour later. He had been shot and had gone for help to a house he had seen with lights on. The residents of the house called the police and an ambulance.

Appellant testified that he had gone to the store with two other men after lending the driver $5.00 for gas. They were supposed to take the other man home, who said he lived behind the store. Appellant and the driver waited in the car while the other man went and got some money to repay appellant. When he did not return, the driver got out of the car and went to see what had happened. When the driver didn't return either, appellant walked down the alley beside the store and noticed the door standing open. He stated that at that point he realized the two men were burglarizing the store. Appellant then saw Mr. Brick coming toward him with a gun and appellant began running. The driver of the car ran out of the store and began running. Appellant stated that he did not know what became of the other man. When Mr. Brick shot appellant the driver of the car helped appellant to the car and they drove off. They hadn't gotten far when the car's engine blew up. The driver of the car pulled appellant out of the

car and left him in a ditch. Appellant then went to the house where he was found.

When appellant had completed his testimony, the defense rested its case. The judge then recessed until the next day. The next morning appellant took the stand again to explain the presence of a knife that some of the jurors had a question about. After testifying that he did not know where it came from, the state was allowed to cross-examine appellant about his 1971 conviction. The trial court explained that it was allowing the testimony because appellant had been allowed to testify extensively about his work record, his service record and the medals he had won in Viet Nam for heroism. The trial court felt that it would be unfair to the state to allow this testimony to go unrebutted and gave a limiting instruction to the jury that the testimony was to be considered only as proof of intent, preparation, plan, knowledge, identity or absence of mistake.

Appellant first argues that the questioning by the state should not have been allowed under U.R.E. Rule 609(b).[1] We agree. Where a defendant in a criminal case testifies in his own behalf, his credibility is placed in issue, and the state may impeach his testimony by proof of prior felony convictions. *Washington* v. *State*, 6 Ark. App. 85, 638 S.W.2d 690 (1982). However, the use of a prior conviction for impeachment purposes is limited by Rule 609(b), which provides:

> Evidence of a conviction under this rule is not admissible if a period of more than ten [10] years has elapsed since the date of conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

Appellant pleaded guilty and received a suspended sentence in 1971, which was fourteen years earlier than the trial date. It was error for the trial court to allow the cross-examination for

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[1] On October 13, 1986, in the case of *Ricarte* v. *State*, 290 Ark. 100, 717 S.W.2d 488 (1986), the Arkansas Supreme Court held that the Uniform Rules of Evidence were adopted at an invalid session of the Arkansas Legislature, and that the Rules did not become law. The court further stated in *Ricarte* that, "under our own rule-making power and under existing statutory authority, as of this date we adopt the Uniform Rules of Evidence as the law in Arkansas."

impeachment purposes.

Appellant also argues that the trial court erred in holding that the questioning was proper according to U.R.E. Rule 404(b). Although this issue is not as easily resolved, we agree with appellant's argument.

Rule 404(b) permits evidence of other crimes, wrongs or acts in order to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Such evidence, however, is not admissible to prove the character of a person in order to show that he acted in conformity therewith. Evidence of other crimes must pass two tests to be admissible: (1) the other crimes' evidence must be independently relevant, and (2) must meet the probative value versus unfair prejudice balancing test of U.R.E. Rule 403. *Golden* v. *State*, 10 Ark. App. 362, 664 S.W.2d 496 (1984). The probative value of evidence correlates inversely to the availability of other means of proving the issue for which the prejudicial evidence is offered. In other words, if the state has no other means to prove the issue, then the evidence is highly probative, and that may outweigh its prejudicial effect. However, in cases where the state has other means of proving the issue, then the balance is tipped in favor of it being excluded because of its prejudicial effect. *Golden, supra.*

In this case, the state argues that the evidence was needed to show that appellant was not at the scene of the burglary by "mistake" as he claimed. However, the state had already shown that appellant was shot fleeing the scene of the crime. Mr. Brick testified that he only saw two people, not three, as claimed by appellant; plastic gloves covered with blood that was shown to be appellant's blood type were recovered from the scene; and a knife that was taken from the store was found in appellant's pocket.

In reviewing the admissibility of prior convictions for the purposes stated in Rule 404(b), this court reviews the facts to determine if, without the prior burglary convictions, the state proved the burglary charges against appellant. *Golden, supra.* Since the state's evidence in this case would have amply supported appellant's conviction, the prior convictions should not have been admitted. The trial court abused its discretion in applying the balancing test between probative value and unfair prejudice. The probative value of evidence of a fourteen-year-old

conviction was slight if present at all, and the probability of unfair prejudice was great.

The state argues that the questioning was proper to rebut appellant's previous testimony about his exemplary conduct during the Viet Nam War. In support of its argument, the state cites the case of *Pursley* v. *Price*, 283 Ark. 33, 670 S.W.2d 448 (1984), in which the Arkansas Supreme Court held that, by the defendant's testifying to his past conduct, the door was opened to the admission of rebuttal evidence which otherwise might be inadmissible. However, that case is not on point. *Pursley* was a civil case where Price was suing Pursley for the battery Pursley committed. While testifying in his own defense, Pursley stated that he had "never had any problem other than a speeding ticket in his life." The police officer who investigated the battery was allowed to testify in rebuttal that Pursley had a reputation for violence in the community when he was drinking. The past conduct testified to was relevant because Price alleged that Pursley had been drinking when the battery occurred. The court said, "We do not hold or imply that Ark. Unif. R. Evid. is abrogated, but we conclude under the circumstances of this case, the trial court did not abuse its discretion in admitting the testimony." *Pursley*, 283 Ark. at 34, 670 S.W.2d at 449.

In this case, appellant made no sweeping denial of any prior wrongdoing; he only testified concerning his work record and service record. The evidence was not admitted to rebut any particular character trait as in *Pursley*, and which is permitted by U.R.E. Rule 404(a)(1). The conduct testified about in *Pursley* did not result in conviction for a crime, and there was slight showing by the state that appellant's conviction for burglary fourteen years ago was in any way relevant to the burglary he was being tried for.

Reversed and remanded for a new trial.

CRACRAFT, C.J., and MAYFIELD, J., concur.

CORBIN, J., and WRIGHT, Special Judge, dissent.

GLAZE, J., not participating.

GEORGE K. CRACRAFT, Chief Judge, concurring. I concur with the result reached by the majority and with the reasoning of

Judge Mayfield's concurring opinion, but write separately in order to state an additional reason for reversal. As stated in the dissent, it is well settled that we will affirm the ruling of a trial court if it reaches a correct result even for the wrong reason and, in view of *Ricarte*, we must look to the law as it existed prior to its attempted supersession by the Uniform Rules of Evidence in applying that rule.

Ark. Stat. Ann. §§ 28-605 and 28-707 (Repl. 1962) provide that evidence of a former felony conviction is admissible for the purpose of going to the credibility of a witness and the weight to be given his testimony. There are no such limitations on admissibility as are contained in Unif. R. Evid. 609. *Burton* v. *State*, 260 Ark. 688, 543 S.W.2d 760 (1976).

Here appellant stated that he had been convicted, but had received a ten-year suspended sentence. At the time that sentence was imposed, a suspended sentence did not constitute a "conviction" within the meaning of similarly-worded disqualifying statutes. *See Sutherland* v. *Arkansas Dept. of Insurance*, 250 Ark. 903, 467 S.W.2d 724 (1971); *Tucker* v. *State*, 248 Ark. 979, 455 S.W.2d 888 (1970); *State Medical Board* v. *Rodgers*, 190 Ark. 266, 79 S.W.2d 83 (1935). These cases hold that where one's sentence is suspended he has not been "convicted" because he has not been required to suffer the punishment prescribed in the judgment of sentence.

As, apparently, there had been no "conviction" within the meaning of prior law, it would likewise appear to have been error to permit the introduction of this evidence in any event.

MELVIN MAYFIELD, Judge, concurring. I agree with the result of the majority opinion written by Judge Cloninger, but for reasons not relied upon in that opinion. Moreover, I agree with the concurring opinion of Chief Judge Cracraft, but I add reasons for reversal also not included in that opinion.

The appellant objected to the evidence that he had received a suspended sentence for burglary and grand larceny in 1971. The record is clear that he objected on the basis that Rule 609(b) of the Uniform Rules of Evidence did not allow this "conviction" for the purpose of attacking his credibility since it was more than ten years old. It is also clear that he objected to its admissibility as

relevant under Uniform Evidence Rule 404(b). The trial judge, however, accepted the prosecutor's argument that the "conviction" was admissible under Rule 404(b) as going to the issue of intent, motive, plan, knowledge, or absence of mistake or accident. And the judge, on his own motion, instructed the jury as follows:

> Ladies and Gentlemen of the Jury, you have just heard some testimony concerning a prior criminal conviction, you are instructed and told, admonished that this testimony is not to be considered by you as evidence of guilt or innocence of Mr. Smith. It may be considered by you going to the issue of intent, motive, plan, knowledge, or absence of mistake or accident, and only for those purposes.

Although neither the judge, nor counsel for either side, knew that the Uniform Rules of Evidence had been adopted at an invalid session of the legislature, the Arkansas Supreme Court has now so held. *See Ricarte* v. *State*, 290 Ark. 100, 717 S.W.2d 488 (1986). Since that case was decided after the State's brief was filed in the instant case, the State could not discuss the opinion in its brief, but the dissenting opinion in this case states that the effect of the *Ricarte* decision is to put the law back as it was before the Uniform Rules of Evidence were adopted by the legislature and the case of *Burton* v. *State*, 260 Ark. 688, 543 S.W.2d 760 (1976), is cited for its holding that under Ark. Stat. Ann. § 28-605 (Repl. 1962) the law (prior to the adoption of the Uniform Rules of Evidence) allowed the introduction of a defendant's prior conviction "for the purpose of going to his credibility." The dissent then cites *Marchant* v. *State*, 286 Ark. 24, 688 S.W.2d 744 (1985), for the proposition that where the trial judge errs in his reasoning but reaches the correct result, the case will be affirmed on appeal. However, even if the *Marchant* rule applies under the peculiar circumstances of this case, it is my contention that the trial judge *did not reach the correct result.*

In the first place, the judge did not hold that appellant's "conviction" was admissible "for the purpose of going to his credibility." The judge held, and so instructed the jury, that the prior "conviction" was admissible for the jury's consideration of

"going to the issue of intent, motive, plan, knowledge, or absence of mistake or accident, *and only for that purpose.*" (Emphasis added.) So, if the "conviction" was admissible for the purpose of attacking the appellant's credibility, the judge did not correctly instruct the jury in that regard and consequently did not reach the correct result on the issue of the "conviction's" admissibility for credibility purposes.

In the second place, it is noted in the State's brief that *Price* v. *State*, 268 Ark. 535, 597 S.W.2d 598 (1980), stated that "if other conduct on the part of the accused is independently relevant to the main issue—relevant in the sense of tending to prove some material point rather than merely to prove that the defendant is a criminal—then evidence of that conduct may be admissible, with a proper cautionary instruction by the court." Thus, the State argues that since the appellant testified that he did not know his companions intended to burglarize the store involved in this case, the issue of knowledge or accident was raised and the evidence of appellant's prior "conviction" for burglary was admissible to show the absence of mistake or accident under Uniform Evidence Rule 404(b).

Price relied upon *Alford* v. *State*, 223 Ark. 330, 266 S.W.2d 804 (1954), for the statement quoted above and *Alford* was decided long before the adoption of the Uniform Rules of Evidence by the Arkansas legislature. Indeed, when the *Price* case was first decided by the Arkansas Court of Appeals, see 267 Ark. 1172, 599 S.W.2d 394, this court said that Uniform Evidence Rule 404(b) only codified the law in existence before the Uniform Rules were adopted. But even if the "conviction" had some independent relevance in the instant case, and even if we concede that the court gave the jury a proper cautionary instruction, I still do not believe the court was correct (even for the wrong reason) in allowing the introduction of appellant's "conviction" into evidence.

At this point, I join the reasoning in Judge Cloninger's majority opinion where it relies upon our case of *Golden* v. *State*, 10 Ark. App. 362, 664 S.W.2d 496 (1984), which held that the probative value of evidence correlates inversely to the availability of other means of proving the issue for which prejudicial evidence is offered. I agree with the majority opinion that there was little

need to introduce appellant's prior conviction in order to show that he was not at the scene of the burglary by mistake, that the prejudicial value of this fourteen-year-old "conviction" far exceeded its probative value, and that the trial court erred in admitting it into evidence for that purpose.

As the Arkansas Supreme Court pointed out in its *Price* case, 268 Ark. 535, 597 S.W.2d 598, Uniform Evidence Rule 404(b) does not expressly provide for the balancing test with respect to the prejudicial evidence of other crimes where independent relevancy is involved. Therefore, we can apply such a test without relying upon the Uniform Rules and I think it is perfectly proper to apply such a test in this case. So, since the trial court did not properly instruct the jury on the use of the "conviction" for credibility purposes, and since I think its prejudicial effect far exceeded any probative value it might have as relevant evidence in this case, I concur in the reversal and remand for a new trial.

ERNIE E. WRIGHT, Special Judge, dissenting. I respectfully dissent from the majority holding which reverses the conviction of the appellant on the ground it was error to elicit testimony from the appellant of a prior conviction of the crimes of burglary and grand larceny. The prior conviction occurred more than thirteen years prior to the alleged offense. The appellant objected to the State interrogating him on cross-examination about a prior conviction more than ten years old, for burglary and grand larceny, on the ground the evidence was inadmissible under Rule 609 of the Uniform Rules of Evidence which bars evidence of convictions occurring more than ten years before the crime charged. The court overruled the objection. The only point for reversal is that the court erred in allowing evidence of the prior conviction.

Rule 609 concerns the admission of evidence for the purpose of attacking the credibility of a witness and contains a provision that evidence of the crime is inadmissible if more than ten years have elapsed since the date of the prior conviction. The Rule also provides that evidence of a prior conviction is not admissible unless the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the party or witness.

The Arkansas Supreme Court, in *Ricarte* v. *State*, 290 Ark.

100, 717 S.W.2d 488 (1986), held that the Uniform Rules of Evidence were adopted at an invalid session of the legislature and never did become law. The court pointed out that earlier statutes were not affected by the repealing clause in the Uniform Rules. Therefore, in reviewing the case before us, we should look to the law as it existed prior to the attempted adoption of the Uniform Rules of Evidence. Ark. Stat. Ann. §§ 28-605 and -705 (Repl. 1962) are, therefore, still in effect, and they provide that evidence of former convictions of crimes is admissible for the purpose of going to the credibility of the witness or the weight to be given to his testimony. The pre-existing law clearly permitted the introduction of prior convictions of an accused who testifies in his defense and permitted the interrogation of the defendant on cross-examination as to prior convictions. *Burton* v. *State*, 260 Ark. 688, 543 S.W.2d 760 (1976) held that cross-examination of appellant about a prior conviction was permissible as Rule 609 was not in effect at time of trial. After *Ricarte, supra* we now know Rule 609 was never the law and *Burton, supra* is controlling. Here, there was no necessity for the State to challenge the validity of the Uniform Rules of Evidence as the judge correctly allowed the challenged evidence.

While the trial judge overruled the objection to the State questioning appellant on cross-examination about the prior conviction on the erroneous ground the evidence was admissible under Rule 404(b) of the Uniform Rules of Evidence, which under *Ricarte, supra* was never the law, the judge was correct in his ruling. The rule is well settled that if the trial judge errs in his reasoning but reaches the correct result, the case will be affirmed on appeal. *Marchant* v. *State*, 286 Ark. 24, 688 S.W.2d 744 (1985).

It is true that the evidence would be admissible under the statute as going only to the credibility of the witness and the weight to be given his testimony, but no instruction was requested by the appellant limiting the evidence to such purpose, and there was no objection to the instruction given. On appeal we do not reverse for failure to give an instruction not requested by appellant. *Alexander* v. *State*, 254 Ark. 998, 497 S.W.2d 279 (1973).

I would affirm.

CORBIN, J., joins in this dissent.

Ralph T. BEMIS and Debra Hare BEMIS *v.* Freddie M. HARE

CA 86-197 718 S.W.2d 481

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

Walls Law Firm, P.A., by: *Charles A. Walls, Jr.* and *J. Michael Stuart*, for appellants.

Hale, Ward, Young, Green & Morley, by: *Milas H. Hale*, for appellee.

DONALD L. CORBIN, Judge. Appellants, Ralph T. Bemis and Debra Hare Bemis, appeal a ruling by the Probate Court of Lonoke County denying their petition for adoption of a child, David Paul Hare, age 12, who was born during the marriage of appellant Debra Hare Bemis to appellee, Freddie M. Hare. We reverse and remand.

The evidence was undisputed that from October 1983, to the time of trial no support was paid by appellee, the natural father. Appellee, who is in the Air Force, testified that he voluntarily chose not to pay the child support and discontinued his military dependent allotment. It was also undisputed that appellee did not visit nor communicate with the child in any manner from October of 1983 to the time of the hearing in February of 1986. However, the trial court ruled that appellee had justifiable cause not to do so, and denied appellants' petition for adoption.

Appellants argue on appeal that (1) the court erred in holding appellee's consent to the adoption was required; (2) the court erred in finding that it would be in the best interest of the child to deny the petition; (3) the court erred in allowing testimony of inadmissible settlement negotiations; and, (4) the

court abused its discretion in questioning the child over appellants' objection.

Ark. Stat. Ann. § 56-206 (Supp. 1985) provides that the natural parents must generally consent to an adoption for it to be valid. Exceptions are set forth in § 56-207(a)(2) (Supp. 1985) which provides as follows:

> (a) Consent to adoption is not required of: (2) a parent of a child in the custody of another, if the parent for a period of at least one [1] year has failed significantly without justifiable cause (i) to communicate with the child or (ii) to provide for the care and support of the child as required by law or judicial decree;

It is well settled that statutory provisions involving the adoption of minors are strictly construed and applied. *Roberts* v. *Swim*, 268 Ark. 917, 597 S.W.2d 840 (Ark. App. 1980). The holding of the supreme court in *Harper* v. *Caskin*, 265 Ark. 558, 580 S.W.2d 176 (1979), places a heavy burden upon the party seeking to adopt a child without the consent of a natural parent of proving by clear and convincing evidence that the parent has failed significantly or without justifiable cause to communicate with the child or to provide for the care and support of the child as required by law or judicial decree. Clear and convincing evidence has been defined as being:

> Evidence by a credible witness whose memory of the facts about which he testifies is distinct and whose narration of the details thereof is exact and in due order and whose testimony is so clear, direct, weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the facts related is clear and convincing. . . . This measure of proof lies somewhere between a preponderance of the evidence and proof beyond a reasonable doubt. . . . It is simply that degree of proof which will produce in the trier of fact a firm conviction as to the allegation sought to be established.

Kelly v. *Kelly*, 264 Ark. 865, 870, 575 S.W.2d 672, 675-676 (1979) (citations omitted). "Failed significantly" does not mean "failed totally" but the failure must be a significant one as contrasted with an insignificant one. It denotes a failure that is

meaningful or important. "Justifiable cause" means that the significant failure must be willful in the sense of being voluntary and intentional; it must appear that the parent acted arbitrarily and without just cause or adequate excuse. *Henson* v. *Money*, 1 Ark. App. 97, 613 S.W.2d 123, *aff'd*, 273 Ark. 203, 617 S.W.2d 367 (1981).

In *Watkins* v. *Dudgeon*, 270 Ark. 516, 606 S.W.2d 78 (Ark. App. 1980), the court of appeals reversed the dismissal of the appellants' petition for adoption. In holding the natural father's consent was not required under the circumstances, we stated:

> The obvious purpose of the applicable statute [Ark. Stat. Ann. § 56-207] is to provide a child with a real father instead of one who, by his conduct, has proven to be a father by blood only. Although the legislature cannot force a man to be a father within the proper meaning of that term, it can and has afforded a judicial method whereby a child may have an opportunity to experience the benefits of having a real father by adoption. Our statute permits the courts, where the proper circumstances present themselves, to grant a petition for adoption to petitioners who demonstrate true love, affection and care for a child, regardless of the arbitrary dissent by a natural father.

Id. at 521, 606 S.W.2d at 81 (citations omitted).

While we review probate proceedings *de novo* on the record, it is well settled that the decision of the probate judge will not be disturbed unless clearly erroneous (clearly against the preponderance of the evidence), giving due regard to the opportunity and superior position of the trial judge to judge the credibility of the witnesses. ARCP Rule 52(a); *Henson* v. *Money, supra.*

Custody of David had been awarded to appellant Debra Bemis and appellee was ordered by the divorce decree dated June 1, 1976, to pay $100 per month for David's support. Appellant Debra Bemis and appellee were subsequently involved in litigation over David in reference to child support arrearages and problems with visitation. Appellee was ordered to increase his child support payments to $150 per month and the arrearages were reduced to judgments against him. Argument of counsel for

appellants reflects that the judgments for arrearages totalling in excess of $10,000 were unsatisfied at the time of the hearing in February of 1986.

Appellee testified that he wanted to support his child and that he would like to see him on a regular basis. He acknowledged his love for his son and indicated that he was willing to place the support on his military allotment again. During cross-examination, appellee admitted that he had made no effort to see his son since October of 1983; that he missed scheduled visitation with his son and could not remember if he had notified appellant Debra Bemis that he would not be exercising his visitation; and that he had not given his son a Christmas present since 1982 nor had he called David or done anything for David on his birthdays as of 1982. Appellee acknowledged that his son seemed to receive good care from appellants and that he was a child to be proud of. Appellee was questioned by the court in regard to his voluntary suspension of allotment payments and stated that he took that action because it was getting harder to get David. Appellee testified that each time he went to appellants' home to pick up David, appellant Debra Bemis had David ready to go and his suitcase packed. Appellee stated that on one occasion he had to physically pick David up, who was screaming and kicking, and put David in the truck. Appellee noted that a lot of times David would run from appellee while still in the house. However, appellee unequivocally testified that appellant Debra Bemis never physically prevented his exercise of visitation with David.

Appellant Debra Bemis testified that David was two years of age at the time of her divorce from appellee. She married appellant Ralph Bemis on June 16, 1976. She stated that appellee had not made regular visits with David since 1981. She would have David ready each time and on many occasions appellee would not show up. Appellant Debra Bemis acknowledged that there had never been any birthday or Christmas cards or Christmas presents sent to David by appellee. She described the relationship between her husband and David as that of a father and son. They did a lot of things together and were very happy.

Appellant Ralph Bemis testified that he had lived with David since he was two years of age and had enjoyed the relationship of father and son with him since that time. He was a

Boy Scout leader of David's troop and enjoyed hunting, fishing and other sports with David. Appellants had two daughters, aged three and six, in their home. He stated he was financially able to support David.

Appellee's mother testified that she loved her grandson and wanted to visit him. She stated that she and her husband had filed petitions seeking visitation rights with David several times. Mrs. Hare testified that she was unsuccessful in exercising those visitation rights. She described the events which took place in appellants' home during times she attempted to exercise her visitation with David. She stated there was always a "scene". She would ask for David and appellant Debra Bemis would tell Mrs. Hare that David was in the house. Mrs. Hare would ask David and David would refuse to go with her. She and her husband had not visited with David since 1983.

The probate judge made specific findings in his order denying appellants' petition for adoption and the following are his findings which are pertinent to the issue of appellee's failure to support or communicate with David in excess of one year:

. . . .

> (5) The respondent, Freddie Max Hare, has not visited with the child nor paid support for over one year, however, the Court believes in this case the action was justified within the meaning of A.S.A. 56-207.
>
> (6) From the Court's view of the witnesses, it is believed that Debra S. Bemis did everything possible to avoid collecting support from the natural father, Mr. Hare, in order to effect an adoption. That Mr. Hare was led to believe that he should not pay support since he was unable to have visitation with the child, without greatly upsetting him. The Court accepts Mr. Hare's testimony in this regard.

. . . .

Upon our *de novo* review of the record, we must conclude the probate judge's finding that appellee's failure to

support David was justified is clearly erroneous. In *Henson* v. *Money, supra*, the Arkansas Supreme Court, in granting the adoption over the objection of the father, stated that "[t]he duty to pay child support is independent of the duty of the custodial parent to allow visitation, as both may be enforced by the courts." *Id.* at 207. In *Green* v. *Green*, 232 Ark. 868, 341 S.W.2d 41 (1960), the supreme court recognized that the father's duty to support his minor child cannot be excused on the basis of the conduct of others, unless that conduct prevents him from performing his duty. *See also Pender* v. *McKee*, 266 Ark. 18, 582 S.W.2d 929 (1979); *Brown* v. *Johnson*, 10 Ark. App. 110, 661 S.W.2d 443 (1983). The probate judge undoubtedly overlooked the above principles of law in determining appellee had justifiable cause to not support David. There was no competent evidence to show that appellants' conduct precluded appellee from making his support payments. There was no evidence that appellee was financially unable to meet his obligation and the record clearly reflects that appellee voluntarily chose not to pay the support. The probate judge concluded in his findings that appellant Debra Bemis "did everything possible to avoid collecting support . . . in order to effect an adoption." Her testimony, as well as the testimony of all the witnesses, does not support this conclusion. She testified that she had been to court approximately twelve times since her divorce from appellee. Her reasons for not having pursued any recourse against appellee for child support since March of 1984 were as follows: (1) she did not feel one should have to make a father support his child; (2) if the father did not want to do it, you can't make him do it; (3) it was not worth staying in court and going through the expense; and (4) any man who loved his child would not have to be made to pay child support.

Under the circumstances of this case, it simply made no difference if appellee believed appellants interfered with his ability to observe visitation with David or not. Appellee has a duty and obligation to support David whether ordered to do so by a court or not. *See Pender* v. *McKee, supra.* The probate judge also determined that appellee was led to believe by appellants that he did not have to pay support since he was unable to have visitation with David and the court accepted appellee's testimony in that regard. The evidence in this case clearly illustrates that beginning

with the time of the divorce on June 1, 1976, appellee unjustifiably failed to meet his support obligations to his child. Appellee contends his failure to support David in the three-year period preceding the hearing on the adoption petition was justifiable because of an agreement he alleges he and appellant Debra Bemis entered into excusing his obligation to pay child support. This also did not relieve appellee of his duty and obligation to support David.

In *Dangelo* v. *Neil*, 10 Ark. App. 119, 661 S.W.2d 448 (1983), we affirmed the probate judge's ruling that the consent of the natural mother was not required for the adoption of her son by the appellees. The natural mother had had no communication and had made no significant contribution toward the care and support of her son in excess of one year. There was evidence the appellees gave the natural mother cause to believe no contribution was expected from her. We stated, however, "Whether appellees expected or requested contributions from appellant is not the determining factor. A parent has the obligation to support a minor child, and no request is necessary. Ark. Stat. Ann. § 57-633 (Repl. 1971)." *Id.* at 122, 661 S.W.2d at 450.

Appellee's action in failing to pay support was an arbitrary act without just cause or adequate excuse. We find that appellants proved by clear and convincing evidence that appellee failed significantly and without justifiable cause to provide for the care and support of David. Appellee's consent to the adoption was therefore not required.

A closer question is presented by the issue of whether appellee failed significantly without justifiable cause to communicate with David for a period of more than one year. In view of our holding on the issue of appellee's failure to significantly and without justifiable cause support David, we need not decide this question nor the other arguments which appellants have raised in their appeal.

A probate court may grant a petition for adoption if it determines at the conclusion of a hearing that the required consents have been obtained or excused and that the adoption is in the best interest of the child or individual to be adopted. Ark. Stat. Ann. § 56-214(c) (Supp. 1985); *Dixon* v. *Dixon*, 286 Ark. 128, 689 S.W.2d 556 (1985); *Falbo* v. *Howard*, 271 Ark. 100, 607

S.W.2d 369 (1980). In the case at bar the order of the probate judge denying appellants' petition for adoption does not address the issue of whether it is in the best interest of David to be adopted. It is only logical for this court to assume that the probate judge did not consider this question in view of his determination that appellee's consent was necessary. We stated in *McKee* v. *Bates*, 10 Ark. App. 51, 661 S.W.2d 415 (1983), that if the trial court determines a parent's consent is unnecessary, such a finding does not require that the adoption be granted. Before an adoption petition may be granted, the probate judge must find that the adoption is in the best interest of the child. *See also Shemley* v. *Montezuma*, 12 Ark. App. 337, 676 S.W.2d 759 (1984). Accordingly, this cause is reversed and remanded with directions to the probate court to conduct a hearing for the limited purpose of determining whether it is in the child's best interest to grant the adoption.

Reversed and remanded.

CRACRAFT, C.J., CLONINGER, J., WRIGHT, Special Judge, join in the majority.

COOPER and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I do not agree that the trial judge's decision in this case should be reversed. The rules by which we review the trial judge's decision were clearly set out in our case of *Taylor* v. *Hill*, 10 Ark. App. 45, 661 S.W.2d 412 (1983) as follows:

> Ark. Stat. Ann. § 56-207 has been the subject of a number of recent opinions of the appellate courts of this state from which the principles governing the issues of this appeal have been established. Statutory provisions involving the adoption of minors are strictly construed and applied. *Roberts* v. *Swim*, 268 Ark. 917, 597 S.W.2d 840 (Ark. App. 1980). The party seeking to adopt a child without the consent of a natural parent bears the heavy burden of proving by clear and convincing evidence that the parents have failed significantly *and* without justifiable cause to communicate with the child or to provide for its care and support for the prescribed period. *Harper* v. *Caskin*, 265 Ark. 558, 580 S.W.2d 176 (1979).

> "Clear and convincing evidence" has been defined as evidence of a credible witness whose memory of the facts about which he testified is distinct and whose narration of the details is so clear, direct, weighty, and convincing as to enable the finder of fact to come to a clear conviction, without hesitancy, of the truth of the facts related. This measure of proof lies somewhere between a preponderance of the evidence and proof beyond a reasonable doubt. It is simply that degree of proof which will produce in the trier of fact a firm conviction as to the allegation sought to be established. *Kelly* v. *Kelly*, 264 Ark. 865, 575 S.W.2d 672 (1979). "Failed significantly" does not mean "failed totally" but the failure must be a significant one as contrasted with an insignificant one. It denotes a failure that is meaningful or important. "Justifiable cause" means that the significant failure must be willful in the sense of being voluntary and intentional; it must appear that the parent acted arbitrarily and without just cause or adequate excuse. *Henson* v. *Money*, 1 Ark. App. 97, 613 S.W.2d 123 (1981) [affirmed on appeal 273 Ark. 203, 617 S.W.2d 367 (1981)]; *Pender* v. *McKee*, 266 Ark. 18, 582 S.W.2d 929 (1979).
>
> While we review probate proceedings *de novo* on the record, it is well settled that the decision of a probate judge will not be disturbed unless clearly erroneous, giving due regard to the opportunity and superior position of the trial judge to judge the credibility of witnesses. ARCP Rule 52(a); *Chrisos* v. *Egleston*, 7 Ark. App. 82, 644 S.W.2d 326 (1983); *Henson* v. *Money, supra.* Personal observations of the judge are entitled to even more weight in cases involving the welfare of a small child. *Wilson* v. *Wilson*, 228 Ark. 789, 310 S.W.2d 500 (1958).

The record contains evidence showing that the appellant, Debra Bemis, was first married to the appellee, Freddie Hare. They are the parents of a son born on March 17, 1974. At that time, Debra was 17 years old and Freddie was 18. They were divorced on June 1, 1976, and Debra was married to the appellant, Ralph Bemis, on June 16, 1976. Both Freddie and Ralph were in the Air Force and stationed in Pulaski County at

the time of both events. Freddie testified that he paid child support until late in 1983, but admits he stopped his allotment for that purpose at that time. At the hearing in February of 1986, he admitted he had not made any support payments nor seen his son for more than two years. In response to questions by the court, he testified as follows:

> I stopped my allotment payments because it was getting harder and harder to get David. Everytime I would go over there she'd have him ready. She would have his suitcase but he wouldn't be ready to go. One time I had to pick him up just kicking and screaming and put him in the truck and take him with us. A lot of times he would run in the house and I wouldn't get him out. I wouldn't want to go in there after him. It would just seem like it wasn't going anywhere. She had made this offer several times to me. The same offer that is on that paper.
>
> THE COURT: What paper?
>
> A. On the—the letter there that Mr. Craig sent me.
>
> THE COURT: Well, tell me what the offer was.
>
> A. She said if I quit seeing my son that I wouldn't have to pay child support.
>
> THE COURT: When did that start?
>
> A. Several years ago. Almost from the first.
>
> THE COURT: What was yours and her relationship on these times when you were attempting to exchange the child?
>
> A. Mine and hers?
>
> THE COURT: Yeah.
>
> A. They were peaceful enough, I guess. I didn't have—it wasn't her that gave me the trouble. Not directly.

> We talked, and everything was fine until I got ready to leave and take David. And that's when all the trouble would start. She didn't every—you know—physically try to stop me, but she never—you know—mentally try to get him ready to go either.

Appellants' abstract, pages 24-25.

In addition to the above evidence, there was evidence from Freddie's mother that she was not allowed to see her grandson. She even obtained a court order allowing visitation rights but said she was not able to successfully exercise that right because there was usually a scene. When she went to the house to get him, Debra would say, "He is in there" and David would say, "I am not going." She stopped trying to visit him in 1983.

The court heard all the evidence, talked to the boy, then 12 years old, in chambers, and then stated in open court:

> I am going to take this case under advisement. I am going to make this one statement, basically, in Court today. I have never seen a child that I thought was more coaxed and prepped on what to say. It is very upsetting, in my opinion, to see what has occurred with that child and how he has been turned against his father. And that's all I'm going to say right now.

In his order, the judge made the following pertinent findings:

> (5) The respondent, Freddie Max Hare, has not visited with the child nor paid support for over one year, however, the Court believes in this case the action was justified within the meaning of A.S.A. 56-207.
>
> (6) From the Court's view of the witnesses, it is believed that Debra S. Bemis did everything possible to avoid collecting support from the natural father, Mr. Hare, in order to effect an adoption. That Mr. Hare was led to believe that he should not pay support since he was unable to have visitation with the child, without greatly upsetting him. The Court accepts Mr. Hare's testimony in this regard.

(7) That the Court's examination of the twelve year old child, David Paul Hare, was most important. The Court believes that Debra Bemis has done everything possible, (although she may not recognize this) to turn the child from his father. That the child was taught to hate his father, although he was unable to explain that dislike. Although not within this Court's jurisdiction, the Court is certain that because of the child's unjustified attitude towards the father, visitation will be almost impossible for a number of years. This will be particularly so, if the mother continues to control the child's thought relating to his father.

(8) The Court accepts the testimony of the father that it was impossible to visit the child without greatly upsetting him.

(9) That the petition for adoption should be and is hereby denied.

Considering that, under *Taylor* v. *Hill, supra*, one seeking to adopt a child without the consent of a natural parent bears "the heavy burden of proving by clear and convincing evidence" that the natural parent has failed significantly *and* without justifiable cause to communicate with the child or to provide for its care and support for the prescribed period; that in order for the failure to support or communicate to be significant, it must appear that the parent acted arbitrarily "and without just cause or adequate excuse"; and that we are not to disturb the decision of the trial judge unless it is clearly erroneous, giving due regard to his superior position to judge the credibility of the witnesses, it is clear to me that we should affirm the trial judge's decision in this case.

The majority opinion lays great stress upon the fact that the appellee has not paid the child support ordered by the court. However, as the statute provides, the right to adopt without consent of a natural parent is allowed only where the failure is without justifiable cause—or as the case law provides, without "just cause or adequate excuse." Here, the appellee's excuse, accepted by the court, was the problem of visitation. While both

appellee and his mother concede that the boy's mother did not refuse visitation rights, there is clear evidence by the boy's father and grandmother that the boy's mother made no attempt to have the boy *mentally* ready for their visitation. Thus, the father stopped making the support payments.

An exhibit, abstracted by appellants, shows that the failure to allow visitation was raised on eight different occasions by motions filed in the trial court. The judge specifically noted that the mother had made no real effort to collect the support payments. She even testified that it was not worth staying in court to try to enforce support payments and that "you should not have to make a father support his child." The real reason for this attitude, I submit, is that the stepfather, who was in the same military unit with the boy's father and who married the boy's mother 15 days after the father and mother were divorced, is able, as he testified, to support the boy and, therefore, they have been content to forget the father's support if he would stop visiting the boy. In fact, there is evidence to the effect that such an agreement was made between the parties. None of this forgives the debt that is owed for past support, but it does, in my view, support the trial court's decision to deny the petition for adoption.

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

ALCOHOLIC BEVERAGE CONTROL BOARD *v.* Bob L. HICKS d/b/a BOB'S LIQUOR STORE

CA 85-485 718 S.W.2d 488

Court of Appeals of Arkansas
Division I
Opinion delivered November 5, 1986
[Rehearing denied December 3, 1986.]

Treeca J. Dyer, for appellant.

Bill J. Davis, for appellee.

ERNIE E. WRIGHT, Special Judge. The Alcoholic Beverage Control Board brings this appeal from a decision of the circuit judge, ordering the Board to issue a retail liquor and off-premises beer permit for appellee to operate a package store in the southwest corner of Union County. On appeal from the ABC Board's denial of the permit, the circuit court ordered the permit issued.

The appellant argues two points for reversal: (1) that the circuit court erred in remanding the case to the ABC Board for the taking of additional evidence, and (2) the circuit court erred in reviewing the evidence on its own when the Board made no findings on the additional evidence. We affirm in part, reverse in part, and remand.

In November 1982, appellee filed an application for a retail liquor and off-premises beer permit to operate a package store in the Dodge City community in Union County. On January 18, 1983, the ABC Director issued a decision finding that (1) the building appeared inadequate and in need of remodeling, and (2) adequate police protection may not be available in the rural area. The director concluded "that the public convenience and advantage would not be promoted by granting the applied for permits."

Appellee appealed to the Board, and a hearing was held on March 23, 1983. The Board's attorney read into the record a letter from the sheriff giving assurance that adequate police protection was available. Appellee testified concerning remodeling being done to the building to be used. However, because appellee failed to bring plans and specifications for the remodeling to the hearing, the hearing was postponed until April 20, 1983.

At the April 20 hearing, appellee presented plans for building improvements. No one appeared in opposition to the application, no objections were made to the final plans for the building to be used for the package store, and no further objections to the adequacy of police protection were made. The Board summarily voted to sustain the Director's decision and deny the permit on the ground of insufficient proof of broad public

need.

Appellee filed an appeal to the circuit court on May 13, 1983, and requested leave to present additional evidence. On November 8, 1984, appellee filed a motion in circuit court, alleging that the issue of public convenience and advantage was first raised at the April 20 hearing, that this issue was not stated as a reason for denial of the permit in the director's decision, and that the Board waived any action they could take for denial based on this issue. Appellee requested that the court either order the Board to issue the permit to appellee, or order a hearing to supplement the record on the issue of public convenience and advantage. The Board responded, stating that it conducted a *de novo* hearing and was not bound by the director's decision. The Board further contended that public convenience and advantage is always an issue of proof, and that the court could order additional evidence only on a showing of good reason for failure to present the evidence at the Board hearing.

The trial judge issued an order on March 18, 1985, remanding the case to the Board for the taking of evidence on the issue of public convenience and advantage. The court found from the record there were good and sufficient reasons that evidence of public convenience and advantage was not presented before the agency. Ark. Stat. Ann. § 5-713(f) (Repl. 1976) empowers the circuit court, upon motion before hearing an appeal from a final decision of an administrative agency, to order additional evidence to be taken when the court finds the evidence is material and that there were good reasons for failure to present the evidence before the agency. It is clear from its order that the trial court considered the evidence material because the evidence concerned the sole ground upon which the Board denied the application. The court order carried with it the implication the Board would make a new decision taking into account the additional evidence.

There was substantial evidence supporting the court's finding that there were good reasons for appellee's failure to present evidence as to the public convenience and advantage. The ABC director, in denying the application, indicated the deficiencies in the application were only the adequacy of the building and the adequacy of police protection. At the first hearing before the Board, a letter from the Union County Sheriff, giving assurance

that adequate police protection was available, eliminated that issue. There was evidence that appellee was in the process of remodeling a building to be used for the outlet. At that time, appellee had expended $2500 to $3000 in the remodeling, but the work was not fully completed, and he did not have with him detailed plans showing the remodeling to be done. Further hearing on the application was delayed to permit the appellee to furnish floor plans and other information on the remodeling. The proceedings before the Board indicate that the Board's primary concern was the adequacy of the building.

The record reveals that at the April 20 hearing, appellee produced evidence that the remodeling had been completed, and the issue as to the sufficiency of the building was dropped.

We do not reverse the trial judge's findings incident to the determination to remand the case to the ABC Board, for the taking of additional evidence as to the public convenience and advantage, unless his findings were clearly erroneous, and from a careful review of the record we are unable to say the trial judge's findings on this point were clearly erroneous. ARCP Rule 52(a).

We now turn to appellant's second point for reversal. At the hearing for supplemental evidence before the Board on April 22, 1985, appellee presented several witnesses who testified to the need for a liquor store in the area, and population records for surrounding townships were introduced. At the close of the hearing, the Board chairman asked for a decision motion. The Board's attorney responded that the hearing was solely for the purpose of receiving testimony, and the hearing was concluded without a decision taking the additional evidence into consideration.

On August 8, 1985, the circuit judge issued an opinion in which he stated:

> On April 22, 1985, the ABC Board met and evidence was presented on the sole issue of public convenience and advantage. No decision was made by the Board and the record is now before this Court for a decision. It is unusual that this Court is in a unique position of considering, on its own, the evidence presented at the April 22, 1985 hearing, and it does not have to review the Board's findings on that

> evidence as it was never considered in the Board's determination of public convenience and advantage.

The judge concluded that there was substantial evidence in the record to support the position that the public convenience and advantage would be served by issuing the permit, and ordered the permit issued to appellee.

We do find merit in the Board's second point. We note that the Board's attorney advised the Board that it was not to make a decision based on the evidence presented at the supplemental hearing. Ark. Stat. Ann. § 5-713(f) (Supp. 1985) clearly provides that when the circuit court orders an additional hearing, "[t]he agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court." Therefore, even without specific instructions from the court, the Board has the statutory authority to make findings of fact and conclusions of law based on the evidence presented, and it had a duty to make a decision after considering the additional evidence that was vital to a final decision.

However, the circuit judge acted without authority in making his own findings of fact and conclusions of law in the absence of a decision by the Board. Ark. Stat. Ann. § 5-713(g) provides:

> The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony may be taken before the court.

Ark. Stat. Ann. § 5-713(h) provides that the court may affirm, reverse, or modify the agency's decision, or remand for further proceedings. Our statutes do not authorize the circuit judge to make his own findings of fact and conclusions of law in administrative proceedings, in the absence of a decision by the administrative agency.

The long-standing rule is that when an administrative agency fails to make a finding upon a pertinent issue of fact, the courts do not decide the question in the first instance. The cause is remanded to the agency so that a finding can be made on that

issue. *Hays* v. *Batesville Manufacturing Co.*, 251 Ark. 659, 473 S.W.2d 926 (1971); *Reddick* v. *Scott*, 217 Ark. 38, 229 S.W.2d 1008 (1950); *Lawrence* v. *Everett*, 9 Ark. App. 138, 653 S.W.2d 140 (1983).

Accordingly, we reverse and remand this cause to the circuit court, with directions to remand it to the ABC Board with directions that the Board make findings of fact and enter a decision on the application, taking the additional evidence into consideration.

Affirmed in part and reversed in part and remanded.

COOPER and CLONINGER, JJ., agree.

George BOEHM d/b/a BOEHM & ASSOCIATES
v. Lorin MOENCH d/b/a MOENCH INVESTMENT COMPANY, LTD.

CA 85-313 718 S.W.2d 491

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

Mobley & Smith, by: *William F. Smith*, for appellant.

James R. Marschewski, for appellee.

PER CURIAM. Upon review of the briefs in this case, we find that both the appellant's and appellee's abstracts flagrantly violate Ark. R. Sup. Ct. and Ct. App. 9(d). The appellant failed to include in his abstract the pleadings and the judgment from which he appeals. The appellee's supplemental abstract is not an impartial condensation of the records, as the appellee consistently underscores portions of the testimony, a practice prohibited by Rule 9. Furthermore, the appellee's supplemental abstract does not correct the deficiencies discovered in the appellant's abstract.

While we could affirm the decision under Rule 9(e)(2), we find that action to be unduly harsh as the appellant has a sufficient abstract to show there may be merit in his position. Therefore, pursuant to Rule 9(e)(2), we will give the appellant's attorney twenty (20) days from today, November 5, 1986, to reprint the brief, at the attorney's expense, to conform to the requirements of Rule 9. The appellee will be granted fifteen (15) additional days from the date the appellant's brief is filed in which to file a revised brief.

Because the reprinting of the appellee's brief is caused at least in part by his own attorney's violation of Rule 9(d), the appellee's attorney will be responsible for the expense of reprinting the appellee's brief, except to the extent it is revised due to changes in the appellant's brief — those expenses shall be paid for by the appellant's attorney. The appellee will be required to file a detailed statement of costs so that the Court may determine the relevant expenses to be paid by each attorney.

SEARCY STEEL COMPANY *v.* MERCANTILE BANK OF JONESBORO, ARKANSAS

CA 86-50 719 S.W.2d 277

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

Hatfield, Robinson, Hodges, Marshall, Jordan & Shively, by: *Steven B. Jordan*, for appellant.

Walker, Snellgrove, Laser & Langley, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Searcy Steel Company appeals from an order of the circuit court holding that service of their writ of garnishment upon Mercantile Bank of Jonesboro was not proper and therefore the bank had no obligation to respond to

the writ. Appellant contends that the trial court erred in ruling that the writ was not properly served and denying it judgment against the appellee in the amount of the judgment debtor's deposit with appellee on the date the writ of garnishment was served. We agree.

This case was submitted to the trial court on a stipulation of fact. It was stipulated that on July 16, 1982, the appellant obtained a judgment against Big Mac Construction Company in the amount of $78,288.00 plus interest. On July 27, 1982, a writ of garnishment in proper form was issued by the clerk of the Craighead County Circuit Court naming the appellee as garnishee and containing the required allegations and interrogatories concerning appellee's indebtedness to the judgment-debtor. The Craighead County Sheriff attempted to serve the writ on the appellee on July 27, 1982, by delivering a copy to an employee of the appellee. It was stipulated that that employee was a part-time employee with a job in "marketing, development, and public relations," a position he had occupied for approximately five years. According to the stipulation, the employee, Hugh Atwood, had all the appearances of a corporate officer but was not one, and had never been given specific written or oral authorization to accept service on behalf of the appellee.

It was further stipulated, however, that on at least four prior occasions the sheriff's office had served writs of garnishment on appellee by delivering the documents to Atwood and that on each of those occasions the bank had filed responsive pleadings.

It was further stipulated that when service was attempted the judgment-debtor had monies deposited in the appellee bank totalling $72,666.91. On the same day the writ of garnishment was presented to the bank, the judgment-debtor filed a supersedeas bond pursuant to Rule 8 of the Arkansas Rules of Appellate Procedure and obtained an order superseding the judgment entered in the circuit court.

Although service of the writ was had upon Atwood, its delivery was known to the president and chief executive officer of appellee within a short period of time after the attempted service and a hold was placed upon the debtor's bank accounts. Copies of the supersedeas documents were also delivered to appellee's president shortly after they were filed. The following morning,

appellee's president issued a memorandum instructing the appellee's employees to "release the hold on the two accounts in the name of the judgment-debtor," stating as his reason that the order for supersedeas cancelled the writ of garnishment and allowed the accounts to proceed as if they had never been garnished. Pursuant to the memorandum, the hold on the judgment-debtor's accounts was released and the accounts were thereafter completely depleted. No response was filed by the bank to the writ of garnishment. It was further stipulated that the judgment-debtor's appeal from the judgment was dismissed in January of 1983 for failure to file a timely record and that the judgment-debtor and his surety on the supersedeas bond became bankrupt on February 22, 1983, and were subsequently discharged in bankruptcy. No payments on the appellee's judgment were made through the bankruptcy court or otherwise. On these stipulated facts the trial court held that the writ had not been properly served upon the appellee; that the delivery of the writ to Atwood did not constitute service of process; and that appellant should take nothing from the appellee by virtue of the writ.

Appellant does not contend that Atwood was a proper person to receive service of the writ on the corporation under the provisions of ARCP Rule 4(d)(5) or any applicable statute referred to in that rule. He clearly was not. Appellant argues that as Mr. Atwood had at least apparent authority, the service should be sustained. The view we take of the case does not require us to address that issue.

Our court has declared that writs of garnishment must meet all the requirements applicable to summonses in civil cases, both as to the formalities of its issuance and the extent that it gives notice which is reasonably calculated to make the defendant aware of his duty to take action or risk entry of a default judgment. *Terminal Truck Brokers* v. *Memphis Truck & Trailer, Inc.*, 279 Ark. 427, 652 S.W.2d 34 (1983); *Tucker* v. *Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982). Here it was stipulated that the writ of garnishment met those requirements and was in proper form duly issued by the clerk of the court rendering the judgment. The only argument advanced is that there was a defect in the service of the writ upon the appellee. It has long been a well-settled general rule that any objection to irregularities or defects in the service of process is waived unless

made properly and diligently and that defective service of process may be sufficient to constitute legal notice of a suit and support a judgment therein so long as the service actually gives the party served notice of the proceedings. Irregularity in service of process may make a judgment voidable but not void. *Pender* v. *McKee*, 266 Ark. 18, 582 S.W.2d 929 (1979). Defects in the service thereof are cured or waived by appearance of the defendant without raising an objection and he is precluded from thereafter taking advantage of the defect. *Id.*

Prior to the adoption of our present rules of civil procedure, objections to defects in service or process were required to be made by special appearance, and any subsequent appearance or pleading which did not preserve the special nature of the appearance was deemed an entry of appearance for all purposes. Our present ARCP Rule 12(b) requires that every defense in law and in fact to the claim for relief shall be asserted in a responsive pleading if one is required, except that certain listed defenses, including lack of jurisdiction over the person, may be made by motion. It further provides that no defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. Commentary to this rule points out that the distinction between general and special appearance is abolished and that it is not now necessary to make a "special appearance" in order to challenge the jurisdiction of the person, process, or venue.

Although that distinction has now been relaxed or abolished, it does not mean that the question must not still be specifically raised in the trial court. ARCP Rule 12(h)(1) provides that the defenses of lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process are waived if they are neither made by motion under this rule nor included in the responsive pleading or amendment thereto.

The record submitted to us does not contain any of the pleadings. It contains only the stipulation of the parties, judgment of the trial court, and the notice of appeal. It was conceded by appellee in oral argument, however, that no motion questioning the service of process or jurisdiction of the person was ever filed in the trial court.

The stipulation of fact filed in this case contains the following statement: "Comes now the plaintiff, Searcy Steel Company, and the garnishee, Mercantile Bank of Jonesboro, Arkansas, who stipulate that the plaintiff's claim against the garnishee should be submitted to the court on the following facts: . . . ."

We conclude that the appellee waived any defect or irregularity in the service of process both by its failure to file a motion to dismiss for lack of jurisdiction of the person under Rule 12(b) and (h) and by submitting the case to the court on the merits without having filed such a motion. By the failure to move to dismiss, the defects were waived and, by submitting the case to the court on the merits, the appellee submitted itself to the jurisdiction of the court for all purposes.

The appellee contends that, even if service of the writ is deemed waived, the trial court's declaration that appellant take nothing under its writ is correct for another reason. Appellee argues that the supersedeas issued by the clerk of the court had the effect of releasing and discharging the lien of the writ.

The effect of a supersedeas on a judgment was discussed by our court as early as *Fowler* v. *Scott*, 11 Ark. 675 (1850), which declared that the function of a supersedeas is to stay the execution of the judgment pending the period it is superseded, but the validity of the judgment is not effected by the stay. It is merely a legal prohibition from execution on the judgment until that prohibition has been removed by operation of law or a judgment of the supreme court. In *Miller* v. *Nuckolls*, 76 Ark. 485, 89 S.W. 88 (1905), the court reaffirmed its declaration in *Fowler* and restated that the supersedeas does not have the effect of vacating the judgment but only stays proceedings to enforce it.

Neither party has cited us a case from this jurisdiction in which a declaration has been made of the effect of a supersedeas on a writ of execution or garnishment which was served before the supersedeas was issued. Appellee cites cases from several sister states which have held that the supersedeas serves to discharge the lien of such a writ previously served. From our examination of the cases, this rule is a minority view and in some cases was mandated by statutory enactments modifying common-law rules.

From our examination of the cases cited in an annotation at 90 A.L.R.2d 483 (1963), we conclude that the better-reasoned rule to apply is that stated in 4A C.J.S. *Appeal & Error* § 667 (1957), as follows:

> At common law a supersedeas does not destroy the lien effected by the previous levy of an execution or effect a stay of further proceedings thereon; but, under the statutes providing for the allowance and perfecting of a supersedeas on the execution of a prescribed bond, the common-law rule and the theory that the levy and sale under an execution are indivisible and that the execution must be regarded as fully executed from the time of the levy are changed, and the general rule now is that a supersedeas becomes effective notwithstanding a levy, and stays further proceedings thereunder, or the court, either trial or appellate, may, in its discretion, make an order recalling or staying proceedings under the execution until the determination of the appeal or writ of error.

The view we take is that the issuance of a supersedeas does not have the effect of vacating the judgment but only stays proceedings thereunder to maintain the status quo until the legal prohibition contained in the supersedeas has been removed. If no writ for the execution of the judgment has been issued at the time the supersedeas is filed, no writ may be issued. If, at the time the supersedeas becomes effective, the lien of a writ has already attached, it has only the effect of prohibiting further proceedings to enforce the lien.

When the judgment-debtor's appeal was dismissed, the prohibition of the supersedeas against further proceedings under the writ of garnishment was removed. Ark. Stat. Ann. § 31-507 (Repl. 1962) provides that where a banking institution fails to answer a writ of garnishment before the return day, judgment shall be entered for an amount not exceeding the full amount of the judgment and also not exceeding the amount in which the garnishee was indebted to the judgment-debtor at the time the writ was served and thereafter up to the return date. As it was stipulated that at the time the writ was served appellee was indebted to the judgment-debtor in the amount of $72,266.91, judgment should have been entered for that amount. The order

appealed from is reversed and the cause remanded with directions to enter a judgment not inconsistent with this opinion.

CORBIN and MAYFIELD, JJ., agree.

David Scott ALLEN and Dr. John E. ALLEN *v.* Roy BEENE and William TIPTON

CA 85-472 719 S.W.2d 281

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

The McMath Law Firm, P.A., by: *Mart Vehik*, for appellant.

Gene O'Daniel, for appellee

DONALD L. CORBIN, Judge. This is an appeal from an order of the Pulaski County Circuit Court registering a Texas default judgment entered against appellant, Dr. John E. Allen, and his son, David Scott Allen. We find no merit to appellant's contention that the Circuit Court of Harris County, Texas, lacked personal jurisdiction over appellant and that its judgment was unenforceable in this state and affirm.

The record reflects that the Texas default judgment was based upon a $25,000 promissory note which appellant, a resident of Arkansas, signed to guarantee the payment of legal services rendered to his son by appellees, Roy Beene and William Tipton. Appellant's son, a resident of Texas, had been charged in Texas with several criminal offenses. Before appellees were retained to represent appellant's son, they received a phone call from a Houston physician who had been asked by appellant to assist him in locating an attorney for his son. John Achor, a Little Rock attorney representing appellant, went to Houston and met with appellees concerning the criminal charges pending against appellant's son. Mr. Achor's trip expenses were paid for by appellant. Appellant subsequently contacted appellee Beene by telephone and a promissory note was mailed to appellant as a result of this conversation. It was signed by appellant in Little Rock and returned by mail to appellees. Appellant's son received a probated sentence and appellees made demand upon appellant for payment of the promissory note. Appellees filed suit in Texas to collect on the note and appellant was personally served in Little Rock by the Pulaski County Sheriff. There was testimony that appellees were contacted by David Bird, a Houston attorney, to negotiate a settlement and appellees delayed taking their default judgment against appellant for thirty or forty days. Appellant did not defend the lawsuit and a default judgment was entered against him. Appellees filed their Application For Registration Of Foreign Judgment pursuant to Ark. Stat. Ann. § 29-801 *et. seq.* (Repl. 1979) on September 5, 1984. On August 6, 1985, an order

was entered registering appellees' foreign judgment in the amount of $22,822.

Appellant argues that his contacts with Texas were not constitutionally sufficient to justify its exercise of personal jurisdiction over him. In this regard he relies upon the fact that the negotiations leading up to the execution of the promissory note took place by telephone; that the promissory note was signed by appellant in Arkansas and mailed to Texas; that the purpose of the note was to guarantee payment of legal fees incurred in Texas; and that appellant did not hire appellees to represent his son nor negotiate their fee.

Section 4 of Tex. Rev. Civ. Stat. Ann. art. § 2013b (Vernon 1964), the Texas "Long-Arm Statute," provides as follows:

> For the purpose of this Act, and without including other acts that may constitute doing business, any foreign corporation, joint stock company, association, partnership, or non-resident natural person shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State.

Article 2031b reaches as far as the federal constitutional requirements of due process will permit. *U-Anchor Advertising, Inc.* v. *Burt*, 553 S.W.2d 760 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978). In *O'Brien* v. *Lanpar Co.*, 399 S.W.2d 340 (Tex. 1966), the Texas Supreme Court recognized the following statement of the three basic elements that must exist to sustain jurisdiction over a non-resident:

> '(1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;
>
> (2) the cause of action must arise from, or be connected with, such act or transaction; and
>
> (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative

> convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.'

In *Product Promotions, Inc.* v. *Cousteau*, 495 F.2d 483 (5th Cir. 1974), a dual test was set out for determining whether a court may take jurisdiction without depriving the defendant of due process: (1) The quality of the defendant's contacts with the forum state must be of such a purposeful nature that the court can determine that such contacts were deliberate rather than fortuitous so that the possible need to invoke the benefits and protections of the forum's laws was reasonably forseeable, if not foreseen, rather than a surprise, and (2) It must be fair and reasonable to require the defendant to come into the state and defend the action.

In *Diversified Resources Corp.* v. *Geodynamics Oil and Gas, Inc.*, 558 S.W.2d 97 (Tex. Civ. App. 1977), suit was brought against a foreign corporation on a note and settlement agreement. The court there determined the trial court had jurisdiction over the foreign corporation, stating:

> We hold, therefore, that the defendant by executing the note, which clearly reflected the payments were due in the State of Texas, and by executing the agreement which settled the lawsuit on file in the Southern District of Texas wherein the settlement was to be performed in the State of Texas, not only purposefully conducted business in the State of Texas but it also contracted to perform its obligations within the State of Texas, thus invoking the benefits and protections of this State's law.

Id. at 99. The evidence in *Diversified* established that there were contacts by the defendant in Texas in addition to the making of payments in that state. The Court of Civil Appeals of Texas also found jurisdiction over the person of the defendant in *Pizza Inn, Inc.* v. *Lumar*, 513 S.W.2d 251 (Tex. Civ. App. 1974). A Texas corporation brought suit there against a nonresident for breach of a franchise contract. The court concluded that the defendant was "doing business" in Texas as defined by Article 2031b by entering into a contract by mail with a resident of Texas, which contract was performable, at least in part, in Texas.

We agree with the trial court's determination in the case at bar that there were sufficient minimum contacts by appellant within the state of Texas enabling it to exercise personal jurisdiction over appellant. Appellee Beene testified that he had set a fee and was in the process of negotiating with appellant's son when appellant sent John Achor to meet with appellees in March. He stated that he decided in April that he would not represent appellant's son unless his fee was guaranteed by appellant. Appellant's action in executing a promissory note guaranteeing payment of his son's legal fees for legal services rendered by appellees in Texas constituted "doing business" in Texas within the purview of the Texas "Long-Arm" statute. The agreement was performable in Texas, the note was payable in Texas and there was also evidence of an attempted settlement of the debt in Texas. Furthermore, appellant contacted appellees in Texas and as a result of this conversation, appellees sent a promissory note for appellant to sign. We hold the evidence conclusively establishes that appellant purposefully elected to consummate transactions in Texas, that appellees' cause of action arose from and was connected with these transactions and that the assumption of jurisdiction by Texas did not offend traditional notions of fair play and substantial justice.

Affirmed.

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

James K. RIDDLING *v.* STATE of Arkansas

CA CR 86-23 719 S.W.2d 1

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

John W. Leach and *Wayne Emmons*, for appellant; Of Counsel: *Wilson*, *McRae*, *Ivy*, *Sevier*, *McTyier* and *Strain*.

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

MELVIN MAYFIELD, Judge. The appellant was convicted of selling a controlled substance, cocaine, and sentenced to ten years in the Arkansas Department of Correction. The case was tried twice, with the first trial resulting in a hung jury. We set out the following factual summary taken from the combined evidence of both trials.

During the summer and fall of 1983, undercover operations were conducted by the Arkansas State Police with regard to narcotic traffic in Crittenden County, Arkansas. The investigation was made in cooperation with the West Memphis Police Department. During the investigation, an individual was arrested who provided information and assisted in the investigation of another individual named Troy Powers. As a result, Powers and his girlfriend, who later became his wife, were arrested and charged with the sale of marijuana.

Powers agreed to become a confidential informer and there is testimony that he was "developed" by Officer Carter of the West Memphis Police Department and later "passed" to John Brackin, who was a criminal investigator with the Arkansas State Police. In August of 1983, at Brackin's direction, Powers purchased cocaine from an individual named Gene Guin. The following day,

Powers had a conversation with the appellant in the Crittenden County Courthouse and was told that appellant knew he had purchased the cocaine from Guin. Powers told Trooper Brackin about this conversation and there is evidence that about this point in time the investigation of the officers had begun to focus on one Larry Rogers.

After the conversation between appellant and Troy Powers, whom appellant had known for many years, Powers began to build upon his relationship with appellant. Powers told appellant that he was being pursued by the internal revenue department and his ex-wife for money, that he was in bad financial shape, had a heart condition, and was trying to get a construction contract that could literally make or break him. He told the appellant that in order to cinch the construction contract he had to get some cocaine to give to the person in charge of approving the contract. Eventually, the appellant agreed to provide cocaine for Powers and his business associate, who was, in fact, Sergeant Larry Gleghorn of the Arkansas State Police, and the exchange of cocaine was made on September 2, 1983.

On October 5, 1983, the appellant received a telephone call from Lt. Jim Presley of the West Memphis Police Department requesting that he come to the police department to look at some property. This was admittedly a ruse and when the appellant arrived he was greeted by Lt. Presley, Trooper Brackin, and Officer Stevens of the Crittenden County Sheriff's Office and appellant was requested to sit down and view a video tape of the transaction of September 2, 1983.

Following the playing of the tape, appellant was informed that if he cooperated he (according to his version) would not be prosecuted but otherwise he would get 40 years to life. Appellant testified that he inquired about an attorney but was dissuaded from seeking legal advice and that he cooperated at that time with the police to the extent that he made a telephone call to Larry Rogers and arranged a narcotic purchase from him. The appellant also testified that he was allowed to leave with instructions to come back the next day to follow up on the transaction and that night he talked to an attorney and was told that immunity could not be arranged by the police officers but would have to be arranged by the prosecuting attorney. So, the next day, according

to appellant, he notified Sergeant Presley that he wanted an attorney to discuss with the police officers the offer of immunity and to advise him of his rights in that regard. The appellant testified that Presley advised him that a certain West Memphis attorney could be arranged for him if he would come to the police headquarters but, since this attorney was not familiar to the appellant, this offer was declined. Appellant said that he suggested another attorney but Presley said he would be arrested if he did not come to the police headquarters immediately. Appellant did not go to the police headquarters and he was subsequently arrested, tried, and convicted.

Appellant's main defense was entrapment. However, during the second trial the court would not allow appellant to introduce evidence of events that occurred after the transaction on September 2, 1983, when he sold the cocaine to the undercover agent, Sergeant Gleghorn. It was the appellant's contention that events after the September 2 transaction were admissible to show the entire scheme of things. He contended that this evidence would help establish his defense of entrapment by showing that the law enforcement officers desired to have him help them catch "bigger fish," to wit, Larry Rogers, and when he refused to help them in this regard, he was prosecuted for the September 2 transaction. The trial court explained that he had admitted the evidence in the first trial but was now convinced that it was not proper. As a result of the court's ruling, it was agreed that the evidence of the first trial relating to the events that occurred after September 2, 1983, which the appellant desired to proffer as proof on the issue of entrapment, could be made a part of the record.

We think this evidence was admissible and that the trial court erred in refusing to allow it to be introduced at the second trial. Ark. Stat. Ann. § 41-209 (Repl. 1977) provides as follows:

> (1) It is an affirmative defense that the defendant was entrapped into committing an offense.
>
> (2) Entrapment occurs when a law enforcement officer or any person acting in cooperation with him, induces the commission of an offense by using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not

constitute an entrapment.

In *Spears* v. *State*, 264 Ark. 83, 568 S.W.2d 492 (1978), the court said that under the provisions of the above statute:

> Primary importance is accorded to the conduct of a law enforcement officer, or the person acting in cooperation with him. . . . Any evidence having any tendency to make the existence of entrapment more probable is admissible. . . . The accused should be allowed a reasonable latitude in presenting whatever facts and circumstances he claims constitute an entrapment, subject to ordinary rules of admissibility.

264 Ark. at 92.

In the instant case, although the court did admit testimony by Officer Carter and Trooper Brackin that the decision to "induce" appellant to provide cocaine for the undercover man was the product of a joint discussion between them and Powers, the court's ruling excluded evidence from which the jury could find that after the police officers video taped the September 2, 1983, sale they called the appellant to come view that taped occurrence and that they then suggested that he cooperate with them to help them catch "bigger fish" and that his failure to so cooperate would get him 40 years, but if he did cooperate, he would not be prosecuted. The court's ruling also eliminated the testimony, given in the first trial by Trooper John Brackin, that on October 5, 1983, when the appellant was called to view the taped occurrence of September 2, Brackin wanted the appellant to arrange a purchase from Rogers because Gene Guin had left the jurisdiction, and that a case was not made against Rogers until after the arrangements with the appellant fell through on October 5, 1983, and they finally found Guin and got him to make a purchase from Rogers. All of the above evidence, we believe, was admissible on the appellant's defense of entrapment.

The trial court was very generous in allowing the appellant to make a proffer of proof of all the testimony in the first trial that appellant thought was admissible on his defense of entrapment, and we do not hold that all of the evidence of events that occurred after September 2, 1983, are necessarily admissible

on retrial. We do hold, however, that the trial court unduly limited the appellant's evidence on his entrapment defense by refusing to let him show *any* evidence of events that occurred after September 2, 1983. In this connection, we call attention to the commentary to Ark. Stat. Ann. § 41-209, *supra*, which states that the statute attributes more importance to the conduct of the law enforcement officer than to any predisposition of the defendant and that the obvious purpose is to discourage governmental activity that might induce innocent persons to engage in criminal conduct. Here, the thrust of the appellant's defense of entrapment is that the police have selected him, and caused an informant of theirs to persuade him to sell the informant cocaine in violation of the law, so that he can be used by the police, under threat of prosecution, to make purchases from "bigger fish" that the police are after. The jury is entitled to hear this evidence in considering the issue of whether appellant has been entrapped.

The appellant also contends that the trial court should have granted his motion for directed verdict made at the conclusion of the State's evidence in the first trial. Apparently, he would have us reverse and dismiss the charges against him, even after the second trial, because he was entitled to that relief in the first trial. Suffice it to say, we are cited no authority for this novel contention and, in addition, we do not agree that he was entitled to that relief in the first trial. Appellant's argument is based upon the contention that his defense of entrapment was established as a matter of law. Entrapment, however, is ordinarily a fact question, *Walls* v. *State*, 280 Ark. 291, 658 S.W.2d 362 (1983), and we think the evidence in the first trial presented a factual question on that issue.

It is also argued that members of the city police department, the county sheriff's office, and the state police department promised that the charges against appellant would be dismissed if he cooperated in helping them to catch "bigger fish" who were engaged in narcotic traffic in Crittenden County and that it would be unconscionable not to enforce the agreement made. *Cooper* v. *U.S.*, 594 F.2d 12 (4th Cir. 1979), and cases from the states of Iowa, Washington and Maryland are cited in support of this proposition. In *Hammers* v. *State*, 263 Ark. 378, 565 S.W.2d 406 (1978), the Arkansas Supreme Court reversed a conviction and dismissed the charge when it held the *record*

established that the defendant in that case had an agreement with the State for immunity from prosecution. But, in the instant case, the record does not *establish* that the appellant had an agreement that he would not be prosecuted if he cooperated with the police. To the contrary, the law enforcement officers testified that they made no such promise. There is authority that "the police in their own right do not have authority to commit the state to anything by way of declining to prosecute," *Butler* v. *State*, 462 A.2d 1230, 1233 (Md. Ct. Spec. App. 1983), but in any event, whether such an agreement has been made is a question of fact. We cannot say the trial court's decision on that point was "clearly against the preponderance of the evidence." *See Hammers* v. *State*, 261 Ark. 585, 603, 550 S.W.2d 432 (1977) (the remand which gave rise to the second opinion in *Hammers* v. *State*, 263 Ark. 378, 565 S.W.2d 406, *supra*).

Another contention is that the prosecutor made improper and prejudicial remarks to the jury during closing argument; however, there was no objection to these remarks at the time and the point cannot be raised for the first time on appeal. *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

The appellant also argues that a video tape of a meeting between Powers and appellant on August 24, 1983, was inadmissible in the State's case in chief because its only relevance was to show predisposition to sell a controlled substance and this evidence would only be admissible in rebuttal to appellant's defense of entrapment. We do not agree. Unlike the case of *Spears* v. *State*, *supra*, relied upon by appellant for this point, in the instant case, there was evidence of entrapment in the State's evidence in chief, therefore, evidence of predisposition was also admissible during the presentation of the State's case in chief.

Appellant's last two points for reversal deal with the trial court's refusal to grant him a continuance of the second trial, and the refusal to grant his motion for mistrial because a potential juror indicated during voir dire that he had a preconceived opinion about the case. Since neither matter is likely to arise again on retrial, we see no reason to discuss these points. For the error in refusing to admit the evidence which we have discussed, this case is reversed and remanded for a new trial.

WRIGHT, Special Judge, agrees.

GLAZE, J., not participating.

ST. PAUL FIRE & MARINE INSURANCE COMPANY *v.* SOUTHWESTERN IMPROVEMENT, INC.

CA 86-122 719 S.W.2d 708

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

Friday, Eldredge & Clark, for appellant.

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

Gibbs and Hickam, by: *D. Scott Hickam*, for appellee, Southwestern Improvement, Inc.

GEORGE K. CRACRAFT, Chief Judge. St. Paul Fire & Marine Insurance Company appeals from a decision of the Arkansas Workers' Compensation Commission holding it liable for benefits due an employee of Southwestern Improvement, Inc., who was injured after the employer had received notice of cancellation of the workers' compensation policy. The sole issue for us to determine is whether the notice requirements of Ark. Stat. Ann. § 81-1338(b) (Repl. 1976) are mandatory. We conclude that those provisions are mandatory and affirm the

decision of the Commission.

The facts are not in dispute. The appellant issued its policy of workers' compensation insurance to appellee for a one-year term. Before the term of the policy expired, the appellee defaulted in the payment of premiums. On February 22, 1983, the appellant sent to appellee its notice of cancellation for nonpayment of premium and stated that the policy would expire after ten days unless the premium was paid. The premium was not paid within that period. No notice of cancellation was sent to the Arkansas Workers' Compensation Commission until July 13, 1983. On April 6, 1983, Ruby Jenkins received a compensable injury while working for the appellee.

[redacted] The appellant contended that it had effectively cancelled its coverage as to the employee prior to the accident and therefore the employer became primarily liable. It argued that it should be held liable due to its failure to notify the Commission only if the employer failed to pay the award. The Commission held that the notice sent the employer was ineffective to cancel the policy because of the statutory requirement that notice also be given to the Commission. We agree.

Ark. Stat. Ann. § 81-1338(b) (Repl. 1976) provides:

> (b) Cancellation. No contract or policy of insurance issued by a carrier under this act shall be cancelled prior to the date specified in such contract or policy for its expiration until at least thirty (30) days have elapsed after a notice of cancellation has been sent to the Commission and to the employer or until ten (10) days have elapsed after such notice if the cancellation is for nonpayment of premium, provided however, that if the employer procures other insurance within the notice period, the effective date of the new policy shall be the cancellation date of the old policy.

This section requires that one of two conditions precede an effective cancellation when due to nonpayment of premiums—that notice of cancellation be given to both the employer and the Commission, or that other insurance be procured within the notice period. Here, notice was not given to the Commission and no new insurance was procured. In 4 Larson, *Workmen's Compensation Law*, § 92.31 (1986), it is stated:

> In view of the essential role of insurance in compensation process, and the serious potential effects of noninsurance on both employer and employee, requirements for cancellation of insurance are generally exacting, and are strictly construed and applied. Failure to deliver the notice of cancellation by the required means, such as registered mail, use of a slightly erroneous address, specifying a cancellation date earlier than that permitted by statute, even by one day, *failing to notify a third party entitled to notice*, or giving oral assurances that the cancellation was a mistake, have been held to vitiate attempted cancellations. [Emphasis added.]

Our statute, as do statutes in a number of sister states, provides that cancellation is not effected until notice has been given to *both* the employer and the Commission for the specified period of time. The courts in those sister states have consistently held that the notice requirements of the cancellation provisions of their compensation acts are to be strictly construed and strictly complied with and that notice given only to the employer does not effectively cancel the policy, but that it remains in force. *See e.g.*, *Cloutier* v. *General Ship Contracting Co.*, 243 N.Y.S.2d 947, 19 A.D.2d 442 (1963); *Empire Fire & Marine Ins. Co.* v. *Spurlock*, 593 P.2d 768 (Okla. 1979).

In *St. Paul Fire & Marine Ins. Co.* v. *Central Surety & Ins. Corp.*, 234 Ark. 160, 162, 350 S.W.2d 685, 686 (1961), our court recognized that the notice requirement of this section "is to be construed strictly to the end that employees will not be left without the protection of insurance coverage." The purpose of such notice is to enable the Commission to know that there is compliance with the workers' compensation law. *Traders & General Ins. Co.* v. *Henderson*, 235 Ark. 896, 362 S.W.2d 671 (1961).

Appellant argues that the workers' compensation act makes the employer primarily liable for benefits to an injured worker; that the construction of the notice provisions made by the Commission is unjust and harsh; and that it should only be liable for payment of benefits if the employer defaults on its primary obligation. It was the clear intent of this legislation to protect the injured worker and secure the payment of benefits due him under

the act by requiring that each employer give security for its primary liability by procuring and keeping in force, a policy of insurance approved by the Commission, or by posting other securities specified by the Commission which may be liquidated and utilized in the payment of benefits in the event the uninsured employer defaults. Ark. Stat. Ann. § 81-1336 (Supp. 1985). It was not intended that one become a self-insured employer by merely failing to procure or keep in force the required insurance or that the insurance, once procured, be cancelled without affording that knowledge to the Commission. We conclude that § 81-1338(b) clearly expresses the legislative intent that once a policy of insurance has been procured in satisfaction of the legislative requirement, it may not effectively be cancelled without notice to both the employer and the Commission. The intent that these notice requirements be strictly construed and applied is apparent and the reasons for so providing are clear.

Affirmed.

CORBIN and MAYFIELD, JJ., agree.

Dixie CARTER *v.* Leon CARTER

CA 86-281 719 S.W.2d 704

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

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

Jones & Stratton, for appellee.

JAMES R. COOPER, Judge. This is an appeal from a decision of the Faulkner County Chancery Court, changing custody of the parties' son Russell (Rusty) Carter, age three at the time of trial, from appellant to appellee. The appellant argues that the chancellor erred because there was insufficient evidence of a change in circumstances and no evidence as to the best interest of the child. The appellant also contends that the court erred in changing custody instead of making a finding of contempt if he found that the appellant had unreasonably violated the visitation order. We agree with the appellant's first point and, therefore, reverse the chancellor's decision.

The parties were divorced March 20, 1985, and a consent decree was entered whereby custody of the parties' son was granted to the appellant, reasonable visitation rights were granted to the appellee, and the appellee was ordered to pay the appellant $50.50 a week as child support. On July 1, 1985, the appellee filed a petition for contempt and to establish specific visitation, alleging that the appellant had denied him visitation. The court entered an order on July 24, 1985, making no finding as to contempt and awarding the appellee visitation every other weekend and certain holidays, including Christmas day and the week thereafter. On November 26, 1985, the appellant filed a petition for emergency relief, stating that the child was afraid to go to the father's home, alleging physical injuries and symptoms, and requesting the restriction of overnight visitation until the

problem was solved. On December 2, 1985, the appellant filed a motion requesting the appellee be held in contempt for failure to make weekly child support payments pursuant to the earlier order. The appellee alleged in his response to the petition for emergency relief that the appellant had attempted to totally deprive him of any visitation with the child and he claimed that any fear the child felt was instilled by the appellant, as the child did not exhibit any fear to him. The appellee requested that, due to financial difficulty on his part in making the weekly payments, they be lowered to $35.00 a week, in accordance with the family support chart, and that the appellant's petition be dismissed. The appellee requested in the alternative that custody be changed to him because of the appellant's persistent attempts to prevent him from seeing his son and because of her attempts to instill fear and hatred in the minor child toward him. In his response to the appellant's petition for contempt, the appellee requested its dismissal, contending it was merely a form of ongoing harassment, and for its consolidation with the petition for emergency relief. This was apparently done.

The chancellor heard evidence on December 30th on the petition and made the following oral findings at the end of the case:

> All right. In this case, as in all cases, the Court is going to do what it feels is in the best interest of the minor child. The child is obviously being disturbed and upset everytime it comes to a situation of visitation. The proof brought by the plaintiff, Dixie Carter, in here is insufficient to restrict any form of visitation.
>
> . . .
>
> *. . . [W]hich leaves the Court with the situation that the plaintiff, Dixie Carter, has not proven her case in what is in the best interest of the child.*
>
> It's the sort of thing the Court hopes the parties will . . . resolve between themselves. We know that Mrs. Carter selected Mr. Carter to be the father of this child and vice versa. They must have felt that they were good parents. Yet, after the divorce, the situation has changed. Simply because they're divorced, Mr. Carter is no longer a

> good parent. We do not have a situation where the court can be on top of a visitation situation at all times. The only thing that we can look at is the situation that we have today is not working.
>
> The Court grants Mr. Carter's petition for change of custody.

(Emphasis added).

The chancellor made the following findings in his written order:

> 1. That the allegations of the plaintiff [appellant] are unfounded and unsubstantiated.
>
> 2. That defendant [appellee] is found to be free from guilt and is not in contempt of this Court.
>
> 3. That the Court further finds from the testimony ore tenus the facts and circumstances are such that it is in the best interest of the said minor child be placed with the defendant.

While chancery cases are tried *de novo*, the chancellor's decision will not be reversed unless it is shown that his decision is clearly against the preponderance of the evidence. *Watts* v. *Watts*, 17 Ark. App. 253, 707 S.W.2d 777 (1986); Ark. R. Civ. P. 52(a). Because there are no cases in which the superior position, ability, and opportunity of the chancellor to observe the parties and their witnesses carry as great a weight as one involving the custody of children, we defer to the chancellor's determination as to the credibility of the witnesses. *Calhoun* v. *Calhoun*, 3 Ark. App. 270, 625 S.W.2d 545 (1981).

While the primary consideration in a change of custody suit is the welfare and best interest of the child, an order changing custody cannot be made without proof showing a change in circumstances from those existing at the time the original order was made. *Sweat* v. *Sweat*, 9 Ark. App. 326, 659 S.W.2d 516 (1983). If there is no showing of a material change of facts, there must be a showing of facts affecting the child's best interest that were not presented to or known by the court at the time the original custody order was entered. *See Kennedy* v. *Kennedy*, 19 Ark. App. 1, 715 S.W.2d 460 (1986). This is because the original

decree constitutes a final adjudication that the appellant, not the appellee, was the proper party to have the child, and before an order can be made changing the status, there must be proof justifying a change of custody. *Anderson* v. *Anderson*, 18 Ark. App. 284, 715 S.W.2d 218 (1986). Here, the chancellor's oral findings indicate that he improperly placed upon the appellant the burden of proving that the change was not in the child's best interest, rather than requiring the appellee to show a change of circumstances. Furthermore, he made no mention or finding of any such change. Looking at the evidence, giving due deference to the chancellor's determination of credibility, applying the correct law and burden of proof, we find there to be insufficient evidence to show a material change in circumstances justifying a change of custody.

The appellee testified that, every time he tried to pick up Rusty, it seemed like the appellant had some reason for not letting him have the child. The first time was because of dust at the rodeo, the next time was because of the bad people and drinking at the rodeo, and another time because of allegations he was leaving Rusty unattended at the rodeo, which he denied. He stated that his current wife had watched after the boy while he was riding bulls. However, the only specific time he testified to being denied visitation was on December 13, 1985. When he arrived to pick up his son, Rusty was crying and saying he did not want to go. He said the appellant told him that he could not have the boy while he was crying. He also testified that Rusty told his wife that the appellant did not like her.

The appellant testified that Rusty had had no problems with visiting his father for the first three months after the divorce, but that, starting about June, he began coming home to her hateful, as if he did not like her anymore, and began to cry when he heard his daddy was supposed to come, saying he did not want to go. The appellant testified that Rusty did not explain his feelings. She stated she had tried to talk with the appellee about the problem, but that he refused to talk about it. She said that, by the time the appellee arrived, Rusty was generally all right and would go with his father. She admitted to denying the appellee visitation three times. The first was in the summer after Rusty had sustained a knot on his head during a visit with the appellee, after falling and bumping heads with his stepbrother. The appellant testified that

the next time she refused visitation was when the child was running a fever of 103 degrees and the appellee wanted to take him to a rodeo. The last time she refused visitation was on December 13th, when he was crying, and she had tried for ten minutes to talk him into visiting with his daddy. She offered to let the appellee come in to talk with the child. She said he told her that he paid child support to see him and he was taking him. The appellant said Rusty was pulling on her shirt to keep from going.

The appellant also testified that the child told her his daddy and stepmother were good to him, but that Brad, his eight-year-old stepbrother, was not. She also discussed a nightmare the child had where he kept saying that he did not do it and for Brad to stop kicking him. Her brother testified that Rusty had told him that Brad was mean to him, hitting him and pushing him and not letting him have any toys. He said the child said the reason that he had not told anyone was because he wasn't supposed to tell on his brother. He testified he noticed a change of attitude in Rusty since his stepbrother had come back from Texas. The appellant's brother and father testified that Rusty came home with a sore groin the next week. The father testified that Rusty said he told the appellee that Brad had hit him and the appellee told him not to tell on his brother.

The appellant and her family denied saying anything to the child to prejudice him against his father and uniformly testified that they were doing all in their power to get him to go with the appellee. They did admit to having regular discussions about why Rusty did not want to go with his dad.

The appellee and his family denied that Brad was abusing Rusty, testifying that the boys got along well together. The appellee denied ever trying to turn the boy against the appellant's family. He explained the bump on Rusty's head and said he watched the boy for three hours after the injury to make sure his pupils did not change. He denied that Rusty had ever told him anything about a kick in the groin. He also testified that he would not deny the appellant visitation if he had custody.

[redacted] While the appellee testified generally that he was denied visitation everytime he went after the child, he could only testify as to being denied visitation one time. The appellant admitted to denying the appellee visitation three times. The only

testimony regarding the instillation of fear or hate in the child was that the child once told his stepmother that his mother did not like her. The appellee additionally testified that he thought the appellant's family was putting it into the child's mind that Brad was hurting him. This was denied by the appellant's family and there was no evidence to support his conclusion. The chancellor's finding that the child was obviously upset and disturbed every time visitation came around is supported by the evidence. However, his conclusion that custody should be changed is not. There is no evidence to support a finding that the appellant is intentionally trying to prevent the child from seeing his father. Custody is not to be changed merely to punish or reward a parent. *Johnson* v. *Arledge*, 258 Ark. 608, 527 S.W.2d 917 (1975). If the chancellor felt the appellant and her family were trying to thwart the child's visitation with his father or trying to teach the child to dislike the appellee and his family, he had the power to hold her and her family in contempt for failure to comply with the visitation orders. Such contempt powers should be used prior to the more drastic measure of changing custody in order to resolve visitation problems and insure some stability in the child's life.

Because we review equity cases *de novo* upon the record made in the chancery court, we resolve the issues based on that record; the fact that the chancellor based his decision on an erroneous conclusion does not preclude us from reviewing the entire case *de novo*. *Ferguson* v. *Green*, 266 Ark. 556, 587 S.W.2d 18 (1979). When the evidence in the case has been fully developed and we can determine the equities of the parties, as is the case here, we should decide the case without remanding it to the chancery court. *Id.*; *accord*, *Callaway* v. *Callaway*, 8 Ark. App. 129, 648 S.W.2d 520 (1980). Because the chancellor changed custody, he did not address the appellee's alternate request for a reduction in child support. Both sides presented evidence from which we can reach a decision on this issue. Therefore, we will look to see whether the chancellor should have granted the appellee's request that the court reduce his child support payments.

It is settled law that a modification in the amount of child support to be paid must be based upon the showing of changed conditions since the entry of the decree. *See Lively* v. *Lively*, 222 Ark. 501, 261 S.W.2d 409 (1953). The assumption in

considering a petition for modification of child support is that the chancellor fixed the proper amount of support in the original decree. *Eubanks* v. *Eubanks*, 5 Ark. App. 50, 632 S.W.2d 242 (1982). The party seeking the modification has the burden of showing a change in circumstances sufficient to require modification. *Id.*

The appellant testified that she worked for the San Antonio Shoe Company since before the divorce and was bringing home $150-$250 per week and that, other than child support, she had no other means of support. The appellee testified that he wanted his child support reduced to an amount commensurate with the amount recommended for his income level on the support schedule, to be paid once a month. He testified that, currently, he brought home $300.00 a week or $16,000.00 a year. Upon cross-examination, he testified that his income had decreased a little since the entry of the divorce agreement. He did not testify to the degree of reduction or to any material increase in expenses that would prevent him from paying the amount of support originally awarded. The appellee failed to present evidence demonstrating a material change in the circumstances of the parties, and therefore, his petition for reduced child support must be denied.

In summary, we hold that the chancellor erred in requiring the appellant to prove that a change of custody was not in the child's best interest and that his decision changing custody was clearly erroneous and against the preponderance of the evidence. Therefore, we reverse, directing that custody of the child be restored to the appellant and denying the appellee's petition for reduced child support.

Reversed.

CLONINGER, J., and WRIGHT, Special Judge, agree.

Robert L. QUALLS *v.* CITY OF CLARKSVILLE

CA CR 86-99 719 S.W.2d 702

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

J. Marvin Holman, for appellant.

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

TOM GLAZE, Judge. Appellant appeals a conviction for driving while intoxicated. For reversal, he contends that the results of an intoxilyzer test should not have been admitted because he was not properly advised of his right to have additional tests made to determine the alcohol content of his blood. We disagree, and affirm.

A Clarksville patrolman stopped appellant on June 1, 1985, and arrested him for driving while intoxicated. The patrolman took appellant to the courthouse where another officer, Officer Breedlove, gave him the following warning which was read from a rights form:

> You will be administered a (blood)(breath) test to determine your blood alcohol content.
>
> If you take the test, you may, at your expense, have a physician, registered nurse, lab technician, or other quali-

> fied person administer a blood or urine test. This department will assist you in obtaining such a test or tests.

Officer Breedlove testified that appellant indicated that he understood all that was read to him and agreed to take a breathalyzer test. After taking the test, appellant was asked if he wanted a blood test, and appellant responded that he did. Appellant had no money, so he was allowed five or six phone calls to raise the money for a blood test. He was unsuccessful, and no additional test was administered.

Appellant argues that the results of the breath test should not have been admitted because he was not advised that he had a right to an additional breath test pursuant to Ark. Stat. Ann. § 75-1045(c)(3) (Supp. 1985) which provides:

> The person tested may have a physician, or a qualified technician, registered nurse, or other qualified person of his own choice administer a complete chemical test or tests in addition to any test administered at the direction of the law enforcement officer. The law enforcement officer shall advise such person of this right. The refusal or failure of a law enforcement officer to advise such person of this right and to permit and assist the person to obtain such test or tests shall preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

Appellant argues his case is controlled by this court's decision in *Mitchell* v. *City of North Little Rock*, 15 Ark. App. 331, 692 S.W.2d 624 (1985). In *Mitchell*, as in this case, the appellant was advised he could have an additional test of his blood or urine, but was not told that he could have another breath test. However, the deciding factor in *Mitchell*, *supra*, was that the defendant was not assisted in his attempt to obtain an additional test. To the extent that our decision in *Mitchell* might infer that a defendant is entitled to be informed of the full range of additional tests available, such a holding would be in conflict with the supreme court's ruling in *Hegler* v. *State*, 286 Ark. 215, 691 S.W.2d 129 (1985). In *Hegler*, the court held that even though the rights form did not mention an additional breath test, the police substantially complied with the requirements of § 75-1045(c)(3), and that substantial compliance is all that is re-

quired. *Hegler, supra.*

Affirmed.

COOPER and CLONINGER, JJ., agree.

Leona BAKER, Administratrix of the Estate of Edgar Baker, Deceased *v.* CERTAIN LANDS IN INDEPENDENCE COUNTY, ARKANSAS, and ARKANSAS GAME AND FISH COMMISSION

CA 85-495 720 S.W.2d 318

Court of Appeals of Arkansas
Division II
Opinion delivered November 26, 1986
[Rehearing denied December 23, 1986.]

Highsmith, Gregg, Hart, Farris & Rutledge, by: *Phillip Farris*, for appellant.

Gary Vinson, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Leona Baker, as administratrix of the estate of Edgar Baker, deceased, appeals from a decree of the Independence County Chancery Court quieting title to three tracts of land in the Arkansas Game and Fish Commission. We conclude that the chancellor erred in confirming title to two of the tracts and reverse that portion of the decree.

The facts pertinent to this appeal were stipulated. The lands in issue were described in the complaint as follows:

> *Tract No. 1*: Southeast Quarter, Northeast Quarter of Section 29, Township 12 North, Range 7 West, 40 acres.
>
> *Tract No. 2*: North One Half of the Northeast Quarter of Section 22, Township 12 North, Range 7 West, 88 acres.
>
> *Tract No. 3*: Southeast Quarter of the Northeast Quarter of Section 27, Township 12 North, Range 7 West, 40 acres.

All three tracts were sold and certified to the state for nonpayment of taxes in the late 1930s and, on January 16, 1943, were transferred by the state to the Arkansas Game and Fish Commission pursuant to the provisions of § 17 of Act 378 of the General Assembly of 1939.[1] That section authorized the state land commissioner to transfer lands to the Game and Fish Commission for use as game and fish refuge areas, hunting and fishing areas, or other related purposes, on finding that the lands were not suitable for agricultural or industrial uses. It provided that such a transfer would be a bar to any grant by the state of the lands so transferred, "[p]rovided that any lands so acquired cannot be sold by the Game and Fish Commission, but same shall revert to the State if such lands are not developed within two years after acquisition, or at any time such lands are no longer desired by the Commission."

Although there was evidence that after 1960 the Game and Fish Commission stocked the area with game and utilized it as a game refuge and later as a public hunting ground under its control and supervision, it was stipulated that the land was wild and unimproved and that "nothing had been done with the land within two years from the date the Game and Fish Commission took title." It was also stipulated that, for unexplained reasons, taxes were levied and assessed against Tract 1 in 1960, and that the appellant's decedent thereafter paid all taxes due on the lands for twenty-three years in unbroken sequence. It was stipulated that taxes were also levied and assessed against Tract 2 in the year 1965 and that the appellant's decedent paid all taxes subsequently assessed against it for eighteen years in unbroken sequence. Taxes were levied against Tract 3 in 1976. It was stipulated that the appellant's decedent paid taxes on that tract for eight years thereafter in unbroken sequence.

The record also shows that in 1976 the appellant's title to all three tracts was confirmed by a decree of the Independence County Chancery Court, but it was not shown that the Game and Fish Commission was made a party to that action or served with process as required by the confirmation statutes.

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[1] This section, with minor changes not material to our issue, now appears as Ark. Stat. Ann. § 47-128 (Repl. 1977).

The chancellor found that the activities conducted on the land by the Commission were sufficient to prevent a reversion to the state under the proviso to Ark. Stat. Ann. § 47-128 (Repl. 1977); that the lands were not subject to taxation; and that the appellant's decedent therefore acquired no title by virtue of the tax payments. He further found that the 1976 confirmation decree was not binding on the Game and Fish Commission because it was the record title holder and not a party to that action. A decree was entered dismissing the appellant's complaint and quieting title in the appellee. We conclude that the chancellor erred in not quieting appellant's title to Tracts 1 and 2.

The Game and Fish Commission cross-complained and sought affirmative relief. The immunity of the state and its arms is therefore not in issue. *Parker* v. *Moore*, 222 Ark. 811, 262 S.W.2d 891 (1953). As it was stipulated that the appellants paid taxes levied and assessed against Tracts 1 and 2 in unbroken sequence for periods of twenty-three and eighteen years, respectively, the principles announced in *Deniston* v. *Langsford*, 211 Ark. 780, 202 S.W.2d 760 (1947); *Koonce* v. *Woods*, 211 Ark. 440, 201 S.W.2d 748 (1947); and *Townsend* v. *Bonner*, 205 Ark. 172, 169 S.W.2d 125 (1943), are controlling, and it was error to deny the appellant's petition for relief.

[redacted] Our courts have long recognized the so-called "doctrine of the lost grant." In *Carter* v. *Stewart*, 149 Ark. 189, 231 S.W. 887 (1921), that doctrine was stated as follows:

> Under its sovereign power, a State imposes the burden upon all its citizens to pay taxes on the property owned by them for the purpose of supporting the government. It is the duty of the officers of the State to place the land in the State on the tax books for that purpose as soon as the State has parted with its title to them. Hence where the State has for a long time demanded and collected taxes on property and the property owner has acquiesced therein by paying the taxes, there arises a presumption that there was a legal liability to pay the taxes, and this furnishes a strong circumstance from which a court may infer a grant from the State. Of course, from the very nature of the thing the person or persons paying the taxes must be in the uninterrupted and continued possession of the land in order to

> warrant the court in finding a grant from the State. In such cases the possession of the adverse claimants could have had a legal inception, and the doctrine of presumption of a grant from the State under such circumstances is recognized in many cases.

Id. at 195, 231 S.W. at 889. The doctrine was stated in *United States* v. *Chaves*, 159 U.S. 452 (1895), as follows:

> [B]y the weight of authority, as well as preponderance of opinion, it is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession of twenty years, and that such rule will be applied as a *presumptio juris et de jure*, whenever, by possibility, a right may be acquired in any manner known to the law.

Id. at 464.

Ark. Stat. Ann. § 37-102 (Repl. 1962) provides that one who pays taxes on unenclosed and unimproved lands for more than seven years under color of title is presumed to have been in possession of the property from the date of the first payment. Ark. Stat. Ann. § 37-103 (Repl. 1962) provides that one who pays taxes on unenclosed and unimproved lands for more than fifteen years is presumed to have had color of title at the time the first payment was made.

In *Townsend* v. *Bonner, supra*, it was held that the presumption of a grant or redemption from a tax forfeiture arises in favor of one paying taxes for many years on wild and unoccupied lands. It was there held that our tax payment statutes referred to above supply the requirement of possession emphasized in *Carter* v. *Stewart, supra.*

In *Koonce* v. *Woods, supra*, the court again held that redemption in favor of one who had paid taxes for over seventeen years in unbroken sequence on unoccupied lands previously forfeited to the state would be presumed *not as a matter of fact but as one of law.* In so holding, the court pointed out that it was not disregarding the difference between the periods involved in earlier cases of sixty-six years, thirty-four years, and the seventeen years involved in *Koonce*, but that "[t]he period of time goes to the matter of good faith of a two-fold character: faithful

conduct by the State's officers on the one hand, and good faith on the part of the taxpayer." *Id.* at 447, 201 S.W.2d at 752. It concluded that the difference in time could have no effect on the legal principle. The court noted in *Koonce* that there is no statute establishing a period directly applicable to this principle, but considered by analogy Ark. Stat. Ann. § 37-103 (Repl. 1962), which provides that one who pays taxes on wild and unimproved lands for fifteen years has color of title as a presumption of law and, when read in conjunction with Ark. Stat. Ann. § 37-102 (Repl. 1962), gives rise to a presumption of actual possession during that period as a matter of law.

In *Deniston* v. *Langsford, supra*, the court discussed the decision in *Koonce* and concluded as follows:

> The opinion as a whole, we think, clearly reflects what the Court had in mind — that the presumption under discussion would never attach unless tax payments of the character in question had been made for a full fifteen-year period.

Deniston, 211 Ark. at 782, 220 S.W.2d at 761. In *Miller* v. *Kansas City Southern Railway Co.*, 216 Ark. 304, 225 S.W.2d 18 (1949), the court again stated:

> But, where the State is concerned, or where the sovereign undertakes to profit because of the negative nature of the records, there is another rule. It is that *after payment of taxes in good faith for not less than fifteen years the presumption of a grant may be one of law, as distinguished from one of fact.*

Id. at 306, 225 S.W.2d at 19 (emphasis added).

Here, it was stipulated that the lands were wild and unoccupied and that the appellant had paid taxes on Tracts 1 and 2 for more than fifteen years in unbroken sequence. Under the doctrine announced in *Townsend, Koonce,* and *Langsford*, there arose a presumption of law that prior to the first payment of taxes some person with a redeemable interest had redeemed the property and it had become subject to taxation, free from claims of the state.

Under the rule we would apply, the presumption can

only arise if it was possible for the state to grant or permit a redemption from the forfeiture. The statute provided that the Game and Fish Commission could not sell the land, but did provide for a reversion to the state if the lands were not developed during the first two years after the commission received its title. It was therefore *possible* for the title to revert to the state and it must be presumed that it did. A person with a redeemable interest in the land could have then redeemed it and it will also be presumed that this occurred. We conclude, therefore, that the chancellor erred in denying appellant's petition for confirmation of her title to Tracts 1 and 2.

Since payment of taxes on Tract 3 was only for a period of eight years, these presumptions would not arise as to it. *Deniston* v. *Langsford, supra.* Since the Game and Fish Commission was not made a party to, or served with process in, the 1976 confirmation action, that decree adds no strength to appellant's title.

The decree is affirmed as to Tract 3, but reversed as to Tracts 1 and 2. The cause is remanded for entry of a decree not inconsistent with this opinion.

CORBIN and MAYFIELD, JJ., agree.

S. Norris BROADHEAD and Paul E. BROADHEAD
v. Jimmy McENTIRE, et al.

CA 85-476 720 S.W.2d 313

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

[redacted]

Robert P. Crockett, for appellant.

Stripling & Morgan, by: *M. Edward Morgan*, for appellee Jimmy McEntire.

L. Gray Dellinger, for appellees Robbie Sullins, Albert Herrington, and Bonnie Herrington.

GEORGE K. CRACRAFT, Chief Judge. S. Norris Broadhead and Paul E. Broadhead appeal from an order of the chancery court quieting title to a tract of land in Jimmy McEntire and granting a judgment against appellants in favor of Robbie Sullins for monies paid to the appellants under a contract for sale of the same tract of land. The appellants advance nineteen points for reversal, but they are so intertwined that it is not necessary that we address them separately.

On April 1, 1975, appellants entered into a written contract to sell forty acres of land to Peggy Washburn for $3,000.00, of which $600.00 was paid down and the balance to be paid in five annual installments of principal and interest. Robbie Sullins alleged that in 1976 she purchased Washburn's interest in the contract and informed an agent of the appellants of the transaction. Sullins made, and appellants accepted, the first four payments when due. The fifth payment was tendered in 1980 but refused by appellants. Meanwhile, the property was sold in November of 1976 for non-payment of the 1975 taxes. Appellee McEntire purchased the property at the tax sale in November of 1976 and was issued a clerk's tax deed on December 8, 1978.

In May of 1983, appellee Sullins filed her complaint for

specific performance of the Washburn contract alleging an oral assignment of the contract from Washburn. The appellants filed an answer denying the existence of the contract, and pleading the statute of limitations, estoppel, laches, and the statute of frauds. On September 5, 1984, the appellee McEntire, claiming under his tax deed, filed a petition to quiet title to the property as against the appellants and Sullins. The appellants and Sullins filed answers alleging the tax sale and deed were void for noncompliance with the statutes relating to tax sales. Both cases were consolidated for trial.

The matter was submitted to the court on stipulation of facts and evidence as to the manner in which the tax sale under which McEntire claimed had been held. It was stipulated that the appellants had entered into the contract of sale with Washburn for the sale of the property, that Sullins made all of the payments due by Washburn under the contract, and that all except the final payment were accepted by the appellants. It was further stipulated that Sullins reimbursed Washburn for the $600.00 down payment made to the appellants and that Sullins made the payments to an agent of the appellants "who had notice that Sullins was claiming to be an assignee of the Washburn contract." The stipulation contained evidence of the manner in which the tax sale in issue had been held. It was also stipulated that McEntire had paid taxes on the tract for more than seven years.

The chancellor held that, pursuant to Ark. Stat. Ann. § 34-1907 (Repl. 1962), McEntire's tax payments under color of title constituted prima facie evidence of title and, since the appellants and Sullins offered no proof to the contrary and based their entire defense on the failure of the sheriff and clerk to maintain appropriate records and properly conduct the tax sale, the McEntire title should be confirmed. He further found that appellee Sullins based her claim of the lands on an oral assignment of the contract from Peggy Washburn and that the appellants had accepted the monies. The chancellor ruled, however, that Ark. Stat. Ann. § 38-101 (Repl. 1962) requires that an action to charge a person with the sale of lands be in writing and, "inasmuch as Washburn was not made a party to the action, and no proof of the agreement was proffered after the same was denied by the petition," denied Sullins' prayer for specific performance. The chancellor found further that, since

appellants had failed in their obligation to protect the title and at the same time accepted Sullins' payment with knowledge that some sort of agreement existed between Washburn and Sullins, they should not be permitted in equity to retain the monies as it would result in unjust enrichment. It was ordered that Sullins recover the funds paid to appellants. Appellants filed a timely notice of appeal. The appellee Sullins has not filed a cross-appeal as required by Rule 4(a) of the Rules of Appellate Procedure.

We agree that the chancellor's order that appellee McEntire's title be confirmed was erroneous. Defects in the tax sale under which McEntire claimed were alleged in the pleadings and evidence was presented in support of those allegations. The chancellor did not rule on the effect of any of the alleged defects, but concluded that title should be confirmed pursuant to Ark. Stat. Ann. § 34-1907 (Repl. 1962). That section provides that, in an action to confirm title, where one cannot show a perfect title, he may establish a prima facie title by showing that he and those under whom he claims had color of title to the lands for more than seven years and during that time he, and those under whom he claims, had continuously paid taxes on the property. The property in issue was forfeited for nonpayment of 1975 taxes and the tax sale was not held until November of 1976. At that time, it was struck off by the clerk and sold to appellee. Our statutes provide a two-year period of redemption from such sales and therefore the clerk's deed in this case was not executed and delivered to McEntire until December 8, 1978. A certificate of purchase issued at a tax sale, however, is not color of title. *Driver* v. *Driver*, 223 Ark. 15, 263 S.W.2d 914 (1954); *Townsend* v. *Penrose*, 84 Ark. 316, 105 S.W. 588 (1907); *Logan* v. *Eastern Arkansas Land Co.*, 68 Ark. 248, 57 S.W. 798 (1900). Since this action was commenced on September 5, 1984, a date less than seven years after appellee acquired his color of title and before he completed seven tax payments under it, appellee McEntire was not entitled to the benefit of § 34-1907.

For the same reason we find no merit in the argument that title had vested in McEntire under Ark. Stat. Ann. § 37-102 (Repl. 1962) which, when coupled with Ark. Stat. Ann. § 37-101 (Repl. 1962), works to invest title in one who has paid taxes on wild and unenclosed lands for a period in excess of seven years. Appellee McEntire also argues that he is entitled to have his title

confirmed by actual physical possession of the property for more than seven years. This argument must fail for two reasons. First, there was evidence that he had only been on the property four or five times during the seven-year period and his other acts of possession were merely fitful. Secondly, it was stipulated by the parties that the property was wild and unimproved and not occupied by anyone.

We also conclude that to quiet title in appellee McEntire was error for yet another reason. Ark. Stat. Ann. § 34-1907 (Repl. 1962) authorizes a deed of confirmation on prima facie evidence of title only where the proceedings are not controverted. *Kennedy* v. *Burns*, 140 Ark. 367, 215 S.W. 618 (1919). Here, the issues surrounding the validity of the tax proceedings were clearly controverted in the pleadings. The trial court should have determined those issues.

On *de novo* review of chancery cases, where we find the chancellor's finding to be clearly erroneous but the record is fully developed so that we can see where the equities lie, we correct the record here by entering the decree that should have been entered rather than remanding for a new trial or further proceedings. *Ferguson* v. *Green*, 266 Ark. 556, 587 S.W.2d 18 (1979). At the trial, appellants and appellee Sullins advanced evidence in support of a number of deficiencies in the tax sale. We find sufficient merit in one of these to dispose of the issue and therefore do not address them all.

Ark. Stat. Ann. § 84-1102 (Repl. 1980) requires that the list of delinquent lands be recorded and have attached to it a certificate of the clerk stating in what newspapers the notice of delinquent lands was published and the date of publication. It has been held that this section requires the certificate of the clerk to be made *prior* to the sale and, where made on the date of the sale, the sale is void. *Standard Securities Co.* v. *Republic Mining & Manufacturing Co.*, 207 Ark. 335, 180 S.W.2d 575 (1944); *Bingham* v. *Powell*, 152 Ark. 484, 238 S.W. 597 (1922). A joint exhibit entered by stipulation shows that, although the clerk did attach the required certificate to the record, he did so on the date the sale was held.

In *Boyd* v. *Meador*, 10 Ark. App. 5, 660 S.W.2d 943 (1983), we reaffirmed previous holdings that a failure of the clerk

to attach his certificate to the delinquent list prior to the sale voids the sale. We further held that such a deficiency is fatal to the validity of the tax sale and that the defect is not cured by the two-year statute of limitations contained in Ark. Stat. Ann. § 84-1118 (Repl. 1980). As the failure of the clerk to comply with the provisions of § 84-1102 was fatal to the validity of the tax sale under which the appellee McEntire claims, the chancellor erred in quieting title in him. The decree must be reversed to that extent.

Appellants further contend that the trial court erred in entering judgment in favor of the appellee Sullins for the money paid under the alleged assignment of the contract. Appellants first argue that the chancellor erred in holding that they had an obligation to pay the taxes on the property. The contract between appellants and Washburn provided that the buyer was to receive no legal or equitable right under the contract until the purchase price had been paid in full, at which time the seller obligated himself to execute a special warranty deed conveying the lands free of all liens and encumbrances. Ark. Stat. Ann. § 84-107 (Repl. 1980) provides that the taxes assessed on real property shall be a preferential lien and bind the lands from the first Monday in January of the year in which the assessment was made and continue until the taxes have been paid, provided that, as between a grantor and grantee, the lien shall not attach until the last date fixed by law for the county clerk to deliver the tax book to the collector in each year after the tax lien attaches. Ark. Stat. Ann. § 84-807 (Repl. 1980) provides that the tax books shall be delivered to the collector on or before the third Monday in February of each year. The contract was entered into in April of 1976, some six weeks after the tax books had been delivered to the collector. Under these circumstances it has been held that the seller is liable for the payment of taxes under the warranty. *Hatch* v. *Lowrance*, 178 Ark. 274, 10 S.W.2d 358 (1928).

Appellants do not deny entering into the contract with Washburn, that the monies were paid to his agent, or that he had knowledge that Sullins was claiming to be an assignee of Washburn's contract. There was introduced into the record four checks totalling the sum of $3,028.00 drawn on Sullins' account, payable to the Broadheads and bearing their endorsement. There is nothing in the record to indicate that they did not receive the

money and retain it. Each check bore a memorandum that it was in payment of the Washburn contract. The record contains no indication that the appellants had in any way renounced their contract or failed to recognize the payments by the assignee until 1980, when Sullins tendered the fifth and final payment. Under these circumstances we agree that the chancellor was correct in applying the doctrine of unjust enrichment, which is based upon the principle that one return money or its equivalent received by him under such circumstances that, in equity and good conscience, he ought not retain it. *Frigillana* v. *Frigillana*, 266 Ark. 296, 584 S.W.2d 30 (1979); *Fite* v. *Fite*, 233 Ark. 469, 345 S.W.2d 362 (1961). In entering his decree, however, the chancellor did not award prejudgment interest on this sum and on remand the decree should be modified to so provide.

Appellants finally contend that the chancellor erred in not holding that Sullins' claim for restitution was barred by the three-year statute of limitations requiring actions on contracts not under seal and not in writing to be commenced within three years after the cause of action accrues, Ark. Stat. Ann. § 37-206 (Repl. 1962). Sullins argues that the payments were made pursuant to a written agreement which is governed by the five-year statute of limitations provided in Ark. Stat. Ann. § 37-209 (Repl. 1962). We do not address that issue because the record does not establish that the period of limitations had run under either statute.

Appellee Sullins commenced her action for specific performance or, in the alternative, for refund of payments on May 19, 1983. The first repudiation of obligation to Sullins occurred when the appellants refused to accept the payment tendered in 1980. The record reflects that Sullins made her payments on June 16, 1976, April 6, 1977, June 2, 1978, and May 14, 1979. There is nothing in the record to indicate the date on which the fifth and final payment was tendered and rejected. The stipulation reflects only that it was rejected in 1980.

One who relies upon a statute of limitations as a defense to a claim has the burden of proving that the full statutory period had run on the claim before an action was commenced. Without any proof of the date on which the tender was rejected, there was no evidence before the chancellor to sustain a finding

that the full three-year period had run before this action was commenced on May 19, 1983.

Furthermore, if there is any reasonable doubt as to which of two statutes of limitation applies to a particular action or proceeding, and it is necessary to resolve the doubt, it will generally be resolved in favor of the application of the statute containing the longer period of limitations. *Dunlap* v. *McCarty*, 284 Ark. 5, 678 S.W.2d 361 (1984); *Jefferson* v. *Nero*, 225 Ark. 302, 280 S.W.2d 884 (1955).

Finally, appellee Sullins argues that the chancellor should have ordered specific performance of her completely performed oral agreement. Since she filed no notice of cross-appeal, we do not address that issue. Rules of Appellate Procedure, Rule 4(a); *Elcare, Inc.* v. *Gocio*, 267 Ark. 605, 593 S.W.2d 159 (1980).

That part of the decree which quiets title to the lands in McEntire is reversed and dismissed. That part of the decree which awards the appellee Sullins judgment against appellants Broadhead is affirmed, but the cause remanded for the entry of a decree awarding Sullins appropriate prejudgment interest.

CORBIN and MAYFIELD, JJ., agree.

Johnny BOVEE *v.* STATE of Arkansas

CA CR 86-100 720 S.W.2d 322

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

Richard A. Garrett, for appellant.

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

DONALD L. CORBIN, Judge. This appeal comes to us from the Saline County Circuit Court. A jury trial was held wherein appellant, Johnny Bovee, was found guilty of second degree murder and was sentenced to 15 years in the Arkansas Department of Correction. Appellant appeals the conviction and the sentence. We reverse and remand.

Appellant raises the following four points for reversal: (1) The trial court erred by not striking a particular juror for cause and by not allowing sequestering of the jurors for questioning by the defense counsel; (2) the court denied the right of appellant to cross-examine witnesses by denying recross examination; (3) the court erred in its failure to grant a directed verdict on the charges of murder in the first degree and murder in the second degree; and (4) the court erred in not declaring a mistrial when the jury returned without a specific sentence or, in the alternative, the court should have sentenced appellant to the minimum sentence.

We find this case should be reversed on the first point raised by appellant. However, the Arkansas Supreme Court's decision in *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), requires that, where the sufficiency of the evidence is challenged on appeal of a criminal conviction, we must review the sufficiency of the evidence, including the inadmissible evidence, prior to

consideration of trial errors.

A motion for directed verdict is a challenge to the sufficiency of the evidence. *Glick* v. *State*, 275 Ark. 34, 627 S.W.2d 14 (1982). In reviewing the sufficiency of the evidence on appeal, this court will affirm if there is substantial evidence to support the verdict. *Pickens* v. *State*, 6 Ark. App. 58, 638 S.W.2d 682 (1982). Substantial evidence is evidence 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 the mind to pass beyond conjecture. *Jones* v. *State*, 269 Ark. 119, 598 S.W.2d 748 (1980).

Appellant was charged by information with the crime of first degree murder. The State alleged that appellant, with premeditation and deliberation, caused the death of Rena F. Wearsch. Appellant was tried by a jury which found him guilty of second degree murder. On appeal, appellant argues that the court's denial of his motions for directed verdict to the charges of first and second degree murder constitutes reversible error.

Testimony adduced by the State at trial established that Rena Wearsch died as the result of a gunshot wound to her head. Charlotte Arp, who was present in the victim's home when the victim was shot, testified that she and the victim had been drinking most of the day on October 31, 1985. She said she passed out and was awakened either by the sound of a gunshot or by appellant. She testified that she saw appellant walk out of the victim's bedroom and heard appellant say that he had shot Rena. Arp entered the bedroom and attempted to help the victim who was still alive at the time. After officers from the Saline County Sheriff's Department arrived, appellant left the scene, even though he had been advised to stay there. A police officer testified that appellant was found crouched behind a bush in the woods. Appellant was transported to the Sheriff's Office. He gave a statement to the officers the next morning.

Appellant's statement, which was admitted at trial through the testimony of Officer Rick Elmendorf, stated that on the day Rena was killed they had been drinking and Rena got mad and went into the bedroom and got a gun. When he grabbed the gun Rena pulled back, the gun went off and she fell down. Appellant told police the gun "just fired because it had a hair trigger" and

that Rena was holding the gun like one would normally hold a gun. The medical examiner testified that the results of a trace metal test indicated that the victim probably was not holding the gun when it was fired and that there was no evidence of a struggle over the gun. A firearms examiner testified that the gun did not have a hair trigger. Testimony adduced at trial indicated that appellant had tried to run over Rena Wearsch with a truck before and that he had threatened to hit her in the head with a bottle.

Viewing all the above evidence in the light most favorable to the jury's verdict we find that there was substantial evidence to support a conviction for second degree murder under Ark. Stat. Ann. § 41-1503 (Repl. 1977).

On January 24, 1986, this case came to trial. Following call of the roll, swearing of the veniremen to *voir dire*, and opening remarks *voir dire* was conducted. Mrs. Catherine DeWeerd was questioned by appellant's attorney and the following exchange occurred:

> Q Can you promise me that you will attach no guilt whatsoever to Johnny Bovee just because he's sitting here today?
>
> A I could try.
>
> Q Well, I understand you can try but I want you to promise me that you won't do it. Can you do that?
>
> A Oh, I think I could.
>
> . . . .
>
> Q . . . Now, just because Johnny Bovee is charged with murder and because of the seriousness of the crime, would you attach any significance to it? Would you be more apt to find him guilty just because of what he's charged with?
>
> A Probably.
>
> Q Pardon?
>
> A I said probably.
>
> . . . .
>
> Q Well, do you understand that Mr. Bovee does not have to

present any case at all?

A No.

Q He does not have to prove anything.

A The State has to prove it.

Q The State is the one that has to do all the proving. Would it bother you if Mr. Bovee didn't take the stand?

A It might, if he's not willing to take the stand for his own self defense.

Q Do you feel like if he did not take the stand that you would be more apt to return a verdict of guilty than you would one of not guilty?

A I think so.

Q Even if the judge instructed you that you were to lend no weight to the fact that he had not taken the stand, that you would still be more apt to find him guilty?

A I would still [sic] more apt to feel like he was afraid of being cross examined.

. . . .

Q . . . Do you have anything morally against drinking?

A Morally against drinking?

Q Yes, Ma'am.

A I don't agree with it. I don't do it and I don't think it's necessary to do it.

Q Because of that, if it comes out in testimony during this trial that a lot of the people involved were intoxicated or in varying degrees of intoxication, would that cause you to have any prejudice against any of them?

A It may.

Q Would you feel like that intoxication could ever be a defense to a crime?

A What do you mean by that?

Q If the judge instructs you that, now I do not know whether he will or not, but let's say that if he did instruct you that the defendant was entitled to an instruction on intoxication which would say that if he was intoxicated enough to not form the intent necessary to commit the crime, that if you determine that he had reached that state of intoxication, that you had to return a verdict of not guilty to that crime charged, would you be able to do so?

A Saying he was intoxicated?

Q Yes, Ma'am.

A But he was not guilty?

Q Yes, Ma'am.

A Would I be able to do so?

Q Yes, Ma'am.

A I'm not real sure whether I could or not.

Q Okay.

A Because of some experiences I've had with it.

. . . .

Q We all try not to be prejudiced but we can't help it. It's something that is born into us and bred into us from the time that we're little bitty until the time we grow up. You can be prejudiced against different things. Do you feel that at this point in time you have any prejudice against Johnny Bovee either because of crime charged or because of the fact that alcohol may be involved?

A Do I have any prejudice?

Q Yes, Ma'am.

A Probably my main prejudice would be alcohol involved.

. . . .

Q Can you promise me that if you are convinced that Johnny Bovee is not guilty and there are eleven people back in the jury room that are convinced that he is guilty that you will stand your ground and say that "I don't believe

> he's guilty, and you're not going to make me change my mind," just by the pressure? Can you take that kind of pressure?
>
> A I don't know. Sometimes I break down pretty easy.

At this point the defense moved that Mrs. DeWeerd be struck for cause. The trial judge denied the motion, stating that Mrs. DeWeerd was qualified. The defense then used a peremptory challenge and excused Mrs. DeWeerd.

Appellant used all his peremptory challenges before jury selection was completed. After expending all his peremptory challenges, appellant's counsel questioned prospective juror Thomas Beard. When asked whether he believed that the defendant should take the stand, Mr. Beard replied that he did feel that the defendant should take the stand, and that he would feel that way even if the court instructed him that it should make no difference whether the defendant took the stand. Defense counsel then moved to have Mr. Beard struck for cause. The trial court allowed additional *voir dire* questioning by the State, qualified Beard as a juror, and denied appellant's motion.

In *Fleming* v. *State*, 284 Ark. 307, 681 S.W.2d 390 (1984), the Arkansas Supreme Court stated the standard of review for a ruling on juror qualifications as follows:

> We will not reverse a ruling on juror qualifications absent an abuse of discretion. *Henslee* v. *State*, 251 Ark. 125, 471 S.W.2d 352 (1971).
>
> Arkansas Stat. Ann. § 43-1919 defines actual bias as "the existence of such a state of mind on the part of the juror, in regard to the case or to either party, as satisfies the court, in the exercise of a sound discretion, that he can not try the case impartially, and without prejudice to the substantial rights of the party challenging." Jurors are presumed unbiased and the burden of proving actual bias is on the party challenging the juror. *Linell* v. *State*, 283 Ark. 162, 671 S.W.2d 741 (1984).

Id. at 309, 681 S.W.2d at 392. This court faced a similar problem in *Miller* v. *State*, 8 Ark. App. 165, 649 S.W.2d 407 (1983), and announced the following rule:

> [A]ppellant is in a position to challenge any error of the trial court in refusing to strike a juror for cause if the record shows that juror he objected to was forced upon him because he had exhausted his peremptory challenges. For that rule to be applicable, however, the appellant must not only show that the trial judge abused his discretion in not excusing the first juror for cause, but must also demonstrate from the record that he would have excused the latter one had he been able to peremptorily challenge him.

Id. at 166, 649 S.W.2d at 407-408 (citation omitted).

In the case at bar we find that it was an abuse of discretion to qualify Mrs. DeWeerd as a juror. She indicated a number of times during the questioning that she was biased. Appellant used all his peremptory challenges and has demonstrated that he would have excused Mr. Beard if he'd had another peremptory challenge, thereby properly preserving his record to raise the issue here. Therefore, we find that the decision of the trial court must be reversed.

Reversed and remanded.

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

Carl DUNCAN and Valerie DUNCAN, Husband and Wife *v.* Billy Charlene McGAUGH, Executrix, and Max McGAUGH

CA 85-467 719 S.W.2d 710

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

Jeff Duty, for appellant.

Blaine A. Jackson, for appellee.

MELVIN MAYFIELD, Judge. The question in this case is whether the court erred in denying appellants a trial by jury.

Appellees filed suit in unlawful detainer against appellants on April 23, 1985. On May 17 a writ of possession was issued which contained a provision for appellants to retain possession of the property by filing a $2,500.00 surety bond within five days of the issuance of the writ. The bond was filed on May 22, 1985, and trial was set for July 18, 1985. On July 3, 1985, an order was entered which stated that the bond which had been filed to permit the appellants to retain possession of the property was not in proper form and was invalid. Appellants were given until July 8, 1985, in which to post a proper bond and if this was not done the clerk was directed to issue a writ granting appellees possession of the property.

In the meantime, appellants had dismissed their original attorney and retained another one, and on June 21, 1985, the new attorney had filed a cross-complaint against appellees and in that pleading had requested a trial by jury. On June 28, 1985, answer to the cross-complaint was filed and it contained an objection to a jury trial on the basis that the request was untimely filed.

On July 18, 1985, court convened for a trial on the merits of the case. Before the trial started, counsel for appellants an-

nounced to the court that the motion for jury trial was renewed. At that time, a record was made on the court's previous denial of appellants' same request. The discussion between counsel for both parties and the court discloses that the case had first been set for trial on July 18, 1985, but had been accelerated to July 3 because of the problem with the bond, and that the court had informed appellants' counsel sometime prior to July 3 that a jury trial could not be had on that date. Then on July 3, 1985, the court had granted an oral motion by appellants' counsel for a continuance, over the objection of counsel for appellees, and had issued the order declaring the bond invalid but giving appellants until July 8, 1985, to post a proper one.

On appeal, the appellants argue that the trial court erred in denying them a jury trial. They say their request, filed on June 21, 1985, was made more than twenty days prior to the date on which the trial was actually held, July 18, 1985. It is admitted, however, that at the time the request for jury trial was made, the case had already been reset for trial on July 3, 1985. The appellants cite the case of *Bussey* v. *Bank of Malvern*, 270 Ark. 37, 603 S.W.2d 426 (Ark. App. 1980), in which the trial court was reversed for taking the case away from the jury when both sides moved for a directed verdict. In that case, we explained that prior to the adoption of the Arkansas Rules of Civil Procedure the Arkansas rule was that where both parties moved for a directed verdict and no other jury instructions were requested by either party, the parties were regarded as having agreed that the issues could be decided by the court rather than the jury, but that the new rules of procedure had abolished that law, and that the new rules "should be interpreted so as not to give effect to dubious waivers of rights." Of course, we are not faced with that same factual situation in the case at bar.

In *Johnson* v. *Coleman*, 4 Ark. App. 58, 627 S.W.2d 564 (1982), the appellant demanded a jury trial on the date of trial. We affirmed the denial of a jury trial because he had failed to comply with ARCP Rule 38. That rule provides:

> (a) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by filing with the clerk a demand therefor in writing at any time after the commencement of the action and not later than 20 days prior to the trial date. Such demand may be indorsed upon a

pleading of the party.

. . . .

(c) Waiver. The failure of a party to file a demand as required by this rule and as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Appellants do not direct us to any Arkansas cases analyzing this rule and our research has disclosed none. The federal rule is somewhat different, and we found no assistance from that quarter. In Texas, a request for jury trial must be made not less than ten days before trial. In *Peck* v. *Ray*, 601 S.W.2d 165 (Tex. Civ. App. 1980), the appellate court held that the trial court did not abuse its discretion in refusing the request for a jury trial which was prepared by the attorney thirteen days prior to trial but inadvertently not mailed until eight days before trial. The Texas appellate court listed several factors to be considered by the trial court in determining whether a jury trial should be granted or denied after a late request. Included were the obviously important considerations of whether granting the request would injure the adverse party, would interfere with the orderly handling of the court's docket, or would unduly delay the trial.

In the case at bar, the record shows that the request for jury trial filed on June 21 was not more than twenty days prior to July 3, the date the case was at that time set for trial. A hearing was held on July 3, or at least an informal conference between counsel and the court, and the order voiding the bond was entered and a continuance for the trial on the merits was granted. The record before us does not disclose that appellants renewed their request for a jury trial at that time. The record shows that the request was renewed only on the day the trial actually took place, July 18. Under ARCP Rule 39(b), the trial court has the discretion to grant a motion for jury trial even though the demand has not been made in keeping with the provisions of ARCP Rule 38. However, in the instant case, the trial court did not use that discretion to grant the motion for jury trial made on July 18. Under the circumstances, we hold that the court did not abuse its discretion in refusing to grant the appellants a trial by jury.

Affirmed.

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

Peter G. CLARK *v.* Lillie B. CLARK

CA 86-185 719 S.W.2d 712

Court of Appeals of Arkansas
Division I
Opinion delivered November 26, 1986
[Rehearing denied December 17, 1986.*]
[Supplemental Opinion Issued December 23, 1986.]

*Mayfield, J., concurs.

The Haskins & Hendricks Law Firm, by: *Robert B. Buckalew*, for appellant.

John D. Bridgeforth, P.A., for appellee.

TOM GLAZE, Judge. In October 1985, appellee filed for divorce against appellant, alleging general indignities. While seven children had been born to the parties since 1966, the parties had not married until November 1978. Two of the children were born after the parties' marriage, but appellant acknowledges all seven are his. Appellee admitted that she had married another man in Chicago in 1962 when she was fourteen years old and had never obtained a divorce from him. Neither party knew where appellee's first husband could be located, and appellee testified that she had not seen him since 1974. Appellant admitted that he had known of appellee's prior marriage and claimed he had tried on several occasions to help appellee dissolve that marriage. The chancery court found the parties never had a valid marriage, and therefore, it could not grant a divorce or settle their property rights. Nonetheless, the court found it had jurisdiction to determine paternity, to award custody of the parties' children to appellee and to order child support in the amount of $450.00 to be paid by the appellant.

On appeal, appellant contends that the chancery court erred in retaining jurisdiction of this cause once he determined the parties were not legally married and no divorce could be granted. In support of his contentions, appellant urges the supreme court's holding in *Stain* v. *Stain*, 286 Ark. 140, 689 S.W.2d 566 (1985),

controls the facts here. We disagree.

In *Stain*, the parties were married in November 1981, and a divorce action was commenced in September 1982. One child had been born to the parties but over a year before their marriage. In her divorce complaint, Mrs. Stain alleged her husband was the father of this child and requested child support. The husband admitted paternity but challenged the chancery court's decision that it had jurisdiction to decide the paternity issue or award child support. The supreme court agreed, relying on article 7, section 28, of the Arkansas Constitution, which provides in pertinent part that "[t]he county courts shall have exclusive original jurisdiction in all matters relating to . . . bastardy. . . ." Citing *Higgs* v. *Higgs*, 227 Ark. 572, 299 S.W.2d 837 (1957), and *Rapp* v. *Kizer, Chancellor*, 260 Ark. 656, 543 S.W.2d 458 (1976), the supreme court ruled that the *Stain* case involved a matter relating to bastardy and, accordingly, reversed the lower court's decision. This case differs from *Stain*, however, because here the validity of the parties' marriage itself is the ultimate question, not whether chancery court has jurisdiction over paternity. Obviously, if the parties' marriage is valid, the chancery court clearly has jurisdiction of appellee's divorce action. In this respect, we find the chancery judge here was clearly erroneous in determining the parties' marriage was invalid, and we remand for further proceedings consistent with this opinion.

Under Ark. Stat. Ann. § 55-108 (Repl. 1971), a bigamous marriage is void from its inception, and no decree of any court is required to declare it so. *Smiley* v. *Smiley*, 247 Ark. 933, 448 S.W.2d 642 (1970); *Goset* v. *Goset*, 112 Ark. 47, 164 S.W. 759 (1914). However, it is a longstanding presumption of law that a marriage entered in due form is valid, and the burden of proving a marriage invalid is upon the party attacking its validity. It is presumed that, when a man and woman are married, and one has a living spouse, the former spouse has been divorced at the time of the marriage. *Higgins* v. *Higgins*, 266 Ark. 953, 588 S.W.2d 454 (1979); *Lathan* v. *Lathan*, 175 Ark. 1037, 1 S.W. 67 (1928); *Cash* v. *Cash*, 67 Ark. 278, 54 S.W. 744 (1899).

Further, there is the additional presumption that the former spouse was dead at the time of the second marriage. *Goset* v. *Goset*, 112 Ark. 47, 164 S.W. 759 (1914). The presumptions of divorce from or death of a previous spouse are so strong that they

exist despite the fact that overcoming them involves proof of a negative, i.e., proof of no divorce and/or proof that the previous spouse is still living. *Estes* v. *Merrill*, 121 Ark. 361, 181 S.W. 136 (1915).

Here, appellant failed in his burden of proving his marriage to appellee was invalid. The only testimony tending to rebut the presumption that appellee's former spouse had been divorced was that of the parties' testimony that appellee had not obtained a divorce. There was no evidence at all that appellee's former spouse had not divorced appellee. The evidence was not sufficient to overcome the presumption of divorce. Neither did appellant produce any proof that appellee's former spouse was alive, which leaves intact the presumption that he was dead.

We decide cases *de novo* on the record, and chancery cases will not be remanded for further proceedings when we can plainly determine from the record the rights and equities of the parties. *Moore* v. *City of Blytheville*, 1 Ark. App. 35, 612 S.W.2d 327 (1981). However, this court may in appropriate circumstances exercise its discretion to remand so that the pertinent facts, not fully developed, may be ascertained. *Id.*

In this divorce case, a temporary hearing and a contempt proceeding were the only proceedings held. Only the parties testified, and as we have said, appellant failed to show his and appellee's marriage was invalid. Since the chancellor erroneously found that the parties had never been married and, consequently, that he did not have jurisdiction to entertain the divorce action, this cause is remanded for further proceedings on appellee's complaint for divorce.

Reversed and remanded.

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

Supplemental Opinion on Denial of Rehearing
December 23, 1986

725 S.W.2d 1

TOM GLAZE, Judge. Appellant has petitioned for rehearing on three separate points, one of which we believe has some merit and requires a clarification of our opinion in this case issued November 26, 1986. Consequently, this supplemental opinion is issued.

In our earlier opinion, we held that the chancellor erred in determining that the parties had never been married and that he had no jurisdiction to entertain the parties' divorce action. That being the case, we remanded this cause for further proceedings on appellee's complaint for divorce which would include custody, support and related matters concerning the children born of the parties' marriage. Of course, the record, as appellant correctly points out, reflects that five of the parties' seven children were born prior to the marriage of the parties in 1978.

We previously noted that *Stain* v. *Stain*, 286 Ark. 140, 689 S.W.2d 566 (1985), holds that article 7, section 28, of the Arkansas Constitution, demands that all matters "relating to . . . bastardy . . ." be heard in the county courts. *See Higgs* v. *Higgs*, 227 Ark. 572, 299 S.W.2d 837 (1957); *Rapp* v. *Kizer, Chancellor*, 260 Ark. 656, 543 S.W.2d 458 (1976). The *Stain, Higgs*, and *Rapp* cases make it clear that any issues, concerning paternity, custody or support for any children of the parties born prior to the 1978 marriage lie in the county court, not chancery court. As the supreme court mentioned in *Stain*, we too are restrained by the provisions of the Arkansas Constitution even though the reason for placing jurisdiction in the county court no longer exists and, indeed, may seem inappropriate in a case such as this.

This cause is reversed and remanded for proceedings not inconsistent with this opinion and our opinion of November 26, 1986.

MAYFIELD, J., concurs.

MELVIN MAYFIELD, Judge, concurring. I concur in the denial of rehearing in the above case only because the appellant did not produce any evidence to overcome the presumption that appellee's former spouse was dead.

Roy GARLAND *v.* WINDSOR DOOR, NATIONAL UNION FIRE INS. CO. and STATE of Arkansas, Second Injury Fund

CA 86-290 719 S.W.2d 714

Court of Appeals of Arkansas
Opinion delivered November 26, 1986

Philip M. Wilson, for appellant.

Walter A. Murray Law Firm, by: *William C. Frye*, for appellee Windsor Door.

PER CURIAM. The appellee Windsor Door has moved that the appellant's appeal be dismissed, contending that the appellant failed to make it a party on appeal. Upon reviewing the case, we agree and dismiss the appellant's appeal.

The appellant's claim was originally brought against both Windsor Door and the Second Injury Fund for temporary total disability and medical benefits. The administrative law judge, *by agreement of the parties*, dismissed the Second Injury Fund as a party because the threshold issue of compensability had not yet been determined and permanent disability was not at issue. After hearing the evidence, the A.L.J. further found that the appellant had failed to prove by a preponderance of the credible evidence that his current condition was related to his employment with Windsor Door. The appellant appealed this decision to the Workers' Compensation Commission on the issues of compensability, temporary total disability, medical expenses, and controversion. The Commission affirmed and adopted the A.L.J.'s opinion. The appellant then filed his *pro se* notice of appeal "on the Second Injury Fund only." The only issue he raises on appeal is whether there is sufficient evidence to support the Commission's finding that his condition is not work-related. The appellant has at no time raised the dismissal of the Second Injury Fund as an issue before either the Commission or this Court.

All persons necessary to a final determination of the matter in issue must be parties on an appeal from a decision of the Commission. 101 C.J.S. *Workmen's Compensation* § 798 (1958). A notice of appeal must be specific and will be judged by what it recites, not by what the appellant intended for it to recite. 4A C.J.S. *Appeal & Error* § 593(1) (1957). The notice of appeal must be addressed and framed to disclose unequivocally the party for whom it is intended and who will be affected by the appeal. 4A C.J.S. *Appeal & Error* § 593(3) (1957). The fact that the notice of appeal is *pro se* is immaterial, as *pro se* litigants are held to the same standards as attorneys and must follow the rules of appellate procedure. *Perry* v. *State*, 287 Ark. 384, 699 S.W.2d 739 (1985); *accord Van Bibber* v. *Laster*, 289 Ark. 87, 709 S.W.2d 90 (1986).

Here, the appellant's motion is directed to "the Second Injury Fund *only*" (emphasis added), a party which had already been dismissed from the suit by agreement of all parties. The dismissal of the Second Injury Fund by the A.L.J. was proper, as the Second Injury Fund can only be held liable in cases of work-related injuries causing a permanent disability. Ark. Stat. Ann. § 81-1313(i) (Supp. 1985). The appellant was not asking for

permanent disability at that time, only medical expenses, temporary total disability, and attorneys' fees. The only party which could be found liable for these expenses was Windsor Door, the employer. Windsor Door is therefore a necessary party who should have been named on the notice of appeal.

Because the appellant failed to properly make the appellee Windsor Door a party on appeal and because the Second Injury Fund was no longer a party at the time the Commission's decision was rendered, the appellant has failed to name *any* appellee against whom this appeal could be perfected. We must, therefore, dismiss this appeal.

Dismissed.

BIG A WAREHOUSE DISTRIBUTORS, INC. *v.* RYE AUTO SUPPLY, INC., John JOPLIN, and Martin GIPSON

CA 85-524 719 S.W.2d 716

Court of Appeals of Arkansas
Division I
Opinion delivered December 3, 1986

Felver A. Rowell, Jr., for appellant.

W.J. Walker and *Frank A. Poff, Jr.*, for appellee Rye Auto Supply, Inc.

Harold W. Madden, for appellee John Joplin.

Zachary D. Wilson, for appellee Martin Gibson.

JAMES R. COOPER, Judge. This is an appeal from the trial court's dismissal of the appellant's third-party complaint with prejudice. On the morning of trial, the complaint was dismissed on the motion of the third-party defendants, appellees John Joplin and Martin Gipson, for failure to state a cause of action. We affirm the court's decision, modifying the dismissal to be without prejudice.

On January 26, 1984, the appellant, Big A Warehouse Distributors, Inc., (Big A) was sued by the appellee Rye Auto Supply, Inc. (Rye) for $15,620.44, the sum Rye alleged was owed by Big A for goods, wares, and merchandise it received from Rye. Big A denied the indebtedness in its answer and on July 25, 1984, with leave of the court, filed a third-party complaint against Joplin and Martin. In granting Joplin and Martin's motion to dismiss, the trial court stated:

> The record will reflect that this is occurring on the morning of the trial. That back in July, we had a pre-trial conference on this matter, at which time the Court expressed it's[sic] utter frustration at the State [sic] of the pleadings. That I have reviewed the pleadings just this morning, again, the third-party complaint, in particular, and the third-party complaint simply states a defense to the claim of Rye Auto, that, if, in fact, it believes, "the beliefs stated are true", they are not as allegations, as I understand it, but they are beliefs that Big A has, that

there was some hanky-panky going on between the managers of these two firms, if they were true, and, as a result of which, Big A did not get the merchandise, Big A had an absolute defense to the claim of Rye. If, on the other hand, there was some hanky-panky, and, in spite of that, Big A got the merchandise, he owes for it. The burden is on Rye Auto to prove that Big A got the merchandise, Big A has an obligation to pay for it, it's that simple.

The allegations against these two managers does not state a cause of action against them, it just simply says that they were engaged in some kind of conspiracy.

Let the record reflect, very clearly, that the Court does not intend to inhibit the defendant from showing a conspiracy, or any hanky-panky, but, to make these two men parties to the action, there's no basis for it. If, in fact, Big A owes for the merchandise, it matters not whether these men were guilty of conspiracy; and, if they didn't get the merchandise, they can show it by the conspiracy, be evidence, but not as a cause of action.

Big A argues that it was entitled to maintain a third-party action because Joplin and Gipson were liable to it for all or part of Rye's claim against it, citing Ark. R. Civ. P. 14. However, Rule 14 also provides that the third-party defendants may raise defenses against the third-party plaintiff as provided in Ark. R. Civ. P. 12. Joplin and Gipson did just that. They moved for a judgment on the pleadings under Rule 12(c), claiming that, under Rule 12(b)(6), the third-party complaint failed to state facts upon which relief could be granted. It is a settled rule of law that a pleading will be judged by its contents. *Martin* v. *Citizens Bank of Beebe*, 283 Ark. 145, 671 S.W.2d 754 (1984). In considering a motion for judgment on the pleadings for failure to state facts upon which relief can be granted, under 12(b)(6), the facts alleged in the complaint are treated as true and are viewed in the light most favorable to the party seeking relief. *McAllister* v. *Forrest City Street Improvement District*, 274 Ark. 372, 626 S.W.2d 194 (1981). A complaint or third party claim must contain a "statement . . . of facts showing that the pleader is entitled to relief . . . ." Ark. R. Civ. P. 8(a). Failure to do so is grounds for dismissal under Rule 12(b)(6); *Harvey* v. *Eastman*

Kodak Co., 271 Ark. 783, 610 S.W.2d 582 (1981); *Thompson-Holloway Agency* v. *Gribben*, 3 Ark. App. 119, 623 S.W.2d 528 (1981). The facts constituting the cause of action must be pled in direct and positive allegations, not by way of argument, inference, or belief. *Kohlenberger* v. *Tyson's Foods, Inc.*, 256 Ark. 584, 510 S.W.2d 555 (1974). Furthermore, statements of generalities and conclusions of law are not sufficient to state a cause of action. *Files* v. *Hill*, 268 Ark. 106, 594 S.W.2d 836 (1980); *Gribben*, 3 Ark. App. at 123.

Upon examination of Big A's third-party complaint, we note that the action Big A is attempting to bring is an action in trover, for the conversion of personal property, in this case the merchandise that Rye claims to have delivered to Big A. To be sufficient, the complaint must state that the plaintiff had a property interest in the subject goods and that the defendant wrongfully converted them. *Sevier* v. *Holliday*, 2 Ark. 512, 576-7 (1840). While a failure to plead either may be cured by a verdict, it is fatally defective upon a general demurrer, or in this case, a motion under Rule 12(b)(6). *Id.*[1] The property interest may be shown by a possession or a present right to possession when the defendant cannot show a better right, since possession carries with it a presumption of ownership. *Arkansas Airmotive Division of Currey Aerial Sprayers* v. *Arkansas Aviation Sales*, 232 Ark. 354, 335 S.W.2d 813 (1960). The act of conversion is "the exercise of dominion over property in violation of the rights of the owner or person entitled to possession." *Quality Motors* v. *Hays*, 216 Ark. 264, 268, 225 S.W.2d 326, 328 (1949). The conversion need not be a manual taking or for the defendant's use: if the defendant exercises control over the goods in exclusion, or defiance, of the plaintiff's right, it is a conversion, whether it is for his own or another's use. *Gentry* v. *Madden*, 3 Ark. 127 (1840).

The third-party complaint is full of inferences, beliefs and conclusions of law; however, after examining the facts alleged in the third-party complaint and taking them all to be true, we find it to fall short of stating a cause of action for trover. While the facts, if true, show that Joplin and Gipson exercised control over Rye's

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[1] The adoption of the Rules of Civil Procedure abolished general demurrers, replacing them with motions under Rule 12(b)(6). *Files*, 268 Ark. at 111 n.1.

property, at no time does the pleading allege that Big A had any interest in, or right to possess, the property. As noted earlier, an allegation of an ownership interest or right to possession is essential to a case of action for trover. Failure to do so is fatal. This case is similar to the above-cited case of *Quality Motors*, where the court held that the plaintiff could not claim the defendant converted the car when it denied owning the car. Here, the appellant has made no allegation of ownership or right of possession and indeed, in its answer to Rye's complaint, denied ordering or receiving the property.

Big A also contends that the court should have allowed it to put on evidence from which the pleadings could be amended to conform to the truth. In determining whether the court correctly ordered judgment on the pleadings, we look to the allegations appearing in the face of the complaint; evidence proffered and excluded is not to be considered. *See Files*, 268 Ark. at 110-11; Ark. R. Civ. P. 12(c). Indeed, it is improper to look at anything beyond the pleadings, unless the court is treating the motion as one for summary judgment. Rule 12(c); *see Guthrie* v. *Tyson Foods, Inc.*, 285 Ark. 95, 685 S.W.2d 164 (1985). This was not the situation in the case at bar. Amendment of the pleadings is within the discretion of the trial court, unless the evidence has already been presented at trial with the express or implied consent of the parties. Ark. R. Civ. P. 15(b). Here no evidence had yet been presented in the cause, and the third-party defendants had objected to the state of the pleadings. The trial court did not abuse its discretion by refusing to allow Big A the opportunity to shore up its defective pleading with evidence.

Even if the third-party complaint had stated a cause of action, the court's dismissal would not be error. Rye's claim against the appellant was for the payment of accounts. The claim the appellant might have against Joplin and Gipson would sound in trover. The proof in the second cause of action would relate entirely to whether Joplin and Martin converted to their own use property of the appellant. The proof in Rye's cause of action relates solely to whether that same property was delivered to the appellant, making the appellant liable to Rye for payment. The only common denominator in the two cases is the property involved. This case is virtually indistinguishable from the case of *Nolen* v. *Prickett*, 268 Ark. 369, 596 S.W.2d 693 (1980), where

The Supreme Court, in upholding the trial court's decision to quash the appellant's third-party complaint, stated " '. . . A defendant cannot assert an entirely separate claim against a third party under Rule 14, even though it arises out of the same general set of facts as the main claim.***' " 268 Ark. at 372 (quoting 3 Moore Federal Practice 14.04 [sic]). The appellant's claim against Joplin and Gipson constitutes just such a separate claim.

The court, however, should not have dismissed the appellant's complaint with prejudice. The appellant should have had the opportunity to plead further; by dismissing his third-party claim with prejudice, the court denied him that opportunity. *See Ratliff* v. *Moss*, 284 Ark. 16, 678 S.W.2d 369 (1984). Therefore, the order of dismissal is modified to be without prejudice, and the judgment is affirmed as modified.

Affirmed as modified.

CLONINGER and MAYFIELD, JJ., agree.

Charles Ray NELKE *v.* STATE of Arkansas

CA CR 86-107 720 S.W.2d 719

Court of Appeals of Arkansas
Division I
Opinion delivered December 10, 1986
[Rehearing denied January 14, 1987.]

John W. Settle, for appellant.

Steve Clark, Att'y Gen., by: *J. Blake Hendrix*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. This is an appeal from the appellant's misdemeanor conviction for criminal nonsupport, under Ark. Stat. Ann. § 41-2405 (Supp. 1985) by a Sebastian County Circuit jury. The appellant was fined $1,000.00 and sentenced to one year in jail. The appellant raises two points for reversal: The trial court erred in allowing testimony concerning the "impact" of the appellant's alleged failure to pay child support and in not granting the appellant's motion for directed verdict at the close of the State's case. We find no error and affirm the conviction.

Because a motion for a directed verdict is a challenge to the sufficiency of the evidence, *see Armstrong* v. *State*, 12 Ark. App. 143, 671 S.W.2d 772 (1984), we must first determine whether the trial court's denial of the motion was error. *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984). In reviewing evidence, we look at it in the light most favorable to the State, overturning the verdict only if there is no substantial evidence to support it. *Kennel* v. *State*, 15 Ark. App. 45, 689 S.W.2d 5

(1985).

In this case, the appellant made his motion for directed verdict at the close of the State's case. Upon its denial, he elected to present evidence in his defense. He then renewed his motion at the close of all evidence. The motion was again denied. Both the appellant and the State feel that, under these circumstances, the reviewing court is to consider only the evidence put on by the State. The appellant cites no authority for this proposition, and the State cites *Christian* v. *State*, 6 Ark. App. 138, 639 S.W.2d 78 (1982). This, however, is not the correct standard of review. In *Christian* we held that, when a defendant presents additional evidence and fails to renew his motion for direct verdict at the conclusion of the evidence, we look to the entire record to determine the sufficiency of the evidence. 6 Ark. App. at 143. The dispositive factor in *Christian* is the fact that the defendant elected to put on additional evidence, *not* that he failed to renew the motion for directed verdict. In *Walker* v. *County of Washington*, 263 Ark. 317, 564 S.W.2d 513 (1978), the Arkansas Supreme Court stated, "we consider only appellant's second motion for directed verdict since the first motion was waived by subsequently offered proof." 263 Ark. at 320. The court went on to consider evidence presented by the defendant in determining the sufficiency of the evidence. Therefore, because the appellant here also waived his first motion by subsequently offered proof, we too must consider all of the evidence.

Arkansas Statutes Annotated § 41-2405(1) (Supp. 1985) provides:

> A person commits the offense if without just cause he fails to provide support to: . . . (b) his legitimate child who is less than eighteen (18) years old . . . .

In order to make out the offense, the State must show a willful or negligent failure to provide, not a mere failure because of inability. *See Dempsey* v. *State*, 108 Ark. 76, 157 S.W. 734 (1913). The statute construed in *Dempsey* provided: " 'If any man shall, without good cause, . . . fail, neglect or refuse to maintain or provide for such wife, child or children . . . he shall be punished . . . .' " 108 Ark. at 77. The statute now uses the words "just cause" instead of "good cause", however, we find, for purposes of this statute, that these phrases are equivalent in

meaning. *See* § 41-2405 commentary (Repl. 1977); *Black's Law Dictionary* 622, 775 (5th ed. 1979). In the context of the criminal nonsupport statute, "without just cause" means to have the inability to pay. *See Dempsey*, 108 Ark. at 79. While the Arkansas courts have not determined what constitutes an inability to pay in a nonsupport case, our sister states have held that the inability to pay cannot be brought about intentionally and willfully by the defaulting parent. *See People* v. *James*, 89 Ill. App. 3d 157, 411 N.E. 2d 563 (1980); *State* v. *Greer*, 259 Iowa 367, 144 N.W.2d 322 (1966); *State* v. *Arnett*, 370 S.W.2d 169 (Mo. App. 1963); *Commonwealth* v. *Wright*, 289 Pa. Super. 399, 433 A.2d 511 (1981). While the State must prove every element of its criminal nonsupport case beyond a reasonable doubt, it may do so by circumstantial, as well as direct, evidence. *See Hudson* v. *State*, 370 N.E. 2d 983 (Ind. App. 1977); *Arnett*, 370 S.W.2d 169; *Wright*, 433 A.2d 511.

In the case at bar, the appellant's ex-wife testified that she and the appellant were divorced in December, 1980, at which time the appellant was ordered to pay $29.00 a week as child support for their daughter who was 8 years old at the time of the trial. She stated that, since the divorce, the appellant had only paid $115.00 in child support ($100.00 in April, 1985, and $15.00 in November, 1985) and that he was approximately $7,000.00 behind in his support. She further testified that, at the time of their divorce and for a while thereafter, the appellant was working at Baldor Electric. The appellant testified that he worked for Baldor for close to a year after the divorce, until he was fired for drinking on the job. He stated that, shortly after being fired, he worked at a pottery plant for three months and then moved to a farm. The appellant stated that he has been working for ranchers the past three or four years for room and board, with the exception of the chicken farm where he made an additional $125.00 per week. He testified that he worked at this last job for about a year, until he was arrested for non-support. The appellant said he would not get a factory job, because when he worked indoors he "was closed up and [he] couldn't stay." We find this evidence of the appellant's duty, failure, and ability to pay support sufficient to uphold his conviction.

The appellant also contends that the trial court erred in admitting evidence showing the impact of his failure to pay support on the child. The appellant contends that this evidence is

irrelevant and inadmissible, citing Ark. Stat. Ann. § 28-1001, Unif. R. Evid. 410, 402, and 403 (Repl. 1979) (now Ark. R. Evid. 410, 402, and 403). The evidence complained of consists of the ex-wife's testimony that, because of the appellant's failure to provide support, she was unable to pay a babysitter for the child while working, and the child received subsidized school lunches. Evidence in this case clearly shows that the appellant has failed, without just cause, to provide support for his minor daughter. Under these circumstances, we do not need to determine whether it was error to admit "impact" testimony, because, even if it were error, we find no prejudice. We do not grant reversal for non-prejudicial error. *Vasquez* v. *State*, 287 Ark. 468, 702 S.W.2d 411 (1985); *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984), *cert. denied* 105 S.Ct. 1847 (1985).

Affirmed.

CLONINGER and MAYFIELD, JJ., agree.

SHELTER INSURANCE COMPANY *v.* Carl and Lois HUDSON

CA 86-228 720 S.W.2d 326

Court of Appeals of Arkansas
En Banc
Opinion delivered December 10, 1986

Adams Law Firm, by: *Donald J. Adams*; and *Matthews & Sanders*, by: *Marci L. Talbot*, for appellant.

Walker & Campbell Law Firm, by: *Gail Inman-Campbell*, for appellee.

JAMES R. COOPER, Judge. The appellees purchased from the appellant a standard homeowner's policy to cover their home and three outbuildings on thirteen acres in Boone County, Arkansas. The policy language which defined coverage stated that the policy did not cover "structures used to any extent for business purposes" and defined "business" as "any full time or part time trade, profession or occupation." The appellees' barn was damaged by a windstorm, and they filed a claim. The appellant denied coverage because, subsequent to purchasing the policy, the appellees purchased eleven head of cattle which they kept on the premises, and they allowed their son to keep nine head of cattle on the premises. Shelter contended that the appellees were in the cattle business and that there was no coverage for a loss to structures used for business purposes. The trial court, sitting as the finder of fact, found that the limited number of cattle owned by the appellees did not constitute a "business" under the terms of the policy; that there was no evidence that the barn was used in business and awarded a judgment to the appellee for $1,743.00, twelve percent statutory penalty plus their costs and attorney's fees of $500.00. From this judgment, the appellant appeals, contending that the trial court's findings that the business exclusion did not apply is clearly erroneous. We disagree and affirm by memorandum opinion pursuant to section (a) of our per curiam *In re Memorandum Opinions*, 16 Ark. App. 301, 700

S.W.2d 63 (1985).

The law in Arkansas is that a loss suffered by an insured is a covered one unless it is excluded by an exception. *Allstate Insurance Co.* v. *Martens*, 5 Ark. App. 157, 633 S.W.2d 715 (1982). Courts are required to strictly interpret exclusions to insurance coverage and to resolve all reasonable doubts in favor of an insured. *Geurin Contractors, Inc.* v. *Bituminous Casualty Corp.*, 5 Ark. App. 229, 636 S.W.2d 638 (1982). Whether an activity is a business pursuit is almost always a factual question presented for the determination by a court. *U. S. Fire Insurance Co.* v. *Reynolds*, 11 Ark. App. 141, 667 S.W.2d 664 (1984).

Here, the appellant contends that, because the appellee Carl Hudson gave the response "admitted" to the appellant's request "[p]lease admit that the barn described in the plaintiff's complaint was used to help raise cattle," he acknowledged that the barn was used for business purposes. The appellee Hudson, however, did not admit he raised the cattle for business purposes but testified that he purchased eleven cows for grass control purposes and that, when the grass began getting thin, he sold part of them. He also stated that he did not receive rent from his son for allowing him to keep his cows on the property, and, although he could not say that he had not fed the cattle hay from the barn, basically the barn was not used in raising the cattle. The only evidence the appellant introduced to dispute Hudson's testimony was the appellees' 1984 tax return, which indicated that the appellees made a $325.00 profit on their farming operation and took a $6,995.00 farming deduction.

Findings of fact of a circuit court sitting as a jury will not be reversed on appeal unless clearly against a preponderance of the evidence, and in making that determination, we give due regard to the superior opportunity of the trial court to judge the credibility of the witnesses and the weight to be given to their testimony. *Jones* v. *Innkeepers, Inc.*, 12 Ark. App. 364, 676 S.W.2d 761 (1984); ARCP Rule 52(a).

In the case at bar, the trial court made two primary findings of fact: first, that the appellee was not in "business," and second, that the barn was not used in a "business." There is clear and uncontradicted testimony that the barn was not used in any business. No witness testified that the barn was used in any

business. The only substantive evidence that the appellees were involved in the cattle business was provided by the appellees' 1984 income tax return. The conflict in the evidence was for the finder of fact to resolve.

We do not find that the trial court's decision was clearly erroneous or against the preponderance of the evidence.

Affirmed.

GLAZE, J., dissents.

SECURITY INSURANCE CORPORATION OF HARTFORD d/b/a FIRE AND CASUALTY OF CONNECTICUT, et al. *v.* Johnny C. HENLEY

CA 85-493 720 S.W.2d 328

Court of Appeals of Arkansas
Division II
Opinion delivered December 10, 1986

Davidson, Horne & Hollingsworth, A Professional Association, for appellant.

Armstrong & Binns, for appellee.

DONALD L. CORBIN, Judge. Appellants, Security Insurance Corporation of Hartford d/b/a Fire and Casualty of Connecticut, and Reynolds Insurance Agency, Inc., appeal a jury verdict in the amount of $35,455.19 in favor of appellee, Johnny C. Henley. This lawsuit was tried on the basis of appellants' alleged

breach of an oral agreement to insure appellee's Mack truck for physical damages and lost profits plus a statutory twelve percent penalty and attorney's fees. We reverse and remand.

In August of 1983, appellee Henley contacted the Frank/Watson Agency in Dumas, Arkansas, to obtain insurance for a Mack truck. The Frank/Watson Agency placed a request for coverage on the truck through appellant Reynolds Insurance Agency, Inc., a licensed agent for appellant Security Insurance Corporation of Hartford, and later forwarded a written application which contained a signature that appellee admitted looked like his signature. At this time there was an existing policy with appellant Security Insurance Corporation of Hartford which covered an International truck owned by appellee and used in his hauling business. On August 11, 1983, the Mack truck was damaged in a single vehicle accident. The damage was evaluated by Crawford and Company, an appraiser appointed by appellant Security Insurance Corporation of Hartford. Appellant Security Insurance Corporation of Hartford's check was subsequently issued to appellee for the physical damage to the Mack truck but the check was never negotiated by appellee. After appellee claimed to have discovered additional physical damage to the Mack truck, and upon obtaining an appraisal, appellant Security Insurance Corporation of Hartford offered to pay the appraised amount of the damage but would not pay the claim for lost profits. Appellee declined the offer and this lawsuit was instituted.

Appellants contend that appellee produced no proof of authority to bind appellants to an alleged oral contract to insure for loss of use, and the trial court erred in its refusal to direct a verdict for appellants. Pursuant to ARCP Rule 50(a), appellants moved for a directed verdict at the close of appellee's evidence as well as at the close of all of the evidence, which motions the trial court denied.

Appellee testified that he went to the Frank/Watson Agency to obtain insurance on his Mack truck. He stated he dealt with Millie Rhodes Corker, an employee of the Frank/Watson Agency. He informed Ms. Corker that he wanted $500,000 worth of liability. He was asked about the value of his truck which he stated was $13,500, and testified that he told Ms. Corker he wanted to be insured for everything, including down time. He

wrote a check for $350 for the down payment. He also testified that he was never told by a company representative nor led to believe that he was not protected for down time.

Millie Rhodes Corker of the Frank/Watson Agency testified that she knew appellee and recalled his coming in and requesting coverage on an additional truck. She stated that she supplied John Reynolds of Reynolds Insurance Agency, Inc., in Little Rock with the information provided by appellee. Ms. Corker identified a document entitled "Truck Application" dated August 8, 1983. She stated that she made sure when appellee signed the application that she had applied for all of the coverage appellee desired. She testified that she did not recall that appellee asked her to get coverage for loss of use on the Mack truck.

John Reynolds of Reynolds Insurance Agency, Inc., testified that he was an insurance agent and had been in the insurance business for approximately thirty years. He noted that most of his business consisted of truck insurance. He was the general agent for appellant Security Insurance Corporation of Hartford and was the agent through whom the Frank/Watson Agency acquired insurance for appellee. He reviewed the policy covering appellee's International truck and stated that there was not a loss of use provision in the policy. Reynolds noted that if Ms. Corker of the Frank/Watson Agency had been told that appellee wanted the down time coverage or loss of use coverage and had indicated to him that it was desired, it should have appeared on the application. The coverage, however, was not requested on the application and appellee did not deny that it was signed by him.

Reynolds also testified that he had been contacted by the Frank/Watson Agency with a request to add a Mack truck to appellee's policy. He received the premium and notified appellant Security Insurance Corporation of Hartford. Reynolds stated that when he called the request in to appellant Security Insurance Corporation of Hartford, the Mack truck was immediately covered. He explained that the coverage on appellee's Mack truck was based upon the application inasmuch as the truck was wrecked within hours of his binding the coverage, noting that it was not necessary to add a written endorsement in order to afford coverage. Reynolds testified that if the Frank/Watson Agency told appellee he had loss of use coverage, such a statement could

not have bound appellant Security Insurance Corporation of Hartford. He explained that there was no such thing as loss of use coverage on that type of policy. Reynolds stated that the Frank/Watson Agency was not an agent of the insurance company with binding authority, but rather appellee's agent.

Certified copies of the agent record cards from the Arkansas Insurance Department were received into evidence which contained the names of the insurers for which the Frank/Watson Agency was licensed to act as agent. The cards established that it held no appointments as agent for either of the appellants.

David R. Newbert, the Midwest Division Claims Manager for appellant Security Insurance Corporation of Hartford, testified that he had never heard of the company's writing loss of use coverage for a vehicle.

The trial court has a duty, when requested to grant a motion for directed verdict, to consider whether the evidence against whom the motion is made, when given its strongest probative force, presents a *prima facie* case; however, if the evidence viewed in that light would require the setting aside of a jury verdict for the party against whom the motion is made, it is error to refuse to grant the motion for directed verdict. *See Henley's Wholesale Meats, Inc.* v. *Walt Bennett Ford, Inc.*, 4 Ark. App. 362, 631 S.W.2d 316 (1982).

It is well settled law that the insured or beneficiary of an insurance policy has the burden of proving coverage. *Snow* v. *Travelers Insurance Co.*, 12 Ark. App. 240, 674 S.W.2d 943 (1984). Arkansas is one of the states that makes the distinction between the authority of general agents and special agents of insurance companies. A general agent is one who has authority to transact all business of the company of a particular kind and whose powers are *prima facie* coextensive to the business entrusted to his care. *Commercial Standard Insurance Co.* v. *Moore*, 237 Ark. 845, 376 S.W.2d 675 (1964). On the other hand, our courts have consistently and repeatedly held that a soliciting agent does not have authority to make contracts on behalf of the insurer. *American National Insurance Co.* v. *Laird*, 228 Ark. 812, 311 S.W.2d 313 (1958). Notice to a soliciting agent is not notice to the company. A soliciting agent has no authority to waive any of the policy requirements, nor can his knowledge be

imputed to the company he represents. *Continental Insurance Companies* v. *Stanley*, 263 Ark. 638, 569 S.W.2d 653 (1978). The burden is on the plaintiff to prove that such an agent has real or apparent authority to bind his principal by contract. *American National Insurance Co.* v. *Laird, supra.* Arkansas follows the general rule that terms of an oral agreement to insure will be enforced if made by a general agent, or on behalf of the company by one acting within the scope of his actual or apparent authority. *National Automobile Insurance Co.* v. *Dalton*, 214 Ark. 120, 214 S.W.2d 507 (1948).

In the case at bar we do not think there is any substantial evidence from which the jury could find that Ms. Corker or the Frank/Watson Agency was clothed with any authority beyond that ordinarily exercised by a soliciting agent. Appellee's contention that the Frank/Watson Agency acted as a general agent by collecting his premium is without merit inasmuch as the collection of premiums is one of a soliciting agent's ordinary duties. *American National Insurance Co.* v. *Laird, supra.* Appellee also argues that the conduct of appellants was of a character that justified the reasonable belief on his part that the Frank/Watson Agency was a general agent. In this respect, he relies upon the fact that he had previously secured coverage on his International truck through the Frank/Watson Agency and that the insurance company actually recognized coverage on the Mack truck by issuing its check to pay the physical damage on that truck. However, we do not find any substantial evidence to support a finding by the jury that either the Reynolds Insurance Agency or Security Insurance Corporation of Hartford ever agreed to insure the Mack truck for loss of use. In fact, appellants adduced evidence establishing that the company did not write insurance for loss of use coverage. Accordingly, since there is no substantial evidence that the Frank/Watson Agency was a general agent and no substantial evidence that either of the appellants agreed to insure the Mack truck for loss of use, the trial court erred in its refusal to direct a verdict against appellee on that issue. In view of our disposition of this issue, we do not find it necessary to address appellants' arguments that (1) appellee failed to prove the essential terms of an alleged oral contract; and (2) appellee's evidence of lost profits was entirely speculative.

Since we must remand this case for another trial to

determine the extent of physical damages to the Mack truck, we will address an evidentiary issue raised by appellants which is likely to arise on retrial. Appellants argue that the trial court erred in admitting appellee's invoices and repair estimates into evidence to establish the amount of physical damage. An invoice and two repair estimates were admitted over appellants' objection on the basis that they constituted inadmissible hearsay, that appellee had failed to establish a proper foundation and the evidence was irrelevant. These exhibits were introduced through the testimony of appellee, not by the persons who prepared or issued them. Appellants contend these exhibits constitute inadmissible hearsay and rely upon the supreme court's holding in *Home Mutual Fire Insurance Co.* v. *Hagar*, 242 Ark. 693, 415 S.W.2d 65 (1967). The court there held that an estimate of repairs offered by the plaintiff as proof of his damages was inadmissible hearsay in the absence of the testimony of the author. We agree with appellants' argument and hold that the admission of these exhibits was prejudicial and constitutes reversible error. *See Wallin* v. *Insurance Co. of North America*, 268 Ark. 847, 596 S.W.2d 716 (Ark. App. 1980).

Finally, appellants argue that the trial court erred in assessing a statutory twelve percent penalty and attorney's fee and that the attorney's fee awarded was excessive. It is well settled in Arkansas that in order for an insured to be entitled to a twelve percent penalty and attorney's fees pursuant to Ark. Stat. Ann. § 66-3238 (Repl. 1980), the plaintiff must recover the exact amount claimed. *Cato* v. *Arkansas Municipal League Municipal Health Benefit Fund*, 285 Ark. 419, 688 S.W.2d 720 (1985). In the instant case, the record reflects that appellee prayed for an award of $15,573.54 in compensatory damages and $47,200 for lost work time in his complaint. In view of our holding that appellee cannot recover for loss of use, the statutory twelve percent penalty and the trial court's allowance of attorney's fees must be reversed also. Of course, we do not know what amount appellee may seek to recover in a new trial, but if he seeks an amount that is contested and recovers the amount sought, the penalty and attorney's fees should be allowed. This is true inasmuch as the trial court may permit amendments to the pleadings for the second trial. *See American National Insurance Co.* v. *Laird, supra*; *Stucker* v. *Hartford Accident & Indemnity*

Co., 222 Ark. 268, 258 S.W.2d 544 (1953).

Reversed and remanded.

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

Johnnie Lee TUBBS *v.* STATE of Arkansas

CA CR 86-51 720 S.W.2d 331

Court of Appeals of Arkansas
Division I
Opinion delivered December 10, 1986

Bullock & McCormick, for appellant.

Steve Clark, Att'y Gen., by: *Robert A. Ginnaven, III*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a conviction of theft by receiving. Appellant was sentenced to one year in the Pope County Detention Center and a $1,000.00 fine.

The evidence shows that in August of 1984, James Hitchcock purchased a young calf outside the Conway Sale Barn from James Blackman. Hitchcock took the calf to the farm of J. D. Pennington to board it. Three days later, it was stolen. In March 1985 Hitchcock and Pennington went to a meeting of the Arkansas Cattlemen's Association. During a discussion of the problem of cattle thieves, Mr. and Mrs. B. B. Carter became aware that a calf they had purchased in late August 1984 matched the description of the calf that had been stolen from Hitchcock. They all went to the Carters' place and Hitchcock identified the calf, now several months old, as the one stolen from him. The Carters named appellant as the person who had sold them the calf. Appellant contended he had gotten the calf from Phillip Chenowith, who had bought it at the sale in Atkins. Appellant said he was with Chenowith when he bought the calf and that he sold calves for Chenowith by agreement.

Appellant first argues that the trial court erred in failing to grant his motion for directed verdict and his motion for judgment notwithstanding the verdict as there was not sufficient evidence to sustain his conviction.

A motion for directed verdict is a challenge to the sufficiency of the evidence; it is proper only where there are no factual issues to be determined. In a criminal case, the test is whether there is substantial evidence to support the verdict and, on appeal, it is only necessary to view that evidence which is most favorable to the appellee in determining whether there is substan-

tial evidence. *Clark* v. *State*, 15 Ark. App. 393, 695 S.W.2d 396 (1985). To be substantial, the evidence must do more than merely create a suspicion; it must be of sufficient force and character as to force the mind beyond conjecture and compel a conclusion one way or the other with reasonable certainty. *Biniores* v. *State*, 16 Ark. App. 275, 701 S.W.2d 385 (1985).

In this case, there is evidence that on August 30, 1984, the appellant sold a calf, which was less than a week old, to the Carters and that it matched the description of a calf that had been stolen from Hitchcock the day before. Moreover, there is very little evidence that Chenowith had purchased the calf at the sale. The owner of the sale barn would not identify the calf as having been sold through his barn, Chenowith did not have any documentation at the trial to show he purchased the calf at the sale, and the appellant admitted he knew Chenowith had stolen cattle before. Theft by receiving only requires that one receive, retain, or dispose of the stolen property knowing, or having good reason to believe, that it was stolen. Ark. Stat. Ann. § 41-2206 (Repl. 1977). The commentary to the statute states that "the jury need not find that the actor actually knew that the property was stolen; it is sufficient that he was on notice of facts that would lead a reasonable person to entertain such a belief." Although the appellant testified that he "was sure" the calf came from the sale barn, he admitted he did not see Chenowith pay for it and did not know that Chenowith paid for it. We think the jury's verdict was supported by substantial evidence.

The appellant next contends that the trial court erred in refusing to admit the testimony of his witness Bill McKissick. According to the proffer made by appellant's counsel, McKissick would have testified that Hitchcock said he had sold the calf at the Conway sale after it was returned to him. This was offered to impeach Hitchcock's testimony that he had the calf butchered. McKissick also would have testified that, contrary to what Hitchcock had testified, Hitchcock had told McKissick that he was aware the calf had been stolen when he bought it outside the sale barn at Conway. In addition, the proffer stated that McKissick would testify that Hitchcock had offered him money to testify against the appellant, and had offered him $2,500.00 to shoot or harm the appellant.

The trial court refused to admit this testimony because McKissick's name had not been disclosed to the State in response to the State's motion for discovery. In the first place, the appellant says the court erred because the State was not diligent in requesting an order from the court requiring such disclosure. In reply, the State points to its motion which requests that it be treated as "a continuing request to disclose pursuant to Rule 19.2." We agree that the State, by filing a timely motion for discovery, discharged its duty and was not required to request an order from the court to compel appellant to comply.

Secondly, appellant contends that McKissick's testimony should have been admitted as rebuttal testimony. The Rules of Criminal Procedure, Rule 17.1(a)(i) and Rule 18.3, require both the prosecution and the defense to disclose to each other the names of witnesses they intend to call at trial. However, it has been held that if a witness called in rebuttal by the State is a genuine rebuttal witness, offering evidence to rebut that presented by the defense, not pertaining to evidence the State would be obligated to present in its case in chief, then the State is not required to furnish the name of such witness. *Parker* v. *State*, 268 Ark. 441, 597 S.W.2d 586 (1980); *see also, McCorkle* v. *State*, 270 Ark. 679, 607 S.W.2d 655 (1980). The appellant argues that the same rationale should apply to witnesses presented by the defense for the purpose of impeaching testimony presented by the State's witnesses.

However, the proffered testimony that Hitchcock had told McKissick that he took the calf and sold it was really not admissible for impeachment purposes because it concerned a collateral matter. One may not cross-examine a witness (in this case, Hitchcock) about a collateral matter and then impeach him by proof of a contradictory statement. *James* v. *State*, 11 Ark. App. 1, 7, 665 S.W.2d 883 (1984). Furthermore, McKissick's testimony that Hitchcock had said he knew the calf had been stolen when he bought it was not admissible under Uniform Evidence Rule 608(b). Although this evidence might tend to show that Hitchcock was guilty of theft by receiving, under the decision of *Rhodes* v. *State*, 276 Ark. 203, 634 S.W.2d 107 (1982), it was a matter that could not be even inquired into on cross-examination because it was not probative of truthfulness or untruthfulness as required by Rule 608(b). Although an undesir-

able trait, an absence of respect for the property rights of others does not directly indicate an impairment of the trait of truthfulness. *See Rhodes* v. *State, supra.* Moreover, even if the misbehavior is denied by the witness and even if it is probative of truthfulness or untruthfulness, it may not be shown by extrinsic proof where there has been no criminal conviction for such conduct. Unif. R. Evid. 608(b).

The proffered testimony that Hitchcock had offered McKissick money to testify against the appellant, or to physically harm him, would tend to show bias against the appellant and would be independently provable and, therefore, not collateral or admissible only for impeachment purposes. *Kellensworth* v. *State*, 275 Ark. 252, 255, 631 S.W.2d 1 (1982); *see also, Hackett* v. *State*, 2 Ark. App. 228, 619 S.W.2d 687 (1981). Even so, we cannot agree with appellant's argument that he complied with Criminal Procedure Rule 18.3 because he disclosed the identity of witness McKissick as soon as practicable before trial. This is appellant's third reason for suggesting that the trial court erred in refusing to admit McKissick's testimony. The evidence cited in support of this contention is counsel's statement that McKissick would testify that Hitchcock's approach to him had occurred "within a week of trial date," and that appellant's counsel had not known about this until the night before trial and had informed the prosecuting attorney and the court about it on the morning of the trial.

It is, of course, obvious that an event occurring "within a week of trial date" could afford opportunity for several days notice to the prosecutor. The record is silent, however, as to how the notice of this event was transmitted to appellant's counsel or why it was not received sooner. Whether to exclude matters not disclosed under the discovery provisions of the Rules of Criminal Procedure is within the sound discretion of the trial court. *Lear* v. *State*, 278 Ark. 70, 75, 643 S.W.2d 550 (1982); *Rubio* v. *State*, 18 Ark. App. 277, 282, 715 S.W.2d 214 (1986). Under the circumstances in the present case, we cannot say that the trial court abused its discretion in refusing to admit into evidence the proffered testimony of appellant's witness, Bill McKissick.

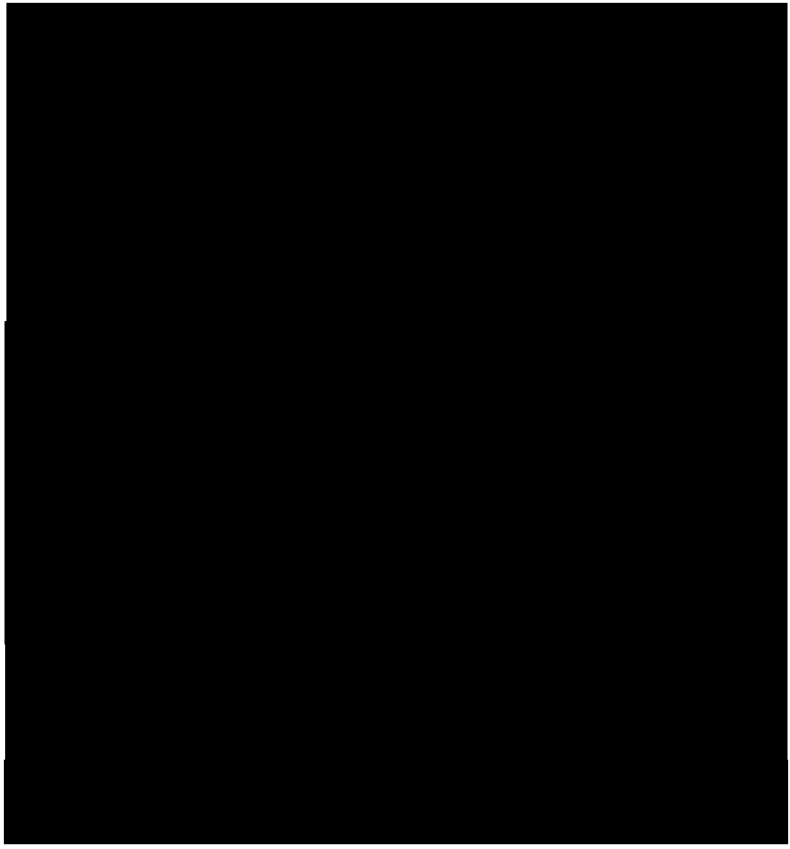
Affirmed.

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

Elmer STYERS and Thelma STYERS *v.* Joe JOHNSON and Gladys JOHNSON, et al.

CA 86-239 720 S.W.2d 334

Court of Appeals of Arkansas
Division II
Opinion delivered December 10, 1986



Boswell, Tucker & Smith, by: *David E. Smith*, for appellants.

Curtis E. Rickard, for appellees.

TOM GLAZE, Judge. This case involves riparian rights. The parties' dispute focuses on a spring that originates on appellants' land and flows into Mill Creek which provides appellees with water for irrigation, drinking and other domestic purposes. In March 1984, appellants applied to the Arkansas Soil and Water Conservation Commission (Commission) for a dam permit which was issued the following May. In August 1984, appellees filed this suit against appellants, alleging appellants constructed a dam which wrongfully impounded waters on their land and obstructed the flow of water to Mill Creek. The appellants moved to dismiss appellees' complaint, urging the trial court had no jurisdiction because appellees failed to exhaust their administrative remedies before the Commission. Alternatively, appellants claimed by law they were exempt from applying to the Commission for any dam-building permit because the spring was located on their land and it did not impede the flow of water into a stream, so neither the trial court nor the Commission had any authority to limit appellants' use of the spring water.

The trial judge found appellants had complied with the Commission's regulations in obtaining the permit for a dam. He held that the dam could remain but that, if an insufficient amount of water overflowed it, appellants must make water available to appellees in an amount equal to the flow from the spring before it was dammed. Appellants raise the same issues on appeal as they did below.[1]

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[1] Appellees respond to appellants' arguments, claiming the trial court found the

First, we agree with appellants and the trial court that appellants properly complied with the state law in obtaining the permit for a dam. The law that was pertinent and effective when appellants applied for their permit is set forth in Ark. Stat. Ann. §§ 21-1306 and 21-1310 (Supp. 1983).[2] Section 21-1306 establishes the procedures required to apply for a permit to construct a dam, and it delineates the notice and hearing requirements interested persons must be given. In sum, appellants claim they complied with those statutory requirements in all respects, and because the appellees failed to file an objection concerning the dam with the Commission, they lost their right to question the Commission's action in granting the permit to appellants. In other words, the appellants argue the Commission's findings that led to its issuance of the dam-building permit became *res judicata*, since appellees had an opportunity to litigate their dispute before the Commission, but did not.

While we agree that the appellants and the Commission complied with the legal requirements necessary for the issuance of the permit for a dam and that the appellees did not object, appellants' argument ignores appellees' response that they had no objection to the dam—only to its obstruction of the flow of water from the spring located on appellants' land. In this respect, § 21-1306(A)(1) (Supp. 1983), in pertinent part, provides protection to appellees, as lower riparian owners, as follows:

> and that there shall be discharged each day from the water impounded by it (dam) a quantity of water as may be fixed by the Commission as that necessary to preserve, from time to time, below the dam, the flow of the stream involved at a rate designed to protect the rights of lower riparian owners. . .

In fact, the Commission in the instant case condi-

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parties entered an express agreement that appellants would pump water out of their impoundment into Mill Creek and that the trial court merely was enforcing that agreement by its decree. The trial court's order reflects no such finding nor can we find any such agreement in the abstract of record.

[2] Both of these provisions have been amended by Act 475 of 1985. Act 475 deleted all of the former subsections (a) through (d) of § 21-1310, so that it now provides no permit is required for any dam which impounds less than fifty (50) acre-feet of water or is of a height less than fifteen (15) feet.

tioned, as it was required to do, its issuance of appellants' dam permit upon the requirement that the dam discharge water below it at a rate approximating the flow the stream would maintain if the dam had not been constructed. The Commission, under Ark. Stat. Ann. § 21-1308 (Repl. 1968), is empowered to allocate available water whenever a shortage exists. This statutory scheme provides the Commission with authority to issue dam-building permits and, at the same time, recognizes and encompasses Arkansas's case-law authority dealing with the rights of riparian owners. *See Harris* v. *Brooks*, 225 Ark. 436, 283 S.W.2d 129 (1955); *Boyd* v. *Greene County, Arkansas*, 7 Ark. App. 110, 644 S.W.2d 615 (1983); *see also* 38 Ark.L.Rev. 221, 235 (1984). Under these same statutory provisions, the Commission may duly modify or cancel any dam permit issued by it if the person holding the permit fails to maintain the dam adequately or to comply substantially with any condition of the permit with respect to the operation of the dam. *See* § 21-1306(D). Consistent with our foregoing analyses of the law and the facts of this case, we hold that the appellees should have sought their remedy before the Commission rather than to have filed this original action in Chancery. *See* Ark. Stat. Ann. § 21-1304 (Supp. 1983) and -1304 (Supp. 1985). Because we conclude the Commission has jurisdiction of this cause, it is an elementary principle of administrative law that an issue must be raised at the lower level to be pursued on appeal. *Arkansas Cemetery Board* v. *North Hills Memorial Gardens*, 272 Ark. 172, 616 S.W.2d 713 (1981).

Since we disagree with appellants' contention that appellees' failure to appear before the Commission was *res judicata*, we consider their alternative contention that neither the Commission nor chancery court had the jurisdiction to limit appellants' use of their water. Of course, we discussed how the Commission acquired jurisdiction in this matter, and now we turn to our reasoning why appellants are not exempt from that jurisdiction.

Appellants contend the Commission had no authority to limit their spring water because they were exempt from applying to the Commission for a dam-building permit pursuant to Ark. Stat. Ann. § 21-1310(b) (Supp. 1983), which provides:

> Any person owning land, or having a right to occupy land, shall have the right to impound, and use for any lawful

> purpose, water flowing from a spring on that land, so long as he does not thereby obstruct the flow of water in a stream, and the Commission shall have no authority or jurisdiction with respect thereto.

Relying upon the above statutory language, appellants claim that, independent from the Commission, they had a right to impound their own water and use it for any lawful purpose because it was water flowing from a spring on their own land and the dam did not obstruct the flow of water in a stream. Appellants offer this contention even though they voluntarily submitted themselves to the jurisdiction of the Commission by applying for a dam permit. But more importantly, appellants are wrong in their assertion that their dam did not obstruct the flow of water in a stream. The record is replete with evidence to the contrary. Appellants' own witness, a water resources engineer for the Commission, testified that there was a natural flow of water out of appellants' spring that made its way to Mill Creek through a channel he described as a water course or stream. He further stated that appellants' dam "is affecting" the flow of water into Mill Creek. The appellees offered similar testimony, summarily concluding that appellants' spring flows into Mill Creek and that the creek never had run dry until after appellants built the dam impounding the water from their spring. Because the record reflects appellants' dam does obstruct the flow of water in a stream, we conclude the appellants are not exempt under § 21-1310(b) (Supp. 1983).

Consistent with the foregoing opinion, we reverse and dismiss this cause, leaving the appellees to seek their remedy before the Commission.

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

James Perry MOUNT *v.* STATE of Arkansas

CA CR 86-139 720 S.W.2d 721

Court of Appeals of Arkansas
Opinion delivered December 10, 1986

PER CURIAM. Appellant's motion to set bond is denied.

MELVIN MAYFIELD, Judge, concurring. I concur in the court's denial of the appellant's motion to set bond in the above matter.

Under Rules of Criminal Procedure 36.5—36.7, persons convicted of crimes other than capital offenses may be admitted to bail by the trial court under the conditions provided by those rules.

The motion in this case does not tell us whether the appellant has applied to the trial court for the setting of a bail bond under the provisions of the above rules. Undoubtedly, this matter should first be presented to the trial court. Therefore, I agree that the present motion should be denied.

Betty CARTER *v.* FLINTROL, INC.

CA 86-169 720 S.W.2d 337

Court of Appeals of Arkansas
Division II
Opinion delivered December 17, 1986

Anthony W. Bartels, for appellant.

Penix Law Firm, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Betty Carter appeals from a decision of the Workers' Compensation Commission holding that she had failed in her burden of proving that a compensable injury sustained in the employ of Flintrol, Inc., was causally connected to the multiple sclerosis from which she now suffers. The appellant testified that on February 29, 1984, while working on an assembly line, she slipped, fell, and struck her head on the floor. She stated that, before the fall, she had no difficulty in maintaining her balance and had not seen a doctor in a number of years. She stated that she was off work for four days due to back pain and balance problems resulting from the fall. Upon returning to work, she continued to have difficulty with her balance, began experiencing vision problems, and became nauseated. She was initially seen by Drs. W. F. Sheppard and Ramon Lopez. They referred her to Drs. Patrick O'Sullivan and Jon Robertson, who hospitalized her for twelve days in Memphis. She was diagnosed as having multiple sclerosis and has been unable to

work since that time.

The medical reports of Drs. O'Sullivan and Robertson disclosed the diagnosis of multiple sclerosis. In a letter, Dr. O'Sullivan stated that "there is evidence in medical literature supporting the idea that multiple sclerosis may be triggered or aggravated by trauma." He gave no personal opinion as to the connection between the trauma and the multiple sclerosis sustained by the appellant. Dr. Wheatley Beard opined that she had "a subdural hematoma and secondarily multiple sclerosis and other vascular diseases." Dr. Lopez stated, "I do not feel that the multiple sclerosis has any relation whatsoever to her injury and appears to be just coincidental." Dr. Stevenson Flanigan examined the appellant and reported that:

> My immediately available reference material on multiple sclerosis does not disclose that such a condition can arise from trauma. It is conceivable that such a condition could be aggravated by trauma, as one of the reports I reviewed seemed to suggest. That report recorded a blow to the head. I would, however, consider the symptoms of multiple sclerosis in this case coincidental with the injury.

The administrative law judge found that the appellant had proved by a preponderance of the evidence that she sustained a compensable injury in the fall. In his discussion of the evidence, he noted that the medical opinions differed regarding a causal connection between the fall and the multiple sclerosis. He stated: "The medical evidence linking the situation to the trauma at work is a little shallow, but it is there." For those reasons, he found that the causal connection did exist. On appeal, the Commission affirmed the finding that the injury was compensable, but reversed the finding that there was a causal connection between the injury and the disability resulting from multiple sclerosis.

In her argument, the appellant acknowledges that the medical evidence as to the causal connection was in conflict, but disagrees with the Commission's conclusion that "the medical opinion supporting the appellant's position is so nebulous as to be deprived of any persuasive worth." The argument is predicated upon the decision of this court in *Pittman* v. *Wygal Trucking Plant*, 16 Ark. App. 232, 700 S.W.2d 59 (1985). We agree with the Commission that *Pittman* is distinguishable from this case. In

Pittman, the only medical testimony on the issue of causation was that of a physician who opined that, based on the history given him, it was "possible and probable" that a causal relationship existed between the claimant's injuries and his disability from disease. There, although there was lay testimony suggestive of a causal connection, the Commission held that the physician's "best guess" was an inappropriate basis for decision making. This court reversed the Commission's requirement in that case that medical testimony must rise to terms of medical certainty before a claimant's burden of proof could be met. We held that because the medical experts used such terms as "possible," "probable," and "might cause," among others, *does not preclude* a finding of causal connection provided there is other evidence supporting that conclusion. In *Kearby* v. *Yarbrough Brothers Gin Co.*, 248 Ark. 1096, 455 S.W.2d 912 (1970), our supreme court recognized that causal connection is generally a matter of inference and possibilities may often play a proper and important role in the establishment of that relationship.

We do not construe the Commission's opinion as applying the "medical certainty" rule to Dr. O'Sullivan's testimony. The Commission pointed out that, in *Pittman*, there was medical opinion that there was a probability of causal connection, and here there was no such medical opinion. Dr. O'Sullivan did not testify that there was a causal connection, but only that "there is evidence in medical literature supporting the idea that multiple sclerosis may be triggered or aggravated by trauma." He stated no opinion based upon the reading of that literature. Here, the Commission concluded that there was no medical opinion that there was a causal connection and agreed with the opinion of Dr. Flanigan, professor of neurology at the University of Arkansas for Medical Sciences, that the onset of symptoms of multiple sclerosis was merely coincidental and had no connection with the appellant's work-related injury. It also had before it the opinion of Dr. Lopez, which fully agreed with that of Dr. Flanigan. The Commission concluded:

> In the face of this expert medical testimony of Dr. Flanigan, we are unable to find the claimant has met her burden of proof with regard to the multiple sclerosis. Since the claimant has the burden of producing evidence and persuading the Commission of its soundness and has failed

to produce the requisite evidence, her claim for benefits for treatment of and disability attributable to the multiple sclerosis condition must be denied.

We cannot agree with the appellant that the Commission erroneously held that one cannot meet the burden of proving causal connection without medical opinion based upon a reasonable degree of medical certainty. Based upon the testimony of Drs. Flanigan and Lopez, we cannot conclude that the finding of the Commission that the appellant had failed in her burden of proof is not supported by substantial evidence.

We do not mean to imply that the claimant must in every case establish the causal connection of the injury to the disability by expert medical testimony, or that there are not cases in which the relationship between the injury and onset of disability can give rise to an inference of such a connection without medical testimony. *Harris Cattle Co.* v. *Parker*, 256 Ark. 166, 506 S.W.2d 118 (1974); *Chambers* v. *Jerry's Dept. Store, Inc.*, 269 Ark. 592, 599 S.W.2d 448 (Ark. App. 1980). The determination of whether the causal connection exists is a question of fact for the Commission to determine. We do hold that the Commission is not required to rely upon inference where there is positive medical testimony to the contrary. The weight to be given that medical testimony is also a matter for the Commission to determine.

Affirmed.

CORBIN and GLAZE, JJ., agree.

SOUTHWESTERN BELL TELEPHONE COMPANY *v.* ARKANSAS PUBLIC SERVICE COMMISSION

CA 86-22 720 S.W.2d 924

Court of Appeals of Arkansas
En Banc
Opinion delivered December 17, 1986

Durward D. Dupre and *Garry S. Wann*; and *Friday, Eldredge & Clark*, by: *Herschel Friday* and *Jeff Broadwater*, for appellant.

Lee McCulloch, for appellee.

JAMES R. COOPER, Judge. Southwestern Bell Telephone Company appeals that portion of a rate case decided by the Arkansas Public Service Commission dealing with the calculation of the Company's cost of capital and the resulting calculation of its required return on its rate base. The Company argues four points for reversal, all of which concern the proper treatment to be accorded investment tax credits (ITC's) and accumulated deferred income taxes (ADIT's) in calculating the correct rate of return.

Bell's first point for reversal is that the manner in which investment tax credits and accumulated deferred income taxes were treated by the Commission was arbitrary, capricious, unreasonable, and not supported by substantial evidence. Secondly, Bell claims that the treatment given ADIT's and ITC's arbitrarily mismatches tax benefits with rate base and expense items. Thirdly, Bell alleges that the treatment given ADIT's and ITC's by the Commission violates federal tax law and regulation, and finally, Bell claims that the Commission's treatment of ADIT's and ITC's violates due process of law.

We agree with Bell on its first point and reverse on that point.

Southwestern Bell's rate of return was determined in this case by what is known as the "weighted cost of capital" approach. In using this approach, the various components of a company's capital structure are weighted as to their cost with respect to their relative proportions in the company's total capital structure and are then added together to obtain an overall figure for the company's cost of capital. The weighted cost of capital is then translated into the rate of return on rate base,[1] and the company is permitted the opportunity to earn that return on its investment.

Both Bell and the Commission agree that ITC's and ADIT's should be recognized in setting rates, but they differ as to how they should be recognized. These tax benefits accrue on a company's books by virtue of investment in plant and equipment upon which the company earns a return. Since ratepayers pay a return on that plant and equipment and thereby supply the funds which generate the tax benefits, the parties agree that ratepayers should receive some consideration in ratemaking for the benefits generated by those funds.

Both parties agree that ITC's and ADIT's can and should be given regulatory treatment in either one of two "theoretically equivalent" methods: (1) a deduction from rate base, or (2) inclusion in the company's cost of capital calculation as a cost-free source of capital. The second method was employed in this case by the Commission. In the first method, the amount of tax benefit attributable to Arkansas plant and equipment would be derived from the company's accounts and deducted from the company's rate base. In the second method, the tax benefits are included in the cost of capital calculation, or an adjustment is made to account for the tax benefit after the company's cost of capital is calculated without the benefits being included. For purposes of this appeal, the parties agree that Bell's Arkansas intrastate rate base is $732,715,000.00; that the total of ITC's and ADIT's attributable to Bell's Arkansas investment is $109,154,000.00 (which is the sum of the amounts carried in Accounts Nos. 174 and 176 on the Company's books); and that Arkansas customer deposits total $3,828,000.00, on which the

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[1] "Rate base" is the net value of a company's investment in plant and equipment dedicated to providing utility service to ratepayers.

Company pays six percent interest. Further, for purposes of this appeal, the parties do not quarrel with Bell's capital structure as adopted by the Commission, nor do they disagree that the Commission's calculation of Bell's cost of capital is 11.719% without any adjustment for ITC's and ADIT's. There also seems to be no question but that 14.81% of Arkansas intrastate rate base is attributable to ADIT's and ITC's, and that 16.72% of Bell's total company rate base is attributable to these tax benefits.[2]

As noted above, the Commission calculated Bell's weighted cost of capital to be 11.719%. This calculation included total company common equity bearing a cost of 13.5% and total company debt carrying with it a cost of just over 9.5%. However, the Commission included Arkansas-only customer deposits, which, as noted earlier, carry a cost of 6.0%. After calculating the weighted cost of capital, the Commission then adjusted that figure to account for 16.72% total company ITC's and ADIT's, yielding an overall rate of return to be allowed on rate base of 9.76%. Applied to the Company's Arkansas rate base of $732,715,000.00, the required earnings on rate base as allowed by the Commission are $71,512,984.00.

The Company complains that use of company-wide ITC's and ADIT's, as opposed to Arkansas-only ITC's and ADIT's,[3] is incorrect and gives Arkansas ratepayers the benefit of tax savings generated by investments they have not supplied. According to Bell, if the Commission's methodology is used and the weighted cost of capital is adjusted to reflect 14.81% of Arkansas-only ITC's and ADIT's, the resulting rate of return is 9.98% and yields a required earnings on rate base figure of $73,124,957.00. Thus, alleges Bell, the Commission's calculation understates required earnings by $1,611,973.00.

We note that the "theoretically equivalent" method whereby ITC's and ADIT's are deducted from intrastate rate

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[2] Besides Arkansas, Bell operates in four other states and has interstate facilities regulated by the federal government.

[3] Arkansas-only ITC's and ADIT's have been used consistently by the Commission in the past and, in fact, were used in the Commission's first order in this case, which was superseded on rehearing by the final order utilizing the calculations which are the subject of this appeal.

base would yield a required earnings on rate base of $73,075,113.00, which is a net difference of only $49,844.00 from the calculation Bell claims the Commission should have made in using the method it applied.[4]

Arkansas Statutes Annotated Section 73-229.1 (Supp. 1985) limits and governs our review as follows:

> 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.

When reviewing an order of the Public Service Commission, we give due regard to the limitations on the scope of our judicial review and the expertise of the Commission. The Commission's findings of fact are not disturbed on appeal if supported by substantial evidence, which is a question of law. In addressing the questions of law raised on appeal, we may not pass upon the wisdom of the Commission's actions or judge whether the Commission has appropriately exercised its discretion. Usually, this Court must defer to the expertise of the Commission, which derives its ratemaking authority from the legislature. However, our review is not a mere formality, and we must determine whether there has been an arbitrary or unwarranted abuse of the Commission's discretion, although considerable judicial restraint should be observed in finding such an abuse. This Court does not advise the Commission how to discharge its functions in arriving at findings of fact or in exercising its discretion, and our review of the reasonableness of the actions of the Commission relates only to findings of fact and to a determi-

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[4] As noted earlier, Arkansas intrastate rate base is agreed to total $732,715,000.00, and ITC's and ADIT's on the Company's books total $109,154,000.00. The "rate base approach" would then require that the difference, $623,561,000.00, have the weighted cost of capital figure of 11.719% multiplied against it, which yields a required earnings on rate base of $73,075,113.00.

nation of whether its actions were arbitrary. *Southwestern Bell Telephone Company* v. *Arkansas Public Service Commission*, 18 Ark. App. 260, 715 S.W.2d 451 (1986).

The Commission is free, within its statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. No public utility has a vested right to any particular methods of valuation or rate of return, and the Commission has wide discretion in choosing its approach to rate regulation. Generally, this Court is not concerned with the methodology used by the Commission in arriving at the result as long as the Commission's action is based on substantial evidence. It is the result reached, not the method employed or the theory, which primarily controls. Our inquiry is concluded if the Commission's regulator's decision is supported by substantial evidence and the total effect of the rate order is not unjust, unreasonable, unlawful or discriminatory. *Southwestern Bell, supra*; *Walnut Hill Telephone Company* v. *Arkansas Public Service Commission*, 17 Ark. App. 259, 709 S.W.2d 96 (1986).

We find the Commission's approach to ADIT's and ITC's to be inconsistent. While it is true that no company has a vested right to any particular method or formula, a utility does have a right to have whatever method or formula the Commission may choose to utilize applied in a consistent manner. In this case, no expert witness endorsed the tax benefit treatment used by the Commission. Bell witness Kaufman used total company debt and equity in his calculation of the Company's cost of capital, and adjusted for Arkansas-only ADIT's and ITC's. Kaufman did not include customer deposits in his cost of capital calculation. The Attorney General's witness Wilson used total company equity and debt and adjusted for Arkansas-only ADIT's and ITC's, as had Kaufman. However, witness Wilson also used Arkansas-only customer deposits in his calculation. PSC staff witness Kilburn took a total-company approach to her cost of capital calculation, using total company debt, equity, customer deposits and ADIT and ITC in her calculation. She testified that, because all dollars are fungible,[5] it is not possible to distinguish what specific

[5] According to Kilburn, the concept of "fungibility" means that, once dollars are pooled (into the funds of a multi-state utility), they cannot later be traced back to a source

investment dollars represented by the various components of a company's capital structure support a specific portion of the Company's rate base in a particular jurisdictional area. She testified that the cost of capital for Southwestern Bell on a total company basis was the best way of deriving the required return the Company should be allowed to earn on its rate base.

Kaufman recommended an overall rate of return of between 11.16% and 11.40%. Wilson recommended a return of approximately 10.23%, and Kilburn recommended a return of 9.83%. No witness sponsored any testimony which embraced the 9.76% return calculated by the Commission in its final order.

While we do not intend to suggest any particular method of determining a company's cost of capital nor the particular ratemaking treatment to be given ITC and ADIT, we hold that, when the Commission selects a particular method advocated by an expert witness, the methodology selected should be applied in a manner consistent with the rationale and theory underlying the methodology.

Here, the expert witnesses agreed that total company equity and debt cannot be practicably segregated on a jurisdictional basis, and that a total company approach to these two components of capital structure was appropriate. The Commission apparently agreed with that concept. Witnesses Kaufman and Wilson testified that Arkansas-only ITC and ADIT amounts were susceptible of determination on a jurisdictional basis, and Wilson further testified that Arkansas jurisdiction-only customer deposits were likewise identifiable and should be included in the Company's cost of capital calculation; Kilburn, as noted earlier, testified that Arkansas jurisdiction-only dollars were indistinguishable and, consequently, she advocated a total-company approach throughout the rate calculations. The Commission apparently agreed with Wilson that customer deposits of nearly $4,000,000.00 bearing a cost of 6.0% were identifiable, but disagreed that Arkansas-only ITC and ADIT were identifiable on a jurisdiction-only basis. Accordingly, the Commission's final order used total company debt and equity along with Arkansas-

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in any particular state.

only customer deposits and then adjusted to account for total-company ITC and ADIT. Therefore, the Commission adopted portions of all the expert witnesses' theories and disregarded other portions of the expert witnesses' theories. We find the Commission's approach in this particular instance to be arbitrary and unreasonable, as well as internally inconsistent in that the Commission, on the one hand, agreed that customer deposits were identifiable on a jurisdictional basis but, on the other hand, did not agree that ITC and ADIT could be identified on a jurisdictional basis.

We do not agree with Bell's contention that the inclusion of total company amounts of ITC and ADIT in calculating its cost of capital violates the Internal Revenue Code and IRC Regulations. Bell argues that Section 167 of the Internal Revenue Code and regulations require a consistency between ADIT as used to determine tax liability and as used in the capital structure. The Commission, on the other hand, seems to hold that the problem is simply one of timing, and not jurisdictional allocations, and that the Internal Revenue Code sanctions these timing differences. Bell claims that the Commission's action violates the I.R.C. by including more deferred tax than was actually shown on the books of the Company. This, Bell contends, could cause the IRS to take the position that Bell had not used a normalization method of regulated accounting as defined in IRS Reg. Section 1.167(L) - 1(h)(6)(i), which in turn could result in the loss of tax benefits.

We think that Bell's argument is speculative at this juncture and deals with possibilities which may or may not come to pass.

Finally, Bell argues that due process requires the Commission to make jurisdictional separations. We do not agree. No utility has a vested right to any particular method or formula. *Southwestern Bell*, 18 Ark. App. 260; *Walnut Hill*, 17 Ark. App. 259. As noted earlier, due process does require that, if the Commission elects to use a particular formula, the formula should be applied in a consistent manner. The requirements of due process do not extend so far as to mandate that a particular method or formula be used.

We reverse and remand, with directions that the Commission shall recalculate the appellant's appropriate rate of return, giving proper and consistent consideration to Investment Tax

Credits and Accumulated Deferred Income Taxes, and applying the methodology selected in a consistent manner throughout.

Reversed and remanded.

GLAZE and CORBIN, JJ., concur.

TOM GLAZE, Judge, concurring. I concur with the majority's holding reversing the Commission in this case.

The problem in this case is precisely the type problem about which I warned in my concurring opinion in *Southwestern Bell Telephone Company* v. *Arkansas Public Service Commission*, 18 Ark. App. 260, 715 S.W.2d 451 (1986): when the Commission adopts a particular methodology, it should apply that formula in a correct and consistent manner. This court affirmed the Commission in that case, because the result reached could not be said to be unfair. Here, the Commission's misapplication of the expert witnesses' methods of dealing with investment tax credits and accumulated deferred income taxes yields a result which is outside the realm of possibilities presented by the expert witnesses.

This case involves the question of the proper treatment to be accorded investment tax credits and accumulated deferred income taxes, and the expert witnesses seem to agree that these tax benefits may be accounted for through a cost of capital calculation or be deducted from rate base. It seems to me that the rate base approach is the most logical. After all, it is the investment in rate base which generates the tax benefits themselves, and there seems to be no problem in determining precisely the tax savings which are generated by Arkansas rate base. This approach is much simpler and seems to "true up" particular dollar amounts of tax savings with the particular rate base giving rise to those savings.

CORBIN, J., joins.

WHIRLPOOL CORPORATION and CIGNA COMPANIES *v.* James E. KAELIN

CA 86-138 720 S.W.2d 722

Court of Appeals of Arkansas
Division I
Opinion delivered December 17, 1986

Jones, Gilbreath, Jackson & Moll, for appellant.

James F. Swindoll, P.A., for appellee.

LAWSON CLONINGER, Judge. This is an appeal of a decision by the Workers' Compensation Commission. A hearing was held on September 16, 1985, to determine the compensability of the

injuries of appellee, James E. Kaelin. Appellants, Whirlpool Corporation and Cigna Companies, failed to appear at the hearing and the only testimony was that given by appellee. Whirlpool is self-insured and has a service contract with Cigna Companies to adjust its claims. The administrative law judge found that appellee's injuries were compensable. Appellants appealed to the full Commission alleging that appellant, Whirlpool, did not have adequate notice of the hearing and it requested the Commission to remand the case for additional evidence. The Commission, denying appellant's request, found that Cigna was an agent of Whirlpool and that Cigna had received adequate notice. For their appeal, appellants argue that Whirlpool was entitled to receive notice and that the Commission erred in denying the request that the case be remanded for the taking of additional evidence. We agree with appellants' arguments and reverse and remand.

Appellee filed a workers' compensation claim on June 6, 1985, alleging that he had been injured in the course of his employment on September 14, 1983. The injury occurred at Whirlpool's factory in Fort Smith, Arkansas. Subsequently, appellee moved to Little Rock, Arkansas, and requested that the hearing be held in Little Rock. The Commission did not direct that the hearing be held in Little Rock, but by administrative error the case was assigned to an administrative law judge in Little Rock.

On August 19, 1985, the notice of the hearing place and time was sent to appellee and Cigna. However, Cigna had closed its Little Rock Workers' Compensation division and transferred all of the files to Dallas, Texas. The return receipt had been signed by an employee of Cigna, but it is not known what happened to the notice after that. A copy of the notice was not sent to Whirlpool.

At the September 16, 1985, hearing, appellee's injuries were found to be compensable. In October, 1985, Whirlpool filed a motion requesting that the Commission reopen the case and allow Whirlpool to present evidence that appellee had actually been injured when he fell from the roof of his home and not while on the job. The Commission denied the motion.

Appellant first argues that Ark. Stat. Ann. § 81-1323(b) (Repl. 1976), requires a finding that the employer is an interested

party and that notice should have been served on the employer Whirlpool. That statute provides in pertinent part:

> If a hearing on such a claim is ordered, the Commission shall give the claimant and other interested parties ten (10) days' notice of such hearing served personally upon the claimant and other interested parties, or by registered mail. The hearing shall be held in the county where the accident occurred, if the same occurred in this state, unless otherwise agreed to between the parties, or otherwise directed by the Commission.

We do not agree with Whirlpool's assertion that the statute requires notice to be served on the employer in all cases. However, in this case, we do find that notice was insufficient because the evidence will not support a finding that Cigna was an agent designated to receive notice and because the venue of the hearing was changed by error, not agreement.

The appellate court views the evidence in the light most favorable to the Commission's decision and affirms if it is supported by substantial evidence. *Franklin* v. *Arkansas Kraft, Inc.*, 12 Ark. App. 66, 670 S.W.2d 815 (1984). In order to reverse a finding by the Commission, the appellate court must be convinced that fair minded persons, with the same facts before them, could not have arrived at the conclusion reached by the Commission. *Franklin, supra.*

In this case, the only evidence of an agency relationship is found in the Commission's order. The Commission makes a statement that in oral arguments Cigna admitted to being an agent; however, that argument is not part of the record. Although there are some allusions to Cigna being a service company for Whirlpool, there is no evidence as to what Cigna's duties were, whether they were in fact under contract to service claims on the date notice was served to Cigna and whether, as part of Cigna's duties to Whirlpool, it was authorized to receive notice of hearings. When we consider this lack of evidence with the facts that the venue was changed by accident and that Cigna had moved its Workers' Compensation division to Dallas, we do not think that fair minded persons could reach the Commission's conclusion that Cigna was Whirlpool's agent. *See Dura Craft*

Boats, Inc. v. *Daugherty*, 247 Ark. 125, 444 S.W.2d 562 (1969).

Appellants argue next that the Commission erred when it refused to remand the case for the hearing of additional evidence. We agree that the Commission abused its discretion.

On appeal an exercise of the Commission's discretion in determining whether and under what circumstances a decision appealed to them should be remanded for taking additional evidence will not be lightly disturbed. *Haygood* v. *Belcher*, 5 Ark. App. 127, 633 S.W.2d 391 (1982). Where the new evidence is relevant, is not cumulative, would justify a different result, and the movant was diligent, the Commission's discretion should be exercised and the motion to present new evidence should be granted. *Mason* v. *Lauck*, 232 Ark. 891, 340 S.W.2d 575 (1960); *Hill* v. *White-Rodgers*, 10 Ark. App. 402, 665 S.W.2d 292 (1984).

Applying these standards to the case before us, we find that appellants should be permitted to present their evidence that appellee's injuries were caused when he fell from the roof of his home. The additional evidence is relevant to the cause of appellee's injuries; there is very little evidence of this fall in the record and therefore it is not cumulative; it could possibly change the determination of compensability, and the appellants were diligent in presenting their motion to add the new evidence.

In light of all the errors made in this case, we are persuaded that the interests of justice will be best served when all relevant evidence is presented to the finder of fact. *See* Ark. Stat. Ann. § 81-1327(a) (Supp. 1985).

This case is reversed and remanded with directions to grant appellants' motion.

COOPER, J., agrees.

GLAZE, J., concurs.

GLAZE, J., concurring. I concur but would reverse simply on the basis that Ark. Stat. Ann. § 81-1323(b) (Repl. 1976) mandates that appellant, Whirlpool Corporation, was entitled to notice of the September 19, 1985, hearing on appellee's claim, and it received none.

Kenneth P. LLOYD *v.* POTLATCH CORPORATION

CA 86-124 721 S.W.2d 670

Court of Appeals of Arkansas
Division II
Opinion delivered December 17, 1986

Winston Bryant, for appellant.

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

MELVIN MAYFIELD, Judge. This appeal from a decision of the Workers' Compensation Commission has a bizarre procedural history which must be recounted for an understanding of the issues. For convenience, our references to the employer include its liability carrier.

On September 21, 1983, a hearing was held before the administrative law judge at which it was stipulated that the claimant, Kenneth P. Lloyd, had sustained a work-related injury when he was burned over 70% of his body. It was also stipulated that he had been paid temporary total disability benefits until the end of his healing period, January 11, 1981, and that subsequently the employer had voluntarily paid him for 10% permanent partial disability to the body as a whole, based upon the September 16, 1981, report of Dr. Robert Love, and for scheduled injuries of 5% impairment to the right arm and 5% impairment to the left leg, based on the ratings of Dr. Richard A. Knutson made on May 27, 1982.

The claimant contended that he was entitled to more than 10% permanent partial disability to the body as a whole and, after the hearing, the law judge awarded the claimant 15% permanent partial disability to the body as a whole and ordered the employer to pay the additional 5%. That opinion was filed November 23, 1983, and the employer did not appeal from that decision. However, on December 13, 1983, the employer filed, with the law judge, a petition for rehearing stating that one of the office notes in the records of Dr. Knutson, introduced into evidence at the hearing, stated that on June 16, 1983, it appeared the claimant no longer had any impairment to his arm and leg. The petition, therefore, requested that the law judge's opinion be "clarified" to hold that the "claimant no longer has an anatomical disability to his right arm and left leg, but does have an anatomical disability of 15% to the body as a whole." On the same day the petition for rehearing was filed, the law judge entered an order stating that the petition for rehearing "is hereby denied."

On January 3, 1984, claimant's counsel, by letter made a

part of the record, requested that the law judge order the employer to pay the full amount due, stating that this amount was $2,835.00, and explaining that the employer was taking credit for the two scheduled injuries previously paid.

On January 6, 1984, the law judge wrote a letter to the employer's attorney, also made a part of the record, and stated:

> A review of my Award entered November 23, 1983, clearly indicates that the respondents were ordered and directed to pay Workers' Compensation benefits at a rate of $126.00 for 22.5 weeks. No credit for previously paid Workers' Compensation benefits was allowed in that Award. Please advise me if the respondents intend to comply with same.

On January 9, 1984, the employer's attorney replied to the law judge's letter and reiterated that they had previously paid permanent partial disability of 10% to the body as a whole, 5% to the right arm, and 5% to the left leg. Therefore, the letter explained, since the doctor had later reported that the claimant no longer had the arm and leg impairments, the employer took the position that the claimant had already been overpaid. Although the record does not reflect a reply letter from the law judge, there is a letter in the record from the employer to the law judge dated January 17, 1984, which refers to the law judge's letter of January 16 and states "it is clear" that the employer's previous letter was not accepted by the law judge as an adequate response to his letter ordering the employer to make the payments found due. The letter restated the employer's position and said that had it been advised in the order denying its rehearing petition that no credit for benefits previously paid was being allowed, it could have appealed but, since that clarification was not made until the law judge's letter of January 6, 1984, was written, the employer considered that letter to be the final ruling on the petition for rehearing. The letter concludes with a request that the employer be permitted to furnish the law judge with the doctor's report stating claimant no longer has any permanent disability to the arm and leg.

The law judge then issued an order dated January 20, 1984, which stated that the employer had been directed to pay benefits to the claimant for a period of 22.5 weeks at a rate of $126.00 per week, for a total of $2,835.00; that no appeal was taken from that

award; that only $472.50 had been paid on it; and that the sum of $2,362.50 was still due. The employer was directed to pay that amount.

The employer filed an appeal from that order on January 26, 1984, and in an opinion issued September 20, 1984, the full Commission held that the appeal was untimely, stating:

> We agree with claimant's attorney that respondents' appeal is not timely. The decision of the Administrative Law Judge which the Full Commission is actually being asked to review is the decision of November 23, 1983. Absent the filing of a ". . . petition in writing for a review by the Full Commission . . .", that decision became final upon the expiration of thirty (30) days from the date it was received by respondents. Ark. Stat. Ann. § 81-1325(a). See also, *Cooper Industrial Products* v. *Meadows*, 5 Ark. App. 205, 634 S.W.2d 400 (1982).

The Commission noted that the employer had filed a petition for rehearing on December 13, 1983, within thirty days of the decision, but held that this did not extend its appeal time. Citing *Cooper Industrial Products* v. *Meadows*, *supra*, the Commission stated that "there is apparently no rehearing procedure at all before an Administrative Law Judge." Further, the Commission held: "With respect to the [law judge's] order of January 20, 1984, from which respondents are attempting to appeal, we hold that that order cannot be used as a vehicle by which to obtain review before the Full Commission of a matter which was, or should have been, decided by the Administrative Law Judge in his November 23, 1983, opinion." Nevertheless, the Commission then remanded the case to the law judge for further consideration of the matter of whether the employer should have been given credit for compensation already paid. The Commission reasoned:

> We do have great concern, however, that respondents have never been able to obtain a definitive ruling specifically addressing the issue of whether they are entitled to a credit for the previously paid scheduled injury impairment ratings, which respondents now say no longer exist. This substantive issue deserves development and decision at the Administrative Law Judge level. It involves serious and important questions of fact and law. Therefore, we are

> going to treat respondents' notice of appeal filed on January 26, 1984, as a petition for modification of the Administrative Law Judge's November 23, 1983, award based upon the alleged change in the claimant's physical condition pursuant to Ark. Stat. Ann. § 81-1326.

Upon remand, the law judge added to the record the correspondence with the parties' attorneys through March 14, 1985, and a report from Dr. Rex Easter, who had examined claimant at the request of the law judge. Attached to a letter for the employer dated September 25, 1984, was a report from Dr. Richard A. Knutson, dated January 12, 1984, which stated that when the claimant was last seen, on June 16, 1983, he did not appear to have any permanent impairment relative to either the knees or the ulnar palsy [arm], although the report also stated it was not "accurate to dismiss potential future problems secondary to the [claimant's] gout or superimposed on the patient's previous knee injury which may yet give him a definitely ratable condition." Dr. Easter's report stated he had examined claimant on October 24, 1984, and that claimant was very lucky to have recovered from such a severe burn with no "functional impairment."

The law judge in an opinion issued May 29, 1985, held, as he had before, that the employer was liable to claimant for an additional 18.75 weeks of benefits [22.5 weeks awarded previously minus 3.75 weeks the employer had paid] at a rate of $126.00 per week for a total of $2,362.50. To this was added a penalty of $472.50. Citing Ark. Stat. Ann. § 81-1319(m) (Repl. 1976), which allows credit for advance payments of compensation, he also held that the employer was not entitled to credit for payments previously made for the scheduled injuries to the leg and arm because they were not advance payments of compensation within the meaning of the statute.

On appeal, the full Commission reversed the law judge by an order filed on December 18, 1985. The Commission reasoned as follows:

> The Full Commission has already acknowledged that the first appeal before it was untimely. However, we also found that because the Law Judge had failed to address important substantive issues, an order of remand was

necessary in order that he do so. In his subsequent opinion the Law Judge specifically found the respondents not entitled to a credit for the 18.75 weeks of scheduled benefits they had already paid. The Law Judge cited in support of his position Ark. Stat. Ann. § 81-1319(m) and found the benefits paid were not "advanced payments of compensation" within the meaning of the statute.

After a *de novo* review of the record and the evidence contained therein, we must conclude that the Law Judge erred in treating this case as one involving a credit and further erred in failing to find the award to the claimant has been satisfied by the respondents. While admittedly these payments were payments for *scheduled injuries*, the inescapable fact remains that these were payments of compensation. To hold otherwise, we find, would result in both an unjust and an inequitable situation and would be a disincentive for employers to voluntarily go forward and pay benefits on a claim as was done previous to the hearing in this case.

. . . .

We find the controlling question in this case is whether or not the respondents have satisfied their obligation to the claimant for permanent partial disability benefits. At no time has the claimant been awarded permanent partial disability benefits in excess of a rating of fifteen percent to the body as a whole. Such a rating equals 67.5 weeks of compensation benefits under any basis of mathematical calculation. The respondents *have paid* 67.5 weeks of compensation benefits. Since the Administrative Law Judge did not modify the award in such a way as to find the claimant's permanent partial disability to be in excess of fifteen percent to the body as a whole, there is no justification for holding the respondents liable for an additional 22.5 weeks of benefits.

As we have found the respondents have fully complied with the award set out in the Law Judge's initial order, we also hold that the penalty imposed upon the respondents is error and must be reversed. (Emphasis in the original.)

Commissioner Farrar dissented.

We find that this decision must be reversed. In simple fact, the Commission's decision of December 18, 1985, has reversed a law judge's decision made on November 23, 1983, and this has been accomplished despite the fact that the Commission's order of September 20, 1984, remanding the case to the law judge, acknowledged that the law judge's decision had not been timely appealed to the Commission. Furthermore, the Commission's order of remand recognized that there was no procedure for rehearing before a law judge and specifically stated that appeal from denial of a petition for such a rehearing could not be used as a vehicle to obtain review of a law judge's decision which had not been timely appealed. But, the Commission, by renaming the appeal and calling it a "petition for modification" allowed the employer to do exactly what the Commission said the employer could not do.

The Commission's order of remand was wrong for two reasons. The Commission said that the notice of appeal was being treated as a petition for modification based "upon an alleged change in the claimant's physical condition pursuant to Ark. Stat. Ann. § 81-1326." However, the record clearly shows that there had been no change in the claimant's physical condition since the law judge's decision of November 23, 1983. Not only had no such change occurred, the employer had never alleged that such a change had occurred *after* the November 23 decision. Indeed, the alleged change in physical condition was called to the law judge's attention by the employer at the hearing on September 21, 1983. Thus, the employer could not contend that it was entitled to a modification of the law judge's decision pursuant to Ark. Stat. Ann. § 81-1326 (Repl. 1976). That section is clearly not involved under the facts of this case, and the Commission erred in remanding to the law judge under the provisions of that statute.

The employer does argue, however, that it was entitled to obtain a "clarification" of the law judge's decision of November 23, 1983, and when this was done by the law judge's order of January 20, 1984, a timely appeal was filed from that order. However, in our case of *Cooper Industrial Products* v. *Meadows*, 5 Ark. App. 205, 634 S.W.2d 400 (1982), there had not been a timely appeal from the law judge's decision, appar-

ently because the law judge had indicated he would reconsider his decision based upon receipt of some clarifying medical information. We said our Workers' Compensation Law does not provide for rehearing or reconsideration procedures and that the law judge did not have the authority or power to make the assurance that he would reconsider his order, "at least after" the thirty-day appeal period had expired. We have never deviated from that position, although in *Smith* v. *Servomation*, 8 Ark. App. 274, 651 S.W.2d 118 (1983), we did explain that this court's decision in *Walker* v. *J & J Pest Control*, 270 Ark. 941, 606 S.W.2d 597 (Ark. App. 1980), held that the Commission had authority to consider a motion for rehearing that was filed *within* the thirty-day period for appeal.

In the present case, the employer did file a petition for rehearing within thirty days of the law judge's decision of November 23, 1983. But that petition was denied on December 13, 1983, and no appeal was filed within thirty days of that date. Our decision that no timely appeal was filed in this case is not changed by the fact that the law judge subsequently, at the claimant's request, filed an order, from which an appeal was filed within thirty days, directing the employer to pay the amount found due by the law judge's original decision. The full Commission recognized, in its September 20, 1984, order of remand that it was "actually being asked to review" the law judge's decision of November 23, 1983, and we agree. The Commission, however, erred in remanding the matter to the law judge as there was no timely appeal from the law judge's decision of November 23, 1983, or from his denial of the petition for rehearing of that decision.

In the *Cooper Industrial Products* v. *Meadows* case, *supra*, the employee argued that we should take a more liberal view on the timely appeal matter. We declined to do so because the time for appeal was a legislative matter. We also rejected the theory upon which the Commission had remanded to the law judge in that case. The Commission had applied an estoppel theory because it said the evidence showed that the employee would have filed a timely appeal if the law judge had not indicated that he would reconsider his award upon receipt of clarifying medical information. Although we expressed "great sympathy" for the employee, we said the law judge and the Commission lost

jurisdiction after the employee failed to file an appeal within thirty days after the law judge's original decision was filed. We rejected a similar argument made by the employee in *Smith* v. *Servomation, supra.* In the present case, it is the employer who wants relief from the failure to file a timely appeal. We must, however, reject this request also.

The employer also argues that the *claimant* cannot appeal from the Commission's last decision, filed on December 18, 1985, because *he* failed to appeal from the Commission's remand to the law judge entered on September 20, 1984. It is sufficient to say that we do not think the Commission's remand order of September 20, 1984, was an appealable order. Therefore, it was perfectly proper for the claimant to raise that issue in his appeal from the Commission's decision of December 18, 1985. The *Cooper Industrial Products* v. *Meadows* case, *supra,* aptly demonstrates this point. That was the second appeal of that case. In the first appeal, *Cooper Industrial Products* v. *Meadows*, 269 Ark. 966, 601 S.W.2d 275 (Ark. App. 1980), the employer attempted to appeal from the Commission's remand to the law judge, made for the purpose of taking additional evidence. This court said the remand order was not a final order, and hence not appealable. Then in the second appeal to this court, we reviewed the question of whether the law judge had the authority to consider the additional evidence and to amend his original order which had not been timely appealed, and we held that the law judge did not have such authority.

It is the general rule that orders of remand are not final, appealable orders. *Floyd* v. *Ark. State Board of Pharmacy*, 248 Ark. 459, 451 S.W.2d 874 (1970) (remand by circuit court for Board to reduce its findings to writing); *Nolan Lumber Co.* v. *Manning*, 241 Ark. 422, 407 S.W.2d 937 (1966) (remand by circuit court to Workers' Compensation Commission for "further development"); *Chandler Trailer Convoy* v. *Henson*, 266 Ark. 760, 585 S.W.2d 370 (Ark. App. 1979) (remand by circuit court to Workers' Compensation Commission for the purpose of taking the testimony of a certain witness and "development of any further evidence to determine" whether the employee was within his scope of employment when he suffered a fatal heart attack). The employer in this present case argues, however, that the mere fact that a remand is ordered does not mean there is no appealable

order if there is a ruling on the merits prior to making the remand. The case of *Bibler Brothers, Inc.* v. *Ingram*, 266 Ark. 969, 587 S.W.2d 841 (Ark. App. 1979), is cited in support of this position. But in that case the circuit court found that the claimant's healing period had not ended, reversed the award of 30% permanent partial disability made by the Workers' Compensation Commission, and found that the claimant could be further healed by entering a therapeutic work program "which the court had personally investigated and found to be available and suitable." The appellate court did reverse the circuit court and order it to reinstate the Commission's decision since the rule that an order of remand is not a final and reviewable order was not applicable because:

> In this case, the Commission order has been reversed and the Commission has no latitude to make further determination of the crucial question whether the healing period has ended. The court substituted its own factual determination and legal conclusion, and that is a final order.

266 Ark. at 973-74.

However, this is not the situation in the instant case. Here, the Commission's remand of September 20, 1984, was not a final, appealable order. It was a remand for "clarification" or for "modification" of the law judge's decision. No final order was involved. The final order in this case is the one made by the full Commission on December 18, 1985. We are today reviewing that order and it is reversed because we hold the Commission erred in remanding this matter to the law judge on September 20, 1984, and because there was no timely appeal from the law judge's decision of November 23, 1983, or from his December 13, 1983, denial of the employer's petition for rehearing of the November 23 decision. The timely filing of a notice of appeal is jurisdictional and should be raised by the court even if the parties do not raise it. *LaRue* v. *LaRue*, 268 Ark. 86, 593 S.W.2d 185 (1980). Here, however, the question was raised before the full Commission in its first hearing which resulted in its September 20, 1984, decision to remand, and again in the last hearing before the full Commission which resulted in its December 18, 1985, order now before this court.

Therefore, we reverse the Commission's order of December

18, 1985, and remand this matter to the Commission with directions to reinstate the law judge's opinion of November 23, 1983, in which he directed the employer to pay the claimant "Workers' Compensation benefits at a rate of $126.00 for 22.5 weeks which represents the additional five percent (5%) permanent partial disability herein awarded," and which also directed the employer to pay "to the claimant's attorney the maximum attorney's fee as allowed by the Arkansas Law on this Award." Before the remand, the law judge held, in his order of January 20, 1984, that the employer had paid $472.50 on the award of November 23, 1983, and we hold that the employer does not have to pay that amount twice. *Whether* the award of January 20, 1984, in fact *had been* paid was not foreclosed by the failure to appeal from that award, but *whether* the award *had to be* paid was foreclosed by the failure to appeal from the law judge's decision making that award.

Reversed and remanded.

CLONINGER and CORBIN, JJ., agree.

Lawrence Edward BENSON *v.* STATE of Arkansas

CA CR 86-126 720 S.W.2d 340

Court of Appeals of Arkansas
Division II
Opinion delivered December 17, 1986
[Rehearing denied January 21, 1987.]

Pilkinton, Pilkinton & Yocum, by: *Tony Yocum*, for appellant.

Steve Clark, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Judge. Appellant appeals from a jury verdict convicting him of aggravated robbery. He was sentenced to twenty years in the Department of Correction. We affirm, as modified, and issue this memorandum opinion pursuant to section (d) of the per curiam *In re Memorandum Opinions*, 16 Ark. App. 301, 700 S.W.2d 63 (1985).

This case is clearly controlled by the supreme court's recent decision in a companion case. *See Trotter* v. *State*, 290 Ark. 269, 719 S.W.2d 268 (1986). *Trotter* was decided on the same facts and evidence presented in the instant case. The court held that the proof did not support the jury's finding of aggravated robbery. Further, the court held that first degree battery was a lesser included offense of aggravated robbery. We are bound by that decision.

In *Trotter*, the court, quoting *Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977), held:

> [i]n this situation we may, depending upon the facts, "reduce the punishment to the maximum for the lesser offense, reduce it to the minimum for the lesser offense, fix it ourselves at some intermediate point, remand the case to the trial court for the assessment of the penalty, or grant a new trial either absolutely or conditionally."

290 Ark. at 277.

First degree battery is a class B felony punishable by five to twenty years imprisonment. The jury sentenced appellant to twenty years in prison, and we see no reason, based upon the record and evidence presented, to change the length of the sentence under the lesser offense—the same as imposed by the supreme court in *Trotter*. Therefore, we fix appellant's sentence

at twenty years for the lesser included offense of first degree battery.

Affirmed as modified.

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

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

CA 85-155 720 S.W.2d 340

Court of Appeals of Arkansas
En Banc
Opinion delivered December 17, 1986

PER CURIAM. In an opinion delivered on October 16, 1985, this court affirmed the decision of the Workers' Compensation Commission in the case of *Rose* v. *Arkansas State Police*, 16 Ark. App. 96, 697 S.W.2d 927 (1985). Subsequently, appellant petitioned for writ of certiorari to the United States Supreme Court. Thereupon, the United States Supreme Court reversed the judgment of the Arkansas Court of Appeals and remanded the case to this court for proceedings not inconsistent with the Court's holdings. *Rose* v. *Arkansas State Police*, ___ U.S. ___, 107 S. Ct. 334 (1986).

The cause of *Rose* v. *Arkansas State Police* is hereby remanded to the Arkansas Workers' Compensation Commission for further proceedings not inconsistent with the decision of the United States Supreme Court.

Remanded.

Robert A. McGAUGH *v.* Ann McGAUGH

CA 86-4 721 S.W.2d 677

Court of Appeals of Arkansas
Division I
Opinion delivered December 23, 1986
[Rehearing denied January 21, 1987.]

Wallace, Hamner & Arnold, for appellant.

Barron & Coleman, P.A., by: *Randy Coleman*, for appellee.

JAMES R. COOPER, Judge. This is an appeal from a decision of the Chancery Court of Pulaski County holding that the property settlement agreement incorporated into the parties' divorce decree was an independent contract and, therefore, unmodifiable. The appellant contends that the chancellor erred in finding the agreement to be unmodifiable and in refusing to consider evidence of the parties' understanding as to when alimony was to cease under the contract.

The parties were divorced on December 13, 1977. The divorce decree set forth, verbatim, the original of the property settlement agreement (Agreement) entered into November 15, 1977, and adopted and incorporated the entire agreement. The Agreement provides in pertinent part:

WHEREAS, it is the desire and intention of the

> parties that their relations, with respect to property and financial matters, *be finally fixed* by this agreement in order to settle and determine *in all respects and for all purposes* their respective present and future property rights, claims and demands *in such a manner that any action* with respect to the rights and obligations, past, present or future, of either party with respect to each other, *be finally and conclusively settled and determined* by this agreement . . . .
>
> . . . .
>
> NOW, THEREFORE, in consideration of the premises and undertakings herein contained, and for other good and valuable consideration, the parties agree:
>
> . . . .
>
> 9. Husband shall pay to wife the sum of $150.00 per month payable on the first of each and every month beginning December 1, 1977, as support for said wife.
>
> . . . .
>
> 12. *The terms and provisions of this agreement shall constitute a stipulation of the divorce action* instituted by the wife against the husband in the Chancery Court of Pulaski County, Arkansas, cause number 76-3660.

(Emphasis added.) The agreement also sets forth detailed provisions regarding property division and child custody, visitation, and support.

It is well settled law that there are two types of property agreements regarding the payment of alimony. *Seaton* v. *Seaton*, 221 Ark. 778, 255 S.W.2d 954 (1953); *Linehan* v. *Linehan*, 8 Ark. App. 177, 649 S.W.2d 837 (1983). The court in *Seaton* distinguished between these two different types of agreements:

> One is an independent contract, usually in writing, by which the husband, in contemplation of the divorce, binds himself to pay a fixed amount or fixed installments for his wife's support. Even though such a contract is approved by the chancellor and incorporated in the decree, as in the *Bachus* case, it does not merge into the court's award of

> alimony, and consequently, as we pointed out in that opinion, the wife has a remedy at law on the contract in the event the chancellor has reason not to enforce his decretal award by contempt proceedings.
>
> The second type of agreement is that by which the parties, without making a contract that is meant to confer upon the wife an independent cause of action, merely agree upon "the amount the court by its decree should fix as alimony." *Pryor* v. *Pryor*, 88 Ark. 302, 114 S.W. 700, 129 Am. St. Rep. 102, which construed an agreement of the first type, and *Holmes* v. *Holmes*, 186 Ark. 251, 53 S.W.2d 226, involving an agreement of the second type. See also 3 Ark. L. Rev. 98. A contract of the latter character is usually less formal than an independent property settlement; it may be intended merely as a means of dispensing with proof upon an issue not in dispute, and by its nature it merges in the divorce decree. In the *Holmes* case we held that the second type of contract does not prevent the court from later modifying its decree.

221 Ark. at 780.

The appellant contends that the agreement is a modifiable one, which was intended merely as a means of dispensing with proof on issues not in dispute and, therefore, merged into the divorce decree. As support for this contention, he points to paragraph twelve (12) of the Agreement, *supra*, which provides that the agreement shall be a stipulation in the divorce action. The appellee counters that the agreement is an independent contract and is nonmodifiable, relying on language in the Agreement which provides that the agreement is finally fixed and determined in all respects and purposes and conclusively settled by the Agreement. We agree with the appellee, and find that *Linehan*, 8 Ark. App. 177, is controlling.

In *Linehan*, the parties entered into a stipulated agreement, orally dictated into the record in open court, providing that the agreement would be incorporated into the decree by reference. 8 Ark. App. at 179. Like the Agreement here, the stipulation was detailed, covering all aspects of the controversy from property division to child visitation, and was incorporated

into the decree without variance. We recognized that there were two types of stipulations: procedural, aimed at facilitating the lawsuit by simplifying proof, and contractual, dealing with the subject of the lawsuit, such as the rights or property at issue. 8 Ark. App. at 180-81. We pointed out that a contractual stipulation can only be withdrawn on grounds for nullifying a contract and stated:

> We are not saying that a stipulation in every instance will have the full force and effect of a binding agreement or a contractual right, but when, as here, all the rights and liabilities of the parties are covered in such a total and complete agreement, then it will not be modifiable.

Id. The Agreement in the case at bar, like the agreement in *Linehan*, is a comprehensive and complete agreement, setting forth everything from child custody to proper visitation. Moreover, it is a written agreement, signed prior to entry of the decree, and by its language, it attempts to finally settle all of the parties' differences. We affirm the chancellor's decision on this point.

The appellant next contends that the chancellor erred in refusing to consider evidence as to the parties' intent as to when alimony should cease. The chancellor found in her order that "what the parties may have intended is not relevant, as the contract must be gathered from the four corners of the instrument, where there is no ambiguity and the instrument is a complete integration of the parties [sic] agreement, as is the case here."

Paragraph nine (9) of the Agreement merely states that the husband is to pay the wife $150.00 a month as support; it is silent as to when, if ever, this obligation ceases. Alimony has long been defined in Arkansas as

> a continuous allotment of sums, payable at regular intervals, for [the wife's] support from year to year, and continues only during the joint lives of the parties, or, in case of divorce from the bonds of matrimony, until the wife marries again. . . .

Birnstill v. *Birnstill*, 218 Ark. 130, 131, 234 S.W.2d 757, 758 (1950) (quoting *Brown* v. *Brown*, 38 Ark. 324 (1881)); *accord, Boyles* v. *Boyles*, 268 Ark. 120, 594 S.W.2d 17 (1980). Where no

definite time is fixed, a decree for alimony will, by its nature, cease with the death of either party, or, upon the remarriage of the wife, the husband may obtain relief by making proper application to the court. *Casteel* v. *Casteel*, 38 Ark. 477 (1882). The former causes cessation of alimony automatically. *See, Snyder* v. *Snyder*, 13 Ark. App. 311, 683 S.W.2d 630 (1985). However, remarriage does not automatically terminate the right to alimony, as there may be circumstances under which the court may be justified in continuing alimony payments. *Frawley* v. *Smith*, 3 Ark. App. 74, 622 S.W.2d 194 (1981). Normally, however, remarriage of the receiving spouse is, in and of itself, a sufficient reason for the termination of alimony. *Id.; accord, Beasley* v. *Beasley*, 247 Ark. 338, 445 S.W.2d 500 (1969); *Wear* v. *Boydstone*, 230 Ark. 580, 324 S.W.2d 337 (1959). Because there are two circumstances in which alimony normally ceases, one automatic and the other not, we find the provision for alimony in this case to be ambiguous as to its termination date. Therefore, we hold that the chancellor erred in refusing to consider evidence of the parties' intent as to when alimony should terminate.

In this case, the chancellor allowed evidence of intent into the record, although she specifically said she did not consider it. The evidence as to intent presented in the record is in hopeless conflict. In such a case, determining the credibility of the witnesses is a critical issue, which must be resolved before the court can reach a decision on the issue of intent. *See, Reed* v. *Radebaugh*, 8 Ark. App. 78, 648 S.W.2d 816 (1983). The chancellor is in a superior position to determine the credibility of the witnesses, as she has the opportunity to observe their demeanor when testifying, while we are restricted to the written record. *See, Bone* v. *Bone*, 12 Ark. App. 163, 671 S.W.2d 217 (1984). Although we do not normally remand cases we have before us on *de novo* review, instead entering the decree that the chancellor should have entered, we do so only when the record is so fully developed that we can plainly see where the equities lie. *McDonald* v. *McDonald*, 19 Ark. App. 75, 716 S.W.2d 788 (1986); *Bercher* v. *Bercher*, 268 Ark. 877, 596 S.W.2d 369 (Ark. App. 1980). Under the circumstances of this case, we find it to be in the interests of justice to reverse and remand, directing the chancellor to consider evidence showing when the parties intended for alimony to terminate.

Reversed and remanded.

CLONINGER and MAYFIELD, JJ., agree.

SECOND INJURY FUND *v.* Ethmer Lee YARBROUGH and Frankie JONES

CA 85-216 721 S.W.2d 686

Court of Appeals of Arkansas
En Banc
Opinion delivered December 23, 1986

E. Diane Graham, for appellant.

Marc I. Baretz, for appellees.

MELVIN MAYFIELD, Judge. The Second Injury Fund appeals a decision of the Workers' Compensation Commission holding it liable to the claimant, Ethmer Lee Yarbrough, for permanent partial disability benefits of 25% to the body as a whole.

The claimant first received an injury to his back on June 28, 1978, while working for Halstead Industries. He was treated conservatively and released to return to work September 12, 1978, with no permanent disability rating. Although he continued to be bothered by "nagging" back pain, claimant worked for Halstead until he was terminated in 1981 for getting into a fight with his foreman. Within a week, he went to work for Frankie Jones. On September 10, 1982, while working for Jones, the claimant was helping lift a prefabricated rafter and felt his back pop, and he was immediately seized with severe back pain. Surgery was performed for ruptured discs at L4 and L5 on September 24, 1982. The claimant reinjured his back the following spring in a noncompensable accident at his home, and surgery was again performed for a ruptured disc at L5.

After a hearing held to determine the extent of claimant's disability and the liability, if any, of the Second Injury Fund, the administrative law judge held that the claimant had a 45% permanent disability to the body as a whole, that the Second Injury Fund was liable for 25% of that disability, and that Frankie Jones was liable for the other 15%. The full Commission affirmed the law judge.

On appeal to this court, the Fund argues that it should not have been held liable in any amount because the claimant did not have a disability that rendered him a handicapped worker prior to the injury sustained on September 10, 1982, while working for Frankie Jones, and that the Commission erred in holding that employer knowledge of a prior disability or impairment is not a prerequisite to applying the Second Injury Fund statute.

We have now clarified the meaning of the words "disability, impairment, and handicapped" as used in the second injury statute, Ark. Stat. Ann. § 81-1313(i) (Supp. 1985). In *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), we held that the word "disability" means loss of earning capacity due to a work-related injury, that "impairment" means loss of earning capacity due to a nonwork-related condition, and that "handicapped" means a physical disability that limits the capacity to work; and in *Second Injury Fund* v. *Fraser-Owens*, 17 Ark. App. 58, 702 S.W.2d 828 (1986), we added that "anatomical impairment" means the anatomical loss as reflected by the common usage of medical impairment ratings. These cases make it clear that, before the Second Injury Fund is liable, one must have a preexisting condition that is independently causing a loss of earning capacity at the time of the second injury, and which continues to do so.

In this case, the law judge's opinion was filed on September 14, 1984, and the full Commission affirmed and adopted that opinion on February 25, 1985. *Osage Oil Co.* v. *Rogers, supra,* was not decided by us until July 3, 1985. Until that case, and the other cases that followed it, defined and clarified the meaning of the words *disability, impairment, handicapped* and *anatomical impairment*, the Commission's view and the view of this court as to the meaning of those words were not in complete agreement. Therefore, we think it necessary to remand this case for the Commission's reconsideration in light of the cases mentioned above.

We must, however, now address the meaning of a provision of the second injury statute not heretofore defined or construed by us. Ark. Stat. Ann. § 81-1313(i) (Supp. 1985) provides, in part:

> It is intended that latent conditions, which are not known to the employee or employer, not be considered previous disabilities or impairments which would give rise to a claim against the Second Injury Fund.

The Fund argues in this appeal that the purpose of second injury fund statutes in general is to eliminate the competitive employment disadvantage suffered by handicapped workers. *See Chicago Mill & Lumber Co.* v. *Greer*, 270 Ark. 672, 606 S.W.2d 72 (1980). But, the Fund asserts, the statutes were also an attempt to encourage employers to put and keep handicapped people in the work force. Our statute supplies an incentive in that respect by attempting to insure "that an employer employing a handicapped worker will not, in the event such worker suffers an

injury on the job, be held liable for a greater disability or impairment than actually occurred while the worker was in his employment." The Fund's brief in this case, therefore, states:

> How can a worker be at a competitive employment disadvantage if his or her employer is unaware of any such prior condition? Will the purposes of [the statute] be fulfilled by employers [or carriers] scurrying to find out if its worker had a prior disability only *after* he is injured on the job? If the employer is unaware of any condition before the injury giving rise to the claim, there is no employment disadvantage to be eliminated. Knowledge of such condition on the part of the employer is essential to existence of an employment disadvantage. Knowledge on the part of the employee is irrelevant.

When the language of a statute is clear and unambiguous, resort to statutory construction is inappropriate. *Patrick* v. *State*, 265 Ark. 334, 576 S.W.2d 191 (1979). When statutes are being construed, the legislative intent behind the wording used must be determined. *Amason* v. *City of El Dorado*, 281 Ark. 50, 661 S.W.2d 364 (1983). In *City of North Little Rock* v. *Montgomery*, 261 Ark. 16, 18, 546 S.W.2d 154 (1977), the Arkansas Supreme Court said:

> We have held that "[T]he meaning of a statute must be determined from the natural and obvious import of the language used by the legislature without resorting to subtle and forced construction for the purpose of limiting or extending the meaning. **** It is our duty to construe a legislative enactment just as it reads." *Black* v. *Cockrill*, Judge, 239 Ark. 367, 389 S.W.2d 881 (1965). We have also said "[I]n construing statutes in the absence of any indication of a different legislative intent, we give words their ordinary and usually accepted meaning in common language." *Phillips Petroleum* v. *Heath*, 254 Ark. 847, 497 S.W.2d 30 (1973).

However, in *Bird* v. *Pan Western Corp.*, 261 Ark. 56, 60, 546 S.W.2d 417 (1977), the court also said:

> The ordinary and generally accepted meaning of words used in a statute must yield to the meaning intended

> by the General Assembly when it is clear from the context of the act that a different meaning is intended. . . . Thus, in construing an act, the courts are bound by specific definitions of a word by the legislature in that act, regardless of the usual and ordinary meaning of that word; unless the definition is arbitrary, creates obvious incongruities in the statute, defeats a major purpose of the legislation or is so discordant to common usage as to generate confusion. (Citations omitted.)

When construing an act, the legislative intent is to be acquired from a consideration of the statute which gives effect to every word if possible. *Holt* v. *Howard*, 206 Ark. 337, 175 S.W.2d 384 (1943). Any construction which would render meaningless one or more clauses of the act is to be avoided if possible. *Id.* While "and" and "or" can be convertible, it is well settled that such a substitution may not be made "unless the whole context of the statute requires, plainly and beyond question, that it be done in order to give effect to the intention of the Legislature." *Shinn* v. *Heath*, 259 Ark. 577, 535 S.W.2d 57 (1976); *see also Hines* v. *Mills*, 187 Ark. 465, 60 S.W.2d 181 (1933); and *Beasley* v. *Parnell*, 177 Ark. 912, 917, 9 S.W.2d 10 (1928). The reason is that, when words have a settled legal meaning, it is dangerous to conjecture that they were used in other than their legal signification. *Beasley*, 177 Ark. at 917-18. "In its ordinary sense the word 'or' is a disjunctive particle that marks an alternative generally corresponding to 'either' as 'either this or that'; it is a connective that marks an alternative." *Id.* at 918.

Apparently, New York is the only state that has required actual employer knowledge of the employee's previous condition in every case in the absence of clear and unequivocal wording in the statute to that effect. *See* 2 Larson, *Larson's Workmen's Compensation Law* § 59.33(b)(1986). New York has, by judicial interpretation, required that there be actual knowledge on the part of the employer. *Bass* v. *Westchester Concrete, Inc.*, 84 A.D.2d 634, 444 N.Y.S.2d 283 (1981); *McCoy* v. *Perlite Concrete Co.*, 53 A.D.2d 749, 384 N.Y.S.2d 234 (1976).

Larson criticizes the New York rule of requiring actual employer knowledge in each case stating:

> The New York rule is defensible only if it is assumed

> that the exclusive purpose of the second injury principle is to encourage the hiring of the handicapped. This is, of course, the central purpose — but the principle also embraces the idea of achieving this result in a way that works hardship on neither the employer nor the employee. If one did not care about incidental hardship to the employee, one could do the hire-the-handicapped job by merely using an apportionment statute. And if one cares about the element of hardship to the employer, one could argue the employer ought to be relieved of the cost of the preexisting condition, whether he knew of it or not, purely on the ground that the cost of this impairment, not having arisen out of this employment, should not in fairness fall upon this employer.
>
> A more down-to-earth reason for disapproving the New York rule is that, as we have seen, it involves one of those distinctions that consume far more litigation time and cost than the policy at stake is worth.

2 Larson, *Larson's Workmen's Compensation Law* § 59.33(e) (1986).

We have concluded that the language in Ark. Stat. Ann. § 81-1313(i) referring to latent conditions "which are not known to the employee or employer" requires knowledge by *either* the employee *or* the employer, but not both. We think this is what the statute says, and we are persuaded that this is what it means.

This construction of section 81-1313(i) was, of course, not known by the Commission at the time it rendered its decision in this case. So, we think it proper on remand for the Commission to also reconsider its decision in view of our decision on this point.

Remanded for reconsideration in keeping with this opinion.

Diana Jean VANDERKAMP and Jan Tina Marie VANDERKAMP *v.* STATE of Arkansas

CA CR 86-66 721 S.W.2d 680

Court of Appeals of Arkansas
Division II
Opinion delivered December 23, 1986

[redacted]

James E. Davis, for appellants.

Steve Clark, Att'y Gen., by: *Lee Taylor Franke*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. Appellants, Diana Jean Vanderkamp and Jan Tina Marie Vanderkamp, were found guilty by a jury of possession of marijuana with intent to deliver. The jury fixed Diana's sentence at one year in the county jail and a $1000.00 fine. Jan Tina's sentence was fixed at 30 days in the county jail and a $500.00 fine. The offenses were alleged to have occurred on January 8, 1985, and were violations of Acts 306 and 417 of 1983. Although, the penalty provided for the violation of these acts would have required imprisonment in the Department of Correction, apparently, the trial judge thought the failure of the acts to expressly state that the offense of possession with intent to deliver was a felony meant that the offense had to be treated as a misdemeanor for punishment purposes. This case was tried on August 15, 1985, and the trial court did not have the benefit of the decision of September 30, 1985, in *Dollar* v. *State*, 287 Ark. 61, 697 S.W.2d 868, holding that the offense involved was a felony

even though not expressly so designated. Even so, the appellants bring this appeal from the judgments assessing the punishment fixed by the jury verdicts.

On appeal, it is contended that the trial court erred (1) in admitting into evidence certain items found as the result of a vehicle search made by the authority of a search warrant issued upon an insufficient affidavit, (2) in overruling the motion for directed verdict made by each appellant, and (3) in refusing to either grant the motion for severance made by each appellant or to exclude certain evidence that did not involve each of them. We find no error and affirm both convictions.

At a hearing on the motions to suppress, it was shown that the warrant to search the vehicle was issued upon the affidavit of Clarence A. Glenn, Jr., who was working with the county sheriff's office as an informant in a drug investigation. The affidavit states Glenn was present at a certain residence in Mena, Arkansas, on January 1 and January 7, 1985; that on the first date, he accompanied Steve Clemmons, a state policeman, to the residence at which Clemmons made a purchase of marijuana from the appellant Diana Vanderkamp; that between midnight of January 7 and 12:30 a.m. of January 8, he was present at the same residence when occupants of the house were intoxicated, apparently on marijuana, and at which time two trash bags filled with some substance were carried from a bedroom of the house to the garage of the house.

The second paragraph of the affidavit states that on January 8, Glenn received information from a confidential informant that the occupants of the house had two large bags of marijuana and were going to remove them before dark. The affidavit states that this "informant has regularly furnished information to the sheriff's office which has proved in other instances to be reliable." It is also stated that late in the day of January 8, Glenn and Tim Shaw, a deputy sheriff, put the house "under surveillance" and later observed an automobile, registered to appellant Diana Vanderkamp, back into the garage and saw the garage door close. About 45 minutes later, the garage door opened and the same car, driven by Diana Vanderkamp, pulled out of the garage. It was stopped after being driven a short distance down the street, and permission to search the vehicle was denied. The affidavit

concludes with the statement that, because of the facts stated, the affiant has ample reason to believe that the vehicle contains controlled substances.

Evidence was introduced to show that the above affidavit was sworn to before a municipal judge who issued the search warrant. The judge also heard testimony which was recorded but the recording had been misplaced or lost and the judge testified he had been unable to find it.

Other evidence heard on the motion to suppress, disclosed that, when the car left the house, Deputy Sheriff Tim Shaw called another deputy sheriff, Jimmy Jacobs; that after Jacobs arrived at the place where Shaw and Glenn had stopped the car, Jacobs arrested the driver; and after she drove it to the police station, the car was impounded and Jacobs drove it to the prosecuting attorney's residence where it was searched the following day after the search warrant had been obtained. The search revealed a large plastic bag containing marijuana in the luggage area of the hatchback vehicle.

It was also stipulated, for purposes of the suppression hearing, that appellant Diana Vanderkamp was the registered owner of the automobile and that appellant Jan Tina Vanderkamp was an occupant of the vehicle at the time it was stopped and Diana was arrested.

Appellants' first point is based upon the contention that the search warrant was issued upon an insufficient affidavit. They cite A.R.Cr.P. Rule 13.1(b), which contains a provision that "If an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained." The appellants say that the affidavit here is defective because it failed to state when or how the "confidential informant" learned that the occupants of the house had marijuana they were going to move to another location and because it failed to state any basis, other than mere conclusions, from which the credibility of the informant could be evaluated.

Although we recognize that the affidavit referred to an unnamed informant whose reliability may have been supported

by a conclusory statement, it also contained information obtained by personal observation of the affiant. In *Thompson* v. *State*, 280 Ark. 265, 658 S.W.2d 350 (1983), the Arkansas Supreme Court adopted the "totality of circumstances" test set out by the United States Supreme Court in *Illinois* v. *Gates*, 462 U.S. 213 (1983). As explained by our decision in *Wolf* v. *State*, 10 Ark. App. 379, 381, 664 S.W.2d 882 (1984), under this test the magistrate issuing the warrant must make a practical, commonsense decision based on all the circumstances set forth in the affidavit. It is then the duty of the reviewing court to simply 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.

In the instant case, the affiant stated that he had been at a house in Mena on January 1, 1985, with a state policeman, at which time Diana Vanderkamp sold the policeman some marijuana. The affidavit also stated that six days later the affiant was again in this same house and the occupants were intoxicated, apparently on marijuana, and that two trash bags of some substance were carried from a bedroom of the house to the garage.

The second paragraph of the affidavit states that the next day, January 8, 1985, the affiant received information from a confidential informant that the occupants of the house were going to remove two large bags of marijuana from the house before dark; that he therefore placed the house under surveillance; that late in the same day, he observed a car registered to and driven by Diana Vanderkamp, back into the garage of the house and about 45 minutes later drive away; and when officers stopped the car, permission to search it was refused.

Probable cause for a search warrant does not require an affiant to assert facts that establish conclusively or beyond a reasonable doubt that a violation of the law exists at the place to be searched. *Flaherty & Whipple* v. *State*, 255 Ark. 187, 500 S.W.2d 87 (1973), *cert. denied*, 415 U.S. 995 (1974).

> Probable cause exists where knowledge of facts or circumstances is imparted to the examining court sufficient to persuade an ordinarily prudent person to actually believe

> in good faith, as opposed to mere suspicion, that the facts asserted in the affidavit are true. . . . The judicial determination by the examining court that probable cause exists for the issuance of a search warrant is entitled to considerable deference and weight by a reviewing court.

255 Ark. at 196.

Although the affidavit does allege that a confidential informant tipped the affiant that the marijuana was going to be removed from the house, and even assuming that the affiant's statement about the informant's reliability was conclusory, nevertheless, we think the affidavit met the "totality of circumstances" test set out in *Illinois* v. *Gates, supra*, and adopted by the Arkansas appellate courts. There is present in this case, as in *Gates*, strong corroboration of the future actions of third parties as predicted by the informant. Also present in this case, we think, was the "objective good faith reliance," by the law enforcement officers, on the magistrate's acceptance of the affidavit referred to in *Herrington* v. *State*, 287 Ark. 228, 230, 697 S.W.2d 899 (1985), in its discussion of the good faith exception to the exclusionary rule enunciated in *United States* v. *Leon*, 468 U.S. 897 (1984). *See also Toland* v. *State*, 285 Ark. 415, 688 S.W.2d 718 (1985) (applying the good faith exception of *Leon*). We find no error in the trial court's denial of the motions to suppress.

At the conclusion of the evidence presented by the State in the trial of the charges against the appellants, they did not introduce any evidence but moved for directed verdicts. They contend in this appeal that the court erred in refusing to grant their motions. A motion for directed verdict is a challenge to the sufficiency of the evidence, *Glick* v. *State*, 275 Ark. 34, 627 S.W.2d 14 (1982), and, on appeal, we view the motion in the light most favorable to the party the motion is directed against and affirm the jury's conclusion if it is supported by substantial evidence, *Shields* v. *State*, 281 Ark. 420, 664 S.W.2d 866 (1984). Substantial evidence is evidence of sufficient force and character that it will with reasonable and material certainty and precision compel a conclusion one way or another; it must force or induce the mind to pass beyond suspicion or conjecture. *Jones* v. *State*, 269 Ark. 119, 598 S.W.2d 748 (1980).

The first question on this point is whether there is

substantial evidence to support the jury's verdict finding each appellant guilty of possession of the marijuana in the vehicle *with intent to deliver*. The evidence shows that there was one large plastic bag found in the luggage area of the hatchback vehicle. In the large plastic bag were two paper sacks with several small "ziploc" plastic bags in each paper sack. One sack contained 16 "ziploc" bags, and the other one contained 14 of them. In addition, there were 16 "ziploc" bags loose in the large plastic bag. According to a drug chemist, employed by the Arkansas State Crime Laboratory, the 46 small bags contained a total of almost 36 ounces of marijuana. Under Ark. Stat. Ann. § 82-2617(d) (Supp. 1985), the possession of more than an ounce of marijuana creates a presumption of intent to deliver. The jury was instructed that the amount of marijuana possessed could be considered along with all the other facts and circumstances in determining the purpose or intent for which marijuana is possessed. This has been held to be a proper instruction. *See Brenneman & King* v. *State*, 264 Ark. 460, 471, 573 S.W.2d 47 (1978), *cert. denied*, 442 U.S. 931, (1979).

Appellants argue, however, that there is no substantial evidence to link them with possession of the marijuana. We think the argument with respect to Diana Vanderkamp is clearly without merit. We realize that she was charged and convicted of possessing marijuana on January 8, 1985, with intent to deliver, although her arrest on that day was apparently for activity occurring a few days prior to January 8. But, regardless, there is testimony from two witnesses, Steve Clemmons and Jody Spurling, who made an in-court identification of Diana as the person from whom they purchased marijuana in a house in Mena, Arkansas, within a week prior to January 8, 1985. Clarence Glenn testified that he was in this same house one night between the 4th and 8th of January, 1985, and that Diana and one or two other ladies, and one man, were in the house. He also said that while he was there, the man carried two bags from a bedroom of the house to the garage which was enclosed in the house. Glenn said he did not look into the bags but they had the same appearance of the large plastic bag found in the back of the car Diana later drove away from the house. And in that connection, both Glenn and Deputy Sheriff Tim Shaw testified that on January 8, 1985, they were watching this house when someone

backed a car into the garage and when Diana drove the car out of the garage. Also, there was testimony at the trial that the car was stopped by Glenn and Shaw and later searched by Deputy Sheriff Jimmy Jacobs who found the plastic bag, containing the smaller bags of marijuana, in the luggage area of the car.

We think this testimony is clearly sufficient for the jury to find that Diana was in possession of the marijuana found in the car driven by her. A closer question exists with regard to Tina Vanderkamp. In *Cary* v. *State*, 259 Ark. 510, 534 S.W.2d 230 (1976), the court laid down the following general rules:

> Constructive possession of a controlled substance means knowledge of its presence and control over it. . . . Neither actual physical possession at the time of arrest nor physical presence when the offending substance is found is required. . . .
>
> . . . .
>
> . . . The evidence is sufficient if it is shown, either by direct or circumstantial evidence, that the accused had the right to exercise control over the contraband substance. . . . When the evidence of possession is purely circumstantial, there must be some factor, in addition to joint occupancy of the place where narcotics are found, linking the accused with the narcotic in order to establish joint possession. (Citations of authority omitted.)

259 Ark. at 517-18.

In the above case, three people were living in the same apartment. Heroin was found on a shelf in a bedroom closet, and the appellant's glove was found in the closet. In affirming the appellant's conviction for possession with intent to deliver, the court said it was not necessary that he have exclusive possession of either the apartment or the bedroom closet where the heroin was found; however, when the evidence of possession is purely circumstantial, there must be some factor, in addition to joint occupancy of the place where narcotics are found, linking the accused with the narcotic in order to establish joint possession of the narcotic. The court added:

> The finding of appellant's glove in the closet might not have

> been sufficient to furnish this link, but when this factor is coupled with evidence that appellant used heroin from the stock kept on the premises and that sales were made there, and the remarks of appellant . . . after the search, there were sufficient circumstances . . . for the jury to draw the inference that appellant had joint possession of the substance . . . .

259 Ark. at 518.

As to Tina's conviction, we think the instant case sufficiently meets the law and evidence criteria set out in the *Cary* case. On January 8, 1985, she was a passenger in the car in which the marijuana was found. The marijuana was in the luggage area of a hatchback vehicle. There is testimony that this is an area of the car that is enclosed and that it is not locked unless the car doors are locked. From this evidence, the jury could reasonably find that this area was accessible from within the passenger compartment of the vehicle. Found in the large plastic bag in the luggage area, in addition to the 46 smaller bags of marijuana, was a gift-wrapped little box with a tag on it that read "Happy Holidays to Mike from Tina." The automobile had just left the garage of a house where witnesses had purchased marijuana within a week prior to the day the vehicle was stopped by the law enforcement officers. A witness, Clarence Glenn, testified that while he was present in the house on a night within three days of the day the vehicle was stopped, he saw a man carry two plastic bags, similar in appearance to the one found in the vehicle, from a bedroom of the house into the garage. And a witness, Jody Spurling, testified that this was the house in which he and Steve Clemmons purchased marijuana a few days prior to January 8, 1985, and that it was Diana's or Tina's house, although he was not really too sure which one it belonged to. Even if the evidence of possession of the contraband substance is not as strong here as it was in the *Cary* case, we believe it is strong enough, when considered in the light most favorable to the State, for the jury to find that appellant Tina Vanderkamp had joint possession of the marijuana found in the car in which she was riding on January 8, 1985, and therefore to constitute substantial evidence to support the verdict against her.

The last point raised by the appellants is that the court erred

in refusing to sever their trials. The argument made on this point is really on Tina's behalf. Included in the argument is the contention that the court erred in allowing, in Tina's trial, the introduction of the evidence concerning the sale of marijuana made by Diana.

The record clearly establishes that both the appellants were tried on the charge that they possessed marijuana on January 8, 1985, with intent to deliver. The evidence concerning the sale of marijuana in the house in Mena, sometime within a week prior to January 8, 1985, was admissible in the trial of each appellant on the charges of the offense alleged to have been committed on January 8, 1985. The questions of who possessed the marijuana found in the vehicle on January 8, and the purpose or intent with which it was possessed, were issues for the jury to decide. Rule 404(b) of the Arkansas Rules of Evidence, provides that evidence of other crimes may be admissible for purposes such as proof of motive, intent, preparation, plan or knowledge. *See Harper* v. *State*, 7 Ark. App. 28, 643 S.W.2d 585 (1982); *see, e.g., Lincoln* v. *State*, 12 Ark. App. 46, 670 S.W.2d 819 (1984). We find no error in allowing the introduction of evidence of the sale of marijuana in the house in Mena during the week preceding January 8, 1985.

Also, we find no error in the trial court's refusal to grant the motion to sever the trials of the appellants. This is a matter within the sound discretion of the trial court. *McDaniel & Gookin* v. *State*, 278 Ark. 631, 648 S.W.2d 57 (1983). Not only do we find no abuse of discretion in failing to sever the trial, but since the same evidence about the activities in the house during the preceding week would have been admissible in the trial of each appellant, the court should have consolidated the trials. *See Henry* v. *State*, 278 Ark. 478, 647 S.W.2d 419 (1983), *cert. denied*, 464 U.S. 835 (1983).

Affirmed.

CLONINGER and CORBIN, JJ., agree.

PULASKI COUNTY, et al. *v.* William R. BOYER

CA 86-178 720 S.W.2d 929

Court of Appeals of Arkansas
En Banc
Opinion delivered December 23, 1986

Jerry G. James, for appellant.

Hilburn, Bethune, Calhoon, Harper & Pruniski, Ltd., by: *Dorcy Kyle Corbin* and *Robert L. Roddey*, for appellee.

TOM GLAZE, Judge. Appellee, a deputy sheriff and radio dispatcher for the Pulaski County Sheriff's Office, was injured en route from his home to work. In his claim for workers' compensation benefits, appellee contended he had sustained an accidental injury arising out of and in the course of his employment. Appellant countered, arguing appellee's claim for benefits was barred by the "going and coming" rule. In awarding benefits to appellee, the Commission determined the "going and coming" rule did not apply because appellee's employer considered the

appellee on duty at the time of his accident. We affirm.

Arkansas recognizes the general rule that injuries which occur while an employee is going to or from work are not compensable. *City of Sherwood* v. *Lowe*, 4 Ark. App. 161, 628 S.W.2d 610 (1982). In this cause, the sole issue is whether substantial evidence exists to support the Commission's decision that appellee's claim is not barred by the "going and coming" rule. We have no problem in concluding there is such evidence.

Appellant argues appellee's claim is not compensable because, at the time of his accident, appellee, when going to work, was riding his own personal motorcycle, wearing civilian clothes and not enforcing any laws. Appellant suggests the only evidence that could support compensability is the testimony of appellant's commander, Major Zoeller — who said appellee was on duty commencing at the time he left his residence. Appellant discounts Zoeller's testimony because appellee worked only an eight-hour shift, was paid for eight hours and was not furthering the sheriff department's interests when he was injured.

While Zoeller indicated appellee and other deputies were paid a salary for an eight-hour shift, he also stated that appellee was "considered . . . on duty from the time he leaves home until the time he gets back home after the end of his shift. And if it took him thirty minutes to get to work and thirty minutes to get home, he'd be on duty nine hours a day. . . ." Zoeller also expressed that the sheriff's department, because of the Fair Labor Standard Act, was going to have to start paying for nine hours instead of eight.

In *Hawthorne* v. *Davis*, 267 Ark. 816, 596 S.W.2d 329 (Ark. App. 1979), *aff'd*, 268 Ark. 131, 594 S.W.2d 844 (1980), our Court, quoting from 100 C.J.S. *Workmen's Compensation* § 535 (1958) at page 536, said:

> In a compensation proceeding evidence is admissible as to statements made by an employer or his representative where the statement constitutes a declaration or admission against the employer's interest; and *an admission by an employer that workmen were injured in an accident arising out of and in the course of their employment may be admissible in evidence although the claim for compen-*

sation is being contested by the employer's insurance carrier. [Emphasis supplied.]

Appellant claims Major Zoeller's admission that appellee was on duty when he was injured is a mere "naked assertion." We cannot agree. Zoeller related that the departmental policy, that a deputy is considered on duty from the time he leaves home, came into effect as a result of the take-home-car program, and has as its rationale the idea that the officer's presence is "more noticeable on the street."[1] As already mentioned, that "going-to-work time" is a period for which Zoeller says the department is required to pay a salary. Also, Zoeller stated appellee is required by departmental policy to take action at any time when he witnesses an offense occurring in his presence. We mention these policy and salary factors only to show that, rather than a naked assertion by Zoeller, there appear to be valid reasons why the sheriff's department expects its deputies to be on duty when going to and from work. Based upon the facts and testimony before us, we believe there was substantial evidence from which the Commission could, and did, conclude that appellee was on duty and within the scope of his employment when he sustained his injury.

Affirmed.

COOPER and MAYFIELD, JJ., dissent; CORBIN, J., not participating; WRIGHT, Special Judge, agrees.

JAMES R. COOPER, Judge, dissenting. I dissent because I disagree that this case should be disposed of on the basis that it presents a simple question of whether there exists substantial evidence to support the Commission's decision. Instead, I am of the opinion that the issue for this Court to decide is whether, under the circumstances present in this case, the going and coming rule applies to bar the appellee's claim. Because I believe that this question must be answered in the affirmative, I respect-

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[1] Consistent with that policy, Zoeller testified that deputies, including those in the radio room, are required to wear their uniforms. Zoeller said that when appellee was injured, deputies, who were in the radio room, were allowed to wear the cooler civilian clothes because the air conditioner in the office was malfunctioning. The sheriff department's expressed reasons for considering deputies on duty when going to and from work make insignificant the fact appellee was wearing civilian clothes at the time of his accident.

fully dissent.

The majority has affirmed the Commission's decision in favor of coverage, finding it to be supported by substantial evidence. That evidence consists of the appellee's immediate supervisor's (Major Zoeller) statement that deputies are "considered" to be on duty while travelling to and from work. This rationale comes close to equating "on duty" status with being "in the course of one's employment," and thus omits an essential step in the analysis. The basic premise of the going and coming rule is that employees having fixed hours and places of work are generally not considered to be in the course of their employment while travelling to and from work. *See* 1 A. Larson, *Workmen's Compensation Law* § 15.00 *et seq.* (1985).

The essential inquiry, then, is not whether Officer Boyer was on duty when the accident occurred, but rather whether the accident occurred in the course of his employment as a police radio dispatcher. Our cases define "course of employment" as relating to the time, place and circumstances under which the injury occurred. *Owens* v. *National Health Laboratories, Inc.*, 8 Ark. App. 92, 648 S.W.2d 829 (1983). Professor Larson's formulation of the test for course of employment requires that the injury occur within the time and space boundaries of the employment, *while the employee is carrying out the employer's purpose or advancing the employer's interests directly or indirectly*. A. Larson, *supra*, §§ 14.00, 20.00 (1985). The requirement that the employee's activity be of some benefit to the employer is what distinguishes "course of employment" from mere "on duty" status.

Benefit to the employer was recognized as an element in the analysis of going and coming cases in *City of Sherwood* v. *Lowe*, 4 Ark. App. 161, 628 S.W.2d 610 (1982). In *Lowe* we held that the going and coming rule did not bar a claim for benefits arising out of the death of a police officer killed in a traffic accident on his way to work. This holding was based upon our finding that Officer Lowe's employer, the City of Sherwood, derived a benefit from his presence on the city streets, in uniform and operating a motorcycle equipped with police blue lights. *Id.* at 168. Whereas Officer Lowe, so dressed and mounted, was indistinguishable from a policeman who had begun his patrol and thus had a deterrent

effect upon potential wrongdoers, no such benefit to the employer is present in the case at bar. Dressed in blue jeans, calf length boots and a flannel jacket, and riding a Suzuki 850 "lowrider" which was not equipped with blue lights, it can scarcely be said that Officer Boyer's presence on the roadway served to inhibit any criminal activity. The fact that Officer Boyer was considered to be on duty by his employer is simply not enough in the absence of evidence that he had begun his workshift, was being paid at the time that the accident occurred, or that the "take-home" car program could not be implemented without treating all deputies as being on duty while travelling to and from work, without regard to whether or not they were actually travelling in a police department vehicle. I submit that the majority has erred in affirming the Commission's decision in favor of coverage where no recognized exception to the going and coming rule is applicable, and where the evidence of benefit to the employer is so tenuous, if not entirely lacking.

I dissent.

I am authorized to state that MAYFIELD, J., joins in this dissent.

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