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Roy S. MAHAN and Lenora E. MAHAN *v.*
William L. POLING, Rose K. POLING, B. J. BAKER,
Janice BAKER and THE FIRST NATIONAL BANK OF
ROGERS, Arkansas

CA 80-529 616 S.W. 2d 20

Court of Appeals of Arkansas
Opinion delivered May 27, 1981

Powell Woods, for appellants.

Hubert L. Burch and *Richard S. Hardwicke*, for appellees.

George K. Cracraft, Judge. Appellants appeal from a decree in which the chancellor relieved appellees from the effect of a stipulation for the acceleration of unpaid installments on a land sale contract under circumstances he found to be unconscionable.

In 1974 the appellants Mahan sold real estate to the appellees Poling on an installment contract under which the deed was deposited with the First National Bank of Rogers with instructions not to deliver the deed until all the installments of principal and interest and all other covenants therein had been fully performed. The installments of principal and interest were to be paid through the bank. The provisions of that contract obligated the buyer, among other things, to pay all taxes and other charges on the property when due.

Paragraph nine of the contract provided that "time shall be of the essence in the performance required by this agreement." It further provided that a delinquency in

buyer's performance of any term or condition, including the payment of taxes, which continued for a period of thirty days vested in the seller the option of two remedies. The seller might declare the contract terminated and recover possession of the premises or at his option declare the entire balance due on the contract to be immediately due and payable coupled with the immediate right to foreclose the unpaid seller's lien. In the event of election to exercise the latter option, an obligation to pay an attorney's fee was imposed upon the buyer.

Under this arrangement the appellees Poling entered into possession of the property and faithfully and promptly paid all of the installments of principal and interest, taxes and insurance premiums and fully performed all other obligations imposed upon them under the contract for a period of five years. In 1979 the appellees Poling conveyed their interest under the contract to appellees Baker, who continued to make the payments of principal and interest up to the time this action was filed.

For reasons not disclosed in the record, the real estate taxes due and payable before October 1, 1979, were not paid. The appellant Mahan became aware that the taxes were delinquent and, without notice or demand upon the appellees, redeemed the taxes on December 17, 1979. Thirty days thereafter on January 16, 1980, again without any notice to the appellees, Mahan elected to exercise his option to declare the entire unpaid balance of principal under the contract to be due and payable and brought his action praying that he have judgment for the unpaid balance and a decree in foreclosure.

The total amount that appellant was required to pay to redeem the taxes, penalty and interest, was in the amount of $79.10. At the time the acceleration of the debt was declared, the appellees were not and had never been otherwise in default. The First National Bank of Rogers was brought into the action solely because of its status as escrow agent. No judgment was sought against it. While the suit was pending the appellees made tender of two installments which were refused. An offer to tender all of the accrued installments and

the amount paid to redeem the taxes was made in open court at the date of the hearing.

The chancellor, on stipulated facts, found that the appellants had not notified the appellees that the taxes for 1978 were delinquent and made no demand on them to make that payment. The chancellor found no showing that the appellees received a tax statement for the 1978 taxes or that one had been mailed to them, and that there was a strong presumption that the appellees had no notice or knowledge that the taxes had not been paid. The court further found that it would not have been an undue burden on the appellants to notify the appellees of the delinquency and make demand on them for payment prior to commencing suit, "rather than sitting silently by and awaiting the expiration of the required thirty day period to bring their foreclosure action at a time when over one-half of the purchase price had been paid and the appellees had in all other respects faithfully performed all the covenants." The chancellor further found that as there was no showing that the failure to pay the taxes was intentional, that it would be "grossly inequitable" to declare a forfeiture of the contract; that the appellants in good conscience should have notified the appellees of the delinquency, and that therefore a court of equity ought to relieve the appellees from the forfeiture. The chancellor ordered the appellees to immediately pay the escrow agent a sum sufficient to bring the payments under the contract current and to reimburse appellants for the redemption, penalty and interest. Appellees were further ordered to pay the current real estate taxes. The decree provided that failure of appellees to do so within ten days would result in the entry of a decree ordering a sale of the property.

The appellants contend on appeal that the chancellor erred in not ordering foreclosure because the contract expressly provided that "time was of the essence" with respect to the performance of all of the covenants and provided in the event of default the appellants should have the option to declare the entire unpaid balance immediately due and payable, and have the right to bring an action to foreclose the unpaid seller's lien. They point out that there

was no denial that the taxes were delinquent and that the contract made no provision for the alternative relief granted by the chancellor.

It cannot at this time be questioned that provisions in an instrument of security providing for acceleration of the secured debt on default are valid and enforceable. *Johnson* v. *Guaranty Bank & Trust Co.*, 177 Ark. 770, 9 S.W. 2d 3. Under our decision the stipulation in such an instrument for the whole debt to mature upon default is not treated as a forfeiture, but rather as a stipulation for a period of credit on condition. *Pulaski Federal Savings & Loan Assn.* v. *Woolsey*, 242 Ark. 612, 414 S.W. 2d 633. It is also clearly established that when the instrument executed between the parties declares that time is of the essence in the performance of obligations of the agreement, the courts will not relieve against the consequences of a default except in certain circumstances. In *Pulaski Federal Savings & Loan Assn.* v. *Woolsey*, supra, the Supreme Court set out these circumstances under which such relief is warranted:

> The stipulation for accelerating the time of payment of the whole debt may be waived by the mortgagee, especially when it is made to depend upon his option. A court of equity will also relieve against the effect of such provisions, where the default of the debtor is the result of accident or mistake, or when it is procured by the fraud *or other inequitable conduct of the creditor himself.*
>
> Under our decisions, the stipulation in a mortgage for the whole debt to mature upon default of a part of the debt is not treated as a forfeiture clause, but rather as a stipulation for a period of credit on condition. A breach of the clause can only be relieved against when some one of the equitable grounds above stated are established. (Emphasis added.)

It has been stated that the purpose for including in security instruments a requirement that the debtor pay all taxes when due is for the purpose of assuring that the title to the security not be lost or the creditor unduly inconven-

ienced. Under our law the appellants were in no danger of losing their security, due to the two year period of redemption from tax sales provided by our law, Ark. Stat. Ann. § 84-1201 (Repl. 1980). He could not be harassed or be unduly inconvenienced by anyone during that period of time.

We agree with the chancellor that it would not have been a heavy burden on the appellants to have notified the appellees of the deficiency and afforded them an opportunity to cure it before declaring the acceleration of the debt. We further agree that it would be grossly inequitable in this case to permit a forfeiture in favor of one who sat silently and awaited the expiration of the required thirty day period for filing a suit in foreclosure. Under the circumstances of this case, the chancellor found that the appellants did not deal fairly with the appellees and took a technical and unconscionable advantage of the situation. While it may not be unconscionable to insist upon strict compliance with the terms of a contract, it would be inequitable to so insist when the default is in a trifling amount and neither endangers the security, hinders the collection of the debt nor otherwise injures the lienee. The appellees' prior performance record certainly gave appellants no reason to believe that the appellees would not promptly cure the default. Appellants' silence, followed by immediate suit, is suggestive of an intent on their part to avoid any act which might bring the deficiency to the appellees' attention in time to cure it and supports the chancellor's finding of inequitable conduct. The clear declaration of *Pulaski Federal Savings & Loan Assn.* v. *Woolsey*, supra, *Johnson* v. *Guaranty Bank & Trust Co.*, supra, *Harrell* v. *Perkins*, 216 Ark. 579, 226 S.W. 2d 803, is that foreclosure, although based in part on legal rights, is an equitable proceeding and it is within the province of a court with equitable powers to see that the party seeking the relief shall have dealt fairly before that relief is granted. We find no error in the action of the chancellor.

We affirm.

Edward ADDINGTON *v.* STATE of Arkansas

CA CR 81-36 616 S.W. 2d 742

Court of Appeals of Arkansas
Opinion delivered May 27, 1981
[Rehearing denied July 1, 1981.]

James A. McLarty, for appellant.

Steve Clark, Atty. Gen., by: *Leslie M. Powell*, Asst. Atty. Gen., for appellee.

James R. Cooper, Judge. The appellant in this case was convicted of theft of property in violation of Ark. Stat. Ann. § 41-2203 (Repl. 1977 and Supp. 1979), and was sentenced to 20 years in the Arkansas Department of Corrections as an habitual offender. The appellant urges as grounds for reversal that the Court was in error in refusing to suppress a statement made by appellant in that he did not make a knowing and intelligent waiver of his right to counsel. Appellant also urges that the Court erred in refusing to give a requested instruction.

I.

THE COURT ERRED IN DENYING DEFENDANT'S (APPELLANT'S) MOTION TO SUPPRESS A STATEMENT TAKEN BY CAPTAIN GARY WILSON IN THAT HE DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER OF HIS RIGHT TO COUNSEL.

The appellant was arrested on August 1, 1980, and was found to be in the possession of a stolen vehicle. He was later charged with theft of property and it was further alleged that

he was subject to an extended term of imprisonment as an habitual offender under Ark. Stat. Ann. § 41-1001 (Repl. 1977). On August 5, 1980, the appellant gave a statement to Captain Gary Wilson of the Newport Police Department. In that statement he confessed to the crime with which he was charged and gave a detailed account of prior felony convictions going back to 1949. The record reflects that upon his arrest appellant was given his *Miranda* rights and he gave a confession to the officer who arrested him. The record also reflects that Captain Wilson advised him of his *Miranda* rights twice. The trial court denied a motion to suppress the statement given to Captain Wilson. The State did not use the statement given to Captain Wilson during its case in chief on guilt, but following a verdict of guilty by the jury the State used the testimony of Captain Wilson to prove the prior felony convictions.

Ark. Stat. Ann. § 41-1003 (Repl. 1977) provides as follows:

> *Proof of previous conviction.* — A previous conviction or finding of guilt of a felony may be proved by any evidence that satisfies the trier of fact beyond a reasonable doubt that the defendant was convicted or found guilty. The following are sufficient to support a finding of a prior conviction or finding of guilt:
>
> (1) a duly certified copy of the record of a previous conviction or finding of guilt by a court of record; or
>
> (2) a certificate of the warden or other chief officer of a penal institution of this state or of another jurisdiction, containing the name and fingerprints of the defendant, as they appear in the records of his office; or
>
> (3) a certificate of the chief custodian of the records of the United States Department of Justice, containing the name and fingerprints of the defendant as they appear in the records of his office.

Under the statute cited above the State had several options as to the method it used to prove the prior convictions. Appellant does not complain that the State

used an incorrect method, but complains that the circumstances required a conclusion that he could not have made a knowing or intelligent waiver of his right to counsel. It is clear that our law presumes that a statement made while in custody is involuntary and the burden is upon the State to show otherwise. *Harvey* v. *State*, 272 Ark. 19, 611 S.W. 2d 762 (1981); *Earl* v. *State*, 272 Ark. 5, 612 S.W. 2d 98 (1981); *Bucy* v. *State*, 271 Ark. 768, 610 S.W. 2d 576 (1981). When we review the voluntariness of a confession, we must make an independent determination based on:

> ... the totality of the circumstances, with all doubts resolved in favor of individual rights and safeguards, and will not reverse the trial court's holding unless it is clearly erroneous. *Harvey*, supra.

Essentially, appellant argues that because Captain Wilson knew, or should have known, that appellant was to be taken before the Municipal Judge for his first appearance within a few hours and that at that time the question of appointed counsel would arise, the statement should not have been taken. Appellant argues that because of this knowledge on the part of the police and the lack of knowledge on the part of the appellant, he could not have knowingly and intelligently waived his right to counsel.

The appellant states that it is clear that he needed an attorney at the time Captain Wilson interviewed him, but that is not a basis for reversal. It may be argued that any defendant who waives his right to counsel should not have done so and that he would have been better off had he had the services of a qualified attorney. There is no allegation raised by appellant that he was mistreated in any way, or that the length of time he had been incarcerated had anything to do with the voluntariness of his statement.

Having examined the circumstances and allegations raised we are unable to say that the finding by the trial court that the statement was voluntary is clearly against the preponderance of the evidence.

Appellant cites *Sutton* v. *State*, 262 Ark. 492, 559 S.W. 2d

16 (1977), as being practically on all fours. However, in *Sutton*, the indigent defendant gave a statement following his appearance at a preliminary hearing, but prior to the time when counsel was appointed for him. The Supreme Court in that case held that the record was insufficient to establish the fact that following his appearance at a preliminary hearing he had knowingly and intelligently waived his right to counsel. That case is clearly distinguishable from the situation here. However, we find that the case must be reversed and remanded on another related issue.

The Arkansas Supreme Court has held that where the proof of prior convictions does not indicate that the defendant was represented by counsel at the time of his prior convictions acceptance of such evidence is error. *McCroskey* v. *State*, 272 Ark. 356, 614 S.W. 2d 660 (1981).

In *Klimas* v. *State*, 259 Ark. 301, 534 S.W. 2d 202 (1976), the Arkansas Supreme Court stated:

> It seems clear to us that when evidence, in whatever form, of a prior conviction is offered which is silent as to representation of the defendant by counsel or his waiver of the right of assistance of counsel, the state must first lay a foundation for its admission by evidence tending to show that defendant was, in fact, represented by counsel or that he did knowingly and intelligently waive his right to the assistance of counsel.

The State offered no evidence as to whether or not appellant had been represented by counsel on any of his seven prior felony convictions. The only evidence found in the record on this point is found in the testimony of appellant in which he indicated that on a manslaughter conviction his attorney and the prosecutor had worked out a plea agreement.

In *Duke* v. *State*, 266 Ark. 697, 587 S.W. 2d 570 (1979), the Supreme Court of Arkansas indicated that where the question as to whether or not appellant was represented by

counsel on prior convictions was not raised in the trial court, the appellate court would not consider such an objection for the first time on appeal. In *Wicks* v. *State*, 270 Ark. 781, 606 S.W. 2d 366 (1980), the Court emphasized that Arkansas does not have a "plain error" rule as is found under federal law, but pointed out that a possible exception to the Arkansas rule could be found in the Uniform Rules of Evidence, Rule 103 (d):

> Nothing in this rule precludes taking notice of errors affecting substantial rights although they were not brought to the attention of the court. Ark. Stat. Ann. § 28-1001 (Repl. 1979).

It is clear a substantial right of appellant was involved here and that the admission into evidence of a prior criminal conviction which was constitutionally infirm under the standards of *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R. 2d 733 (1963) is inherently prejudicial. *Burgett* v. *Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967).

The judgment is reversed and the cause remanded for a new trial unless the prosecutor elects first to assume the burden of proving at a hearing that Addington was in fact represented by counsel in the earlier cases. Should that burden not be met, a new trial will be necessary.

II.

THE COURT ERRED IN REFUSING TO GIVE DEFENDANT'S (APPELLANT'S) REQUESTED INSTRUCTION NO. 1. (AMCI 4002)

Although we have reversed and remanded the case on another point in the event there is a new trial we feel it would be helpful to deal with the second point raised by appellant.

The instruction requested by appellant reads as follows:

The State must also prove beyond a reasonable doubt

that defendant knowingly engaged in prohibited conduct. (AMCI 4002).

Definition

"Knowingly" — A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result. (AMCI 4002)

The instruction given by the Court is as follows:

Edward Addington is charged with the offense of theft of property. To sustain this charge, the State must prove beyond a reasonable doubt that Edward Addington knowingly took the property of another person with the purpose of depriving the owner thereof.

"Purpose". A person acts with purpose with respect to the results of his conduct when it is his conscious object to cause the results.

"Knowingly". A person acts knowingly with respect to his conduct when he is aware the conduct is of that nature.

Appellant does not argue that the instruction actually given by the Court is an incorrect statement of the law. Appellant does argue that there is more than one definition of "knowingly" contained in the various model instructions in use in Arkansas and that the instruction found in AMCI 4002 should have been used. Appellant correctly points out that the definition of "knowingly" under AMCI 2203 and AMCI 4002 are not the same. Further the appellant correctly points out that the State concedes that the requested instruction could have been given. We do not find error in the refusal of the trial court to instruct as requested by appellant.

In *Byers* v. *State*, 267 Ark. 1097, 594 S.W. 2d 252 (Ark. App. 1980), the Arkansas Court of Appeals stated:

> ... Where the subject matter of a requested instruction has been sufficiently covered by the instruction given, there is no error in the court's refusal to give the requested instruction. *Cobb* v. *State*, 265 Ark. 527, 579 S.W.2d 612 (1979).
>
> A trial court is not required to instruct the jury on the law in every possible manner even though a correct statement of it may be prepared by the defense counsel. *Butler* v. *State*, 261 Ark. 369, 549 S.W. 2d 65 (1977).
>
> ... Instructions which are cumulative are not necessary.

In this case we do not find any incorrect statement of the law in the instruction given by the Court, and find no error in the Court's refusal to instruct as requested. The additional instruction as to the definition of the word "knowingly" would have been cumulative and probably would have served to confuse the jury rather than to provide additional information to it.

Reversed and remanded.

David NEAL et ux *v.* Cleo JACKSON

CA 80-435 616 S.W. 2d 746

Court of Appeals of Arkansas
Opinion delivered May 27, 1981
[Rehearing denied July 1, 1981.]

L. T. Sims, II, for appellants.

Charles P. Allen, for appellee.

LAWSON CLONINGER, Judge. This appeal questions the validity of a deed executed by Albert Neal and his wife, Mary Neal, and a will executed by Albert Neal, on January 8, 1976. Mary Neal died on February 28, 1976, at the age of 81, and Albert Neal died on June 26, 1976, at the age of 91. The chancery court action seeking to set aside the deed and the

probate court action seeking to set aside the will were consolidated for trial.

The appellee, Cleo Jackson, is the grantee in the contested deed and is the principal beneficiary under the terms of Albert Neal's will. Appellant David Neal, the natural son of Albert Neal, and Daisy Neal, the wife of David Neal, filed actions to set aside the deed and the will on the grounds that Albert Neal and Mary Neal were mentally incapable of executing the instruments, and that they were subject to fraud and undue influence exercised by Cleo Jackson.

The trial court held that Albert Neal was mentally capable of making the will and the deed; that there was no fraud or undue influence exercised by Cleo Jackson; and that it was not necessary to determine the competency of Mary Neal, because title to the land was in Albert Neal alone, and therefore when Mary Neal predeceased Albert Neal any rights in the property which Mary Neal might have had by dower or homestead expired. The petition of appellants to set aside the deed and the will were dismissed by the trial court.

For reversal, appellants argue that (1) The will of Albert Neal was not executed according to Arkansas law; (2) The court erred by not setting aside a dismissal of appellants' petition to set aside the deed; (3) Albert and Mary Neal lacked mental capacity to make a deed or a will; and (4) They were subjected to undue influence and fraud.

We find no merit in appellants' arguments as to points 1 and 2, but we must reverse the decision of the trial court as to points 3 and 4.

Appellants, for their first point, argue that the will of Albert Neal was not properly executed because the person who wrote Albert Neal's name near Albert's mark did not sign as a witness to the signature. Ark. Stat. Ann. § 60-403 (Repl. 1971) provides:

> Execution. The execution of a will ... must be by

the signature of the testator and of at least two (2) witnesses as follows:

a. The testator shall declare to the attesting witnesses that the instrument is his will and either . . .

(3) Sign by mark, his name being written near it and witnessed by a person who writes his own name as witness to the signature . . .

Neither Ark. Stat. Ann. § 60-403, *supra*, nor the holding in *Green* v. *Smith*, 236 Ark. 829, 368 S.W. 2d 280 (1963), relied upon by appellants, requires that the person who writes the name of the testator near his mark must also sign as a witness to the signature or as a witness to the instrument itself. In this case there were two witnesses to the mark of the testator, and merely because neither of these witnesses wrote the testator's name near his mark is of no consequence.

Appellants, for their second point for reversal, urge that the trial court should have set aside the Rule 10 dismissal of appellants' petition to set aside the deed executed by Albert and Mary Neal to Cleo Jackson. The petition was filed on November 18, 1976. The Uniform Rules for Circuit and Chancery Courts, Rule 10, provides that a court docket may be cleared of any case upon which no action has been taken for one year. Dismissal is specified to be without prejudice. Pursuant to Rule 10, appellants' petition was dismissed on October 13, 1978, and appellants, on October 31, 1979, alleging justifiable cause, moved to reinstate the petition. The trial court found in the case now before the Court that the Rule 10 dismissal was with prejudice, thus barring any further proceedings in this case. The trial court, however, held that notwithstanding the dismissal, the court would make a determination of the petition on its merits. The trial court should have held that the Rule 10 dismissal was without prejudice to another action, but inasmuch as the court heard and decided the petition to set aside the deed on its merits, and none of the parties objected to the court's actions, the trial court's action is approved.

The questions of mental capacity and undue influence,

points 3 and 4 relied upon for reversal by the appellants, are so closely interwoven that they will be considered together. In *Phillips* v. *Jones*, 179 Ark. 877, 18 S.W. 2d 352 (1929), the Court said:

> As we have said, the questions of testamentary capacity and undue influence are so interwoven in any case where these questions are raised that the Court necessarily considered them together (*St. Joseph's Convent* v. *Garner*, 66 Ark. 623, 53 S.W. 298), for in one case where the mind of the testator is strong and alert the facts constituting the undue influence would be required to be far stronger in their tendency to influence the mind unduly than in another, where the mind of the testator was impaired, either by some inherent defect or by the consequences of disease or advancing age ... The facts constituting undue influence largely depend upon the condition of the mind of the person alleged to have been influenced. It has been said in the case of *Kelly's Heirs* v. *McGuire*, 15 Ark. 555, that if one is of such great weakness of mind as to be unable to resist importunity, and his act is not that of a judgment deliberatedly exercised, but the result of the control of a stronger mind by any means or artifice, cunning or fraud, that act is void.

The totality of the circumstances leading up to and culminating in the execution of the deed and the will in the case before the Court has to be examined before a picture emerges, and it will be necessary to set out those circumstances in some detail.

David Neal was the son of Albert Neal and Ernestine Ellaby. David's parents were not married, and in 1950 when David was four months old he was sent to live with Albert Neal and Albert's wife, Mary. David lived with Albert and Mary Neal continuously from 1950 to December 13, 1975, at which time Albert and Mary Neal moved out of their home and went to live in a house trailer parked behind the residence of appellee. It is virtually undisputed that David was Albert's son, and that Albert and Mary Neal gave David their name and treated him as a son. David and Daisy Neal

were married in 1971, and after that time David and Daisy lived with Albert and Mary. Daisy did the cooking and cleaning for the family, and paid most of the bills; David took care of the livestock on the farm and he also had a job. David testified that Albert and Mary Neal promised him all they had if he would stay and take care of them, which he did. Albert and Mary Neal executed a deed to David Neal for one-half acre of land in 1971, and in 1974 a new brick house was built on the one-half acre. The deed to David Neal recited in the consideration clause that the deed was given because of "the love and affection we hold for the grantee, our grandson." A thirty-year mortgage for $13,500 was given to finance the house, signed by Albert and Mary Neal, and by David and Daisy Neal.

Mary Neal had a light stroke early in December, 1975, and was treated in her home by a physician. On December 8, 1975, Mary Neal became convinced that David and Daisy Neal had taken one of her deeds, an abstract, and $1,500. Daisy Neal testified that Cleo Jackson told Mary Neal that Daisy Neal took the items and the money, but this is denied by Cleo Jackson. An unidentified person called the sheriff and reported the theft. David and Daisy Neal were taken to the sheriff's office and questioned, where it was discovered that the money was still in the bank, and David and Daisy Neal were cleared. Cleo Jackson took Mary Neal to the sheriff's office that same day, and then took Mary Neal to an attorney's office where Mary Neal discussed the making of a deed and a will. On December 10, 1975, Cleo Jackson took Mary Neal to West Memphis, where she selected a house trailer and bought it. Mary Neal paid $1,000 on the purchase price and Cleo Jackson paid $500. A promissory note in the sum of $3,300 was signed by Albert and Mary Neal and Cleo Jackson for the balance of the purchase price. On December 13, 1975, Albert and Mary Neal moved out of their house and into the trailer, which had been placed immediately behind Cleo Jackson's house. On January 6, 1976, Cleo Jackson took Albert and Mary Neal to Dr. Daniel Toneyman's office and obtained a certificate from Dr. Toneyman that Albert and Mary Neal were competent to transact their affairs.

About 8:00 a.m. on January 8, 1976, Albert and Mary

Neal executed instruments styled joint or reciprocal wills "in reliance upon our mutual agreement to dispose of our respective property . . ." Albert's will provided that Mary was to take everything if she survived him; in the event she predeceased him, he devised to David Neal his house and the half acre on which it is located; all the remainder of his property was devised to Cleo Jackson. The will recited that Albert Neal was that date selling Cleo Jackson his land, and the will provided that if any portion of the purchase price of the land was owing at Albert's death, the unpaid balance should be cancelled. The will recited that he and Mary had not had any children; that they had raised David Neal, but had not adopted him; that they loved him and wanted to provide for him to a certain extent. Mary Neal's will is identical to that of Albert Neal's. At the same time, Albert and Mary Neal executed a deed to their thirty-six acres of land to Cleo Jackson for a consideration of $9,000, $2,000 of which was paid, and the balance to be paid at the rate of $1,000 annually.

The instruments were executed in the house trailer of Albert and Mary Neal. The attorney who prepared the instruments was present, as were Cleo Jackson, his son, his daughter, and five others who had been brought there for the purpose of witnessing the execution of the instruments. The witnesses were friends of Cleo Jackson, and were picked up and brought to the house trailer by Cleo Jackson and his son. The group was there for more than an hour, and Albert was seated in a chair near the bedroom of the trailer. Mary was in bed. The attorney read the wills, pausing on occasion to ask Albert and Mary if they understood; the attorney said that Albert nodded twice in acknowledgment, but the other witnesses did not observe that. Neither Albert nor Mary said the instruments were their wills, nor did they ask the witnesses to be witnesses. Albert and Mary Neal made their marks, the attorney wrote the name of each by the marks, and the marks were witnessed. The attorney testified that Albert and Mary Neal were aware of what they were doing. Mary Butcher, age 83, a friend of the Neals as well as a friend of Cleo Jackson, testified that Mary's mind was all right; when she was asked if Albert's mind was clear that day she gave no answer. Mary Neal had a conversation with Mary Butcher

the day the instruments were executed, but the only time Albert spoke was to ask one of the witnesses if he was the son of an old acquaintance of Albert's. The witnesses testified that Albert and Mary Neal "touched the pencil, the pen, and made an X." They stated that the attorney made it very plain that they were witnesses that they touched the pencil and made the X.

On January 12, 1976, Mary Neal was hospitalized, suffering from arteriosclerotic heart disease, congestive heart failure, dehydration and malnutrition. She was admitted to the hospital again in February, 1976, suffering from heart failure and chronic brain syndrome. She died on February 28, 1976. Albert Neal went to Chicago in April to live with Mary Neal's niece, and he died there on June 26, 1976.

The evidence relating to the mental competence of Albert and Mary Neal is in conflict. Dr. Daniel Toneyman had been their physician for several years before their deaths, treating them both for high blood pressure and enlarged hearts, and examined them two days before the instruments were executed; however, Dr. H. B. Oldham treated Mary Neal on January 12, 1976, four days after the execution of the instruments, when Mary Neal was admitted to the hospital in a "state of semicomatose, very malnourished." Dr. Oldham stated that the malnourishment would have had to have been present for at least several weeks. Mary Neal was treated again by Dr. Oldham on February 6, 1976, when she was hospitalized again in a state of coma; her temperature was 95° and she was almost frozen; the doctor testified that she was at the time 81 years old, senile, and suffering from chronic brain syndrome; he testified that at all times when he treated her, she was not responsible for her actions.

A number of old friends of Albert and Mary Neal testified, and their testimony was in conflict. There was evidence that Albert and Mary Neal did not even acknowledge their presence. There was evidence that Albert and Mary Neal stopped going anywhere, even to church, several years before their deaths; that Mary Neal didn't want to leave Albert because Albert didn't think well, and that she had to

take care of all the business. There was also evidence that Albert denied selling his land after the deed was given. Other friends testified that Albert and Mary Neal were aware of what was going on, and were as alert as others their age. As is usually the case, the people who saw them daily have a vital interest in the outcome of this case, and their testimony has to be weighed accordingly.

David and Daisy Neal testified that Albert and Mary Neal were unable to help with any of the work around the house and farm the last ten years of their lives; that Albert was like a baby, and that when he went to the bathroom alone he would use the bathtub, thinking it was the commode. Cleo Jackson stated that Albert and Mary Neal were aware of their property and what they wanted to do with it; that they were able to do things for themselves, and that he did not influence them in anything they did; that he, Cleo Jackson, was not really aware of what the will provided for, although he was executor, at the time of the trial.

The rule for testing undue influence was laid down in the early case of *McCulloch* v. *Campbell*, 49 Ark. 367, 5 S.W. 590 (1887), and the rule has been restated in many subsequent cases:

> [T]he fraud or undue influence, which is required to avoid a will, must be directly connected with its execution. The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of his property. And the influence must be specially directed toward the object of procuring a will in favor of particular parties . . .

Undue influence may be inferred from facts and circumstances. *Alford* v. *Johnson*, 103 Ark. 236, 146 S.W. 516 (1912). In *Hyatt* v. *Wroten*, 184 Ark. 847, 43 S.W. 2d 726 (1931), the Court stated:

> [Undue influence] is generally exercised in secret,

> not openly ... its sinister and insidious effect must be determined from facts and circumstances surrounding the testator, his physical and mental condition as shown by the evidence, and the opportunity of the beneficiary of the influenced bequest to mold the mind of the testator to suit his or her purposes.

The burden of proving undue influence, incompetence and fraud which will defeat a will is on the party contesting the will. *Thompson* v. *Orr's Estate*, 252 Ark. 377, 479 S.W. 2d 229 (1972). However, in the case of *Short* v. *Stephenson*, 238 Ark. 1048, 386 S.W. 2d 501 (1965), the Court stated that there was a rebuttable presumption of undue influence in the case of a beneficiary procuring the making of the will, and that the proponent of such a will must show *beyond a reasonable doubt* that the testator had both the required capacity and the freedom of will to make the will valid.

The will of Albert Neal provided that "... I give, devise and bequeath to David Neal, whom we have raised, our house and the one-half acre on which it is located ..."

The trial judge, in a memorandum opinion written to the attorneys for the parties, made this observation:

> It must be further noted that Albert did not leave David out of his will altogether, but made what amounts to a fairly substantial provision for him. This indicates to the Court that Albert weighed the circumstances surrounding the making of the will, and came to a decision about them which he found to be satisfactory. If Albert were competent to do this (and we have found that he was), then the law gives him full leeway to do what he did. Our law does not require a testator to give preference to his blood relatives, to the exclusion of friends. We must only be careful to ascertain that the testator makes this selection free from any tainted influence. We find that Albert did so in this case.

The fact is, Albert Neal left nothing to David Neal in his will, because the house was built on the one-half acre which

he and Mary had deeded to David Neal in 1971, and the devise of the one-half acre and the house was the only provision made for him in the will. The devise casts doubt upon the awareness Albert and Mary had as to the extent of their property. Testamentary capacity means that the testator must be able to retain in his mind, without prompting, the extent and condition of his property, to comprehend to whom he is giving it, and relations of those entitled to his bounty. *Hiler* v. *Cude*, 248 Ark. 1065, 455 S.W. 2d 891 (1970). *Short* v. *Stephenson, supra*.

Procure means to cause a thing to be done, to bring about. There is evidence in abundance that Cleo Jackson procured the wills and the deed of Albert and Mary Neal. He was present and active at every stage of the events leading to the execution of the wills and the deed; when Mary Neal thought that David and Daisy Neal had taken her property, Cleo Jackson was at their house, and it was Cleo Jackson who took Mary Neal to the sheriff's office and then directly to the attorney's office to discuss the making of the will; two days later Mr. Jackson took Mary Neal to West Memphis to select a house trailer, and he not only paid $500 down on the trailer, he also signed a promissory note for the balance due. Mr. Jackson took Albert and Mary Neal to Dr. Toneyman's office to obtain a certificate of competency two days prior to the execution of the wills and deed; Mr. Jackson made the arrangements for the witnesses to be present for the signing of the wills and deed, and he and his son picked up the witnesses and brought them to Albert and Mary's trailer. Cleo Jackson was the procurer of the instruments, and he was the sole beneficiary under the terms of the will. As a procurer and beneficiary he was required by the rule enunciated in *Short* v. *Stephenson, supra*, to show beyond a reasonable doubt that Albert Neal had both the required capacity and the freedom of will to make the wills and deed valid. This he has failed to do.

The disposition of this property made by Albert Neal in his will was not a natural one. David Neal was Albert's natural son, and had been treated as a son by both Albert and Mary. They had sufficient love for him in 1971, at a time when Albert was 86 years old, to deed to him the one-half

acre upon which their home was located, describing David in the deed as their grandson, and in 1974, when Albert was 89 years old, they built a new brick home on David's land. Until about December 1, 1975, soon after Mary Neal suffered her first stroke, there was no evidence of disharmony in the family. Cleo Jackson was a neighbor and friend who owned 400 acres of land a short distance from the Neal farm.

The medical evidence presented in this case for the most part concerned the competence of Mary Neal. There was testimony to indicate that she was more active than Albert for the last few years of their lives, but she had more illness requiring hospitalization and the attendance of a doctor. Although Dr. Toneyman testified that she was competent to transact her business affairs, Dr. Oldham found her to be suffering from heart disease, hypothermia, chronic brain syndrome, and senility, within less than thirty days after the execution of the contested instruments, and his opinion was that in all probability she was suffering from those conditions in December, 1975. This Court is aware that the validity of the instruments executed by Mary Neal are not in contention here, and that her competence and vulnerability to undue influence are to be considered only as they may reflect on Albert's competence and freedom of will. The wills executed by Albert and Mary are self-styled "joint and reciprocal," and it is evident that Mary often took the lead in their joint actions; Mary alone went with Cleo Jackson to first discuss the making of the wills and deed, and Mary alone went to West Memphis with Cleo Jackson to buy a trailer. The mental and physical condition of both Albert and Mary was such that they were susceptible to undue influence.

We hold that the decision of the trial court was clearly against the preponderance of the evidence and that the petitions of the appellants to set aside the will of Albert Neal and the deed of Albert should have been granted by the trial court.

Evidence was presented in the trial court indicating that appellee has made improvements on the land purported to be conveyed by the deed. He is entitled to a lien on the land to secure the payment of the value of the improvements and

taxes he has paid. Ark. Stat. Ann. § 34-1423 (Repl. 1962). The rule for establishing the value of improvements was set out in *Wallis* v. *McGuire*, 234 Ark. 491, 352 S.W. 2d 940 (1962), and approved in *Williams* v. *Jones*, 239 Ark. 1032, 396 S.W. 2d 286 (1965), as follows:

> The measure of the value of betterments is not their actual cost, but the enhanced value they impart to the land, without reference to the fact that they were desired by the true owner, or could not be profitably used by him.

The decree is reversed and the cause remanded to the trial court with directions to permit the taking of proof relative to the value of the improvements made by appellee.

CRACRAFT, J., not participating.

Carla WORRING *v.* STATE of Arkansas

CA CR 80-94 616 S.W. 2d 23

Court of Appeals of Arkansas
Opinion delivered May 27, 1981

William C. McArthur, for appellant.

Steve Clark, Atty. Gen., by: *C. R. McNair, III*, Asst. Atty. Gen., for appellee.

DONALD L. CORBIN, Judge. Appellant was charged with murder in the first degree in violation of Ark. Stat. Ann. § 41-1502 (Repl. 1977). Following a trial by jury, she was found guilty of manslaughter and sentenced to ten years in the Arkansas Department of Correction. She alleges five points of error on appeal. One point is meritorious. We reverse the judgment and remand the case for retrial.

On December 11, 1978, appellant Carla Worring had followed her husband's truck to a darkened area behind a truck terminal in Stuttgart, Arkansas. She found her husband seated in a parked automobile with Diane Moritz. Appellant parked directly behind Ms. Moritz's car and walked around to the driver's side of the other vehicle and opened the door. She verbally accosted her husband and shot him one time with a .22 caliber pistol. Appellant and Ms.

Moritz attempted to load the victim into appellant's car to take him to the hospital. Ms. Moritz left the scene to find someone to help them load the victim into the car. Cecil Worring, the appellant's husband, died shortly after arriving at the local hospital.

I.

Appellant contends the trial court erred in excluding expert testimony presented by appellant relating to appellant's psychological make-up and formation of intent. Appellant proposed to present at trial the testimony of psychiatrist Dr. Aubrey C. Smith concerning certain psychological aspects of appellant as they relate to culpable mental state, intent, and other aspects of appellant's state of mind at the time of the shooting. The trial court excluded such testimony but allowed appellant to make a proffer of what Dr. Smith's testimony would be. Appellant testified that she had not intentionally fired the weapon and had no intention of doing so at any time. She contends her testimony would have been corroborated by the expert testimony of Dr. Smith.

We fail to see where appellant was prejudiced by the court's failure to allow this testimony. The charge of first degree murder was reduced to manslaughter by the jury, apparently on the testimony of appellant as to her state of mind at the time of the shooting.

The manslaughter statute, Ark. Stat. Ann. § 41-1504 (Repl. 1977), in part provides:

> *Manslaughter.* — A person commits manslaughter if:
>
> (a) he causes the death of another person under circumstances that would be murder, except that he causes the death under the influence of extreme emotional disturbance for which there is reasonable excuse. The reasonableness of the excuse shall be determined from the viewpoint of a person in the defendant's situation under the circumstances as he believes them to be;
>
> . . .

(c) he recklessly causes the death of another person;

The jury could have used either one of these definitions to convict appellant of manslaughter.

II.

Appellant alleges that the trial court erred in denying appellant's motion for mistrial because of inadmissible, inflammatory and prejudicial cross-examination by the State. Since we are reversing and remanding for a new trial, we need not consider this issue because we believe it can be adequately dealt with at the trial court level.

III.

For her third point for reversal, appellant alleges that the trial court erred in not instructing the jury on negligent homicide. In the case at bar, appellant was charged with first degree murder. The jury was instructed on first degree murder, second degree murder and manslaughter. Defendant's requested instruction on negligent homicide was refused by the court.

Ark. Stat. Ann. § 41-1505 (Repl. 1977) defines negligent homicide as: "(1) A person commits negligent homicide if he negligently causes the death of another person."

Ark. Stat. Ann. § 41-203 (Repl. 1977) defines reckless and negligent culpable mental states. The Commentary to that section distinguishes the definitions for reckless and negligent mental states, to-wit:

> "Negligent" conduct is defined by subsection (4). It is distinguished from "reckless" conduct primarily in that it does not involve conscious disregard of a perceived risk. An actor charged with negligent homicide — for example, negligent homicide (§ 41-1505) — is assumed to have been unaware of the existence of the risk. Under the definition, the fact finder must determine whether the actor should have been aware of a

risk. The nature and degree of the risk itself are the same for both culpable mental states.

It follows that the jury, as the finder of fact, should have been instructed on negligent homicide. They could have determined whether appellant should have been aware of the risk in her pointing a gun at the victim.

IV.

Appellant alleges that the trial court erred in allowing the State to present hearsay testimony to corroborate another witness.

During the testimony of Tammy Bose, a witness called in behalf of the State, the State elicited testimony concerning a conversation between Ms. Bose and Diane Moritz to which appellant objected. Appellant contends these were hearsay statements concerning Ms. Moritz's intention to purchase a weapon from the victim as a gift to her husband. The obvious intent of eliciting this statement was to corroborate Ms. Moritz's testimony as to her reason for meeting Mr. Worring behind the truck-stop on the evening of the shooting. We agree with the State that the testimony was not offered to prove the truth of the matter asserted, and therefore, the testimony was not hearsay. Ark. Stat. Ann. § 28-1001, Uniform Rules of Evidence, Rule 801. We find no error here.

V.

Appellant alleges that the trial court erred in sustaining the State's objection to appellant's redirect testimony.

After cross-examination by the State, appellant testified on redirect. The State objected to her testimony stating that the testimony had not been covered in direct examination and was improper. The objection was sustained by the court and excluded. Appellant acknowledges that the reason for this testimony was to show the jury that appellant had related the same series of events from the night of this occurrence to the date of trial with little or no variation in

her statements. Appellant contends that her credibility was of utmost importance in this case.

It was recently observed by the Arkansas Supreme Court in *George* v. *State*, 270 Ark. 335, 604 S.W. 2d 940 (1980) that:

> The general rule is that prior consistent statements of a witness are not admissible to corroborate or sustain his testimony given in court. *Rogers* v. *State*, 88 Ark. 451, 115 S.W. 156 (1908). Such statements are self serving and cumulative, and their admission would simply suggest that credibility depends upon the number of times the witness had repeated the same story rather than inherent trustworthiness of the story. 4 Wigmore on Evidence (Chadbourne Rev.) §§ 1122-1124.

During cross-examination of the appellant, the State never expressly or impliedly charged that the appellant's direct testimony was fabricated. We find no error in the trial court's refusal to exclude this testimony.

We reverse and remand.

GLAZE, J., concurs.

CLONINGER, J., dissents.

Thomas J. HUMANN *v.* Richard J. RENKO
and Suzanne M. RENKO

CA 81-2 616 S.W. 2d 26

Court of Appeals of Arkansas
Opinion delivered May 27, 1981

Floyd G. Rogers, for appellant.

Shaw & Ledbetter, for appellees.

TOM GLAZE, Judge. This appeal involves an action for specific performance wherein the Crawford County Chancery Court ordered the appellant, Thomas Humann, to convey certain real estate to the appellees, Richard Renko and Suzanne Renko. In 1974, the appellant and appellees apparently discussed the prospects of purchasing land in Arkansas, and they travelled from Kansas City, Missouri, to Crawford County, Arkansas, to view eighty acres near the community of Chester. Later, in May, 1974, Humann signed an agreement to purchase the eighty acres for the sum of $14,000, and to pay monthly mortgage payments of $138.33. Title to the property was taken in Humann's name alone. At the time of the closing of the real estate transaction, the Renkos were residing in Kansas City, Missouri.

Although Humann denies that there was any specific agreement entered into with the Renkos prior to his purchase of the eighty-acre tract, Humann and the Renkos apparently discussed the prospects of entering into a partnership relative to the purchase and maintenance of the eighty-acre tract. In any event, the Renkos moved onto the property in February, 1976, and they began paying one-half of the monthly payment, *i.e.*, $69.17 per month, each check payable to Humann with the notation "For mortgage" and the name of the month. Whatever agreement that was reached between the parties, there was nothing reduced to writing.

In early 1979, the Renkos requested that Humann execute the documents necessary to convey title to one-half of the property to them pursuant to their alleged oral agreement, *viz.*, that the Renkos and Humann were partners in the purchase of the tract. Humann refused.

The Renkos then filed this action seeking specific performance of the alleged oral agreement. The chancery court decreed that the parties had entered into an oral agreement, and under the terms of the agreement, Humann and the Renkos were joint owners of the eighty acres. The court further held that the parties had agreed to a division of the eighty acres, *i.e.*, the Renkos were to receive title to a ten- and thirty-acre tracts which were specifically designated by a survey and Humann was to retain title to the remaining forty acres of the original eighty-acre tract. Humann brings this appeal, raising two points for reversal: (1) The chancellor erred in granting specific performance where there was not sufficient evidence to indicate a definite and certain agreement between the parties; (2) Any agreement between the parties was unenforceable because it was in violation of the statute of frauds.

The issues posed by appellant are controlled by the rule that to remove an oral contract from the statute of frauds, it is necessary that the quantum of proof be clear and convincing both as to the making of the oral contract and its performance. *Hudspeth* v. *Thomas*, 214 Ark. 347, 216 S.W. 2d 389 (1949), and *Pfeifer* v. *Raper*, 253 Ark. 438, 486 S.W. 2d 524

(1972). We agree with the chancellor that the appellees met their burden of proof to establish an oral contract of sufficient definiteness. Moreover, the evidence is also clear and convincing that appellees made improvements of a valuable nature which were sufficient to remove the oral agreement from the statute of frauds. This case is before us largely because appellant challenges the chancellor's findings relative to the weight and sufficiency of the evidence. Unless the chancellor's findings are clearly erroneous, we must affirm. Rule 52, *Arkansas Rules of Civil Procedure.*

The overwhelming inference deduced from the record as a whole is that the appellant and appellees were partners in the purchase of the eighty-acre tract. Aside from the testimony of the parties, the witnesses called by the appellees were neighbors and testified that they understood from both appellant and appellees that they were each one-half owners of the tract. For instance, Mr. Austin testified that he was told by Humann and the Renkos that "they were buying the land together and it was to be split up in the future." Austin said that Humann agreed that the Renkos were buying one-half and Humann one-half of the tract. Mr. Rosenzweig, who testified he had known the parties since 1974 or 1975, stated that he specifically remembered Humann referring to the Renkos as one-half owners of the property. Last, Mr. Landry, who had known the parties for four years and went with Humann when he paid for the land, testified that he understood the parties were partners. When confronted with the testimony of these witnesses on cross examination, appellant never directly contradicted their statements that he and the Renkos were partners. To give further credence to appellees' contention that a partnership existed between them and Humann, a letter written by Humann was introduced at trial as Plaintiffs' Exhibit 3 wherein Humann referred to Richard Renko as "my partner."

Admittedly, as is true in so many oral agreements, the parties did not agree on whether an agreement existed, much less on any of the terms of the contract. The chancellor did find, however, the terms of the sale agreement signed by Humann were definite and that the Renkos were one-half obligors under that agreement. The fact that the Renkos did

not pay one-half of the down payment when the sale agreement was executed by Humann is of little significance so long as their liability is fixed for one-half of that amount. Appellant also argues the agreement is indefinite because it does not mention who is to pay the real estate taxes. Again, the Renkos' one-half obligation as partners is fixed as to taxes as well, and the chancellor was not required to insert terms or write the parties' contract in so holding. Appellant further contends that there was no agreement regarding the division of the property. Suffice it to say, the proof clearly shows there was a discussion between the parties concerning a division of the eighty-acre tract into three tracts; two tracts totalling forty acres were to belong to the Renkos and the remaining forty acres were Humann's. There was, indeed, a conflict in the testimony of Humann and the Renkos, but considering the entire record, we are unable to reverse the chancellor's holding that an agreement concerning a division of the land was reached between the parties.

Appellant finally argues that the appellees did not render substantial part performance of the oral agreement, and therefore, the agreement is in violation of the statute of frauds. We disagree. The Renkos moved from Kansas City, Missouri, onto the subject property to live in 1976. They cleared the property, built fences, dug a well, provided electricity and telephone service, improved a road and built a house. Their neigbors, Austin and Landry, testified that they assisted in these improvements, *viz.*, Austin helped the Renkos build the house and Landry testified he helped the Renkos and Humann fence their boundaries.

After a review of the record, we conclude that the evidence is sufficient to support the chancellor's findings, and we, therefore, affirm his decision.

Affirmed.

Roddy Lynn BLOSSER *v.* Sheryl Lynn BLOSSER

CA 81-16 616 S.W. 2d 29

Court of Appeals of Arkansas
Opinion delivered May 27, 1981

Jeff Duty, for appellant.

John E. Jennings, for appellee.

TOM GLAZE, Judge. The appellant father appeals the Benton County Chancery Court's decision, declining jurisdiction of a habeas corpus action filed by the appellee mother and recognizing and enforcing a prior Oklahoma divorce decree which awarded custody of the parties' minor child, Toby, to appellee. In rendering its decision, the trial

court acted pursuant to the Uniform Child Custody Act (Ark. Stat. Ann. §§ 34-2701 et seq.).

The parties resided in Oklahoma when the appellant filed for divorce on February 7, 1979. Although he was first awarded custody of Toby, the court entered a second order one week later giving temporary custody to appellee. On or about April 1, 1979, appellant took physical possession of Toby and went to Canada. Appellant claims that he then moved to Rogers, Arkansas, where he and Toby have resided since May 1, 1979. On January 29, 1980, the Oklahoma court granted appellee a divorce and awarded her permanent custody of Toby. Appellant's whereabouts were unknown by appellee at the time of the divorce and he was not present when the divorce was granted.

In February, 1980, appellant filed an action in the Benton County Chancery Court seeking custody of Toby and obtained an order awarding custody on April 23, 1980. Appellee was never served with any notice of this Arkansas proceeding. Sometime after this proceeding, appellee discovered where appellant and Toby resided and filed a petition for writ of habeas corpus in the Benton County Chancery Court on August 5, 1980, requesting the court to recognize and enforce the Oklahoma decree which awarded appellee custody of Toby. After a trial on appellee's petition in September, 1980, the trial court vacated its earlier order entered on April 23, 1980, granting custody to appellant, and the court proceeded to dismiss appellee's petition and awarded custody of Toby to appellee in accordance with the Oklahoma decree and pursuant to Ark. Stat. Ann. § 34-2713. Appellant appeals the trial court's order, contending that it erred: (1) in not permitting appellant to develop evidence bearing both on the fitness of the parties and also where the best interests of the child lie; (2) in dismissing the appellee's petition, finding it had no jurisdiction and enforcing the Oklahoma decree.

At the trial, the appellant attempted to elicit testimony from witnesses to show appellee was unfit to be awarded custody of the parties' child. The court refused to hear the evidence offered by appellant, stating it must first determine

whether the court would exercise jurisdiction of the case. To determine the correctness of the court's ruling, we must first consider Ark. Stat. Ann. § 34-2706(a), which provides:

> *A court of this State shall not exercise its jurisdiction under this Act* [§§ 34-2701 — 34-2725] *if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this Act*, unless the proceeding is stayed by the court of the other state because this State is a more appropriate forum or for other reasons. [Emphasis supplied.]

Appellant argues that no action was pending in Oklahoma when the actions in Arkansas were filed. If appellant were correct in his argument, the trial court had the discretion to take jurisdiction under one of the alternative situations set forth in Ark. Stat. Ann. § 34-2703.[1] We disagree

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[1]34-2703. Jurisdiction. — (a) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one [1] contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(4) (i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this State of the child, or of the child and one [1] of the

with appellant's contention. Like Arkansas, the Oklahoma courts are vested with continuing jurisdiction in child custody matters when a decree of divorce is granted. See, *Clampitt* v. *Johnson*, 359 P. 2d 588 (Okla. 1961), and *Turk* v. *Coryell*, 419 P. 2d 555 (Okla. 1966). In accordance with this legal principle, either party may choose to petition the Oklahoma court to modify or enforce its divorce decree. In fact, appellee did file such a petition in Oklahoma in February, 1979, after she was awarded temporary custody and when appellant removed Toby from the State of Oklahoma. Of course, appellant defeated appellee's attempt to enforce the Oklahoma court's order by going to Canada and then to Arkansas. Appellant's actions are exactly the type of conduct the Uniform Child Custody Jurisdiction Act is designed to prevent or counteract. The record before us clearly reflects that Oklahoma obtained jurisdiction, which is continuing over the appellant and appellee, and the jurisdiction exercised by the Oklahoma court is clearly in conformity with our Uniform Act, a prerequisite to be met under Ark. Stat. Ann. § 34-2706(a) above before our court will defer jurisdiction to another state.[2]

Once a custody decree has been rendered by another state, as the Oklahoma court did here, we must then determine whether the Arkansas court should exercise jurisdiction under § 34-2708. See, 9 Uniform Laws Annotated, Uniform Child Custody Jurisdiction Act, § 6, *Commissioner's Note*. Paragraph (b) of § 34-2708 provides:

> (b) *Unless required in the intrest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody* or has improperly retained

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contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody. [Acts 1979, No. 91, § 3, p. —.]

[2]Oklahoma adopted the Uniform Child Custody Jurisdiction Act (10 Okla. St. Ann. § 1601 et seq.) which became effective October 1, 1980, nine days after entering of the parties' Oklahoma divorce decree.

> the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provisions of a custody decree of another state, the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

Appellant contends that the interests of Toby require that the Arkansas trial court permit him to present evidence which he argues shows appellee to be an unfit mother. Most of the evidence offered by appellant and excluded by the court concerned allegations that appellee lived in Oklahoma with a rather unsavory man without the benefit of holy matrimony and she had been seen frequenting taverns. There were additional allegations that appellee used obscenities on the telephone when speaking with appellant's mother and that she also threatened to kill appellant's father.

We do agree with appellant that under § 34-2708(b) the Arkansas court could exercise jurisdiction irrespective of the prior Oklahoma decree if Toby's interests so warranted. However, in the case of an improper removal or retention under § 34-2708(b), the refusal of jurisdiction is mandatory unless the harm done to the child by a denial of jurisdiction outweighs the parental misconduct. See, 9 Uniform Laws Annotated, Uniform Child Custody Jurisdiction Act, § 8, *Commissioner's Note*. The misconduct attributed to appellant in the instant case is not limited to his surreptitious removal of Toby to Canada and Arkansas. Upon filing his custody action in Arkansas in February, 1980, appellant intentionally misrepresented to the court that he did not know the whereabouts of appellee and that her last known address was 519 East Center, Alva, Oklahoma, the residence of appellant's aunt and uncle. Appellant admitted that appellee had never lived with his aunt and uncle. In this same custody action, he also failed to give the court information required by Ark. Stat. Ann. § 34-2709 and in so doing, failed to inform the court of the prior Oklahoma custody action and the addresses where and the persons with whom Toby had lived in the past five years.

As to the issue of what harm might come to Toby if we

affirm the trial court's decision to decline jurisdiction, we see little merit in appellant's argument. Appellant admits that most of his witnesses concerning appellee's alleged unfitness are located in Oklahoma. The parties were residents of Oklahoma when appellant filed for divorce. The Arkansas trial court determined from the testimony of appellant and appellee that evidence to be presented by each was more readily available in Oklahoma. It is only because appellant improperly departed from Oklahoma in the first place that Arkansas has any contacts which could result in any relevant evidence to the parties' quest for custody of Toby. We also find it significant that there was no evidence, including that offered by appellant and excluded by the trial court, which would indicate any immediate danger to Toby. In so finding, we do not mean to in any way countenance the misconduct or misdeeds of appellee if they are true. Because appellant charges this misconduct of appellee occurred in Oklahoma, the Oklahoma court is in a much better position to obtain the facts which bear on the fitness of the parties and the best interests of the child. We agree with appellant and hold accordingly that the trial court has a duty under the Uniform Child Custody Jurisdiction Act, including § 34-2708 (b), to consider the interests of the child and not automatically defer to a prior sister state order or decree. From the record, we conclude the court did consider Toby's interests and correctly determined they can best be protected by the court in Oklahoma.

Appellant's last contention concerns the trial court's dismissal of appellee's petition for writ of habeas corpus and enforcement of the Oklahoma decree. The appellee filed a certified and authenticated copy of the Oklahoma decree with the clerk of the trial court below. After an extended hearing, specific findings were made by the court, and the court recognized and enforced the Oklahoma decree pursuant to § 34-2713. The chancellor's findings, enforcement of the Oklahoma decree and dismissal of appellee's petition were all included in the trial court's order entered on September 22, 1980. Appellant contends the trial court erred in taking judicial notice of the law of Oklahoma in determining if it is in substantial conformity with Arkansas law, a requirement under the Uniform Child Custody

Jurisdiction Act. Appellant cites the case of *Wallis* v. *Mrs. Smith's Pie Company*, 261 Ark. 623, 550 S.W. 2d 453 (1977), wherein the court stated, "Arkansas courts are required to take judicial notice of the statutory laws of other states and . . . it is only necessary to plead foreign law, not prove it." Accordingly, appellant argues appellee did not plead Oklahoma law, and for this reason, the court should not have considered it. We disagree. Throughout the petition of appellee, she pled that the Arkansas court should give full faith and credit to the prior Oklahoma decree, and it is clear from the pleading that Oklahoma law was in issue. The Uniform Child Custody Jurisdiction Act does not require a party to plead a sister state's law. Even in cases where Arkansas law requires a party to give notice in his pleading if he intends to rely on another state's law, our courts have held that no such specific notice is required if this inference can be found from the party's pleading. See, *Yarbrough* v. *Prentice Lee Tractor Company*, 252 Ark. 349, 479 S.W. 2d 549 (1972); Rule 44.1, *Arkansas Rules of Civil Procedure*.

Affirmed.

Ruth IRELAND *v.* Charles L. DANIELS, Director of Labor, and BREAD BASKET #1

E 80-197 616 S.W. 2d 33

Court of Appeals of Arkansas
Opinion delivered May 27, 1981

Michael G. Rothman, for appellant.

Bruce H. Bokony, for appellees.

TOM GLAZE, Judge. In this employment security benefits case, the claimant was held to have been disqualified from benefits pursuant to Ark. Stat. Ann. § 81-1106(a) (Supp. 1979), for the reason that "she left her last work voluntarily because of an illness or other disability but *without making reasonable efforts to preserve her job rights*." (Emphasis supplied.)

Claimant worked as manager for Bread Basket #1 in Hot Springs from October, 1977, until February 11, 1980, when she suffered a heart attack and was hospitalized. On the night of February 11, the employer, Steve Marovich, went to see claimant at the hospital, and while there, Marovich informed the family that the claimant would be replaced if she could not return to work within twelve days. Although her family did not tell the claimant during her two week stay at the hospital what Marovich had said, claimant learned from her co-employees on the day she was released from the hospital that she was being replaced at work the next day. The claimant's doctor told her that she would not be able to return to work until June, 1980. She testified that she never did ask the employer for a leave of absence because the employer did not grant leaves.

The claimant filed for unemployment benefits on June 9, 1980, and the Agency denied her claim under Ark. Stat.

Ann. § 81-1106(a) (Supp. 1979). She then appealed to the Appeal Tribunal, which affirmed the Agency determination that the claimant had voluntarily quit due to an illness but had failed to make reasonable efforts to preserve her job rights. Specifically, the Tribunal stated:

> The claimant last worked for the above-named employer on February 11, 1980, and was then hospitalized for two weeks after suffering a heart attack. The day after being released, she heard from several employees that she had been replaced, but did not contact the employer in an effort to determine whether such was true. A week after being released her daughter informed her that the employer had indicated she would be replaced if she did not return to work within 12 days of her heart attack. She did not contact the employer or, indeed, at any time throughout, to request a leave of absence or otherwise attempt to protect her job. She failed to do so because she just knew the employer did not grant leaves.

Claimant denied that she quit her job, both at the hearing and in her appeal to the Board of Review. At the hearing before the Appeal Tribunal, the claimant asked the Referee to contact Marovich, who would confirm that she was terminated while in the hospital. The Referee refused to do so, saying that it had never been the practice of the Appeal Tribunal. We feel that it was error for the Referee to refuse claimant's request. The claimant should have been informed, instead, that the hearing could be continued at her request and the witness subpoenaed.

In *Cross* v. *Daniels*, 271 Ark. 201, 607 S.W. 2d 680 (Ark. App. 1980), we held that it was error not to subpoena a witness requested by the claimant. In that case, the claimant was disqualified upon the same basis as we have here, *i.e.*, "he quit his last work because of illness, injury, or other disability but did not make reasonable efforts to preserve his job rights prior to quitting." The claimant, while at the hearing, requested that one of his superiors be subpoenaed for the purpose of testifying. There, the Referee acknowledged his authority to grant a continuance but declined to

do so. He said he would hold another hearing if, after reviewing the evidence, he felt it necessary. No further hearing was held and the witness sought was neither subpoenaed nor heard. The court reversed and remanded with instruction to hold a further hearing after the witness sought by claimant had been subpoenaed to appear.

In the instant case, however, it will be unnecessary to remand for further hearing. The claimant's only purpose in requesting this witness was to corroborate her own testimony that she did not voluntarily quit, but instead was involuntarily terminated when she was unable to return to work within twelve days of her heart attack. There is nothing in the record nor in the findings by the Appeal Tribunal which would indicate that the Tribunal disbelieved the facts as the claimant related them. The testimony of the witness, therefore, would be cumulative of the evidence that the claimant did not voluntarily quit. A claimant who is terminated by an employer through no fault of her own is not bound to preserve her job rights as she is required to do when she voluntarily quits her employment. In the instant case, asking for leave of absence after the employer replaced her would have been a useless act which we do not see fit to require of her.

On that basis, we reverse with instruction to award benefits.

Reversed.

MACK FINANCIAL CORPORATION
v. CARTER OIL COMPANY, INC.

CA 80-524 616 S.W. 2d 769

Court of Appeals of Arkansas
Opinion delivered June 3, 1981

Allen, Cabe & Lester, for appellant.

Dodd, Kidd, Ryan & Moore, by: *Judson C. Kidd*, for appellee.

GEORGE K. CRACRAFT, Judge. The appellant, Mack Financial Corporation, Inc., originally brought this action

in the Circuit Court of Pulaski County against the appellee, Carter Oil Company, Inc., for the balance due it on an installment contract for the purchase of a truck which had been destroyed by fire. The appellee filed its answer and counterclaim alleging that the appellant had been at fault in the failure to procure insurance on the truck, denying its liability to pay the debt for that reason, and by way of counterclaim asking for damages in the amount of the difference between the debt sued on and the full value of the uninsured truck. The complaint named as co-defendants Fred S. James and Company of Arkansas, Inc. and the Home Insurance Company, alleging that the Fred S. James and Company of Arkansas, Inc., appellee's insurance broker, had been negligent in the issuance of a policy of insurance ordered through it and for reformation of a policy of insurance issued by Home Insurance Company. The cause was then transferred to Chancery.

At the conclusion of the trial the chancellor dismissed the appellant's complaint as to all of the defendants and entered judgment against the appellant in favor of the appellee on its counterclaim. The appellant does not appeal from the action of the chancellor in dismissing the complaint as to the co-defendants but contends that the chancellor erred in dismissing his complaint as to Carter Oil Company, Inc., and in granting the appellee judgment on its counterclaim.

The facts, as found by the chancellor, reflect that on August 30, 1975, Texarkana Mack Sales, Inc. sold a 1975 Mack truck identified as "No. 674" to East Texas Leasing Corporation. The transaction was financed by Mack Financial Corporation, the appellant herein. The East Texas Leasing Corporation in turn leased this truck to the Carter Construction Company, Inc. On April 1, 1977, Carter Oil Company (a separate corporation owned by the same principal stockholder) entered into an agreement with East Texas Leasing Corporation and Carter Construction Company, Inc. whereby Carter Oil assumed all the obligations of the East Texas Leasing and Carter Construction under the original installment contract. Both the original installment sales agreement and the transfer agreement place the obli-

gation of insuring the truck on the vendee, Carter Oil.

Prior to the date of the assumption the vehicle was insured by Home Insurance Company in the name of East Texas Leasing and Carter Construction, as owners, with loss payable to Mack Financial.

Three weeks prior to the execution of the transfer agreement Mack Financial, in accordance with an established policy, wrote a letter to both East Texas Leasing and Carter Construction informing them that the policy which covered the truck in question was due to expire on April 17th and requested that it be furnished with a copy of a renewal policy. A copy of this letter was sent to the Fred S. James Company, Carter Construction's insurance broker. Again on March 31, 1977, the day before the transfer and assumption agreement was executed, Mack Financial sent a second letter to East Texas Leasing, Carter Construction and the Fred S. James Company, reminding them that the policy was due to expire and again requesting a copy of a renewal policy. On April 12th, prior to the expiration date of the existing policy but after the date of the transfer, Fred S. James Company, without knowledge of the transfer, forwarded its certificate to Mack Financial, certifying insurance on the truck but incorrectly listing Carter Construction as the insured. Upon receipt of the certificate, Mack Financial requested that the certificate be reexecuted with additional provisions. Mack Financial prepared such a certificate and furnished the same to Fred S. James Company for execution. This certificate prepared by Mack Financial erroneously listed East Texas Leasing and Carter Construction as the named insureds. No mention of the transfer of interest to Carter Oil was made. Fred S. James Company executed the submitted certificate showing Carter Construction as insured and returned it to Mack Financial on April 16th. The premium on the policy was charged to and paid by Carter Construction without discovery of the error. The premiums were subsequently refunded by Home Insurance.

On November 29, 1977, the truck in question was severely damaged by fire, and at the time of that loss it was still insured by Home Insurance policy showing Carter

Construction as the named insured. Home Insurance denied the claim for the loss of the truck on the grounds that Carter Construction had no insurable interest in it and Carter Oil had no insurance upon it. There was evidence that while Home Insurance would and did insure this truck for use in construction business, it would not have insured a truck hauling oil or other flammables. Carter Oil's other trucks were insured by another insurer.

In dismissing the plaintiff's complaint with respect to all defendants the chancellor found that even though the duty to procure the insurance in accordance with the agreement was upon Carter Oil, Mack Financial had assumed that duty of notifying the broker and the insurer of the change of ownership and use, and that due to its negligence Carter Oil was entitled to redress. The chancellor found that the value of the truck at the time of the destruction exceeded the amount of the indebtedness against it by the sum of $5,495.47, and entered judgment for that amount for Carter Oil on its counterclaim.

Mack Financial contends that the trial court erred in its finding that they had undertaken to notify the insurance companies of the change in ownership. They argued that the transfer agreement placed the burden upon Carter Oil to procure the insurance on the vehicle and that the action of the chancellor effected a variance upon the terms of the written instrument. We do not view the action of the chancellor as having that effect.

The chancellor did find that the contract imposed the duty upon Carter Oil but he found that the appellant, although not obligated under the transfer agreement to take action with regard to hazard insurance, undertook to do so, and having assumed the duty, its negligent course of conduct in the execution of that duty entitled Carter Oil to relief.

Mack Financial contends that it was not in the business of procuring insurance and did not attempt to do so in this case. It was their position that they only required that all collateral held by them be so insured and that the action of

its agents in this case was taken merely to verify that coverage was in force. It further contends that Carter Oil was the party who attempted to insure the vehicle. Evidence in support of these positions was offered in their behalf.

There was, however, evidence before the court that Mack Financial had assumed the duty of assuring the insurance in the name of Carter Oil, upon issuing its own erroneous certificate of insurance. There was evidence, and the court found, that Mack Financial did prepare a formal certificate of insurance, submitted to Fred S. James Company, that showed the vehicle in question to be owned by Carter Construction rather than Carter Oil. The chancellor further found that an additional duty was imposed upon Mack Financial in the certificate of insurance prepared by it, to notify the insurer of any change in ownership or if an increase in hazard had occurred. This it failed to do. It was not disputed that Mack Financial had full knowledge of the transfer and failed to correctly communicate that fact to the insurer, and thereafter failed to discover or correct its mistake.

Mack Financial's insurance clerk admitted that she made the mistake in preparation of the certificates and erroneously showed the ownership of the truck. Mr. Martin, president of Fred S. James Company, testified that it was normal procedure for Mack Financial in its dealings with him to give notice forty-five days prior to a renewal that they needed a certificate of insurance and that Mack Financial normally listed the insured and vehicles to be insured. The first person to contact Fred S. James Company is usually the lienholder. In this case they received several notices from Mack Financial showing the vehicle to be owned by the wrong corporation. Mr. Martin further testified that in issuing the certificate he relied solely on information furnished them by Mack Financial and that none was received from Carter Oil.

There was testimony from Mr. Carter, who was the principal stockholder in both of the Carter corporations, that in past dealings both Mack Truck Sales and Mack Financial had always assumed responsibility for getting the

insurance issued and in force and that Carter paid the premiums. In this case he left it up to Mack Financial and the Fred S. James Company to get the policy in effect.

Findings of the chancellor will not be reversed unless found to be clearly against a preponderance of the evidence, and since preponderance turns largely on the credibility of the witnesses, we defer to the superior position of the chancellor in that regard. *Hackworth* v. *First National Bank of Crossett*, 265 Ark. 668, 580 S.W. 2d 465; *Winkle* v. *Grand National Bank*, 267 Ark. 101, 590 S.W. 2d 852.

We find no error in the chancellor's decision denying Mack Financial recovery for its loss resulting from its own neglect.

Mack Financial further contends that the chancellor erred in entering judgment against it for the amount of Carter Oil's equity in the truck, as if the insurance which ought to have been in force was in force. We agree.

While we hold that Mack Financial breached its duty and was negligent in not discovering that breach, we find a corresponding duty rested upon Carter Oil to make some inquiry and examination to determine if the insurance was in force. Had this loss occurred closer in time to the initial neglect of Mack Financial, a recovery of Carter Oil's equity might well have been warranted based upon that initial reliance. However, a period of seven months expired between the error and the loss. Although Mack Financial was negligent in not discovering and correcting its error, this initial failure to correctly communicate the change in ownership and use of the truck did not fully and finally relieve Carter Oil of its duty to protect its own interest.

We hold that Carter Oil had a corresponding duty to make reasonable inquiry and examination of its own records to determine that the truck was properly insured. Ordinary prudence demanded that it investigate to assure that the requested insurance was in force. The evidence shows that no effort whatever was made by Carter Oil to do so during the entire seven month period.

The counterclaim should be dismissed as without merit due to Carter Oil's own neglect.

Affirmed in part and reversed in part.

GLAZE, J., not participating.

MAYFIELD, C.J., concurs.

COOPER, J., dissents.

JAMES R. COOPER, Judge, dissenting. I respectfully dissent from the majority's holding in this case. The majority has held that Carter Oil Company, Inc. cannot recover against appellant because of its own negligence in failing to make sure that a policy of insurance had been issued on the truck in question.

The trial court held that, because of its breach of a duty to procure insurance, Mack could not recover the amount of its lien from Carter, and that for the same reason, Mack was liable to Carter for the difference in the lien amount and the fair market value of the truck at the time of the loss, less salvage. I believe that the trial court was correct.

The Chancellor specifically found that Carter's failure to discover the error made by Mack did not make the mistake mutual, and that there was no negligence or inequitable conduct by Carter which would cause the Court to reform the contract. I do not believe that these findings by the trial court are clearly erroneous or against a preponderance of the evidence and I would affirm.

Had Carter brought suit against Mack for the fair market value of the truck, based on Mack's same failure to procure insurance, I cannot see how Mack would be entitled to a credit for over $5,000.00 over and above the amount of its lien and the salvage value of the truck, yet that is the practical result of the majority's holding in this case.

Johnce L. COPELAND *v.* Charlsa M. COPELAND

CA 81-28 616 S.W. 2d 773

Court of Appeals of Arkansas
Opinion delivered June 3, 1981

Tom Donovan, for appellant.

Tatum & Sullivan, P.A., by: *Tom Tatum*, for appellee.

George K. Cracraft, Judge. The appellant, Johnce L. Copeland, appeals from a decree granting appellee, Charlsa M. Copeland, a divorce, contending that the appellee failed to state or sufficiently corroborate her grounds for divorce, and that the chancellor erred in awarding properties to their son, Steve Copeland, who was not a party to the action. We agree.

The parties were married in 1946 and now have two grown children. During the course of the marriage the parties separated on more than one occasion and thereafter became reconciled. On October 3, 1979, the appellee finally separated herself from the appellant and remained separate and apart from him since that date.

On May 15, 1980, the appellant filed an action for divorce against the appellee alleging general indignities as his ground for divorce. The appellee answered that complaint and counterclaimed for divorce, also alleging general indignities. At the trial of the cause the appellant elected not to pursue his complaint and the matter was presented on appellee's cross-complaint. At the close of the evidence the chancellor denied appellant's motion to dismiss the counterclaim for appellee's failure to corroborate her grounds; granted her divorce, and made a division of the property of the parties. In the decree, however, he awarded Steve Copeland, a child of the parties who was not a party to the action, certain personal property which appellee testified was his.

Divorce is a creature of statute and can only be granted when statutory grounds have been proved and corroborated. Ark. Stat. Ann. § 34-1212 (Supp. 1979) authorizes the granting of a divorce when one spouse shall have proved that the other has offered such indignities to the person as to

render his or her condition in life intolerable. Personal indignities have been defined in the cases as rudeness, unmerited reproach, contempt, studied neglect, open insult and other plain manifestations of settled hate, alienation and estrangement, so habitually, continuously and permanently pursued as to create that intolerable condition contemplated by the statute. *Sutherland* v. *Sutherland*, 188 Ark. 955, 68 S.W. 2d 1022. It is also well settled by our cases that the testimony of the plaintiff as to the ground for divorce is not sufficient and that same must be corroborated by other testimony. Our cases have also held that in a contested matter in which it is apparent that there is no collusion that the corroboration required may be relatively slight. *Coffey* v. *Coffey*, 223 Ark. 607, 267 S.W. 2d 499. The testimony offered in this case simply does not meet the requirement of the rules regarding corroboration.

The appellee testified that her marriage with the appellant had been a bad one for the past ten years and had reached a point where it was impossible for them to live together. She testified that the conditions under which she lived with him were detrimental to her health, that he had threatened her and that she was afraid of him. She did not testify as to the nature of the threats or why she was in fear. She testified further that her children were not welcome in the home and that this caused her concern. The only corroborating testimony offered was that of the daughter of the parties, Mary Dennis. Although she testified that the parents had been having difficulties for the past ten years, which were becoming progressively worse, she did not testify as to what the cause of those difficulties was, who was at fault, nor of any acts of either party to the other which fall within the definition of the statutory grounds. She did not mention any threats made to the mother or any occasion on which she or her brother were made to feel unwelcome in the home.

Corroborating testimony may not consist of mere generalities, opinions, beliefs and conclusions on the part of the witness but must be directed toward specific language, acts and conduct. If it is not so directed it is not sufficient. *Welch* v. *Welch*, 254 Ark. 84, 491 S.W. 2d 598. Here the

corroborating witness disclosed no facts or actions which would indicate a cause for the estrangement or where the fault lay.

Corroboration as required by laws of divorce is testimony of some substantial fact or circumstance, independent of the statement of a complaining spouse, which leads an impartial and reasonable mind to believe that material testimony of that spouse is true. Where a particular fact or circumstance is vital to complainant's case, some evidence thereof in addition to complainant's testimony is necessary to constitute corroboration. *Gabler* v. *Gabler*, 209 Ark. 459, 190 S.W. 2d 975. Here, Mary Dennis's testimony goes no further than to show that the appellee's statement that she could no longer live with the appellant was probably true. The mere want of congeniality and constant quarrels are insufficient to constitute general indignities justifying divorce. *Settles* v. *Settles*, 210 Ark. 242, 195 S.W. 2d 59. That parties to a marriage are not likely to live together again does not warrant the granting of a divorce on these grounds. *Lipscomb* v. *Lipscomb*, 226 Ark. 956, 295 S.W. 2d 335.

We also agree with appellant that the chancellor erred in awarding disputed items of personal property to the son of the parties who was not himself a party to the action. Third parties may be brought into, or intervene in, divorce actions for the purpose of clearing or determining the rights of the spouses in specific properties. *Lance* v. *Mason*, 151 Ark. 114, 235 S.W. 2d 394. In this case neither was done. The court might also have simply found that the disputed property belonged to neither contending spouse. The trial court had no authority, however, to award the property to a stranger to the action.

Reversed and remanded.

Raymond KEATHLEY, Jr. *v.* DIVERSIFIED FASTENER & TOOL COMPANY et al

CA 81-33 616 S.W. 2d 755

Court of Appeals of Arkansas
Opinion delivered June 3, 1981

Guy Jones, Jr., for appellant.

Clark & McNeil, for appellees.

GEORGE K. CRACRAFT, Judge. The appellant, Raymond Keathley, Jr., filed his complaint alleging that he had on October 14, 1978, leased an apartment to the appellee, Diversified Fastener & Tool Company, for the use of one of its employees, Anita Kramer, in which the appellee agreed to pay the rent. Appellant further alleged that in January 1979 the appellee terminated the lease but that Anita Kramer refused to give up possession. During the holdover tenancy appellant claimed that the premises had sustained damage for which he sought recovery. He prayed for judgment for those damages and a reasonable rental for the period during which possession was wrongfully withheld. The appellee answered asserting that it had only entered into a month to month rental agreement with appellant, and that after the

termination of that agreement any holding over was solely attributable to Anita Kramer.

After hearing evidence, the court sitting without a jury found that the property had sustained damage, but that the appellee was not obligated for payment of those damages and that appellee was not liable for double damages for failure to return possession. It found that Anita Kramer had not been served with process and therefore no judgment had been rendered against her. On those facts the court entered judgment against the appellee for the accrued rentals in the sum of $600, but denied claims for double rent and damages. The appellant appeals from that judgment.

The appellant argues in support of his position that he was entitled to double damages under Ark. Stat. Ann. § 50-507 (Repl. 1971) which does provide for assessment of double rent if any tenant gives notice in writing of his intentions to quit the premises but fails to deliver possession of the property at the time specified in the notice. The answer to appellant's contention is twofold. First, it appears from the record that there was no prayer for award of double damages in his complaint or any other subsequent pleading. Special damages must always be specifically plead. *Arkansas Power & Light Company* v. *Harper*, 249 Ark. 606, 460 S.W. 2d 75. The second and more compelling answer is the fact that the transcript of the testimony on which the trial court made its findings that appellee was not liable for double rent or damage to the property was not brought forward in this record. Evidence of failure to give the written notice and that the property damage was not attributable to appellee would justify the order made. Without a transcript of the testimony there is no way that this court can determine what facts the trial court considered in making its findings and conclusions. Our law has long been established that where the proceedings had before the trial court are not preserved and brought forward in the record, the appellate court must presume that the absent material was sufficient to support the trial court's findings and decree. *Watson* v. *Jones*, 233 Ark. 203, 343 S.W. 2d 415.

We affirm.

Jill T. DaCOSSE *v.* John T. AHRENS, Suzanne E. AHRENS, Thomas DaCOSSE & Frank DaCOSSE

CA 80-457 616 S.W. 2d 777

Court of Appeals of Arkansas
Opinion delivered June 3, 1981

Howard & Howard, by: *William B. Howard*, for appellant.

Leo J. Carney, Roy E. Danuser, and *Howell & Price*, for appellees.

James R. Cooper, Judge. Appellant, the widow of John DaCosse, filed suit in Baxter County Chancery Court against appellees, executor of his will and his children by a prior marriage, seeking specific performance of a contract to make a will, or, in the alternative, restoration to her position prior to the execution of the contract.

The facts are not disputed. Appellant and John DaCosse were married on September 14, 1977, the third marriage for each of them. Each owned property individually at the time of the marriage. In February of 1978, the deceased created a tenancy by the entirety by deeding his separate property to himself and his new wife. They acquired two two-acre tracts in both names at approximately the same time.

On October 25, 1978, John DaCosse filed suit for divorce against appellant. On October 27, 1978, he executed a will excluding appellant and leaving all his property to his children. On January 25, 1979, John DaCosse and appellant executed a "Reconciliation Agreement." As part of the agreement, appellant was to convey to John DaCosse the interest in real estate and notes which she acquired by reason of his February, 1978 conveyance to her. The agreement further provided that "on or before April 18, 1979," appellant was to transfer the balance in a particular savings account into a joint account with her husband.

Two days after the execution of the agreement, John DaCosse suffered a heart attack and was hospitalized for ten days. He returned home, but died March 9, 1979, without executing a new will. At the time of his death appellant had not transferred the funds into a joint savings account, but she did so later, prior to April 18, 1979, on the advice of her attorney.

This suit was filed to compel enforcement of the

contract, or, in the alternative, to restore to appellant the property she conveyed to John DaCosse pursuant to the "Reconciliation Agreement." The practical effect of either prayer for relief would be the same, that is, vesting ownership of all the real property of decedent in appellant.

The trial court made detailed findings of fact, and concluded that the "Reconciliation Agreement" was a two-part contract. The Court found that the first part, to be performed on January 25, 1979, required that appellant convey to John DaCosse all of his separate property which he had conveyed to her in February of 1978.[1] The Court found that this portion of the agreement further provided that the parties were to forgive each other of any prior misconduct and resume living together. John DaCosse agreed not to give away or otherwise transfer any of the property conveyed to him without appellant's written approval. The Court found that this part of the agreement was fully performed by both parties. The Court held that appellant, in exchange for her conveyance of the property to John DaCosse, received a halt to the divorce proceedings filed by him, a resumption of the marital relationship, the possibility of becoming sole beneficiary of John's will on or before April 18, 1979, and the right to retain sole ownership of the savings account until she got the will. The Court further found that John DaCosse acquired his separate property back, was able to resume the marital relationship, and was willing to obligate himself to make a new will leaving everything to appellant within 90 days. The Court found good and mutual consideration for the first part of the agreement, and that each party got what they bargained for as of January 25, 1979.

As to the second phase of the agreement, which was unperformed at the time of John DaCosse's death, the Court found that it was conditioned on the couple living together for 90 days. John DaCosse, of course, had the option of making his will sooner if he desired. The Court found that

[1]Appellant also owned real property separately on January 25, 1979, but apparently it remained in her name only. Her separate property is not referred to in the reconciliation agreement.

John's death, prior to April 18, 1979, extinguished his obligation to make a new will, and stated:

> ... just the same, in my opinion, as the obligation to make a new will would have been extinguished if prior to April 18, 1979, Jill had given John cause for divorce and they had separated before that date and before the making of the new will. In either event Jill then would be entitled to retain her half of the savings account money. (T. 426)

The Court believed, from all the evidence, and the terms of the contract itself, that appellant had taken a calculated risk that both she and her husband would live harmoniously for at least 90 days following the reconciliation. The Court felt that there was a lack of mutuality of obligation in the event they were not living together on April 18, 1979.

Appellant transferred the money from her separate name to the joint account after John's death and before April 18, 1979. The Chancellor attributed little weight to this transfer, since the funds were transferred to a joint account with right of survivorship.

The Court noted other language in the contract which stated:

> The statutory rights of each of the parties in the estate of the other are hereby fully restored. (T. 427)

The Court interpreted this to mean that the parties intended to place themselves in the same position as they were in prior to their marriage, and that the only rights they would have in the other's estate before April 18, 1979, would be their statutory rights. Based on that interpretation of the contract and the evidence, the trial court denied any relief to appellant. We agree with the trial court that appellant is not entitled to any relief.

When construing a contract in order to give effect to the intent of the parties, the court must consider the circumstances surrounding the making of the contract, the subject

of the contract, and the situation and relation of the parties at the time of its making. *Louisiana-Nevada Transit Co.* v. *Woods*, 393 F. Supp. 177 (W. D. Ark. 1975). At the time appellant conveyed her interest in the property to her husband, she was aware of the existence of the earlier will which cut her out. She was represented by an attorney at that time and cannot claim that she did not know the effect of her actions.

The purpose of the 90 day delay in implementing the remainder of the agreement is unclear. The only testimony regarding its purpose is that of her attorney, who indicated that the delay was inserted to prove her faith in her husband. Appellant's attorney drafted the "Reconciliation Agreement." The Arkansas Supreme Court has held that when there is uncertainty or ambiguity in a contract and it is susceptible to more than one reasonable construction, then we must construe it most strongly against the party who drafted it. The reason for this rule is that the drafter of a contract is in a better position to convey a clarity in meaning by his choice of words and phraseology. *Elcare, Inc.* v. *Gocio*, 267 Ark. 605, 593 S.W. 2d 159 (1980). This rule has application in this case.

The appellant argues that the Court engrafted conditions and terms on the contract which were not included in it. We disagree. The parties had been married a short time (five months) when appellant created the tenancy by the entirety in his separate property; eleven months when the divorce action was filed, and only sixteen months when the reconciliation agreement was signed. There is no suggestion of any reason why all the terms of the agreement could not have been fulfilled in January of 1979, and, therefore, the parties must have had a reason for the delay. We believe, as did the Chancellor, that the reason was more substantial than that expressed by appellant's attorney. We agree with the Chancellor that this portion of the agreement contemplated the parties living together harmoniously at least until April 18, 1979, and, if that occurred, John DaCosse intended to devise his property to appellant, and she intended to re-establish their joint ownership of the funds she had held as her own since the separation. To hold otherwise would

require us to believe that the two contracting parties and their attorneys established a date for the performance of certain acts (execution of the will and transfer of funds) for no substantial reason.

Appellant had retained ownership of her separate property, and, from all the circumstances, it seems obvious that the parties were attempting to start over, and to forgive the past. If their fresh start was successful, they intended to perform the additional acts agreed upon. We do not believe that the delay was unimportant to the parties, and we cannot agree that, from the time the agreement was executed, John DaCosse was irrevocably obligated to devise his property to Jill, regardless of their status during the ninety days, whether divorced, separated or happily cohabiting.

The appellant argues that, if the trial court is correct, no specific performance of a contract to make a will could ever be ordered against a personal representative because of the death of the obligor before performance. This position is incorrect, as there could easily be performance by the obligee which would require performance by the personal representative. Here, we agree with the Chancellor that there was no performance by the obligee which requires performance by the personal representative.

In chancery cases, we review the record de novo, but we will not reverse the findings of the Chancellor unless they are clearly erroneous or against the preponderance of the evidence, giving due regard to the opportunity of the trial court to judge the credibility of the witnesses. Ark. Rules of Civil Proc., Rule 52; *Andres* v. *Andres*, 1 Ark. App. 75, 613 S.W. 2d 404 (1981); *Hackworth* v. *First National Bank of Crossett*, 265 Ark. 668, 580 S.W. 2d 465 (1979).

We have considered the arguments advanced by appellant as to enforcing the agreement, and the allegations as to errors committed in the trial court proceedings, but we find them to be without merit. We cannot say that the findings of the Chancellor are against a preponderance of the evidence, or that they are clearly erroneous, or that equity dictates a

different result following *de novo* review by this Court, and therefore, we affirm.

Affirmed.

CRACRAFT, CLONINGER, and CORBIN, JJ., dissent.

DONALD L. CORBIN, Judge, dissenting. I must respectfully dissent to the majority opinion. To pursue the reasoning of the majority in the instant case requires remarkable imagination or an exercise in mental gymnastics that is mind-boggling to behold.

The learned trial court seemed to preface his remarks with an indication that John DaCosse would have been successful in his original divorce action. This was never litigated because of the reconciliation of the parties. One cannot speculate on the success or failure of this litigation. The trial court viewed this reconciliation agreement as a two-phase agreement, the first phase being what would happen on January 18, 1979. Under the first phase, Jill obtained what she bargained for, to wit: a halt of the divorce proceeding, a resumption of living together with John, and the possibility of receiving a will naming her as sole beneficiary of John's estate at some point in the future, not later than April 18, 1979, plus the right to keep her half of the savings account money in her name until she got the will. John got what he bargained for; he was restored to sole ownership of the property and resumption of living together with Jill and in order to get this he was willing to obligate himself to make a will 90 days hence or sooner if he desired.

The second phase called for John to make a new will leaving everything to Jill and for Jill to transfer her money back into joint ownership. Because of John's death, he did not perform.

The majority agreed with the trial court's reasoning that: Jill, by entering into the reconciliation agreement took a calculated risk as it pertains to the property, the risk being that she and John would both live for 90 days after

reconciliation and would live in harmony for that period of time.

Jill kept her part of the contract. There is nothing in the record to reflect that she or John placed a condition precedent (that either must live until April 18, 1979) in the contract. Nor is there any evidence that the parties did not "live in harmony" during the interval between the execution of the agreement and John's death. In fact, the contract specifically stated, "By entering into this agreement and the resumption of their cohabitation, husband and wife are not providing for a trial reconciliation but a reconciliation in the full sense of the word."

While I believe specific performance is the better remedy, *Loveless* v. *Diehl*, 236 Ark. 129, 364 S.W. 2d 317 (1963), the doctrine of unjust enrichment would just as easily apply. In *Little Rock Municipal Airport Commission* v. *Arkansas Valley Compress and Warehouse Co.*, 224 Ark. 1018, 277 S.W. 2d 836, this Court discussed the doctrine of unjust enrichment and said, in part:

> The basis of the right to recover is that the defendant has been unjustly enriched at the expense of the plaintiff, and that plaintiff is entitled to restitution therefor.

Appellant should be restored to the position which she occupied immediately prior to the execution of the Reconciliation Agreement.

The finding here is completely inequitable, harsh, unjust and unfair. The least that should be done if both specific performance and unjust enrichment remedies are not followed would be to allow Jill to sue for damages for breach of contract. The measure of damages being the value of one half of the property which was to come to appellant.

In 17A C.J.S. *Contracts* § 338 (1963), it is said:

> They (the Courts) are disinclined to construe stipulations in a contract as conditions precedent,

> unless compelled to do so by language of the contract plainly expressed, particularly where so to do would result in injustice. Thus a condition precedent may not be implied when it might have been seen and provided for by express agreement.

I see no difference here between a 90-day provision to write a will and a promise to write a will before the promissor dies. It could just as readily be construed that the 90-day period here was provided in order to give the decedent time to have a will properly drawn; and perhaps a time frame to provide the appellant with an opportunity to bring a specific performance action against the decedent had he lived and failed to execute a will at the end of 90 days. This seems more reasonable to me. Under an indefinite time period involving a contract to make a will, there can be no breach until the promissor dies; consequently no action would lie until that time.

I am authorized to state that Judges Cracraft and Cloninger concur with this dissenting opinion; but Judge Cracraft would reverse and remand with directions to enforce specific performance.

Beatrice CALAWAY *v.* SOUTHERN FARM BUREAU LIFE INSURANCE COMPANY et al

CA 80-371 619 S.W. 2d 301

Arkansas Court of Appeals
Opinion delivered June 3, 1981
[Rehearing denied August 19, 1981.]

Rubens, Rubens & Forrest, and *Howard & Howard*, for appellant.

Ray & Donovan, for appellees.

LAWSON CLONINGER, Judge. This is an interpleader action filed by Southern Farm Bureau Life Insurance Company, the insurer, in which the proceeds of a life insurance policy in the sum of $48,409.78 have been paid into court. The insured, Walter Calaway, Jr., was shot and killed by his wife, the appellee, Rose Marie Calaway, the

primary beneficiary under the policy, and it is the contention of the appellant, Beatrice Calaway, the mother of the insured and contingent beneficiary under the policy, that the killing was under such circumstances as would disqualify appellee as beneficiary.

This appeal is from a finding by the trial court that the killing was justified and that appellee is entitled to the proceeds due under the policy. The only issue on this appeal is whether the findings of the trial court were clearly against the preponderance of the evidence.

The trial court was correct and we affirm.

At about 12:30 a.m., September 25, 1977, decedent arrived at his home, intoxicated, and he continued to drink beer until 4:30 a.m., at which time the fatal shooting occurred. During the intervening four hours, decedent alternately talked angrily about his parents, drank beer, and threatened, slapped, choked and kicked appellee. For a period of some fifteen minutes decedent played with a loaded .44 caliber pistol, pointing it at appellee and inquiring whether she was scared of it. Shortly after 4:00 a.m. decedent staggered from the dining room to the bedroom, then returned to the dining room door and told appellee to bring the gun to him. Decedent returned to the bedroom, lay across the bed, and had propped up his head on one elbow; appellee just stood by the bed, holding the gun. Her ankle had been broken, and she was told to stop limping, that there was nothing wrong with her. Appellee testified that decedent then told her that she just didn't look bad enough; that he was going to pistol whip her and might as well kill her. Appellee stated that decedent was in the process of getting up when appellee closed her eyes, lifted the gun, and pulled the trigger. It is undisputed that appellee fired the shot, and that the shot was the cause of death. Appellee said she always did what decedent told her to do; that if she had disobeyed him or left the house he would have found her then or at a later time and would probably have killed her.

During the trouble the couple's two children, ages 2 and 1, awoke and stood at the bedroom door crying. Decedent

told the children that if they didn't shut up he would whip them. Appellee put the children back to bed, and she stated that she was afraid to leave the children in the house with decedent, and that in her injured condition she could not take them with her.

Appellee testified that decedent had beaten her severely many times upon previous occasions, and that she was afraid of him. She stated: "I would not tell him it would hurt, he would just hit harder. Walter was the type of person that when he was drinking that if you didn't do what he said when he said it then it was just too bad. He would light into me and just start hitting me with his fist and slapping me and kicking me, and this wasn't just this time, it was years — years of it I mean — the time he shot my cat and shot the hole in the kitchen — I mean that he would do things like that when he was drunk. I was always required to do exactly what he said . . ."

Following the incident, appellee was in the hospital eight days. Her injuries, medically verified, included fractures to her ankle, upper leg and jaw, swollen eyes, bruises on the face, arms, back, and throat.

In Couch on Insurance 2d, § 27:154 (1960), it is stated that a beneficiary who kills the insured under such circumstances that the act is justifiable, excusable, or lawfully committed in self defense, or under such circumstances that he has no criminal responsibility for his acts, is not barred from receiving the proceeds of the policy. Thus, the beneficiary is entitled to recover when he killed the insured while acting in self defense. Ark. Stat. Ann. § 41-507 (Repl. 1977) provides:

> Justification. Use of deadly physical force in defense of a person.
>
> (1) A person is justified in using deadly physical force upon another person if he reasonably believes that the other person is:
>
> (a) committing or about to commit a felony

involving force or violence; or

(b) using or about to use unlawful deadly physical force.

(2) A person may not use deadly physical force in self defense if he knows that he can avoid the necessity of using that force with complete safety:

(a) by retreating, except that a person is not required to retreat if he is in his dwelling and was not the original aggressor . . .

It is settled law in Arkansas that when the beneficiary in a policy of life insurance wrongfully kills the insured, public policy prohibits a recovery by the beneficiary. *Horn* v. *Cole, Administrator*, 203 Ark. 361, 156 S.W. 2d 787 (1941). In the case of *Metropolitan Life Insurance Company* v. *Shane*, 98 Ark. 132, 135 S.W. 836 (1911), the Court said:

> The willful, unlawful and felonious killing of the assured by the person named as beneficiary in a life policy forfeits all rights of such person therein. It is unnecessary that there should be an express exception in the contract of insurance forbidding a recovery in favor of such person in such event. On considerations of public policy the death of the insured, willfully and intentionally caused by the beneficiary of the policy, is an excepted risk so far as the person thus causing the death is concerned.

A case almost directly in point with the case at bar is *Pendergrass et al* v. *New York Life Insurance Company*, 181 Fed. 2d 136 (1950), in which the United States Court of Appeals, 8th Circuit, in applying Arkansas law, found the homicide to be justifiable, and stated:

> At this time the deceased was violent and abusive to cross-defendant. When in the bedroom the deceased struggled with the cross-defendant and attempted to choke her. She extricated herself from his hold and flung her body across his in an attempt to hold him on

> the bed. The deceased threw the cross-defendant to the floor. At that time she had an urge to run but the deceased, with an oath, then demanded his gun. The cross-defendant impulsively began to execute his command as she had done many times before. Just as the cross-defendant was handing the gun to deceased, the latter, with an oath, threatened to 'kill' or 'get' the cross-defendant. He made this threat as he was arising from the bed, and at that moment the cross-defendant pulled the trigger.

Appellant contends that the testimony of appellee is unworthy of belief, because of inconsistent statements between her deposition and the testimony at the trial. In his ruling, the trial judge made the following specific finding:

> It is contended that she is unworthy of belief, because her statements to the Court conflict with those given in a pretrial deposition. When those statements relied upon are read in context and along with the whole deposition, the Court finds no inconsistency.

We agree with the trial court that appellee's testimony, when read in context, is not inconsistent. In *Digby* v. *Digby*, 263 Ark. 813, 567 S.W. 2d 290 (1978), the Court stated:

> While this Court considers the evidence on a chancery appeal *de novo*, it will not reverse the chancellor unless it is shown that the lower court decision is clearly contrary to a preponderance of the evidence. Particularly where the credibility of witnesses appearing before the chancellor is concerned, this Court attaches substantial weight to the chancellor's findings on material issues of fact.

The trial judge believed the testimony of appellee, and we not only recognize the superior position of the trial judge to gauge the credibility of the witness, there is nothing in the record to cause this Court to doubt the truthfulness of appellee. Appellee was in her dwelling and she was not required to retreat from the home. Her testimony was that she feared for her life and the safety of the couple's small

children, and evidence given by decedent's closest friend and drinking companion indicated that appellee's fears were well founded. The companion testified that he had been present on a previous occasion when decedent had severely beaten appellee, and that he observed decedent severely punish the older child, a two-year-old girl, when the child did not perform as decedent demanded. On both occasions, the actions of the decedent were of such an extreme nature that the companion intervened and persuaded decedent to desist.

The trial court found, and we hold, that appellee had justification to reasonably believe that decedent was about to commit a felony involving force or violence or was about to use unlawful deadly physical force.

The decision of the trial judge is affirmed.

CRACRAFT, J., not participating.

Hulon P. MITCHELL *v.* Ann MITCHELL

CA 81-3 616 S.W. 2d 753

Court of Appeals of Arkansas
Opinion delivered June 3, 1981

Holmes, Holmes & Trafford, by: *Winfred A. Trafford*, for appellant.

Coleman, Gantt, Ramsay & Cox, for appellee.

LAWSON CLONINGER, Judge. Appellant Hulon P. Mitchell and appellee Ann Mitchell were divorced on October 17, 1978, and it was decreed that appellant was to pay the sum of $350.00 per month for the support of the couple's two minor children. Appellant was to also maintain insurance and pay medical bills for the children. When the oldest child, Michelle, attained age 18, appellant petitioned the court to terminate support for Michelle and to establish the proper amount of support for the one remaining child, Paula. The trial court found that support should continue for the older child and that appellant should pay $400.00 per month for the support of the two children.

For reversal, appellant urges that the trial court committed error when it (1) amended the pleadings to ask for continuing support beyond age 18 for the older child; (2) found that appellant had a duty to continue support for a child who had reached age 18; and (3) set the support at $400.00 per month.

We determine that appellant's first point is without merit, but that the trial court's decision must be reversed on points 2 and 3.

In her response to appellant's petition, the appellee did not ask for continued support payments for Michelle, the

older child, but requested only that the support payments for Paula, the younger child, be substantially increased. The issue of continued support for Michelle was brought up by the chancellor, and testimony was taken regarding the college expenses of Michelle. For his first point for reversal, appellant argues that it was an abuse of discretion for the court to amend the pleadings on its own motion.

This Court recently held in *Capitol Old Line Insurance Company* v. *Gorondy, Administratrix*, 1 Ark. App. 14, 612 S.W. 2d 128 (1981), that the trial court may require a pleading to be amended to conform to the facts proved. Ark. Rules of Civil Procedure, Rule 15 (b), provides that when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. There was no objection made by appellant to questions concerning college expenses of Michelle, and, in fact, appellant's attorney questioned appellant about Michelle's college expenses and voluntary payments toward college expenses made by appellant. The chancellor did not abuse his discretion in treating the pleadings as amended to conform to the evidence.

Appellant's second and third points are discussed together on this appeal because they were treated as interdependent by the trial court. The chancellor, in his ruling, discussed at length the duty of a parent to contribute to the college education of a child who has reached majority, and it is clear that the setting of support payments in this case was influenced by the chancellor's belief that a parent bears such a duty. The chancellor, in his ruling, made this observation:

> The Court — recognizing that there is no clear cut case in Arkansas directly in point — but also recognizing that the very few cases that we have imply rather strongly that all parents of adult children, under certain facts, do have a certain legal obligation as distinguished from a moral obligation to support an adult child in college.

A number of Arkansas cases have held that a parent has a legal obligation to contribute to the education of an adult

child, but in every case so holding there has been a circumstance of special need. In *Petty* v. *Petty*, 252 Ark. 1032, 482 S.W. 2d 119 (1972), the Court held that support should be continued past majority where the daughter was afflicted with epilepsy and was in need of specialized training to obtain employment. In *Elkins* v. *Elkins*, 262 Ark. 63, 553 S.W. 2d 34 (1977), the father was required to continue child support payments as long as his handicapped adult child was in college. In *Matthews* v. *Matthews*, 245 Ark. 1, 430 S.W. 2d 864 (1968), the Court ordered support continued for an eighteen-year-old child until she graduated from high school. In *Jerry* v. *Jerry*, 235 Ark. 589, 361 S.W. 2d 92 (1962), the Arkansas Supreme Court stated:

> In *Missouri Pacific Railroad Company* v. *Foreman*, 196 Ark. 636, 119 S.W. 2d 747 (at page 651 of the Ark. Reports) we said: 'Ordinarily, there is no legal obligation on the part of a parent to contribute to the maintenance and support of his children after they become of age.' A significant word in the above quotation is the word 'ordinarily,' showing that the Court realized there might be circumstances which could impose on a parent the duty to support a child after such child became of age. This fact was expressly recognized in *Upchurch* v. *Upchurch*, 196 Ark. 324, 117 S.W. 2d 339 (page 327 of the Ark. Reports) where it was stated: 'It is of course the duty of the father to contribute to the support of his children even after they are of age if the circumstances are such as to make it necessary.' . . .

In *Riegler* v. *Riegler*, 259 Ark. 203, 532 S.W. 2d 734 (1976) the Court stated:

> The appellant's daughter involved in the case at bar has reached her majority and is not physically or mentally handicapped. We conclude, on trial *de novo* that the appellant should have been relieved of the legal obligation to support his youngest daughter after she attained her majority and graduated from high school.

We are not aware of any Arkansas case that has required

a parent to support an adult child, whether in college or not, where there are no circumstances which make such support a necessity. There was no showing in the instant case that any special or unusual circumstance was present, and we hold that the appellant cannot be required to support Michelle. It was error for the trial court to consider the support of Michelle in establishing the amount of appellant's payments, and because of that error this cause must be reversed.

Appellant contends that the trial court committed error when, in fixing the amount of the support payments, it deviated from the mathematical formula set forth on the Family Support Chart. It is sufficient to say here that the chart is only a guide for the trial court and is not intended to be binding. The setting of the amount of support payments is in the sound discretion of the chancellor, and his finding will not be disturbed on appeal in the absence of a showing of an abuse of discretion. *Grumbles* v. *Grumbles*, 238 Ark. 355, 381 S.W. 2d 750 (1964).

This cause is reversed and remanded to the trial court for the purpose of establishing the amount of support payments for the younger child, Paula.

FARM BUREAU MUTUAL INSURANCE COMPANY OF ARKANSAS, INC. *v.* Jimmie J. GLOVER

CA 81-31 616 S.W. 2d 755

Court of Appeals of Arkansas
Opinion delivered June 3, 1981

Laser, Sharp & Huckabay, for appellant.

James O. Burnett, for appellee.

DONALD L. CORBIN, Judge. This is an appeal from a jury verdict in the Circuit Court of Lonoke County awarding appellee, Jimmie J. Glover, $5,430.74 against appellant, Farm Bureau Mutual Insurance Company of Arkansas, Inc.

In September, 1978, Jimmie Glover and Earnest Hill (co-defendant below) reached an oral agreement whereby Hill was going to use a 1977 truck owned by Jimmie Glover on a trial basis to see if Hill would be interested in purchasing it. It was undisputed that Hill and Glover agreed that during the time the truck was being operated and tested by Mr. Hill, Mr. Hill would be responsible for its upkeep, including insurance. It is also undisputed that on September 19, 1978, Mr. Hill's brother-in-law called appellant's office in Lonoke and secured physical damage coverage on the

truck in question. This coverage was placed with the appellant under Mr. Hill's already existing policy of insurance which covered all of the fleet of trucks owned by Mr. Hill.

In October, 1978, Mr. Hill advised Mr. Glover that because of the condition of the truck, the price, the amount of the bank lien and other matters he was not interested in purchasing the truck and he was unwilling to go through with his initial proposal. The parties at that point reached a second agreement whereby Glover was to retain title to the truck, be responsible for all maintenance and upkeep thereon and was to haul minnows for Mr. Hill to Texas at the rate of $300.00 per trip.

Following an accident in the State of Texas, Mr. Glover contacted the Farm Bureau office and made claim under Mr. Hill's policy. Farm Bureau, in the mistaken belief that Mr. Hill owned the truck, evaluated the claim and sent Mr. Hill a draft in the amount of $5,430.74. Farm Bureau obtained the draft back from Hill and refused to make any payment to Glover after discovering that Hill had no proprietary or ownership interest in the truck and because Mr. Glover had never been listed on the policy as an insured. Glover then brought suit against Hill and Farm Bureau Mutual Insurance Company.

At trial, after the plaintiff's case was presented, the Court ruled as a matter of law that Hill had no insurable interest in the truck at the time of the accident and granted Farm Bureau's motion for directed verdict on this issue. The trial court submitted to the jury the question of whether Hill and Glover had an oral agreement requiring Hill to procure and maintain insurance on Glover's truck. The jury returned a verdict in favor of Hill and against Farm Bureu Mutual Insurance Company. Thereafter, Farm Bureau filed a motion for a judgment notwithstanding the verdict, asserting that there was no substantial evidence supporting a theory of liability on which it would be liable to Glover; and further, that since the jury had found that Hill had not made any oral agreement with the plaintiff, as a matter of law, no recovery could be had against Farm Bureau. The

motion was overruled. Farm Bureau then appealed to this Court. Hill is not a party to this appeal.

The Arkansas Supreme Court has stated that insurance proceeds are payable only to the person whose interest is covered by the policy, provided he has an insurable interest at the time of making the contract and at the time of the loss. See *Barner* v. *Barner*, 241 Ark. 370, 407 S.W. 2d 747; *National Bedding and Furniture Industries, Inc.* v. *Clark*, 252 Ark. 780, 481 S.W. 2d 690.

The jury was given the following instruction:

> A contract is an agreement which creates an obligation. There must be competent parties, a subject matter, a legal consideration, a mutuality of agreement. Agreement is the expression of two or more persons of a common intention to affect their legal relations. It consists of their being of the same mind and intention concerning the matter agreed upon.

The jury found as a matter of fact that there was no underlying agreement between Hill and Glover to purchase insurance. It follows that there was no basis upon which a verdict against Farm Bureau could be returned. When taken with the fact that the trial court ruled as a matter of law that on the day of the alleged accident Hill had no insurable interest in the truck, it follows that there is no basis for a judgment against Farm Bureau.

We would also point out the doctrines of waiver and estoppel are not applicable in this case. Our Supreme Court has specifically held that in view of the strong public policy against enforcing insurance contracts in which there is no insurable interest involved, the doctrines of waiver and estoppel are completely inapplicable to create coverage which otherwise does not exist under the policy or to place therein a risk expressly excluded from the policy. *Life & Casualty Insurance Co. of Tennessee* v. *Nicholson*, 246 Ark. 570, 439 S.W. 2d 648 (1969); *Batesville Insurance & Finance Co.* v. *Butler*, 248 Ark. 776, 453 S.W. 2d 709 (1970).

This court has the power and duty to set aside a verdict totally unsupported by substantial evidence or unsupported by facts sufficient to support the award made by the jury. *Coca-Cola Bottling Co. of Arkansas* v. *Eudy*, 193 Ark. 436, 100 S.W. 2d 683; *Midwest Bus Lines, Inc.* v. *Williams*, 243 Ark. 854, 422 S.W. 2d 869 (1968).

Reversed and dismissed.

MAYFIELD, C.J., dissents.

GLAZE, J., not participating.

Cecil HAMPTON *v.* Charles L. DANIELS,
Director of Labor

E 80-219 616 S.W. 2d 757

Court of Appeals of Arkansas
Opinion delivered June 3, 1981

Truman E. Yancey, for appellant.

Thelma Lorenzo, for appellee.

DONALD L. CORBIN, Judge. This is an appeal from denial of unemployment insurance benefits. Appellant filed his claim for unemployment benefits on May 2, 1980. The Appeal Tribunal, on June 20, 1980, and the Board of Review, on July 29, 1980, affirmed the agency's denial of benefits.

Appellant is retired and receives Social Security benefits. After retirement and while receiving Social Security benefits, appellant was employed and then terminated from employment under conditions rendering him eligible to receive unemployment insurance benefits. He was denied benefits based upon Section 5 (f) (4) (B) of the Arkansas Employment Security Law [Ark. Stat. Ann. § 81-1106 (f) (4) (B) (Supp. 1979)] which provides in part:

> For any week of unemployment which begins after March 31, 1980, any governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment received with respect to such week and which is based on the previous work of any individual claiming benefits; provided, that the amount of unemployment benefits payable to such individual for such week shall be reduced (but not below zero) by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week.

The sole issue before this court is whether, as a matter of law, the reduction of claimant's unemployment insurance benefits mandated by Section 5 (f) (4) (B) includes retirement benefits received from the Social Security Administration.

On October 20, 1976, Pub. L. 94-566 was enacted by Congress. This Public Law, known as the Unemployment Compensation Amendments of 1976, mandated that states make a large number of changes to their law in order to comply with the Federal Unemployment Tax Act and the Social Security Act provisions for certification. (26 U.S.C.A. §§ 3302, 3303, 3304 and 42 U.S.C.A. § 503.) Section 314 of Pub. L. 94-566 contained the following provision:

> *General Rule.* — Subsection (a) of section 3304 of the Internal Revenue Code of 1954 (relating to requirements for approval of State unemployment compensation laws) is amended by redesignating paragraph (13) as paragraph (16) and by inserting after paragraph (12) the following new paragraphs:
>
> . . .
>
> "(15) the amount of compensation payable to an individual for any week which begins after September 30, 1979, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week;"[1]

The legislative intent behind the above quoted language was clearly stated as that of insuring that states "would be required to reduce the unemployment compensation of an individual by the amount of any public or private pension (including social security retirement benefits and railroad retirement benefits) based on the claimant's previous employment." *U.S. Code Congressional and Administrative News*, 94th Congress, Second Session, 1976, "Unemployment Compensation Amendments of 1976," 90 Stat. 2667, 2680, p. 6040.

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[1]The "Emergency Unemployment Compensation Extension Act of 1977", Pub. L. 95-19, Section 302(e), amended this paragraph by inserting "March 31, 1979" in lieu of "September 30, 1979."

Immediately after the passage and approval of Pub. L. 94-566, the Arkansas General Assembly enacted Act 376 of 1977. The intent of Act 376 of 1977 was expressed in Section 21 as follows:

> [I]n order to receive the benefits of Federal law and to comply with the mandate of the United States Congress as provided in United States Public Law 94-566. . . .

Section 11 of Act 376 of 1977 provides:

> Paragraph (4) of subsection (f) of Section 5 of Act 391 of 1941, as amended, the same being Arkansas Statutes 81-1106 (f) (4), is hereby amended to read as follows:
>
> (A) . . . .
>
> (B) For any week of unemployment which begins after September 30, 1979, any governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment received with respect to such week and which is based on the previous work of any individual claiming benefits; provided, that the amount of unemployment benefits payable to such individual for such week shall be reduced (but not below zero) by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week.

Section 8 of Arkansas Act 492 of 1979 amended Section 5 (f) (4) (B) of the Employment Security Law, as set forth above, by substituting "March 31, 1980" for "September 30, 1979." This enabled the effective date of Section 5 (f) (4) (B) to conform with the effective date of the parallel provision in the Federal Unemployment Tax Act as established by Section 302 (e) of Pub. L. 95-19.

Clearly, both the federal and state legislative intent was to reduce a claimant's unemployment insurance benefits if he was receiving Social Security retirement benefits.

Claimant cites *Commissioner of Labor* v. *Renfroe*, 253 Ark. 380, 486 S.W. 2d 73 (1972) as additional support for his contention that Social Security retirement benefits are not disqualifying remuneration under Section 5 (f) (4) (B). The *Renfroe* decision is inapplicable because it was handed down by the Arkansas Supreme Court in 1972 and was based on the language in Section 5 (f) (4) of the Arkansas Employment Security Law that was in effect at that time. As noted, the language was subsequently amended in 1977.

We affirm.

Ben HUNT, Jr. and Jeanne B. HUNT, Husband and Wife; George W. BROWN and Coweta Jean BROWN, Husband and Wife *v.* McILROY BANK AND TRUST

CA 81-21 616 S.W. 2d 759

Court of Appeals of Arkansas
Opinion delivered June 3, 1981

Everett & Whitlock, for appellants.

Pettus, Johnson & Gibson, for appellee.

TOM GLAZE, Judge. The appellee, McIlroy Bank and Trust, filed a foreclosure suit against the appellants, alleging that appellants were in default on six separate promissory notes due and payable to the appellee. The appellants are Ben Hunt, Jeanne Hunt, George Brown and Coweta Brown, all of whom were doing business at S.B.H. Farms. Appellants filed a general denial, alleged a number of affirmative defenses and counterclaimed against appellee for $750,000, contending appellants were damaged as a result of certain misrepresentations and a breach of an oral contract by the appellee to loan appellants monies. The trial court found that appellants failed to produce evidence of fraud or misrepresentation, nor was there proof of an oral agreement or contract requiring appellee to loan monies to appellants. The court dismissed appellants' counterclaim and entered judgment in favor of appellee on its complaint.

One of appellants' points for reversal arises out of their contention that in October, 1976, the appellee, through its agricultural loan officer, Don Larkin, orally contracted to loan appellants an indefinite amount of monies which would be sufficient to build hog houses, to buy livestock and to generally finance the expansion of their existing farming operation. The appellee argues, and the trial court found, that no contractual agreement was reached between the parties because the terms discussed by the parties were so indefinite and uncertain that neither side could have performed the agreement with any degree of certainty. Since appellants are the parties who urge the existence of an oral agreement, it was incumbent upon them to show by a preponderance of the evidence the existence of such parol agreement, a breach and damages. *Hanna* v. *Johnson*, 233 Ark. 409, 344 S.W. 2d 846 (1961).

In reviewing the record before us, we keep foremost in mind two legal principles when deciding whether a valid contract was entered into by appellants and appellee in October, 1976: (1) A court cannot make a contract for the parties but can only construe and enforce the contract which they have made; and if there is no meeting of the minds, there

is no contract. *Irvin* v. *Brown Paper Mills Company*, 52 F. Supp. 43 (D. C. Ark. 1943), rev'd. on other grounds, 146 F. 2d 232 (8th Cir. 1944); and (2) It is well settled that in order to make a contract there must be a meeting of the minds as to *all* terms. *Hanna* v. *Johnson, supra*, and *Gatling* v. *Goodgame*, 209 Ark. 867, 192 S.W. 2d 878 (1946). The essential elements of a contract were recited by the court in *Gentry* v. *Hanover Insurance Company*, 284 F. Supp. 626 (D. C. Ark. 1968), *viz.*: (a) competent parties, (b) subject matter, (c) legal consideration, (d) mutual agreement, and (e) mutual obligations.

After a study of the evidence presented at trial, we have no hesitancy in agreeing with the chancellor that the appellants failed to prove a contract existed between themselves and the appellee. Appellee's officer, Larkin, and appellant Ben Hunt initially discussed the financing of the expansion of the S.B.H. Farm operation, but the total amount of loan proceeds was never decided. Hunt said that at one time Larkin told him he could have up to $750,000. Larkin testified that the appellee was willing to loan in excess of $500,000, and it could have been $700,000. Both Larkin and Hunt agreed that no interest rate or repayment terms were ever agreed upon. There apparently was some discussion that long term permanent financing would be necessary, but the terms of such financing were left to future determination. Meanwhile, short term notes were signed by appellants for loan proceeds so the farm expansion could commence. Although Larkin and Hunt may have generally agreed on a course of action as to the need for financing the farm project, they never agreed on the essential, much less all of, the terms of a contract to loan monies. There is no way that a court could take the general terms discussed between Larkin and Hunt regarding an open-ended loan with no repayment provisions and be asked to enforce an agreement without filling in necessary terms essential to the formation of a contract. The subject matter of the proposed agreement was indefinite and the mutual assent and obligations were so vague as to be unenforceable.

Appellants argue that all terms of a contract need not be supplied so long as the parties to a contract by their mutual actions furnish an index to its meaning. To support this

contention, appellants rely on *Swafford* v. *Sealtest Foods Division of National Dairy Products Corporation*, 252 Ark. 1182, 483 S.W. 2d 202 (1972). Appellants urge that they and appellee had depended on the future conduct of the parties to heal the uncertainty of the amount and the precise amortization of the loan. We believe that appellants give the court's holding in *Swafford* far too broad an interpretation and application to the facts at bar. The *Swafford* court dealt with a distributorship agreement and gave effect to the acts of the contracting parties in an effort to clear up uncertainties in the executed portion of the agreement. The court in *Swafford* did not attempt to supply terms to an executory contract. Even if we should attempt to review the acts of the parties here subsequent to the Hunt/Larkin discussions in October, 1976, it is difficult to see how that would help appellants. There were a series of promissory notes, mortgages and other documents executed, but these and the other contemporaneous actions taken by the parties still fail to tell us the total amount of monies to be loaned nor does it provide us with an index to determine how the parties intended the permanent financing to be arranged.

In anticipation that we might not hold that a valid agreement was existent in October, 1976, appellants argue further that appellee should be estopped from denying the validity of such a contract since appellants reasonably relied on certain acts and misrepresentations made by the appellee, particularly Larkin. It is this alleged misconduct of Larkin's which appellants contend should not only bar the foreclosure relief sought by appellee against the appellants, but also is the basis of appellants' action for damages for fraud even when no express contract has been shown. Thus, the equitable estoppel and clean hands defenses as well as the action for fraud asserted by appellants must rise or fall depending upon whether the chancellor clearly erred in not finding that appellee was guilty of misconduct or misrepresentation. Again we must disagree with the contentions of the appellants.

As has been mentioned previously, Larkin and Hunt agreed that appellee would loan monies in excess of $500,000, and Larkin believed it could have been as much as

$700,000. The appellee did loan appellants $589,000, which is certainly within the limits and figures stated by Larkin and Hunt. The clear inference from all the evidence indicates that even more monies would have been forthcoming to appellants if the Federal Reserve Examiners in May, 1977, had not classified the loans made to appellants because the value of the security pledged against the indebtedness had fallen below an acceptable level. Obviously, this fact alone restricted future actions between appellants and appellee. Nevertheless, on September 29, 1977, appellants and appellee entered into an oral agreement whereby appellee was to loan an additional sum of $235,000 subject to certain conditions. This was the sum which Hunt stated he needed to complete the project. Although there again is a dispute as to what the conditions were to which the loan was subject, it is clear that appellee was still attempting to work with appellants regardless of the action taken by the Federal Reserve Board. At this point in the negotiations between appellants and appellee, we can only conclude from the evidence that appellee was still acting in good faith to work with appellants. Hunt testified that he was happy with this new deal even though he was not perfectly satisfied because he had lost money during the summer of 1977. In view of these actions which took place subsequent to the Hunt and Larkin negotiations in October, 1976, we conclude that there was sufficient evidence for the chancellor to find and hold that the appellee was not acting wrongfully or fraudulently. In doing so, we acknowledge appellants' argument that Larkin asserted that appellee would make certain loan commitments which, due to the Federal Reserve, it was unable to honor. Contrary to appellants' contention, Larkin's representations did not meet the test of constructive fraud, *i.e.*, representations made by one (Larkin) who, not knowing whether they are true or not, asserts them to be true. See *Evatt* v. *Hudson*, 97 Ark. 265, 133 S.W. 1023 (1911). The record does not reflect that Larkin or appellee intentionally misled the appellants nor does it show that a fact asserted by Larkin was not true in October, 1976. Neither Larkin and the appellee nor the appellants contemplated the action taken by the Federal Reserve Board in May, 1977, when the negotiations took place between them in October, 1976. Certainly, this is not the type of misrepresentation intended

to be covered by the rule enunciated in *Evatt*. If Larkin had asserted, knowingly or unknowingly, a material fact to be true which was not true at the time of the representation, an actionable constructive fraud would lie. The facts before us fail to support such a conclusion or finding. From the evidence, we find no basis to bar appellee's foreclosure action under the theory of estoppel or unclean hands nor do we find any support for appellants' action for damages due to constructive fraud.

The last two issues raised by appellants involve the oral agreement reached between the parties in September, 1977. As previously mentioned, the appellee agreed to loan appellants $235,000. Appellants in turn were to pay the loan back at the rate of $50,000 plus interest annually, commencing in January, 1979, and they were also to complete their farm expansion project. There was a dispute between the parties as to whether additional collateral was also required of the appellants as well as a showing that the S.B.H. Farm could make a profit. Apparently, appellee advanced all of the $235,000 to appellants except for approximately $60,000 which amount was withheld until appellants pledged additional collateral. Appellants first claim appellee breached the September, 1977, agreement by withholding the $60,000, and, secondly, they contend this same agreement effectively changed the due dates on all prior notes executed by appellants and no payments on principal or interest were due and payable until January, 1979. At the time appellee filed this action, one $50,000 payment plus interest was due and in default by appellants.

Whether the parties agreed in September, 1977, that additional collateral was required of appellants was a question of fact determined by the chancellor. Admittedly, the testimony was in conflict on this issue. However, there was testimony given by two officers of appellee upon which the chancellor could premise his finding that additional collateral was required as well as the added fact that the Federal Reserve Examiners had already determined appellants should receive no further loans because the collateral was not sufficient. We are unable to reverse the chancellor's finding on this factual issue since it is not clearly against the

preponderance of the evidence. Rule 52, *Arkansas Rules of Civil Procedure*.

On the final issue raised by appellants, their argument would be well taken except they were clearly in default one payment plus interest on the September, 1977, agreement at the time this action was filed. The appellee and appellants were free to agree in September, 1977, on a different means or method to discharge the prior promissory notes executed by appellants. If the agreement and payment had been fully executed, appellants would be correct that the due dates and payment on the previously signed notes would have been changed to fall due on January of each year commencing in 1979. Until such an agreement is executed, it does not *pro tanto* extinguish or change the prior notes or the terms of each. See, *Vinson* v. *Wooten*, 163 Ark. 170, 174, 259 S.W. 366 (1924).

In accordance with the foregoing, we affirm the trial court's findings and decision.

Affirmed.

William HUNTER *v.* Charles L. DANIELS, Director of Labor and SEARS ROEBUCK & CO.

E 80-207 616 S.W. 2d 763

Court of Appeals of Arkansas
Opinion delivered June 3, 1981

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

Thelma Lorenzo, for appellees.

TOM GLAZE, Judge. The appellant, William Hunter, appeals from the decision of the Board of Review affirming a determination that he was disqualified for benefits under the Employment Security Act because he had voluntarily terminated his employment without good cause connected with the work.

Appellant had been an employee of Sears for a period of four years when he resigned on March 31, 1980. On that date, Hunter informed his supervisor that he intended to run for public office and inquired as to how long he would be permitted to work for Sears. His supervisor contacted the Sears regional office concerning Hunter's plans to run for public office and the supervisor later informed Hunter that if he became a candidate for office he would have to resign immediately and would not be granted a leave of absence to campaign. Hunter then prepared and submitted his resignation on a printed form and filed as a candidate for county judge later that day.

Sears has an unwritten but commonly known policy

that any employee who desires to seek public office cannot continue in its employ. Hunter was fully aware of the policy and testified that he had decided not to become a candidate two years previously because of that rule. After resigning his employment, Hunter filed a claim for unemployment benefits stating that he had quit his job but had been forced to do so. The Agency determined that he was not entitled to benefits because he had quit his job without good cause connected with the work pursuant to Ark. Stat. Ann. § 81-1106 (a) (Supp. 1979). This determination was affirmed by the Appeal Tribunal and the Board of Review.

Appellant appeals the Board's decision to deny benefits, urging that his termination was not brought about by any misconduct but because of a worthy purpose to seek new employment in political office. The Board responds that Hunter resigned because of personal reasons and additionally contends that Hunter's petition for review should be dismissed for failure to abstract the record as required by Rule 9 (d) of the Rules of the Supreme Court and Court of Appeals.

We first consider the Board's Rule 9 argument. While it is true that Hunter's brief did not meet the requirements of that rule, we hold that it was not required to do so. Our Rule 7 (a) requires the filing of briefs in all civil cases. We have not heretofore treated petitions for review from the decisions of the Board of Review as cases in which briefs are required. It is rare when appellants in unemployment benefit cases are represented by counsel. It is even rarer when we are furnished anything other than a transcript of the proceedings on appeal. We have not treated unemployment benefit cases the same as other civil cases under our Appellate Rules. Accordingly, we hold that appellant is not required to abstract the record under Rules 7 or 9 of this court since this appeal involves an unemployment benefit case.

Next, we consider the case on appeal on its merits and the one issue raised by appellant. In so doing, we must affirm the Board's decision unless we find that its determination is not supported by substantial evidence. Moreover, we are also guided by the rule that we must give the successful

party below the benefit of every inference that can be drawn from the testimony. Here, we must view the testimony in the light most favorable to the Board of Review. *Harris* v. *Daniels*, 263 Ark. 897, 567 S.W. 2d 954 (1978). In reviewing the evidence before us in accordance with these legal principles, we conclude that the determination of the Board of Review must be affirmed.

Hunter admitted that he was fully aware of the employer's policy and knew that if he elected to run for public office he would be asked to resign. He had declined to seek office two years earlier because of the same policy. Hunter does not challenge the fundamental soundness of the Sears policy and we do not consider that issue. The Board of Review found from the evidence that he initiated his separation by announcing his intent to act contrary to that policy and although his job would have been available to him otherwise, he chose to submit a written resignation when the employer denied his request for a leave of absence. The Board further found that Hunter resigned voluntarily and, of his own free will, made his choice to give up his job for the purpose of seeking public office. There was substantial evidence to support those findings. No matter how worthy his purpose might be held to be, it was a personal consideration and his resignation did not result from working conditions or other good cause connected with the work.

Affirmed.

MAYFIELD, C.J., concurs.

CLONINGER and COOPER, JJ., dissent.

Concurring Opinion delivered June 10, 1981

MELVIN MAYFIELD, Chief Judge, concurring. I concurred in the result of the majority decision handed down in this case on June 3, 1981. Because I believe the reason for that concurrence to be of importance to the bar, I am today stating my reason.

The majority's opinion holds that it is not necessary for the appellant to abstract the record in an appeal from the Board of Review. In my opinion that decision violates this court's own rules because our Rule 9 requires the appellant to abstract the record and makes no exception for unemployment benefit cases. Nor in my opinion should such an exception be made.

In an article by Justice George Rose Smith, *Arkansas Appellate Practice: Abstracting the Record*, 31 Ark. L. Rev. 359 (1977-78), he explains why the record should be abstracted:

> For purely practical reasons. There is only one typewritten record of the trial court's proceedings. That one transcript cannot possibly be examined by all seven members of the court in every case and in fact *will not be* so examined in any case.

Each of the six members of this court cannot examine the record in every unemployment benefit case. They must, however, get their factual information some way. If an appellant wants each of them to get that information from the record, then it is absolutely essential that the record be abstracted. Any appellant who does not file a brief which abstracts the record runs a substantial risk of having only one judge who knows what the record contains.

Furthermore, it is hard to understand how an appellant can write a brief without referring to the evidence disclosed by the record. It certainly should not be difficult to abstract that evidence. In this case, the appellee abstracted the record. The same day this case was submitted, two other unemployment security appeals were submitted on briefs and in each of them the appellant abstracted the record. The abstracts in all three cases ran a total of nine pages for an average of three pages each.

Of course, we have many appeals in unemployment benefit cases where the claimant is not represented by counsel and we decide those cases without briefs of any kind. But I suggest that an attorney representing an appellant in

an unemployment benefit case should give serious consideration to the matter before filing an appellant's brief without an abstract of the record.

Shirley PRICE *v.* William F. EVERETT,
Director of Labor

E 81-70 616 S.W. 2d 766

Court of Appeals of Arkansas
Opinion delivered June 3, 1981

TOM GLAZE, Judge. This is a review of an order of the Arkansas Employment Security Board of Review denying unemployment compensation benefits to claimant because she had unduly restricted her availability by her salary demand for full-time work.

Claimant is a Greenbrier resident who works for the Internal Revenue Service in Little Rock on a "call as needed basis." She began working in this manner on September, 1977, and at the hearing before the Appeal Tribunal, she testified that she was continuing to do so. This appeal arises from a denial of benefits for a period covering from September 5, 1980, until November 10, 1980, when she was recalled to work.

The claimant testified that she had been seeking other employment in the Conway area which paid in the range that she was making with IRS, $14,000. She told the office at Conway that she would take a job which paid as little as $12,000. She stated that some of the jobs which she learned of through ESD paid only $3.50 per hour. A job she checked on with the Forestry Service paid only $7,000 annually. She applied with Chicopee where her husband works because they could commute together. She applied with Safeway and Kroger in Conway. She also applied with an accounting firm in Conway but never heard from them again.

In its January 13, 1981, decision, the Appeal Tribunal found that the claimant was disqualified from receiving benefits under Section 4(c) of the Arkansas Employment Security Law, Ark. Stat. Ann. § 81-1105 (c) (Repl. 1976), which provides that claimants will be eligible for benefits if they are unemployed, physically and mentally able to

perform suitable work, available for such work, and doing those things that a reasonably prudent individual would be expected to do to secure work.

The Board of Review found that the claimant was not fully able and available for suitable work and fully attached to the full-time labor force. The Tribunal noted that the claimant had worked for three years for this employer on a call as needed basis. The only other employment during that time was a temporary position with the Census Bureau. Additionally, the claimant was found by the Board to restrict her availability by her salary demand for full-time work.

The claimant contends that she is able and available for work and that $12,000 is not unreasonable for the type of work she is seeking. The record contains an advertisement offering an annual salary of $12,000 for a bookkeeper in the Conway area, which the claimant attached to her Petition for Appeal to the Board of Review. She states that she works part-time for the IRS only because she cannot find other permanent full-time work.

The court recognizes that there is no talismanic percentage figure that separates a substantial reduction in salary from one that is not. Each case must be measured by its own circumstances. *Ship Inn, Inc.* v. *Commonwealth of Pennsylvania, Unemployment Compensation Board of Review*, 50 Pa. Cmwlth. 292, 412 A. 2d 913 (1980).

Not every wage demand will be considered good cause for the refusal of a job offer. In *Duvall* v. *Daniels*, 1 Ark. App. 51, 613 S.W. 2d 116 (1981), we held that a claimant was not fully available and actively seeking work because she was unwilling to leave her intermittent job as a poultry inspector unless she was offered a full-time job which paid her more money per year. In that case there was substantial evidence to find she was not available to pursue a full-time position elsewhere.

However, a claimant who is offered a job similar to his previous position at a salary less than what he had previously received can refuse it and not be termed unavailable

for work unless the reduction is relatively insignificant. In *Johnson* v. *Administrator, Division of Employment Security*, 166 So. 2d 366 (La. App. 1964), the claimant's prior earnings in her customary occupation had been $35.00 weekly for an appreciable length of time. She was offered work which paid a net of merely $25.00 weekly from which an additional weekly $3.00 had to be paid for transportation so that the work offered paid less than two-thirds of the claimant's customary prior wages. That court held that the work offered was not suitable if the wages are substantially less than the prior earnings of the claimant in his primary occupation from which he has become unemployed.

It appears from the record that the Appeal Tribunal and the Board of Review omitted from their consideration in the instant case whether the work which was offered to claimant was suitable in view of claimant's prior training, experience and earnings. If the claimant could have found employment to which her training and experience entitles her, with appropriate salary, she should have been granted a reasonable opportunity to make that quest. Under Ark. Stat. Ann. § 81-1106 (c) (D) (1) (Repl. 1976), these factors must be considered by the Board of Review when determining whether proffered work is suitable. Section 81-1106 (c) (D) (1) (Repl. 1976) provides:

> In determining whether or not any work is suitable for an individual and in determining the existence of good cause for voluntarily leaving his work under subsection (a) of this section, there shall be considered among other factors, and in addition to those enumerated in paragraph (2) of this subsection, the degree of risk involved to his health, safety and morals, his physical fitness and *prior training, his experience and prior earnings*, the length of his unemployment, his prospects for obtaining work in his customary occupation, the distance of available work from his residence and prospects for obtaining local work. [Emphasis supplied.]

As is provided in § 81-1106 (c) (D) (1) (Repl. 1976), another factor the Board must consider is the length of the

claimant's unemployment. The period of unemployment in question here is only nine weeks, which is a relatively short period of time. As the period of unemployment continues, a job offer at a salary lower than the claimant earned previously may become suitable, even though the lower salary may not have been suitable at the time the claimant first became unemployed. Thus, after a period of fruitless searching for a job, it may then be reasonable for the Board to expect the claimant to moderate her salary expectation. See, *Johnson* v. *District Unemployment Compensation Board*; 408 A. 2d 79 (D. C. 1979).

Although it does not appear that the Board considered the factors set forth in § 81-1106 (c) (D) (1) (Repl. 1976), there is sufficient evidence in the record to decide this case in view of the legal principles and statutory requirements noted above. Here, the claimant was unemployed for only a short period of time, was making $14,000 per year in her part-time job, and was offered employment which would involve a 50% salary reduction. Under these facts, we hold that she was not offered suitable employment and is not disqualified for the weeks in question.

Reversed.

Mary GATEWOOD *v.* LITTLE ROCK PUBLIC SCHOOLS

CA 80-506 616 S.W. 2d 784

Court of Appeals of Arkansas
Opinion delivered June 10, 1981

Appellant, *pro se*.

G. Ross Smith, for appellee.

GEORGE K. CRACRAFT, Judge. The appellant, Mary Gatewood, appeals from an order of the Circuit Court of Pulaski County upholding the action of the Little Rock School Board in terminating her employment as a teacher for unprofessional conduct which adversely reflected on the integrity of the district and its instructional staff. Although represented by counsel both before the Board and in the Circuit Court, she appears here pro se.

For reversal she urges that her termination was discriminatory, that it was based upon violation of a policy of which she had no knowledge and hence she was denied due process of law; that it was in retaliation for a grievance filed by her against her principal; and that the Board considered instances of her conduct not related to her classroom performance.

The appellee responds to each of these points urged as error, and in addition contends that the court should dismiss the appeal for appellant's failure to abstract the record in accordance with Rule 9 of the Supreme Court and Court of Appeals.

We find the appellant to be in flagrant violation of our Rule 9 and that her appeal should be dismissed. Our courts

have held that this rule applies to persons who elect to appear before this court pro se on appeals from the circuit court. *Weston* v. *State*, 265 Ark. 58, 576 S.W. 2d 705. In her initial brief appellant gave us no concise statement of the case as required by our Rule 9(b) and abstracted none of the pleadings, orders, testimony or exhibits referred to in her brief as required by our Rule 9(d). When this deficiency was brought to her attention by appellee's brief, she filed what we treated as a motion to grant additional time in which to cure the defect by reply brief. In that motion she indicated that she had consulted counsel and had been advised of the requirements of the rule and consequences of failure to comply. We granted her a thirty day extension of time in which to bring herself into compliance. The reply brief, while supplying what we consider to be an adequate statement of the case, contains no abstract of the pertinent parts of the record. Our Rule 9(d) provides that when the court finds the abstract to be flagrantly deficient, the judgment will be affirmed for noncompliance with that rule. We find under the circumstances that this violation is of that nature. In *Weston* v. *State*, supra, the court stated:

> Rule 9 does not exist as a snare for unwitting litigants or for those who appear before the Court, pro se. In fact, we are inclined to be more lenient in invoking Rule 9 in the cases of persons appearing pro se than in other cases. But the jurisdiction of this Court is limited to appellate jurisdiction only. Arkansas Constitution, Article 7, Section 4; Ark. Stat. Ann. § 27-2101. We do not try anew all litigation or come to the assistance of appellants, pro se or otherwise, by combing the record and re-writing their pleadings for them and re-shaping their prayers into some form of relief which this Court may grant. We look only to see if the record shows that the trial court committed an error prejudicial to the appealing party. To aid in a speedy determination of appeals we, along with most other appellate courts, have promulgated Rule 9(d) placing upon appellants the burden of furnishing an abstract of the record consisting of an impartial condensation, without comment or emphasis, of only such material parts of the pleadings, proceedings, facts, documents and other

matters in the record as are necessary to an understanding of all questions presented to this Court for decision.

Notwithstanding our ruling with regard to Rule 9(d), we have carefully examined appellant's arguments and the record presented to us and find no error in the action of the Board or the Circuit Court in affirming that action.

Ark. Stat. Ann. § 80-1264.3 (Supp. 1980) provides:

Any certified teacher may be terminated for any cause which is not arbitrary, capricious or discriminatory, or for violating the reasonable rules and regulations promulgated by the school board.

The record reflects that she was terminated by the suprintendent for unprofessional conduct adversely reflecting on the integrity of the school district and its staff. That unprofessional conduct was founded upon testimony, and her own admission that she had offered her students higher grades in exchange for their purchase from her of raffle tickets.

The record reflects that the school district had a written policy that prohibited employees of the school district from using their positions to solicit children or parents in projects which involve the expenditure of money for goods and services and the like. Although she denied knowledge of this rule, there was evidence that she was furnished a copy of it. Whether or not she was aware of it, dismissal for making that offer of higher grades in exchange for purchases of raffle tickets would not be arbitrary, capricious or discriminatory. Absent the regulation this conduct would be just cause for dismissal of a teacher.

While it was shown that appellant issued a correction statement to her students after the investigation was started and no tickets were sold to her students, it is clear that this improper offer was the basis for her termination, that all of the notices required under the so-called Teachers Fair Dismissal Act of 1979 were complied with, and that she was

afforded procedural due process of law. She was represented by able counsel both before the Board and in the Circuit Court. We are convinced from the record, as found by the trial court, that she was discharged for her conduct with regard to raffle tickets and that her other arguments in support of reversal of that determination are without merit.

We affirm.

Curley WOODELL *v.* BROWN & ROOT, INC.

CA 81-50 616 S.W. 2d 781

Court of Appeals of Arkansas
Opinion delivered June 10, 1981

Junius Bracy Cross, Jr., for appellant.

Wright, Lindsey & Jennings, for appellee.

GEORGE K. CRACRAFT, Judge. The appellant brings this appeal from an order of the Circuit Court of Jefferson County, granting appellee's motion for summary judgment and dismissing appellant's complaint. He contends that there was a material issue of fact to be determined and that it was error to grant the summary judgment.

The appellant, Curley Woodell, brought this action in the Circuit Court for personal injuries against the appellee, Brown & Root, Inc., alleging that during a "preemployment physical" examination the appellant was negligently injured by a technician or nurse employed by the appellee who, while "acting within the scope of his employment in making the examinaion," acutely hyperextended him, severely re-injuring a former injury to his lower back.

The appellee answered that at the time the injury occurred the appellant was its employee and that the injury arose out of and in the course of that employment, pleading the exclusive remedy provisions of Arkansas Workers' Compensation Act as a complete defense.

Thereafter the appellee filed a motion for summary judgment pursuant to Rule 56, Rules of Civil Procedure [Ark. Stat. Ann. vol. 3A (Repl. 1979)]. Attached to the motion was an affidavit of the employer's safety supervisor, in which it was asserted that the work records of the appellee company showed that on the date of the injury the appellant worked for the appellee ten hours and was paid for his labor on that date the sum of $41.94. He further stated that on the date on which the injury occurred the appellant was an employee of appellee.

The appellant responded, asserting that the injury resulted from appellee's negligent attempt to provide medical service, which was outside of the employer/employee relationship, and that the action was brought to recover damages for the negligent manner in which the medical service was performed. Appellant filed no supporting affidavits with his answer. The trial court ruled that the appellant was an employee of appellee on the date in question and was in the course and scope of his employment when the injury was sustained, and ordered that the motion for summary judgment be granted and the complaint dismissed.

In a proper case a summary judgment is a useful device for avoiding unnecessary trials where there is no real material issue of fact to be decided, and when the pleadings,

depositions, answers to interrogatories and admissions on file, together with supporting affidavits show that there is no genuine issue as to any material fact, the moving party is entitled to a judgment as a matter of law. *Hughes Western World* v. *Westmoor Manufacturing Company*, 269 Ark. 300, 601 S.W. 2d 826 (1980); *Deam* v. *O. L. Puryear & Sons*, 244 Ark. 18, 423 S.W. 2d 554. The theory underlying a motion for summary judgment is the same as that underlying a motion for a directed verdict. Hence the trial court views the evidence in the light most favorable to the party resisting the motion, with all doubts and inferences being resolved against the moving party. *Russell* v. *City of Rogers*, 236 Ark. 713, 368 S.W. 2d 89 (1963).

Ark. Stat. Ann. § 81-1304 (Supp. 1979) provides that the rights granted an employee by the Workers' Compensation Act shall be his exclusive remedy against his employer. If the injury is one covered by the Workers' Compensation Act, the employee is restricted to the remedies provided in that act against his employer and may not bring an action on the same facts in tort. On this summary motion it was incumbent upon the moving party to establish that there was no genuine issue of fact as to whether or not the appellant would be entitled to the benefits of the Workers' Compensation Act.

It is well established that in order for a worker to receive benefits under that act, he has the burden of proving both that the relationship of employer/employee existed and the injury arose out of and in the scope of that employment. Ark. Stat. Ann. § 81-1302(d) (Repl. 1976); *Williams* v. *Arkansas Nursing Home*, 255 Ark. 880, 503 S.W. 2d 474 (1974); *Duke* v. *Pekin Wood Products Company*, 223 Ark. 182, 264 S.W. 2d 834; *Bunny Bread* v. *Shipman*, 267 Ark. 926, 591 S.W. 2d 692 (1979). Conversely, for the exclusive remedy provided by § 81-1304 to be available to the employer on summary motion it must show that there is no material issue of fact to be determined as to either of those elements of entitlement to the worker.

The appellant argues that the court erred in granting the motion for summary judgment because the affidavit did

not establish that the injury arose out of appellant's employment and, as the physical examination was deemed a preemployment one, there was a material issue of fact as to whether the appellant was at the time of the injury in the employ of the appellee.

In considering a motion for summary judgment the trial court examines the pleadings, depositions and admissions as well as affidavits, to determine if there is a general issue as to the material facts involved. Rule 56(c), Rules of Civil Procedure [Ark. Stat. Ann. vol. 3A (Repl. 1979)]; *Deam* v. *O. L. Puryear & Sons*, supra.

The complaint alleges that appellant was an employee of appellee when injured on the job during the course of his employment with appellee on April 30, 1979. It alleges that he was subsequently released to return to work for the appellee, but prior to his return to work the employer conducted a physical examination on him which was negligently conducted and caused his re-injury. The allegations clearly indicate that the examination was required for the benefit of the employer and was conducted by one of its employees acting within the scope of his authority. In the complaint the examination is referred to as a "preemployment" physical and that it was required "prior to reemployment." It was appellant's contention that as the examination occurred prior to his reemployment, his injury was sustained before the employer/employee relationship was established. When the issues were joined, whether or not he was an employee within the meaning of the Workers' Compensation Act was a disputed issue of fact.

However, the affidavits filed with the appellee's motion for summary judgment establish that on the date in question the payroll records of the employer show that appellant worked ten hours that day and was paid at his usual rate for that work. The affidavit further established that he was an employee of appellee on that date. No counteraffidavits were submitted in appellant's answer. He relied then and now on his allegation that this was a preemployment examination and hence the relief should not have been given.

Appellant's argument that summary motion should not have been granted because there was no connection between it and the actual employment of appellant must fail for two reasons. Examinations of the type in issue are wholly for the benefit of the employer and under his direction and control. The employee conducting the examination was stated to have been an employee of appellee, acting within the scope of his employment. Workers who are injured as the result of examinations so required and conducted are entitled to the protection of the Act. *Lotspeich* v. *Chance Vought Aircraft*, 369 S.W. 2d 705 (Tex. Civ. App.).

Appellant relies upon *Albert Pike Hotel* v. *Tratner*, 240 Ark. 958, 403 S.W. 2d 73. In *Tratner* the injured party had been offered a job to commence two days later, provided she could obtain a health card. She was injured while on the premises of the City Health Department seeking to obtain the card. There the examination was not done under the supervision of the employer and the injury occurred two days before the employment was to commence. It is clearly distinguishable from the facts now before the court.

Secondly, there was no material issue of fact as to whether appellant's employment had commenced at the time he underwent the required examination by appellee's employee. Appellee's supporting affidavits established that he was so employed at the time and was paid for his work at his customary rate.

The appellant did not file a counteraffidavit or in any way contradict the affidavit by appellee that the status of employer/employee existed at the time. As he did not controvert that affidavit, he may not now rely upon and argue with reference to the allegation in his answer to that motion that the employer/employee relationship did not exist nor rely upon the statements in his complaint which were the subject of the appellee's affidavit. It is well established that when the movant for summary judgment makes a prima facie showing of entitlement to a summary judgment, the respondent must discard the shield and cloak of formal allegations and meet proof with proof by showing a genuine issue as to a material fact. *Hughes Western World*

v. *Westmoor Manufacturing Company*, supra. Appellee established the employer/employee relationship by affidavit which was not contradicted. The appellant himself alleged that the examination resulting in the injury was had in connection with his reemployment, and that the person causing the re-injury was an employee of appellee acting within the scope of his employment.

It is not necessary on a Workers' Compensation claim that the employee be injured while performing the specific task for which he has been employed. It has been held that he is equally covered if he is injured while performing some task other than that assigned to him, if it be in connection with his employment and required by his employer. *Elm Springs Canning Co.* v. *Sullins*, 207 Ark. 257, 180 S.W. 2d 113.

We find no error in the action of the Circuit Court.

Affirmed.

MAYFIELD, C.J., and COOPER, J., dissent.

BOARD OF EDUCATION OF FRANKLIN COUNTY, Arkansas *v.* OZARK SCHOOL DISTRICT NO. 14

CA 80-494 619 S.W. 2d 304

Court of Appeals of Arkansas
Opinion delivered June 10, 1981
[Rehearing denied August 19, 1981.]

Edgar A. Woolsey, Jr., A. Jack King and *Neva Belcher King*, for appellants.

Gregory P. McKenzie and *Jonah T. Yates*, for appellees.

DONALD L. CORBIN, Judge. This case was filed by the Ozark School District No. 14 in the Circuit Court of Franklin County, Arkansas, Ozark District, on September 14, 1979, as an appeal and a Writ of Certiorari from a decision of the Franklin County Board of Education. The case involved a May 19, 1941, Franklin County Court order which purported to establish a boundary line between two school districts located in Franklin County. The Court order authorized the transfer of 240 acres from the Manitou School District No. 70 to the Adams School District No. 20.

On March 16, 1948, a Franklin County Board of Education order placed all lands contained within the Manitou School District No. 70 within the Ozark School District No. 14. The Adams School District consolidated with the Pleasant View School District No. 4 in 1949, at which time the 240 acres were transferred to the Pleasant View School District No. 4 on the tax records.

At its July 20, 1979, meeting, the Franklin County Board of Education considered a letter from the President of

the Board of Directors of the Ozark School District No. 14, which asked the Board to assist in correcting a "courthouse clerical error" by transferring the 240 acres to the Ozark School District No. 14 from Pleasant View School District No. 4 on the county books. The Board found (1) that no accurate map of the school district boundaries in Franklin County existed; (2) that the 240 acres were in the Adams School District No. 20 from 1943 until its consolidation with Pleasant View School District in 1949; and (3) that the boundaries should remain as fixed by such consolidation.

At the August 16, 1979, meeting of the Franklin County Board of Education, representatives of the Ozark School District appeared, contending that a clerical error in the 1940's caused the 240 acres to be transferred from Manitou School District No. 70 and placed in Adams School District No. 20. They asked the Board of Education to order such correction and transfer the same on the books. The Board of Education again refused to transfer and affirmed its previous action of July 20, 1979.

Appellee, Ozark School District No. 14, filed a Writ of Certiorari and appealed to the Circuit Court of Franklin County from the finding of the appellant, Franklin County Board of Education. Thirty-four residents within the 240-acre area filed a petition to intervene and join with Ozark School District No. 14 in the Circuit Court. The appellee contended that the Board of Education's refusal to order a correction of the records as requested by the Ozark School District amounted to a boundary line change between Ozark and Pleasant View School Districts; that there was no compliance with the statutory requirements to annex territory or change district boundaries; and that the order of the Board of Education was therefore void.

No witnesses testified and the case was submitted on documentary evidence and briefs of counsel. The trial court rendered a declaratory judgment, ruling that the May 19, 1941, Franklin County Court order was invalid and void because of the failure to follow the requirements of Arkansas law and because of the ambiguities contained in the land description in said order. The trial court further ruled that

the decision of the Franklin County Board of Education constituted a boundary change as defined by Arkansas case and statutory law. The Pleasant View School District No. 4 was not a party to this action. Appellants have appealed the decision of the Franklin County Circuit Court.

Ark. Stat. Ann. § 34-2510 (Repl. 1962) provides in part:

> Parties. — When the declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

Ark. Stat. Ann. § 34-2505 provides:

> When court may refuse judgment or decree. — The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

In applying these statutes to the case at hand, it is evident that any decision rendered by this Court would not terminate the uncertainty or controversy giving rise to the proceeding because the Pleasant View School District No. 4 is a necessary party to this proceeding. It stands to lose 240 acres of land if the decision below is affirmed. A declaratory decree in this case would not bind the Pleasant View School District No. 4 which, though not a party hereto, is a real party in interest. It follows that a decree would not end the dispute since the Pleasant Valley School District No. 4 would still be entitled to be heard on the quesiton. See *Johnson* v. *Robins*, 223 Ark. 150, 264 S.W. 2d 640 (1954). All necessary parties have not been brought into court. The statute requires that all persons shall be made parties who have any interests which would be affected by the declaration. See *Laman* v. *Martin*, 235 Ark. 938, 362 S.W. 2d 711 (1962).

We reverse and remand for further proceedings consistent with this opinion.

COOPER, J., dissents.

Lillian J. GAUTNEY, Florence McDONALD and Mildred LUMPKIN *v.* Elsie Spargo RAPLEY

CA 80-519 617 S.W. 2d 377

Court of Appeals of Arkansas
Opinion delivered June 17, 1981

[redacted]

John F. Gautney, for appellants.

Cox & MacPhee, for appellee.

George K. Cracraft, Judge. The appellants, collateral heirs of Lillian Goucher, deceased, appeal from an order of the Probate court of Garland County admitting to probate as decedent's last will a document executed by her on April 28, 1978. The appellee, Elsie Rapley, also a collateral heir of the testatrix, was named a principal beneficiary and executrix in the will. None of the other heirs at law of the testatrix were favored in that will. The appellants, Lillian Gautney, Florence McDonald and Mildred Lumpkin, advanced six points of error. We find no merit in any of these points, and in this opinion will address them in the order in which they were presented in the briefs.

THE FACTS

The will in question was executed by the testatrix on April 28, 1978, in the office of the drafting attorney. The attorney and one of his secretaries signed the will as attesting witnesses. They testified in this proceeding that they had not known the testatrix prior to the first of her two visits to their office, and could not now describe her. Both testified that she was alert and competent at that time, read the will and declaring it to be her will, signed it in their presence. Both testified that she came to their offices for the execution of the will unaccompanied. The drafting attorney testified that she was also unaccompanied on her first visit, at which time she outlined to him the provision she desired incorporated in the proposed will.

It was stipulated that the testatrix was mentally com-

petent to execute the will and was of sound mind on the date it was signed. There was testimony from other witnesses including the appellant, Lillian Gautney, that her sound mental condition continued up to the time of her death on December 22, 1980, and that she was a "smart," "knowledgeable," "decisive" and "opinionated" person. While stipulating to the mental capacity of the testatrix, the appellants question the validity of the will solely on the ground that it was executed while she was unduly influenced by the appellee, her principal beneficiary.

In support of the contention that appellee had unduly influenced the testamentary disposition of the testatrix, appellants relied entirely upon statements purportedly made by the testatrix prior to her death. The court excluded that evidence as incompetent to prove undue influence. In the proffer of proof made in the record, appellant Gautney stated that the testatrix had stated to her and to others "my will is not the way I want it, but it is the only way Elsie (Rapley) will have it." After the proffer of proof was concluded it was stipulated that the other two appellants, if called, would have made the same proffer. No direct or substantive evidence of undue influence was adduced.

At the conclusion of all of the testimony the trial judge ruled that there was no admissible evidence of undue influence on the part of the appellee that affected the testatrix's testamentary disposition. Appellants appeal from that ruling.

I.

The appellants first contend that the court erred in admitting the will to probate on the testimony of the two attesting witnesses inasmuch as they stated that they had not previously known the testatrix and could not now describe her. This, they contend, negates the "positive identification of the signer." The appellants cite no authority in support of that position and we have found none. In any event, it was not alleged or ever contended that the testatrix, Lillian Goucher, was not the person who signed the will in question. Appellants admitted in their motion that testatrix had

signed the will, and contested its validity solely on the grounds that when she signed it her testamentary disposition was so unduly influenced by appellee that it was not, in fact, her own will.

If it was being contended that the person who signed the will in the offices of the attorney was in fact an imposter, that fact could easily have been proved by any person familiar with her signature. The signature on the will appearing to be genuine and unquestioned, the testimony of the attorney and secretary as to the circumstances under which that signature was affixed to the will is sufficient to sustain the finding of the trial judge that the will was executed in the manner required by law. *Pennington* v. *Pennington*, 1 Ark. App. 311, 615 S.W. 2d 391 (1981).

Furthermore it is to be noted that this question was not raised in the court below by the pleadings or arguments of counsel. It cannot be considered for the first time on appeal. *McIlroy Bank & Trust Company* v. *Seven Day Builders of Arkansas*, 1 Ark. App. 121, 613 S.W. 2d 837 (1981); *Green* v. *Ferguson*, 263 Ark. 601, 567 S.W. 2d 89 (1978).

II.

The appellants contend that the trial judge erred in excluding the appellants' testimony as to statements made by the deceased concerning her will. Those statements were: "My will isn't the way I want it, but it is the only way Elsie will have it." We find no merit in this contention.

The court, in excluding the evidence, correctly stated the law as follows:

> Mr. Gautney, in view of the cases that have been cited here, the fact that the inquiry has been limited solely to undue influence and not to the question of testamentary capacity — admittedly *if we had testamentary capacity involved then those statements would be admissible, but when, as I read the cases, they are not admissible at all in a situation in which undue influence was the sole point.* (Emphasis supplied.)

It is well settled in this state that statements and declarations of the testator, whether made before or after the execution of a will, are not competent as direct or substantive evidence of undue influence, but where testamentary capacity is in issue may be admissible to show the mental condition of the testator at the time the will was executed. *Floyd* v. *Dillaha*, 221 Ark. 805, 256 S.W. 2d 48. Our case law and Rule 801(c), Arkansas Rules of Evidence, generally define hearsay as an extrajudicial statement, offered to prove the truth of the matter asserted in that statement. Such statements are not objectionable hearsay if not offered to prove the truth of the matter asserted but merely to show that the statement was made. When the condition of a testator's mind is placed in issue, declarations made by him may be received in evidence as external *manifestations of his mental condition* but not as evidence of the truth of those statements. On the other hand, where the declarations are offered to *prove the truth of a fact asserted*, such as having yielded to undue influence, the declaration, being offered to prove the truth of the matter asserted, is subject to the hearsay exclusionary rule. *Milton* v. *Jeffers*, 154 Ark. 516, 243 S.W. 60; *Kennedy* v. *Quinn*, 166 Ark. 509, 266 S.W. 462; *Mason* v. *Brown*, 122 Ark. 407, 183 S.W. 973; *Floyd* v. *Dillaha*, supra.

The mental condition of the testatrix was not in issue here, it having been stipulated that she was fully competent. The proffer was directed solely at the issue of undue influence. Such statements could only be offered to prove the truth of the matter asserted — that Elsie had exercised undue influence over her. The statement was clearly hearsay and properly excluded by the trial judge.

III.

The appellants next argue that the trial judge erred in finding that there was insufficient evidence to establish an exercise of undue influence over the testatrix. We do not agree.

The argument is made that as appellee demurred to the evidence at the conclusion of the trial and the court's ruling was made immediately thereafter, the evidence must be

tested in accordance with rules applicable to such demurrers. The rule contended for is that the trial court has a duty to give the evidence in favor of the plaintiff its strongest probative value and to sustain the demurrer only if the party against whom dismissal is sought has failed to make a prima facie case. *Nowlin* v. *Spakes*, 250 Ark. 26, 463 S.W. 2d 650. While we conclude that the trial judge was ruling on the merits of the case at the time, we further conclude that his ruling was correct by either test.

The undue influence which invalidates a will requires a showing that the influence was of such a character as to destroy the testatrix's free agency, in effect substituting another's will in the place of her own, and must be directed toward the object of procuring a will in favor of a particular person or persons. *Kyle* v. *Pate*, 222 Ark. 4, 257 S.W. 2d 34. It is also required that the undue influence relied upon must be directly connected with the execution of the will. *Orr* v. *Love*, 225 Ark. 505, 283 S.W. 2d 667. Ordinarily the burden of proving undue influence is on the contestant. *Werbe* v. *Holt*, 218 Ark. 476, 237 S.W. 2d 478.

There was no evidence of any kind, apart from the proffered hearsay previously discussed, which would indicate any exercise of influence by the appellee over the testatrix. There was no evidence of the nature of their association, how frequently they might have seen each other, or of any action of the appellee which might indicate a dominant status. The record is completely silent as to their relationship and dealings with each other. The testimony further indicates that appellee did not accompany testatrix to the attorney's office for either the conference or execution of the will. Absent the proffered hearsay there is not a scintilla of evidence tending to show undue influence. The trial court's action in dismissing the petition contesting the will on grounds of undue influence was therefore proper, even if that ruling be treated as one sustaining a demurrer to the evidence.

IV.

The appellants next argue that the trial court erred in

receiving a pre-trial memorandum filed by the appellee several days prior to the date of the hearing without allowing appellants an opportunity to respond.

We see no error in the trial court's action in receiving such a memorandum. The document in question contains a clear, concise statement of the issues and resume of the testimony presented to the court by way of deposition. It points out to the court the appellee's objection to the reception of the expected proffered hearsay, and cites cases in support of her position.

The record reflects that before the testimony was taken, the appellee orally asked the court to rule on her motion that the expected hearsay statements of the testatrix be excluded, referring to the cases cited in the pre-trial memorandum. Appellants' attorney responded, outlining his position with regard to those statements and citing cases on which he relied, stating that he had expected the objection to come at the time the evidence was offered. The court overruled the motion to exclude the memorandum as not having been timely filed, indicating that at the time the evidence was offered, if he found it to be inadmissible he would afford appellants the right to make a proffer of proof. This was done.

We see nothing wrong in presenting to a trial court a pre-trial memorandum. In fact, in most cases it would be most helpful to the trial judge in his preparation and understanding of the case. While it would be better if both parties submitted such memoranda, we see no error flowing from acceptance of only appellee's memorandum where it was not shown to be misleading or incorrectly citing the law. The issues were correctly stated and the cases cited therein are the same as cited by this court, and correctly state the applicable law. The cases referred to by appellants' counsel in his opening statement are the same as those he relies on in his brief in this court. Nothing contained in the memorandum could have in any way improperly influenced the court or prejudiced appellants in any way. We find no merit to this contention.

V.

The appellants finally contend that the trial court erred in taxing costs of the action against them. We find no merit to this contention.

Rule 54 (d), Rules of Civil Procedure [Ark. Stat. Ann. vol. 3A (Repl. 1979)], expressly provides that except when express provision therefor is either made in a statute or the rules, costs shall be allowed as a matter of course to the prevailing party unless the court otherwise directs. Rule 1, Rules of Civil Procedure [Ark. Stat. Ann. vol. 3A (Repl. 1979)], expressly states that those rules govern the procedure in probate courts. Appellants refer us to no statute or rule which requires that a court direct the costs of an unsuccessful contest of a will be borne by the estate. We find no error in the court's action.

VI.

Appellee urges in her brief that appellants' appeal be dismissed pursuant to Rule 9 (e), Rules of Civil Procedure [Ark. Stat. Ann. vol. 3A (Repl. 1979)], for failing to abstract those portions of the record containing the appellee's pretrial memorandum and the holdings of the court.

Rule 9 (e) (1), Rules of the Supreme Court and Court of Appeals, provides that if an appellee considers the appellant's abstract to be defective, he may, in his printed brief, call the deficiency to the court's attention and, at his option, may submit a supplemental abstract. When the case is considered on its merits the court may impose or withhold cost to compensate either party for the other party's noncompliance with this rule. It further provides that in seeking an award of costs under this paragraph, counsel must submit a statement by the printer showing the costs of the supplemental abstract and a certificate of the amount of time devoted in the preparation of it.

The appellee elected in her brief to cure the deficiency by abstracting the missing portions referred to. The cost of printing the missing portion of the abstract will be allowed

in the amount set forth in appellee's position. We do not feel that the deficiency is of such a substantial nature as to warrant allowance of attorney fees.

We affirm.

Lora HODGES *v.* William F. EVERETT, Director of Labor, and UNIVERSAL MANUFACTURING CORP.

E 81-113 617 S.W. 2d 29

Court of Appeals of Arkansas
Opinion delivered June 17, 1981

LAWSON CLONINGER, Judge. Appellant Lora M. Hodges applied for unemployment compensation benefits after she

was discharged by her employer, Universal Manufacturing Corporation, for being involved in a fight with another employee. The Arkansas Employment Security Division determined that appellant was entitled to benefits under § 5(b)(1) of the Arkansas Employment Security Law, Ark. Stat. Ann. § 81-1106(b)(1) (Repl. 1976), finding that she was attacked physically and tried to defend herself by holding on to her attacker. The decision was appealed to the Appeals Tribunal by the employer. When the employer failed to appear at a hearing before the Appeals Tribunal, the determination of the Agency was affirmed. The employer then appealed to the Board of Review, which, after hearing, found that appellant was disqualified for benefits because she was involved in a fight in willful disregard of the best interests of the employer.

The decision of the Board of Review is reversed.

Section 5(b)(1), *supra*, provides that an individual shall be disqualified for benefits:

> If he is discharged from his last work for misconduct in connection with the work . . .

The only eyewitness to the incident who testified at the Board of Review hearing was appellant. She stated that on the day of the incident, when it was time to go home, another girl, Della, called appellant by name; that when appellant turned around Della hit appellant on the side of the face with her closed hand and then grabbed appellant's hair. Appellant then grabbed Della's hair, but there is no evidence that appellant hit Della. Appellant testified that she said nothing to Della, and that there had been no previous argument.

Jeff Luther, the employer's personnel manager, testified that he did not see the fight but that it was reported to him by the foremen. He stated that company policy provided that any time a person is involved in a fight, he will be discharged; if a person is attacked he should not fight back; he can do anything to get away from the attacker, but striking another employee is a dischargeable offense; strik-

ing back will result in discharge even if it is done in one's own defense. No effort was made by the employer to determine who struck the first blow, or whether appellant was acting in self defense. Appellant testified that she was not aware of a company rule against striking back when attacked, and there is nothing in the record to indicate that she had been told about it.

We have searched the record in this case and find nothing which indicates that appellant was guilty of misconduct as set out in the Employment Security Law, and as defined in case law. The general rule is that misconduct, within the meaning of the unemployment compensation act excluding from its benefits an employee discharged for misconduct, must be an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of the standard of behavior which the employer has a right to expect of its employees. *Stagecoach Motel* v. *Krause*, 267 Ark. 1093, 593 S.W. 2d 495 (1980).

It may well be that the employer is justified in having a rule making any employee engaging in a fight subject to discharge, but the existence of such rule does not necessarily mean that the discharged employee is guilty of misconduct within the meaning of the Arkansas Employment Security Law. There is no evidence in this case that appellant knew of a rule against self defense, but even if she had known, legitimate self defense would not disqualify her for unemployment benefits. Furthermore, there is no substantial evidence to indicate that appellant struck her attacker, or do more than hold her by the hair. The right of self defense is recognized under English common law and by Arkansas statutory law. Ark. Stat. Ann. § 41-506 (Repl. 1977), and is universally accepted. It is a right the exercise of which cannot be said to be an act of wanton or willful disregard of the employer's interest. There is no substantial evidence to support the Board of Review's finding that appellant was guilty of misconduct, and she is entitled to unemployment benefits.

Reversed.

DODSON CREEK, INC. *v.* FRED WALTON REALTY COMPANY and SOUTHALL INVESTMENTS, INC.

CA 81-67 620 S.W. 2d 947

Court of Appeals of Arkansas
Substituted Opinion on Petition for
Rehearing delivered September 9, 1981

Tucker, Hall, Lovell, Alsobrook & Moudy, for appellant.

Boswell & Smith, P.A., by: *David E. Smith*, for appellees.

DONALD L. CORBIN, Judge. Appellees, Fred Walton Realty Company and Southall Investments, Inc., entered into an exclusive listing contract to sell, exchange, lease or rent land owned by appellant, Dodson Creek, Inc. Dodson Creek, Inc. was trying to develop the property as a shopping center.

The exclusive listing agreement between the parties was for one year. The agreement also contained an automatic

extension clause of 180 days unless the contract was cancelled in writing by Dodson Creek, Inc. It was not so cancelled, therefore, the listing contract expired October 14, 1978.

The contract also contained the following provision which is critical to this appeal:

> [I]f the property be sold, exchanged, leased, rented or otherwise disposed of after the expiration of this contract to any person or organization to whose attention said property was brought through the efforts or services of Agent or on information secured directly or indirectly from or through Agent during the term of this contract, then Agent shall be conclusively presumed to be the procuring cause of such transaction, in which case Owner agrees to pay Agent the professional fee as set forth above.

During the term of the contract, appellees attempted to sell Safeway a site in the shopping center. The negotiations began in the summer of 1977 and a proposal was submitted through the local Safeway office to the home office in California on April 7, 1978. It was rejected by Safeway on April 25, 1978, and appellees did nothing after that date to sell Safeway a site in appellant's shopping center.

After appellees' listing contract expired on October 14, 1978, appellant entered into a listing contract with Danny Thomas Co. on November 22, 1978.

Safeway approved a site in another shopping center across the street from appellant's shopping center. About two weeks before Safeway was to close this deal (which was about 2 months after the expiration of the 180 day extension clause to the listing agreement between appellant and appellees), negotiations began between Danny Thomas Co. and Safeway representatives concerning the Dodson Creek, Inc. property. Safeway took an option on the Dodson Creek, Inc. property in August of 1979, the option was exercised in December of 1979, and the purchase was closed in January of 1980. Safeway purchased essentially the same site originally

considered with changes in the size and price.

While negotiations between Safeway representatives and Danny Thomas Co. concerning the Dodson Creek, Inc. property were continuing, appellees notified the appellant by a letter dated April 17, 1979 that Safeway and twenty-five other businesses had been contacted by the appellees and were listed as reserved clients.

Appellant paid the Danny Thomas Co. a ten percent commission on the $310,920 sale to Safeway. Appellees demanded that they receive a ten percent commission which appellant refused to pay. Appellees filed suit against appellant for a ten percent commission alleging that they acted as the procuring cause of the sale.

Judgment was entered on a jury verdict in favor of appellees for the sum of $31,092. This appeal follows.

Appellant argues that the Court erred in not granting its request for a directed verdict, judgment notwithstanding the verdict and a new trial for appellees' failure to plead and prove a cause of action.

The proper prequisite for both a directed verdict and a judgment notwithstanding the verdict was not fulfilled by the appellant. The court properly denied these motions.

At the close of appellees' case-in-chief, appellant made the following motion.

> At the close of the plaintiff's case and the plaintiffs having announced that plaintiffs rested, the defendant moved for a directed verdict.

At the close of the case, appellant made the following motion for a directed verdict:

> The first thing is that the defendant would move the court to direct a verdict for the reason that plaintiffs have neither alleged nor proved a cause of action.

The trial court ruled that:

> [T]he motion for a Directed Verdict made by the Defendant at the close of the case was not sufficiently specific to apprise the court of the defendant's ground for making the motion and, therefore, does not constitute a sufficient prerequisite for the making of a motion for judgment notwithstanding the verdict.

Rule 50(a) of the Arkansas Rules of Civil Procedure states in pertinent part:

> A motion for a directed verdict shall state the specific grounds therefor. ... The motion may also be made at the close of all of the evidence and in every instance the motion shall state the specific grounds therefor.

The requirement that specific grounds be stated in a motion for a directed verdict is mandatory and failure of the motion to state the specific grounds relied on is in itself sufficient basis for denial of the motion. *Svestka* v. *First Nat'l Bank in Stuttgart*, 269 Ark. 237, 602 S.W. 2d 604 (1980). Wright & Miller, Federal Practice and Procedure: Civil § 2533.

A motion for a directed verdict is a condition precedent to moving for a judgment notwithstanding the verdict. It must state the grounds on which it is made. Since it is technically only a renewal of the motion for a directed verdict made at the close of evidence, it cannot assert a ground not included in the motion for directed verdict. Wright & Miller, Federal Practice and Procedure: Civil § 2537.

The basis of appellant's motion for judgment notwithstanding the verdict was Ark. Stat. Ann. § 71-1302 (Repl. 1979) which provides in part:

> No recovery may be had by any broker or salesman in any court in this State on a suit to collect a commission due him unless he is licensed under the provisions of this act and unless such fact is stated in his complaint.

The matters raised in the motion for judgment notwith-

standing the verdict had never before been mentioned in either of the motions for directed verdict and under the authority previously cited, were waived. Furthermore, the statute had neither been pled in answers, nor had it ever been raised in prior motions.

This very point has previously been ruled upon by the Arkansas Supreme Court in *St. Louis Union Trust Co.* v. *Hammans*, 204 Ark. 298, 161 S.W. 2d 950 (1942). Act 148, Section 2, Acts 1929 (Ark. Stat. Ann. § 71-1302), was also in issue there. In that case, during the trial, the claimant real estate broker had not pled or proved that he was a licensed real estate broker. The defendant, against whom a recovery had been made, on appeal for the first time, raised the provisions of the statute. The Supreme Court disposed of the issue as follows:

> The statute referred to above was not invoked by appellants as a defense in the court below. In other words, it is raised as a defense for the first time in this court. This court ruled in the case of *Bolen* v. *Farmers' Bonded Warehouse*, 172 Ark. 975, 291 S.W. 62 (quoting syllabus 3), that: "Issues not raised by the pleadings nor by requested instructions will not be considered on appeal."

Because this matter is raised for the first time on appeal and the appellant did not specifically raise the statute in defense or in a motion to dismiss, this matter shall not be considered by the Court.

Next, appellant argued that the court erred in giving certain instructions to the jury over appellant's objections and refusing to give those instructions requested by appellant. The appellee offered the following instructions:

PLAINTIFFS' REQUESTED
INSTRUCTION NO. 6

AMI 1012 Modified

> Fred Walton Realty Company and Southall Investments, Inc., assert two separate grounds for the recovery of damages:

First: That the property was sold after the expiration of the contract to Safeway Stores, Incorporated, to whose attention said property was brought through the efforts or services of them or on information secured directly or indirectly from or through them during the term of the contract, and,

Second: That they were the procuring cause of the sale of the property to Safeway Stores, Inc.

It will be necessary for you to consider separately each asserted ground for recovery. If you find from the evidence that every essential proposition with respect to any one ground for recovery has been proved, then your verdict should be for Fred Walton Realty Company and Southall Investments, Inc., and against Dodson Creek, Inc.; but if you find from the evidence that any essential proposition with respect to any one ground for recovery has not been proved, then your verdict with respect to that ground for recovery should be for Dodson Creek, Inc.

PLAINTIFFS' REQUESTED
INSTRUCTION NO. 7

By "procuring cause," it is meant that if, after the property is placed in the agent's hands, the sale is brought about or procured by the agent's advertisements or exertions, the agent will be entitled to a commission; or if the agent introduces the purchaser or discloses his name, to the owner, and through such introduction or disclosure, negotiations are begun, and the sale of the property is effected, the agent is entitled to his commissions, though the sale may be made by the owner.

PLAINTIFFS' REQUESTED
INSTRUCTION NO. 8

The exclusive listing contract under which Fred Walton Realty Company and Southall Investments, Inc., seek to recover contains the following provision:

> "(If) the property be sold, exchanged, leased, rented, or otherwise disposed of after the expira-

tion of this contract to any person or organization to whose attention said property was brought through the efforts or services of Agent or on information secured directly or indirectly from or through Agent during the term of this contract, then Agent shall be conclusively presumed to be the procuring cause of such transaction in which case Owner agrees to pay Agent the professional fee as set forth above."

If you find that the property was sold after the expiration of the contract to a person or organization to whose attention said property was brought through the efforts or services of Fred Walton Realty Company and Southall Investments, Inc., then plaintiffs are entitled to the presumption that they were the procuring cause of the sale.

Specific objections made by the appellant to these instructions were: (1) they did not include a requirement that there be causation between the activities of appellees and the ultimate sale to Safeway; (2) there was no requirement that the ultimate sale occur within a reasonable time after the expiration of the contract; and (3) there was no requirement that appellees notify appellant during the term of the listing contract of their intention to claim Safeway as a reserve client and claim a commission if the property were sold to Safeway.

The appellant requested the following instructions which were denied by the Court:

DEFENDANT'S REQUESTED
INSTRUCTION NO. 8

The plaintiffs claim the defendant owes the plaintiffs a commission for the sale of land by the defendant to Safeway.

To be entitled to recover in this case, the plaintiffs must prove that their efforts were the efficient, procuring, proximate or inducing cause of this sale. That is, the sale was the direct and proximate result of their efforts.

When I use any one of these terms, I mean a cause originating or setting in motion a series of events which without break in continuity result in the procurement of a purchaser who is ready, willing and able to buy on defendant's terms.

While it is not essential that the plaintiffs' efforts be the sole cause of the sale, it is essential that they be the predominately effective cause and they are not sufficient to entitle them to a commission where they are merely an indirect, incidental or contributing cause.

DEFENDANT'S REQUESTED
INSTRUCTION NO. 11

You are instructed that unless you find from a preponderance of the evidence that the sale to Safeway proximately resulted from the efforts of the plaintiffs, within a reasonable time after the expiration of the listing contract and that the plaintiffs notified the defendant before the expiration of the listing contract that the plaintiffs claimed Safeway as a reserve client, the plaintiffs are not entitled to recover from the defendant.

DEFENDANT'S REQUESTED
INSTRUCTION NO. 11-A

You are instructed that unless you find from a preponderance of the evidence that the sale to Safeway proximately resulted from the efforts of the plaintiffs, within a reasonable time after the expiration of the listing contract, the plaintiffs are not entitled to recover from the defendant.

DEFENDANT'S REQUESTED
INSTRUCTION NO. 11-B

You are instructed that unless you find from a preponderance of the evidence that the sale to Safeway proximately resulted from the efforts of the plaintiffs, the plaintiffs are not entitled to recover from the defendant.

We initially reversed on this point. We held that the jury in the instant case should have been instructed as to whether the appellees introduced the purchaser or disclosed his name to the owner and through such introduction or disclosure, negotiations were begun and the sale of property to Safeway was effected within a reasonable time after the expiration of the listing period.

As authority, we quoted the following cases:

In *Moore* v. *Holman Real Estate Co.*, 129 Ark. 465, 196 S.W. 479 (1917), the Supreme Court upheld a directed verdict for a real estate broker's commission in a similar situation as here, but plainly recognized reasonable time as being an element. The Court stated that:

> It is also finally insisted that a sale would have to be made within a reasonable time on this information, in the absence of bad faith on the part of the owner, to make the owner liable. If this be conceded, we think it may be said, *as a matter of law*, that the sale was made *within a reasonable time*, as the sale was perfected within two months after the expiration of the contract. (Emphasis supplied.)

In *Beck* v. *Neal*, 228 Ark. 186, 306 S.W. 2d 875 (1957), the Court considered the following language contained in a broker's contract:

> The Owner further agrees to pay the commission set forth in Paragraph 2 to the Agent if the property be sold or otherwise disposed of by any other person, association or corporation, including the Owner, after the expiration of the above listing period, when such sale or other disposition of the property resulted from or was based upon information given by or obtained through the Agent, with notice thereof to the Owner, during the period of this contract.

The Court, in authorizing the real estate broker a fee for a sale that took place by the owner after the expiration of the contract, stated the following:

> The sale by appellees to Alexander within a *reasonable*

> *time* thereafter upon the exact terms of the listing contract and upon information given and obtained through the appellant, with proper notice to appellees, rendered them liable to appellant for the commission of 5 per cent. (Emphasis supplied.)

See also, 51 A.L.R. 3d 1149, § 17.

In *Green* v. *Toney*, 257 Ark. 853, 520 S.W. 2d 290 (1975), the Supreme Court in ruling on whether a real estate broker was entitled to his commission following the sale by the owner after the expiration of a six-month option held:

> If May had bought the property five minutes after the expiration of the option the brokers' right to a commission could hardly be disputed, while if the purchase had been made five years later Green's position would be equally strong. Between the extremes there is a middle ground that falls within the jury's province.

In *E. C. Stromberg* v. *Seaton Ranch Co.*, 160 Mont. 293, 502 P. 2d 41 (1972) the Court made the following statement about reasonableness of time:

> Under usual circumstances time allowed to protect the broker after expiration of the principal listing under a protective paragraph, if no time period is named, is held to be a reasonable time. Reasonable time in transactions of this type is determined by the nature and character of the service to be rendered, magnitude of the undertaking, the intention of the parties, and all the facts and circumstances of the case. 12 C.J.S. *Brokers* § 88, page 203.

On rehearing, appellees rely on Arkansas Rules of Civil Procedure Rule 51 which reads in pertinent part:

> . . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto before or at the time the instruction is given, stating distinctly the matter to which he objects and the grounds of his objection, and no party may assign as error the failure to instruct on any issue unless such party has submitted a proposed instruction on that issue.

> A mere general objection shall not be sufficient to obtain appellate review of the trial court's action relating to instructions to the jury except as to an instruction directing a verdict or the court's action in declining to do so.

In their Response to the Petition for Rehearing, the appellants rely on Arkansas Rules of Civil Procedure Rule 46 which provides in part:

> Formal exceptions to ruling or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and its grounds therefor; . . .

Since ARCP 51 is specifically directed toward jury instructions it controls in this case.

One who has not asked a proper instruction on the subject cannot complain of the refusal of the court to give an improper one. *Western Union Telegraph Co.* v. *Ford*, 77 Ark. 531, 92 S.W. 528 (1906). A party entitled to an instruction on a subject, but requesting an erroneous instruction, may not complain of failure to charge on the subject. *Newman* v. *Peay*, 117 Ark. 579, 176 S.W. 143 (1915). While defendant is entitled to have his theory of the case submitted to the jury, it is his duty to prepare and request a correct instruction embodying it. *Bovay* v. *McGahhey*, 143 Ark. 135, 219 S.W. 1026 (1920). A trial court need not give instruction which needed explanation, modification or qualification. *Reynolds* v. *Ashabranner*, 212 Ark. 718, 207 S.W. 2d 304 (1948).

The instructions offered by the court were correct in what they stated relative to the issue of procuring cause. The Supreme Court held in *Scott* v. *Patterson and Parker*, 53 Ark. 49, 13 S.W. 419 (1890) that:

> If, after the property is placed in the agent's hands, the sale is brought about or procured by his advertisements, and exertions, he will be entitled to his com-

> missions. Or if the agent introduces the purchaser or discloses his name to the owner, and through such introductions or disclosure, negotiations are begun, and the sale of the property is effected, the agent is entitled to his commissions, though the sale may be made by the owner.

Since the appellant failed to offer proper instructions regarding the issue of reasonable time, we must affirm the decision.

Affirmed.

MAYFIELD, C.J., concurs.

GLAZE, J., dissents.

FIRST NATIONAL BANK OF BRINKLEY and Paul FARRELL *v.* Freeland NASH, Otto CLIFTON, and EDEN FARMS, INC.

CA 80-516 617 S.W. 2d 24

Court of Appeals of Arkansas
Opinion delivered June 17, 1981

Sharp & Spratt, by: *James B. Sharp*, for appellants.

Daggett, Daggett & Van Dover, by: *Jimason Daggett*; and *Ray & Donovan*, by: *Robert J. Donovan*, for appellees.

TOM GLAZE, Judge. This case arose out of a dispute involving the sale of a farming operation and whether a real estate commission was to be paid a real estate broker by appellees as a result of the sale. Appellees, Freeland Nash (Nash) and Otto Clifton (Clifton) formed a corporation, appellee Eden Farms, Inc. (Eden Farms), and purchased a nine hundred acre farm in 1974. The underlying facts in this dispute are somewhat unusual because the real estate broker, Larry Guthrie (Guthrie), who assisted in the sale of the farm, was also the President of the appellant First National Bank of Brinkley (Bank), which had loaned monies to appellees to finance their farming operation. Additionally, appellant Paul Farrell (Farrell), a majority shareholder and director of the Bank, was involved in the negotiations in the sale of the farm, and although he does not claim a real estate commission, Farrell does claim an interest in any commission owed Guthrie on the sale because of monies he claims to have previously loaned Guthrie.

The legal authorities cited by the parties are exhaustive, and the arguments made by both sides are well presented. The case law and legal principles applicable to this cause are well settled. In each case cited by the parties, it is the application of law to the respective fact situations which poses the greatest problem. Thus, a clear understanding of the facts before us must first be reviewed. Three years after Clifton and Nash formed Eden Farms and financed its operation through the Bank, Eden Farms' operation ran into financial trouble. Through the efforts of Guthrie and Farrell, a purchaser was located who agreed to buy Eden Farms. On March 25, 1977, an offer and acceptance was executed. Five days later, this sale was closed by the parties in Guthrie's office in the Bank. At this time, a dispute arose as to whether Guthrie was entitled to a real estate commission in the amount of $22,750. Because of this dispute, Guthrie proceeded to close the sale by disbursing all monies and paying Eden Farms' debts to the Bank, but placed the remaining balance of the sale proceeds, $22,293.30, in his account, as agent, until the commission issue could be resolved.

No further action was taken until June 15, 1977. At this time, Guthrie wrote a check on the disputed account to Farrell for $17,500. He wrote another check to Farrell for $2,500 on July 28, 1977. Guthrie later took the balance, $2,293.30, on October 19, 1977.

In November, 1977, Nash brought action against Guthrie for the $22,293.30. After taking Guthrie's discovery deposition, Nash then sued the Bank, alleging it had knowledge of the funds in Guthrie's trust or escrow account and the Bank should have prevented Guthrie from converting these funds. Nash also made Farrell a party to the suit, alleging Farrell and Guthrie wrongfully converted the funds. Eden Farms intervened in the suit and adopted all of the relief sought in Nash's complaint. On an unrelated matter, the Bank counterclaimed against Nash on two notes concerning a separate indebtedness.

When this case went to trial, Guthrie failed to appear, but all other parties were represented and presented evidence. The trial court held Guthrie liable to Eden Farms for $22,750 and the Bank jointly and severally liable for the $22,293.30, which had been placed in Guthrie's account. Farrell was held jointly and severally liable for the $20,000 he received. The court awarded the Bank judgment on its counterclaim plus attorney's fee of 5% of the debt owed by Nash. The Bank and Farrell appeal and Nash cross appeals the trial court's decisions.

The Bank's initial point raised for reversal is that it is not liable for Guthrie's withdrawal of the disputed funds from the trust or escrow account he maintained at the Bank. In its argument, the Bank recognizes the long established rule of agency enunciated by the court in *Hill* v. *State*, 253 Ark. 512, 487 S.W. 2d 624 (1972), that:

> ... a corporation, which can act only through its officers and agents, is affected with notice which comes to an officer, agent or employee in the line of his duty and the scope of his powers and authority and that knowledge ... is ordinarily imputed to the corporation.

The Bank contends this rule of law is not applicable to the facts here because: (1) The Bank neither participated in nor was a beneficiary of any of the commission funds in dispute; and (2) Guthrie had an individual interest in the commission, thus his knowledge and acts should not be imputed to the Bank.

Concerning the Bank's first point, it relies on the following legal principle announced in *Bank of Hartford* v. *McDonald*, 107 Ark. 232, 154 S.W. 512 (1913):

> The appellant Bank had no interest whatever in the property and derived no benefit from the venture and was in no way responsible for its success or failure, and it has been held that where a trustee has full control over the funds deposited in a bank, he may draw them out of the bank *ab libitum*, and the bank incurs no liability in permitting this to be done, so long as it does not participate in the breach of trust, resulting in a misapplication of the funds.

We have no difficulty in accepting the Bank's argument that it derived no benefit from the transaction in question. While it is true the Bank received none of the disputed funds held in Guthrie's account, it certainly benefited from the sale of the Eden Farms operation. There is no dispute that Eden Farms was in financial trouble, a matter which concerned the Bank since it had a sizeable outstanding loan made to Eden Farms. It was the Bank's majority shareholder, Farrell, who actually sought and found a buyer for the Eden Farms operation which in turn permitted Eden Farms, Nash and Clifton to pay off their loan to the Bank. The Bank, through its president, Guthrie, actively negotiated and closed the sale of its farm operation. The Bank, of course, would urge us to consider the commission dispute as a separate matter, *i.e.*, although the Bank may have benefited from the sale of the farm, it received no benefit from what transpired in connection with the commission dispute. We have problems with severing or bifurcating the sale transaction as the Bank would have us do. The Bank officials, Guthrie and Farrell, continued to participate in the actions which took place

subsequent to the sale and relative to the commission dispute. The commission question crystalized at the same time the sale was to be closed. If Guthrie had not agreed to hold the $22,293.30, as agent, there is a fair inference from the facts that the sale may not have been consummated. Since the Bank's president took this action to consummate the sale, the Bank cannot later abdicate its responsibility regarding these trust funds merely because it will not be the recipient of any portion of the funds. The Bank, through Guthrie, undertook to close the sale of Eden Farms and until all monies were disbursed, the sale transaction was never fully closed.

The Bank's second point is premised on the rule of agency that the knowledge of the agent will not be imputed to the principal where the agent acts for himself or has a personal interest in the transaction, thus rendering it improbable that he will report his knowledge to his principal. *Howard* v. *Wasson*, 187 Ark. 756, 62 S.W. 2d 30 (1933). See also, 19 Am. Jur. 2d *Corporations* 672. In brief, the Bank contends Guthrie's interest in the disputed commission precludes his knowledge and acts from being imputed to the Bank. However, whether or not Guthrie claimed an interest to the Eden Farms commission was in serious conflict at trial. Nash and Clifton testified, *without objection*, that they never agreed to a commission and that Guthrie had disclaimed any interest in a commission prior to closing the sale of the farm. Although the Bank now objects on appeal that this testimony of Nash and Guthrie is hearsay and should not be considered, Guthrie is a party-opponent in this cause and the statement attributed to him is clearly admissible as an admission. Rule 801 (d) (2) (i), *Uniform Rules of Evidence*. Even if he had not been made a party, the Guthrie statement would have been permitted as a hearsay objection under Rule 804 (b) (3), *i.e.*, a statement which at the time it was made was contrary to Guthrie's pecuniary or proprietary interest. We hold this testimony of Nash and Clifton alone is sufficient to support the trial court's finding that Guthrie was not engaged in a personal, separate enterprise nor in an interest adverse to that of the Bank. Also without objection, Clifton testified that Guthrie stated it

was Farrell who wanted the commission. Thus, regardless of Guthrie's abandoned interest in the commission, a dispute still continued over these monies and was reason enough for Guthrie to have held the funds in trust until the matter was fully resolved. Although it appears from the record that the Bank did not object to Clifton's reference to Guthrie's remark concerning Farrell's claim to the commission, we doubt it matters. The statement was certainly admissible to show why Guthrie held the disputed funds even though the remark, on proper objection, may have been excluded for the purpose of showing the truth of the matter asserted. See Rule 803 (3), *Uniform Rules of Evidence*.

The Bank contends the trial court admitted, over objection, incompetent testimony on other occasions that Guthrie disclaimed any commission. Even if this were true, there is sufficient evidence in the record to otherwise support its finding and decision, and any error in this regard would be harmless. See *M. W. Elkins & Company* v. *Ashley*, 195 Ark. 313, 112 S.W. 2d 627 (1938). The Bank urges that the trial court should have given more weight to the testimony offered by the purchaser of Eden Farms, who stated that at the closing Guthrie said that he was entitled to a commission. On review, we must affirm the trial court's findings unless they are "clearly erroneous (clearly against the preponderance of the evidence), and due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses." Rule 52, *Arkansas Rules of Civil Procedure*. In this same vein and consistent with our findings above, we further hold there was sufficient evidence to support the trial court's conclusion that Guthrie was at all times acting as the chief executive officer of the Bank in an effort to effect the sale of Eden Farms, and the acts and knowledge of Guthrie were imputable to the Bank, making it liable to Eden Farms for the conversion of the $22,293.30 in question.

We have less difficulty in our consideration of Farrell's assignment of error. The trial court found that Farrell did not receive the $20,000 from Guthrie in the ordinary course of business nor did he part with anything of value in

exchange. Farrell testified that he knew Guthrie was holding these funds as agent as the result of the Eden Farms sale transaction. These funds were clearly not Guthrie's, and Farrell knew it. Farrell was also on the signature card to this account which was noted as "Larry Guthrie, Agent." Without question, Farrell cannot be said to be an innocent recipient of funds misappropriated from the Guthrie account. Farrell was involved in this matter from its inception, *i.e.*, when he found a willing buyer for the Eden Farms operation. In spite of his knowledge that Guthrie held these disputed funds as agent, Farrell instructed Guthrie to write him checks on the account for $17,500 and $2,500. These funds were not Guthrie's to give, and we believe the record amply supports the conclusion that Farrell was aware of this fact. We agree with the trial court's holding that Farrell is liable to Eden Farms in the $20,000 amount he received from Guthrie.

The last issue we must consider involves two promissory notes (not related to the Eden Farms matter) which reflect the loan of monies by the Bank to Nash. Both notes provide that if Nash defaults in payment and collection is necessary, he agrees to pay the holder ten percent (10%) additional on the principal and interest as attorneys' fees. The trial court awarded the Bank judgment against Nash on the two notes and granted it an additional five percent (5%) on the past due principal and interest as attorneys' fees. Although the Bank failed to object to this award of attorneys' fees below, the Bank argues on appeal that the court should have awarded 10% attorneys' fees as provided by the notes and authorized under Ark. Stat. Ann. § 68-910 (Repl. 1979). Since this issue was not brought to the trial court's attention, we would normally not consider the matter on appeal. Nash, however, contended at trial and now on cross appeal that the Bank should not be entitled to any interest because it converted the Eden Farms commission funds, which are monies which could have been applied on Nash's indebtedness. Since the attorneys' fees issue is before us on Nash's cross appeal, we will also consider the respective arguments of both parties.

As mentioned previously, the Bank contends it is entitled to the entire 10% attorneys' fees provided in the two notes. Neither the Bank nor Nash cite any Arkansas cases on this point. Therefore, we will first review the language of § 68-910, which provides:

> Attorney's fee — Provision enforceable. — A provision in a promissory note for the payment of reasonable attorneys' fees, not to exceed ten percent [10%] of the amount of principal due, plus accrued interest, for services actually rendered in accordance with its terms is enforceable as a contract of indemnity. [Acts 1951, No. 350, § 1, p. 841.]

The foregoing law was enacted by our legislature in 1951. Until 1951, a stipulation in a promissory note which provided for attorneys' fees in any amount was held to be against public policy and unenforceable. See *Holimon* v. *Rice*, 208 Ark. 279, 185 S.W. 2d 927 (1945). Apparently the only occasion on which the issue before us has been considered was in the case of *First National Bank of Magnolia, Arkansas* v. *Magnolia Steel Corporation*, 261 F. Supp. 283 (W. D. Ark. 1966). In *Magnolia Steel*, there were two notes, one provided for a 10% reasonable attorney's fee and the second provided for a reasonable attorney's fee not to exceed 10%. The court allowed 10% attorneys' fees on each note but not before it considered certain factors to determine if the total amounts of attorneys' fees called for by the notes were reasonable.[1] In this regard, the court considered: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to conduct the case; (2) the customary charges of the Bar for similar services; (3) the amount involved in the controversy and the benefit resulting to the client from the services. We agree with the federal court's analysis of § 68-910 and conclude that although it allows the parties to provide for an attorney's fee not to exceed 10%, it is within the court's province to determine if

[1]The court followed Canon 12 of the American Bar Association's Canon of Professional Ethics to determine whether the attorneys' fees sought were reasonable. Canon 12 was adopted by the Arkansas Supreme Court by per curiam order dated June 21, 1976, effective July 1, 1976.

the percentage to which the parties agreed is reasonable in view of the foregoing factors.

Finally, we consider Nash's argument that the interest due on these notes should be abated since the Bank converted the Eden Farms funds. Nash offers no legal authority to support his argument but apparently couches his position in terms of estoppel, a defense he raised in his pleading below. We find no merit in Nash's contention. The two notes executed by Nash were personal debts and not obligations of Eden Farms. The trial court awarded judgment to Eden Farms, not Nash, when it decided the Bank (along with Guthrie and Farrell) was liable for the conversion of the disputed commission funds. There is entirely no evidence in the record which connects the Eden Farms matter with the notes signed by Nash. Under these facts, we fail to see how equitable estoppel can be applied against the Bank.

Affirmed.

CRACRAFT, J., not participating.

Charles E. GRIFFIN *v.* STATE of Arkansas

CA CR 81-18 617 S.W. 2d 21

Court of Appeals of Arkansas
Opinion delivered June 17, 1981

E. Alvin Schay, State Appellate Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Victra L. Fewell*, Asst. Atty. Gen., for appellee.

Tom Glaze, Judge. The appellant was charged with kidnapping and rape. At a trial by jury, the jury returned a verdict of guilty on the kidnap charge and remained deadlocked on the rape allegation. Since the appellant possessed prior felony convictions, punishment was imposed under Arkansas' habitual offender's law. Appellant was sentenced to twenty-five years in the Department of Correction.

Confusion existed from the inception of filing the charges against appellant since he was charged with the crime of kidnapping, which was designated in the information as a Class B felony. Under Arkansas law, kidnapping is either a Class A or C felony. If the defendant shows by a preponderance of the evidence that he or an accomplice voluntarily released the person restrained alive and in a safe place prior to trial, kidnapping is a Class C felony. Without such a showing, kidnapping is a Class A felony. On this information which reflected the erroneous Class B classification, evidence was presented by both sides without objections at trial, and the case was submitted to the jury. Subsequently, the jury rendered the verdict of guilty to the kidnapping charge.

The State then presented evidence showing that the

appellant has been convicted of a felony on two prior occasions. After this additional evidence was admitted, the jury again retired to deliberate on the punishment to be imposed. At this point, appellant's attorney interposed his motion to set aside the verdict on the ground that it was contrary to law and the evidence, and the court duly denied the motion. Approximately five minutes after the jury had retired, the court recalled the jurors and advised them that they were given the wrong verdict form. The court then gave the verdict form which reflected that kidnapping was a Class A felony rather than a Class B. The appellant objected to the new instruction, contending that he was prejudiced because he had been given notice that he was charged with kidnapping as a Class B felony. He additionally renewed his motion to set aside the verdict based on the insufficiency of the evidence, but he never requested that a Class C verdict form should be submitted to the jury. Appellant's motions were again denied, and the State orally amended its information to read that the appellant was charged with kidnapping as a Class A felony.

After a review of the evidence, we conclude that the evidence was sufficient to support the kidnapping conviction, but the appellant's punishment should clearly have been imposed under the Class C felony provision. In a presentation of the State's case at trial, the prosecutrix testified that she was safely released by the appellant approximately a block from her house. The State argues that Arkansas law requires the appellant (defendant) to show by the preponderance of the evidence that he voluntarily released the prosecutrix alive and in a safe place. We see no merit in this contention. Obviously, this burden of proof was initially the appellant's. This burden, however, was met by the testimony elicited by the State from the prosecutrix. It is difficult to accept the State's rationale that the appellant would also have to take the stand to confirm the prosecutrix's story that she was voluntarily released alive and in a safe place.

The State, relying on *Ply* v. *State*, 270 Ark. 554, 606 S.W. 2d 556 (1980), further argues that the appellant never objected to the verdict form in trial court and, therefore, may

not do so on appeal. We find that the rule in *Ply* is inapplicable to the facts at bar. While it is true that the appellant did not interpose an objection as to the verdict form, appellant did move that the evidence was not sufficient to support a verdict of kidnapping as a Class A felony. In view of the testimony of the prosecutrix mentioned previously, we agree with appellant and hold the penalty imposed as a Class A felony was erroneous. To hold otherwise would be placing form over substance.

The trial court's error in this instance had no bearing upon the jury's determination of guilt or innocence. It affected only the extent of the punishment to be imposed. We have a choice among several corrective measures, *viz.*, we may 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 assessment of penalty or grant a new trial. *Clark* v. *State*, 246 Ark. 876, 440 S.W. 2d 205 (1969). In this case, we choose to remand the case to the trial court for imposition of the penalty.

Appellant's next argument is that the trial court erred in giving an *Allen* charge (otherwise called a "Dynamite" charge). The record reflects that after the jurors had retired to consider their verdict, they returned to the courtroom "after a certain time" and reported to the court that a verdict had not been reached. The judge then asked the foreman how the jury stood numerically, and the foreman replied, "Eleven to one on one count, and ten to two on the other count." Except for two minor deviations, the supplemental instruction or *Allen* charge given by the trial court was the same as that set forth in *AMI Criminal*, Instruction 6004. Appellant concedes that *AMI Criminal*, Instruction 6004 has been approved by the Supreme Court for use in Arkansas but contends the trial court's deviations were prejudicial. The two deviations cited as prejudicial by the appellant are: (1) The trial judge told the jurors that a hung jury would mean additional expense to the tax payers; and (2) The trial judge also told the jurors that he thought they could and should arrive at a verdict in this case. As the State points out in its brief, both of these deviations have been specifically

approved by the Supreme Court in the case of *Graham* v. *State*, 202 Ark. 981, 154 S.W. 2d 584 (1941), quoting *Stepp* v. *State*, 170 Ark. 1061, 282 S.W. 684 (1926), wherein the court held:

> This court, however, is committed to the general rule . . . to the effect that the trial court may detail to the jury the ills attendant upon a disagreement, *the expense*, the length of time it has taken to try the case, the length of time the case has been pending, and that the case will have to be decided by some jury upon the same pleadings and in probability upon the same testimony.
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> * * *
>
> This court . . . has held that the trial court may warn the jury to lay aside all pride of opinion and consult with each other for the purpose of harmonizing their views, if possible, under the evidence, and that *it was their duty* to apply the law as given by the court to the facts in the case and deal with each other in a spirit of candor in order *to arrive a verdict*. [Emphasis supplied.]

In view of the Supreme Court's decision in *Graham*, we hold the trial court's variance from *AMI Criminal*, Instruction 6004 was not prejudicial and was consistent with prior court holdings on the same issues raised here. Even though these deviations have been upheld by prior decisions, appellant still contends that the trial judge erred when he inquired as to the numerical division of the jury regarding the verdict prior to his giving the *Allen* charge. This issue was not raised at trial, and appellant asks us to consider this assignment of error for the first time on appeal. In accordance with the rule set forth by the Supreme Court in *Wicks* v. *State*, 270 Ark. 781, 606 S.W. 2d 366 (1980), we are unable to do so. Suffice it to say, appellant concedes that our Supreme Court has held that it is not error for the trial judge to inquire of a deadlocked jury as to its numerical division.[1] See, *Hardin* v. *State*, 225 Ark. 602, 284 S.W. 2d 111 (1955).

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[1]The appellant contends that the case at bar is controlled by *Brasfield* v. *United States*, 272 U.S. 448 (1926), which held that a trial judge's inquiry as to a deadlocked jury's numerical division is itself reversible error.

Appellant finally urges that the trial court erred in failing to credit the time he spent in custody prior to trial against his sentence. Under Ark. Stat. Ann. § 41-904 (Repl. 1977), the court must credit the time a defendant spends in custody against his sentence. From a review of the record, there is no showing that this matter was ever brought to the attention of the trial judge nor is there evidence that the appellant served any incarceration prior to his sentence. Since we are remanding this case for the trial court to impose sentence consistent with a Class C felony, we also direct the trial court to consider any evidence which would reflect jail time credit to which appellant may be entitled under § 41-904 above. See, *Swaite* v. *State*, 272 Ark. 128, 612 S.W. 2d 307 (1981).

Reversed and remanded.

William A. DAVIS *v.* C & M TRACTOR COMPANY et al

CA 81-61 617 S.W. 2d 382

Court of Appeals of Arkansas
Opinion delivered June 24, 1981

Henry Means, III, for appellant.

George E. Lusk, Jr., for appellees.

MELVIN MAYFIELD, Chief Judge. This is a motion for a rule on the clerk of this court filed pursuant to Rule 5 of the Rules of the Supreme Court and Court of Appeals.

Under our Rule 29(1)(i) the motion would be heard by the Supreme Court except this is an attempt to file a record on appeal from the Workers' Compensation Commission. The Supreme Court does not have jurisdiction of appeals from agencies or commissions. *Ward School Bus Mfg.* v. *Fowler*, 261 Ark. 100, 547 S.W. 2d 394 (1977); *Houston Contracting Co.* v. *Young*, 267 Ark. 44, 589 S.W. 2d 9 (1979). It does, of course, have jurisdiction of appeals from *courts* and has granted certiorari to both modify and reverse Workers' Compensation decisions made by the Court of Appeals. *Houston Contracting Co.* v. *Young*, 267 Ark. 322, 590 S.W. 2d 653 (1979); *Arkansas State Hwy. Dept.* v. *Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981); *Buckeye Cotton Oil* v. *McCoy*, 272 Ark. 272, 613 S.W. 2d 590 (1981).

Notice of appeal was timely filed with the Commission in this matter but the record from the Commission was tendered to the clerk of this court more than 90 days from the filing of the notice of appeal. Because Rule 5 of the Rules of Appellate Procedure provides that the record be filed within 90 days from the filing of the notice of appeal, the clerk refused to file the record and appellant has filed a motion for a rule to require that it be filed.

The motion contends that appellant's attorney was not notified by the Commission that the record was ready until after the 90-day period to file had expired. The motion also points out that Rule 5 of the Rules of Appellate Procedure provides that a trial court, under circumstances set out in the rule, has authority to extend the time to file the record on appeal but that there is no provision allowing the Workers' Compensation Commission to so extend the time. The motion says, since all appeals from the Commission are now taken directly to the Court of Appeals, we should allow the record in this case to be filed or tell the attorneys of the state how an extension of time to file the record can be obtained.

Our present appellate procedure dates from the passage of Act 555 of 1953 which "made the most far-reaching revision in our procedural law ... since common law pleading was abandoned in 1868." Smith, *Panel on Appellate Procedure*, 8 Ark. L. Rev. 1 (1953-54). With only a very

limited number of statutory changes this procedure remained in effect until the Rules of Appellate Procedure were adopted by the per curiam order of the Supreme Court entered December 18, 1978, "pursuant to Act 38 of 1973 and to its constitutional and inherent power to regulate procedure in the courts" and which became effective July 1, 1979. See order at 264 Ark. 964. And the Reporter's Note to Rule 1 says, "These appellate rules are basically a revision and condensation of prior Arkansas statutory law . . ." 3A Ark. Stat. Ann. 460 (Repl. 1979).

After the adoption of Amendment 58 to the Constitution in November of 1978, the General Assembly passed Act 208 of 1979 establishing the Court of Appeals authorized by the amendment. In the same session the General Assembly passed Acts 252 and 253, both of which provided for appeals from the Workers' Compensation Commission directly to the Court of Appeals. (The Supreme Court's Rule 29 has the same effect.) Section 1 of Act 252 simply provides, "Appeals from the Commission to the Court of Appeals shall be allowed as in other civil actions . . ." Section 7 of Act 253, however, provides that an appeal to the Court of Appeals may be taken:

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

Our first question is whether the 90-day time period provided in the Rules of Appellate Procedure applies to the filing of a record on appeal from the Workers' Compensation Commission. Act 252 of 1979 says those appeals shall be allowed as in other civil actions. It would seem, therefore, that the 90-day period in which to file the record that applies to other civil actions would apply to appeals from the Commission. But Act 253 provides, after notice of appeal is filed, that the Commission shall "send to the court" the record on appeal and does not set out any specific time

limitation within which it should be filed. That was the same requirement in the original workers' compensation law, Act 319 of 1939, and was the same requirement in the Act passed in the extended session in 1976, Ark. Stat. Ann. § 81-1324(b) (Repl. 1947), which was in effect when Acts 252 and 253 of 1979 were passed. And in *Commercial Standard Ins. Co.* v. *Hill*, 203 Ark. 768, 158 S.W. 2d 676 (1942) the court held that the provision of the 1939 Act meant the Commission should file the record "within a reasonable time" although at that time the record was filed in the Circuit Court to which appeals from the Commission were then taken.

It can be noted that Act 252 of 1979 is concerned only with providing that appeals of workers' compensation and unemployment benefit cases shall go to the Court of Appeals while Act 253 of 1979 is concerned with amending many other sections of the workers' compensation law. Also, it can be noted that the two acts do not have to conflict since "send to the court" in Act 253 can be construed to mean within the same time period "in other civil actions" in harmony with Act 252. It can be noted too that while both of these acts were approved the same day Section 5 of Act 252 made that act effective on July 1, 1979, whereas Act 253 became effective on the date of approval, March 2, 1979. Since Act 208 of 1979 established the Court of Appeals and made the court effective on July 1, 1979, it is clear that Act 253, which became effective March 2, 1979, could not cause an appeal to be made to the Court of Appeals until that court came into existence. And we note that our Supreme Court has said that "acts passed upon the same subject must be taken and construed together" and that "this rule is especially applicable where the two acts were under consideration by the Legislature at the same time." *Roachell* v. *Gates*, 185 Ark. 350, 47 S.W. 2d 35 (1932).

All of this is to say that a good argument can be made that the record on appeal from the Workers' Compensation Commission should be filed in the Court of Appeals within 90 days from the filing of the notice of appeal as is required in other civil actions. And, since that is a decision the Supreme Court can and may ultimately make, we think it

best to so hold now. In that way, a party in the future will not be caught relying on an indefinite, uncertain, and unsettled period within which the record on appeal must be filed. It will be clear from this point on, unless changed by the Supreme Court, that the record must be filed within 90 days from the filing of the notice of appeal as provided by Rule 5 of the Rules of Appellate Procedure.

This holding makes it important, we feel, to attempt to make another point clear. In the motion before us the appellant says he was not *advised* that the record was ready to be filed until after the 90 days had expired. If records on appeal from the Commission are to be filed within the time period set out in the Rules of Appellate Procedure we think it proper that the responsibility for seeing that the record is filed in time should rest where it rests under the Rules of Appellate Procedure. To determine where that is, we first look at Act 555 of 1953 from which these Rules come.

Section 14 of that act provided: "The clerk of the trial court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties." In an early case construing Act 555, *Southwest Casualty Ins. Co.* v. *Wesson*, 226 Ark. 16, 287 S.W. 2d 575 (1956), the record was not filed in time and it was claimed that it was not appellant's fault because its attorneys relied upon the court reporter to obtain an extension of time and the court said, "Appellant's counsel had no right to rely on the court reporter to get the order of extension."

During the course of the next twenty years, many similar decisions were made, and in 1975 in *Canal Ins. Co.* v. *Arney*, 258 Ark. 893, 530 S.W. 2d 178 (1975), the Supreme Court held it was the appellant's duty to file the record on time or obtain an extension saying:

> That party is the purportedly aggrieved party, and unquestionably the principal one interested in, and to be benefited by, a reversal of trial court judgment. We think it obvious that, having this paramount interest, the appellant shoulders the obligation to comply with

all steps in a proceeding that might redound to his (or its) benefit.

When the Rules of Appellate Procedure were adopted, Rule 7 changed section 14 of Act 555 by providing "After the record has been duly certified by the clerk of the trial court, it shall be the responsibility of the appellant to transmit such record to the clerk of the appellate court for filing and docketing." In *Christopher* v. *Jones*, 271 Ark. 911, 611 S.W. 2d 521 (1981), the court construing its Rules of Appellate Procedure stated "The responsibility for the timely filing of appeals must rest upon the litigant and his attorney, not upon the trial judge or court reporter."

Thus, under the Rules of Appellate Procedure, it is the responsibility of the appellant (which means his attorney if he has one) to see that the record is filed in time. This is not a new concept. One hundred forty years ago *Hathaway* v. *Smith*, 3 Ark. 248 (1841), held it was the appellant's duty to cause the transcript to be filed. The question has frequently arisen, however, as to what constitutes a valid excuse for not filing the record in time.

In *West* v. *Smith*, 224 Ark. 651, 278 S.W. 2d 126 (1955), the court allowed a record to be filed after the 90-day period had expired and no extension had been obtained. This action was by a divided court, on rehearing, and was taken because Act 555 was new. The court said it would use its inherent constitutional power, in the interest of justice, to allow records to be filed late during the next thirty days.

Again, in *Gallman* v. *Carnes*, 254 Ark. 155, 492 S.W. 2d 255 (1973), the court allowed a record to be filed out of time when Act 206 of 1971 amended Act 555 which had been in force for 18 years. Act 555 allowed the trial court, "in its discretion and with or without motion or notice" to extend the time for docketing an appeal (up to seven months from date of judgment) provided the extension order was entered within a period previously allowed.

Act 206 of 1971 changed that by adding the condition that an extension could be granted only upon a showing that

appellant had ordered a transcript of evidence stenographically reported. No testimony had been reported in *Gallman* but an extension had been allowed and the record filed during the extension. In that situation, the appellees' motion to dismiss the appeal was denied with the court saying, "to avoid unnecessary hardship to litigants who are not themselves at fault, we think it best to allow a short period of grace before the provisions of Act 206 will be routinely applied."

With the exception of *West* and *Gallman*, the Supreme Court has been extremely reluctant to allow records on appeal to be filed out of time. In *Bernard* v. *Howell*, 254 Ark. 828, 496 S.W. 2d 362 (1973), the court said it had been liberal in accepting late appeals in criminal cases, "But in civil cases we have refused to exercise our inherent powers in accepting late appeals 'except in a most extraordinary situation.' " (Citing *West.*)

Criminal cases are, of course, a special situation. The Arkansas Supreme Court has recognized that an appeal in a criminal case sometimes must be accepted where to do otherwise would be a denial of the defendant's constitutional right to effective counsel. *Moore* v. *State*, 267 Ark. 548, 592 S.W. 2d 450 (1980). So in keeping with its per curiam order of February 5, 1979, 265 Ark. 964, the court has allowed records to be filed out of time where counsel for the defendant admits he was at fault but a copy of the order has been sent to the court's Committee on Professional Conduct.

In *Thomas* v. *Ark. State Plant Board*, 254 Ark. 997-A, 497 S.W. 2d 9 (1973), the court allowed the record in a civil case to be filed late where the failure to file on time was due to the aftermath of several tornadoes which struck Jonesboro on May 27, 1973, damaging the attorney's home and law office and substantially increasing his duties as city attorney. The court said:

> We can readily classify the devastating Jonesboro tornado or tornadoes as falling within the category of the forces of nature or Act of God characterizing an unavoidable casualty productive of the 'most extraor-

dinary circumstances' which justify our permitting the tardy lodging of an appeal. (Citing *West* and *Bernard*, supra.)

We have tried to solve the problem caused by the differences in Acts 252 and 253 of 1979 with regard to filing the record on appeal and to make clear our view as to where the responsibility lies for seeing that the record is timely filed. We have also tried to show that the failure to discharge that responsibility is excused only by "most extraordinary circumstances." Since the Supreme Court has the final authority in these matters, we have been concerned to adopt views, which if followed, will prevent any appellant from losing his appeal by failing to timely file the record on appeal.

Since Acts 252 and 253 of 1979 have not been interpreted before we think it within the spirit of *West* and *Gallman* to grant the appellant's motion for a rule on the clerk but it should be obvious that this action cannot be relied upon in the future.

There is a problem with regard to extending the time to file the Commission's record on appeal. Under the conditions set out in Rule 6 of the Appellate Rules the trial court can extend this time but there is no authority for the Commission to do so. Perhaps the answer is the promulgation of a rule by the Supreme Court. In *Commercial Standard Ins. Co.* v. *Hill*, supra, certiorari was used to get a Commission record in circuit court and some of the motions and writs referred to in Rule 29(1)(i) of the Rules of the Supreme Court and Court of Appeals would seem to be available to the Court of Appeals in Workers' Compensation Commission matters.

Motion for rule on clerk is granted.

SEBASTIAN COUNTY, Arkansas *v.* Thelma LEYVA

CA 81-52 617 S.W. 2d 387

Court of Appeals of Arkansas
Opinion delivered June 24, 1981

Jerry G. James, for appellant.

Hardin, Jesson & Dawson and *Daily, West, Core, Coffman & Canfield*, for appellee.

GEORGE K. CRACRAFT, Judge. The appellant, Sebastian County, appeals from a decision of the Arkansas Workers' Compensation Commission that it was liable as employer for a compensable injury sustained by the appellee, Thelma Leyva. The sole issue on the appeal is whether at the time of appellee's injury she was an employee of Sebastian County or of Western Arkansas Planning and Development District. The appellant argues that there was no substantial evidence to support the finding of the employer-employee relationship between it and appellee, and to the contrary that the evidence overwhelmingly supported a finding that she was in fact an employee of Western Arkansas Planning and Development District. We do not agree.

It is settled that this court will affirm the Workers' Compensation Commission where there is substantial evidence to support its findings and, in evaluating the evidence, will interpret it in the light most favorable to the Commission's finding. *Clark* v. *Shiloh Tank & Erection Co.*, 259 Ark. 521, 534 S.W. 2d 240 (1976); *Superior Improvement Co.* v. *Hignight*, 254 Ark. 328, 493 S.W. 2d 424 (1973). The question on appellate review is not whether the testimony would have supported a contrary finding but whether it supports the findings made by the Commission. *Herman Wilson Lumber Co.* v. *Hughes*, 245 Ark. 168, 431 S.W. 2d 487 (1968). When the record before us is viewed in the light of those well settled rules governing appellate review, we find no error in the determination made by the Commission.

The proper approach to the issue in this case requires an understanding of the Comprehensive Employment Train-

ing Act, 29 U.S.C. § 801, et seq., generally referred to as CETA. The CETA program is designed to fund employment and training in public service jobs for the economically disadvantaged and unemployed. The Act contemplates employment and on the job training for a maximum period of eighteen months, after which the participant must either have become permanently employed at his work site or is terminated from the program and must seek employment on his own account. Appropriate local agencies are designated for the administration of the program and are provided grant funds for the purposes contemplated by the Act. The appointed administrative agency hires unemployed or underemployed persons and pays their wages from the grant funds. Once hired by the agency the employee is placed by that agency at "work sites" in public employment such as city and county departments and other designated agencies. The appellee, Thelma Leyva, was a CETA employee of Sebastian County which had obtained such a grant and been appointed an administrative agency of the CETA program. She was hired by the county on an application form ordinarily used for those seeking county employment. Appellee was initially placed by the county in a job with the local mental health unit and was thereafter recalled by the county, at her request, and placed with the Western Arkansas Planning and Development District in the position of co-ordinator.

The Development District was itself a non-profit organization acting as an administrative agency of CETA. While it had been funded for the purpose of payment of wages to some of its administrative personnel and all of its participants, it had received no funds with which to hire a co-ordinator. The county was requested to provide, and did provide, from its participants a co-ordinator. Appellee was the county participant so selected.

During the term of her work at the Development District, the appellee was paid exclusively by the appellant County, which withheld taxes, social security and health insurance premiums from her wages. The appellee kept her own time sheets and submitted them to the county for payment of her wages. The only payroll function of the

Development District was to verify those time sheets. The Development District did not hire her in the usual sense. She was hired by the County and sent to the Development District for interview to determine if she was acceptable for placement with them. The Development District found her acceptable and furnished her office space, stenographic equipment and supplies, told her what to do and how to do it, and had control over her activities while on the job. While it was stated that the Development District could not fire her in the sense of actual termination, it could request that the County recall her and place her elsewhere. It was further shown that the County could, at will, recall the appellee or place her elsewhere without a request from or the consent of the Development District.

The Development District had twenty-five other employees who were paid by it and from whom taxes and social security were withheld. Other fringe benefits such as sick leave, vacation pay, medical insurance, life insurance and holiday schedules were provided these employees. The appellee was the only person on the staff of the Development District excluded from those benefits. Benefits of that nature were supplied her by the appellant, Sebastian County. There was evidence that the appellee was required to go to the county courthouse for the purpose of submitting her time sheets and receiving her pay, and on occasions she was required to report to the county judge's office for consultation, progress evaluation and skill testing.

On the date of her injury she had been instructed by the County to report to the office of the county CETA supervisor for the purpose of interview and skill assessment by a person designated by the area administrative agency. After that evaluation was completed, she left the courthouse and was returning to the office of the Development District several blocks away. Before reaching that office, and while crossing a street, she was struck and injured by a passing automobile. It was her testimony that at the time of her injury she had not yet reached the Development District's office, from which she had been summoned by the County, or where her vehicle was parked. It was her intention to drive that vehicle to

another location where she had duties to perform on behalf of the Development District rather than return to her office.

On these facts the Commission found that appellee was a "dual employee" of both appellant Sebastian County and the Development District and that either, or both of them, could be held liable to her for Workers' Compensation benefits. The Commission further ruled that in determining liability in such a relationship the controlling element is the claimant's activities at the time of the injury rather than claimant's activities during the entire period of the relationship. The Commission further found that a preponderance of the evidence reflects that at the time of the accident and injury the appellee had not returned to employment with the Development District but was engaged in activities which were necessitated solely by her employment with the County and that such activities were for the benefit of the County. It concluded that the appellant, Sebastian County, was liable for all appropriate benefits under the Compensation Act as a result of those injuries.

Our courts in *Dillaha Fruit Co.* v. *LaTourrette*, 262 Ark. 434, 557 S.W. 2d 397 (1977), recognized that the relationship of employer and employee may be simultaneously sustained between several employers and the same employee; that in such cases the Workers' Compensation Commission might find either or both employers to be liable for workers' compensation benefits; and where the Commission makes such a determination, its finding will be sustained if supported by substantial evidence even though it appears that the testimony would have supported a contrary finding. We cannot say that the Commission's finding, that appellee's recall to the exclusive control of the appellant County had not ended at the time of the injury, is not supported by substantial evidence. It is clear from the opinion adopted by the Workers' Compensation Commission that if appellee had been injured, not while returning from her summons to the county judge's office but while performing her intended errand for the Development District, a contrary finding might have been reached.

We find no error in the decision of the Commission and

affirm its award.

MAYFIELD, C.J., and CLONINGER and CORBIN, JJ., dissent.

Myrna L. BLACK and Sammy A. BLACK *v.*
WESTWOOD PROPERTIES, INC.

CA 81-44 618 S.W. 2d 169

Court of Appeals of Arkansas
Opinion delivered June 24, 1981

Richard H. Wooten, for appellants.

Wood, Smith & Schnipper, for appellee.

LAWSON CLONINGER, Judge. Appellants Myrna L. Black and Sammy A. Black, prosecute this appeal from a decision of the trial court that appellants had failed to establish title by adverse possession to .53 acres of land owned by appellee, Westwood Properties, Inc. Appellee was granted judgment on its complaint in ejectment filed for the possession of the tract in dispute, an irregularly shaped strip lying immediately south of property owned by appellants.

The only issue on appeal is whether the trial court's finding is clearly against the preponderance of the evidence. We affirm the decision of the trial court.

Adam Dorn, the common predecessor in title of appellants and appellee, bought the property now owned by appellants and appellee in 1949; and soon thereafter put in a west to east country road on land now owned by appellee in order to give Ship, Dorn's neighbor on the east, an ingress and egress road. A short time later Dorn put up a fence on the north side of the private road in order to keep Ship's livestock off of his cultivated land. This old fence is the line to which appellants claim, and appellants replaced the old fence with a new one when they acquired their property. Neither the old fence nor the new fence fully enclosed the disputed area. The last persons before appellants to live on appellants' property, the Millwoods, had run livestock on the land to the old fence, and the Millwoods moved away in 1969. Appellants bought their property on August 20, 1970, and at that time it was grown up and uncared for. Appellants

cleared up the land after their purchase, planted trees, mowed the grass, maintained the property to the fence line, and they have continuously cultivated a garden in a portion of the disputed area. Appellant Myrna Black stated that she knew their south boundary was a straight line on the plat, and that the fence was curved. The complaint here was filed in the trial court by appellee for possession of the .53 acre tract on June 23, 1977.

Shelton Whitlow owned appellee's land from 1960 to 1977, and testified that he walked the perimeters of the land several times. He did not know the fence was there since it was grown up in brush and vines. He saw appellants every week but no one told him the appellants were claiming part of his land.

The chancellor found that the country road and fence were not intended by Dorn to establish a boundary line, but simply provided a permissive use by Ship and his successor in title. The chancellor further found that appellants had failed to sustain their burden of proof that either they or their predecessors continuously held the disputed area openly and adversely for seven years. While a decision of a chancery court is reviewed *de novo* on appeal, we will not reverse as to the facts unless the chancellor's finding is clearly erroneous, or clearly against the preponderance of the evidence. *Gautrau* v. *Jan's Realty*, 271 Ark. 394, 609 S.W. 2d 107 (Ark. App. 1980). Arkansas Rules of Civil Procedure, Rule 52.

In order for adverse possession to ripen into ownership, possession for seven years must be actual, open, notorious, continuous, hostile, exclusive, and it must be maintained with an intent to hold against the true owner. The owner of the paper title must have knowledge that another is holding his property, or there must be such physical evidence as would indicate to him, if he visits the premises and is a person of ordinary prudence, that a claim of ownership is being asserted. *Moore* v. *Anthony Jones Lumber Company*, 252 Ark. 883, 481 S.W. 2d 707 (1972). Possession for the statutory period must be continuous. *Utley* v. *Ruff*, 255 Ark. 824, 502 S.W. 2d 629 (1973).

The possession of appellants contained some of the elements of adverse possession, but they have failed to prove all of the elements by a preponderance of the evidence; their possession was actual, open, hostile, exclusive, and they intended to hold against the true owner. However, they have failed to show that their adverse holding was known to the owner, or that their acts were such as would reasonably indicate that appellee should have known their intentions. They knew the owner, yet their intent was never communicated to him, and there is nothing in the record to indicate that others in the community were aware of appellants' holding. There was testimony that the owner walked the perimeters of his property and never saw the fence or knew of the adverse holding, and there is evidence that appellants knew or suspected that their property line did not go all the way to the fence. As it was stated in *Barclay* v. *Tussey*, 259 Ark. 238, 532 S.W. 2d 193 (1976), "... the doctrine of adverse possession is intended to protect one who honestly enters into possession of land in the belief that the land is his own ..."

There is an additional reason, not remarked upon by the chancellor, why appellants cannot prevail. Their possession was not continuous for the statutory seven year period. The early case of *Brown* v. *Hanaver*, 48 Ark. 277, 3 S.W. 27 (1886) held that when actual possession of land by an adverse claimant ceases, the constructive possession of the legal owners revives and a renewed adverse possession will not receive aid from or be tacked to a former possession to piece out the time allotted by statute for acquiring title by adverse possession.

Appellants in the instant case cannot be permitted to add their possession to that of their predecessors in title, the Millwoods. The Millwoods moved away from the property some time in 1969; appellants did not buy the property until August 20, 1970, and the land was grown up in brush and vines when appellants first saw it. The ejectment action was filed by appellee on June 23, 1977. Therefore, the holding by appellants was only for six years and ten months.

The decision of the trial court is affirmed.

Corrine Marie STERLING *v.* William Frederick STERLING

CA 81-68 621 S.W. 2d 1

Court of Appeals of Arkansas
Substituted Opinion delivered August 26, 1981

Eugene J. Mazzanti, for appellant.

Dale Price, for appellee.

LAWSON CLONINGER, Judge. Appellant, Corrine Marie Sterling, was granted a divorce from appellee, William Frederick Sterling, on April 21, 1971, after twenty-four years of marriage. The parties entered into a written property settlement agreement which provided that the husband, appellee, was to pay the wife, appellant, alimony of $175.00 per week. The divorce decree did not refer specifically to alimony but provided, "The court doth find that the parties have reached an agreement regarding the settlement of their property, which is incorporated into this decree by reference and made a part thereof."

On July 7, 1980, appellant filed her motion for contempt, alleging that appellee had made no alimony payments for the months of June and July, 1980. On July 18, 1980, appellant amended her motion to allege that appellee

had reduced alimony payments from $175.00 per week to $125.00 per week without the approval of the court or appellant, and she asked for a judgment for the arrearage in the sum of $18,931, attorney's fee and costs. Appellee responded, alleging that the parties entered into an oral agreement five years previously to reduce the alimony to $125.00 per week, and denied that he was in arrears.

At the close of appellant's testimony appellee's motion for judgment was granted. The trial court found that the obligation of the appellee was contractual; that there was a novation of the agreement whereby the parties agreed that the sum would be reduced to $125.00 per week; and that appellee was current in his payments.

We hold that the trial court was in error when it granted appellee's motion for judgment and we reverse.

Novation is the substitution, by mutual agreement of a new debt or obligation for an existing one, and, like any other contract, a novation must be supported by a valid consideration. *Barton* v. *Perryman*, 265 Ark. 228, 577 S.W. 2d 596 (1979). The burden of establishing a novation is upon the party claiming it. *Simmons National Bank* v. *Dalton*, 232 Ark. 359, 337 S.W. 2d 667 (1960). In order to constitute a novation there must be a clear and definite intention of the parties that such is the purpose of the agreement. *Alston* v. *Bitley*, 252 Ark. 79, 477 S.W. 2d 446 (1972). We are unaware of any Arkansas case dealing with child support and alimony in which the term "novation" has been employed, but a number of our cases have held that, under the circumstances of a particular case, the parties may modify an existing agreement for child support and alimony. Most of the cases have involved child support, but it has been pointed out that there is an analogy in cases involving alimony and those involving child support. *Brun* v. *Rembert*, 227 Ark. 241, 297 S.W. 2d 940 (1957). Within limitations attributable to the overriding concern of the courts for the welfare of children, cases involving child support arrearages have been considered as precedential in cases involving alimony arrearages and vice versa. *Bethell* v. *Bethell*, 268 Ark. 409, 597 S.W. 2d 576 (1980).

In *Bachus* v. *Bachus*, 216 Ark. 802, 227 S.W. 2d 439 (1950), the parties had entered into a written agreement by which they settled all property rights and agreed that the wife would receive $200.00 per month as alimony and support for the couple's children. The chancellor approved the contract and it was incorporated into the divorce decree. Subsequently, the court entered an order changing the amount Mrs. Bachus would receive as set out by the contract, from $200.00 per month to $150.00 per month. The decision of the trial court was reversed on appeal, the court saying:

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

In *Seaton* v. *Seaton*, 221 Ark. 778, 255 S.W. 2d 954 (1953) the Arkansas Supreme Court said:

> Our decisions have recognized two different types of agreement for the payment of alimony. One is an independent contract, usually in writing, by which the huband, 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.' ... 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 the proof upon an issue not

in dispute, and by its nature it merges in the divorce decree.

In *Armstrong* v. *Armstrong*, 248 Ark. 835, 454 S.W. 2d 660 (1970), the wife filed for alimony in arrears and asked that the husband be cited for contempt under a separation agreement which had been incorporated into the divorce decree. The husband answered, asking for a reduction of the alimony payments. The court's divorce decree provided, "... the agreement ... is ... approved and confirmed and is made a part of the decree of this court and is given the same force and effect as if set forth herein ..." The trial court gave the wife judgment for the sums in arrears, found that the agreement was contractual, and found that the payments were not subject to reduction by the court. On appeal, it was held that there was an agreement independent of the decree, and in affirming, the court stated:

> Here, too, the court might well have punished appellant for contempt if it had found that he was in willful violation of its decree, but as stated in *Bachus*, the court does not have to enforce the provisions of a decree through contempt proceedings. Of course, one of the purposes of incorporating an agreement that is independently entered into, is to be able to enforce its provisions through contempt proceedings.

In the case now before the court, there was an independent agreement which was enforceable at law or through contempt proceedings. The agreement was a complete contract, aside from the decree of the court. The agreement made no reference to the proposed decree, and in that way it is clearly distinguishable from the agreement in *Bethell*; the *Bethell* written agreement specifically provided that it would merge into the divorce decree. Also, the *Bethell* decree itself ordered the husband to pay $700.00 per month alimony, whereas in the instant case, the decree made no reference at all to alimony. We agree with the trial court's finding in the instant case that the appellee's obligation was contractual, but we hold that on the basis of the testimony presented there was no modification of the agreement by the parties. There has been no evidence presented to indicate that the husband gave up anything; there is nothing in the

record to indicate any reason for the reduction except his poor financial condition, and, unlike the husband in *Bethell*, his refraining from going into court and asking for a reduction in alimony payments was not a valid consideration. He had no standing to ask the court for modification of the agreement, because it was not an agreement capable of being modified by the court.

There has been no showing of a clear and definite intention of appellant to accept the reduced payments except on a temporary basis. Appellant contended all through her testimony that she agreed to a temporary reduction only until the financial position of the appellee improved, and she insisted that it was agreed that appellee was to make up the arrearages. The appellant was the only witness, and while we are not obligated to accept her testimony as undisputed, it is the only testimony presently in evidence.

In *Sage* v. *Sage*, 219 Ark. 853, 245 S.W. 2d 398 (1952), it was held that accrued installments, decreed as support money, become fixed with rendition of a judgment and the court was without power to remit them. *Sage* has been relied upon as authority for holding that the chancery courts have *no* power to remit past-due payments; however, the court indicated in *Bethell* v. *Bethell, supra*, that subsequent cases have said that the courts have no power to remit accumulated payments *under the circumstances* prevailing in that case. Under the facts presented in the instant case, there is no basis to remit any accumulated payments.

The cause is reversed and remanded to the trial court with instructions to deny appellee's motion for judgment and to proceed with the taking of evidence.

Hurley ASHCRAFT *v.* Paul QUIMBY and
ROCKWOOD INSURANCE CO.

CA 81-153 617 S.W. 2d 390

Court of Appeals of Arkansas
Substituted Opinion on Rehearing
delivered June 24, 1981

McMath & Leatherman, P.A., by: *Phillip H. McMath*, for appellant.

Norwood Phillips, for appellee.

PER CURIAM. On May 20, 1981, we delivered a per curiam opinion denying the appellant's motion for a rule on the clerk and cited *LaRue* v. *LaRue*, 268 Ark. 86, 593 S.W. 2d 185 (1980). The motion was denied because we thought the motion assumed that Rule 4 of the Rules of Appellate Procedure applied and that the notice of appeal was tendered one day late.

A petition for rehearing has been filed saying that this is an appeal from the Workers' Compensation Commission and that Acts 252 and 253 of 1979 provide that appeals may be taken from the Commission by filing a notice of appeal "within thirty (30) days from the date of the receipt of the order or award of the Commission."

The petition for rehearing states that the opinion of the Commission was filed in this case on February 23, 1981, and mailed to claimant's attorney, who at that time was a

resident of Warren, Arkansas. No response has been filed to the petition for rehearing and we have examined the record tendered and these allegations appeared to be correct. Assuming that the decision was mailed on February 23, 1981, it could not have been received before February 24, and under Rule 6 (a) of the Rules of Civil Procedure we start counting with the next day, February 25, and the thirtieth day is March 26, 1981, which is the day the notice of appeal was filed.

The petition for rehearing is, therefore, granted and the clerk is ordered to file and docket the record tendered.

E. O. HENSLEY and Doris HENSLEY *v.* Roger BROWN

CA 81-58 617 S.W. 2d 867

Court of Appeals of Arkansas
Opinion delivered July 1, 1981

Leon Reed and *Guy Jones, Jr.*, for appellants.

Robert Sharp Gunter, for appellee.

MELVIN MAYFIELD, Chief Judge. Appellant E. O. Hensley, a pedestrian, was struck by a vehicle operated by appellee Roger Brown. In an action filed by appellants for damages, service was had on appellee on June 2, 1979. On July 25, 1979, no answer or other pleading having been filed by appellee, appellants filed their motion for judgment on the question of liability. And, although Rule 55(b) of the Rules of Civil Procedure did not require it, appellants gave appellee notice of the date the motion was set for hearing. On August 2, 1979, appellee filed a response, alleging that on June 15, 1979, his attorney mailed an answer to the clerk, with a copy to each of two separate attorneys representing appellants. The attorneys and clerk filed affidavits denying they received the answer. There is nothing else in the record pertaining to appellants' motion except a copy of the court's docket entry on September 27, 1979, showing "Default denied."

The issues of liability and damages were subsequently presented to a jury on March 5, 1980, and the jury returned the verdict for appellants for $1,000. Apparently not satisfied

with that amount, the appellants appeal and argue that the granting of a default judgment on the issue of liability was mandatory and that the trial court did not have any discretionary authority to deny it.

We agree that the granting of a default judgment on the issue of liability is not a matter of discretion where no answer or other pleading is timely filed.

In the first place, Rule 12 of the Arkansas Rules of Civil Procedure provides that a defendant shall file his answer within twenty (20) days after service of summons. Rule 6(b) provides that where an act is required to be done within a specified time, the court may, after the expiration of that period, order the time enlarged where the failure to act was the result of excusable neglect, unavoidable casualty, or other just cause.

In the second place, Rule 55(a) provides: "When a party against whom a judgment for affirmative relief is sought has failed to appear or otherwise defend as provided by these rules, judgment by default *shall* be entered by the court." Reporter's Note 1 to Rule 55 says it "generally follows prior Arkansas law" and in *Walden* v. *Metzler*, 227 Ark. 782, 301 S.W. 2d 439 (1957), the court sustained the granting of a default judgment where the answer was not filed in time and said in view of the language of Acts 49 and 351 of 1955, "We cannot sustain the appellant's contention that the courts still have unlimited discretion to grant further time to a defendant already in default." And in *Moore, Adm'x.* v. *Robertson*, 242 Ark. 413, 413 S.W. 2d 872 (1967), the court, referring to *Walden*, said: "We held that the 1955 statutes were mandatory in requiring a defendant to plead within the time fixed by law." The court did point out, however, that Act 53 of 1957, relaxed the strictness of the 1955 acts by providing that: "Nothing in this act shall impair the discretion of the court to set aside any default judgment upon showing of excusable neglect, unavoidable casualty, or other just cause."

Act 53 of 1957 and Act 49 of 1955 were codified as part of Ark. Stat. Ann. § 29-401 (Repl. 1962) and that section was

before the court in *Perry* v. *Bale Chevrolet Co.*, 263 Ark. 552, 566 S.W. 2d 150 (1978), where the trial court had granted a default judgment. In reversing that judgment, the Supreme Court referred to several cases where the circumstances were said to be sufficient to avoid the "harshness of a default judgment" because of excusable neglect, unavoidable casualty, or other just cause, and said, "Under the circumstances of this case, we hold that the filing of a typewritten answer only one day late was attributable to excusable neglect or other just cause."

It is, therefore, our view that a court does not have the discretion to excuse the failure to file a timely answer or other pleading and refuse to grant a default judgment. If the failure to file, however, was due to excusable neglect, unavoidable casualty, or other just cause, judgment by default should not be granted.

There are other situations where as a matter of law — not discretion — judgment against a defendant in default is not authorized. For example, judgment should not be granted against a defendant who has not timely answered if the action is against several defendants jointly and one of them has filed a timely answer which asserts a defense common to all. *Firestone Tire & Rubber Co.* v. *Little*, 269 Ark. 636, 599 S.W. 2d 756 (Ark. App. 1980). Furthermore, a default admits only those facts alleged in the complaint and a judgment should not be granted for relief which the alleged facts do not warrant. *Kohlenberger* v. *Tyson's Foods*, 256 Ark. 584, 510 S.W. 2d 555 (1974). Rule 55(b) provides that "no judgment by default shall be entered against an infant or incompetent person" and it also provides for three days written notice before a default judgment can be entered against a party who has appeared.

Even where a default judgment on the issue of liability is granted, the amount of the judgment must be established and the defaulting defendant has the right to cross-examine witnesses and introduce evidence in mitigation of damages. *Kohlenberger*, supra. And it may be necessary to establish some other fact before judgment can be entered. Rule 55(b), in dealing with these matters, provides:

> If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings as it deems necessary and proper and may direct a trial by jury.

So while we agree with the appellants that the granting of a default judgment on the issue of liability is not a matter of discretion where no answer of other pleading is timely filed, this does not mean that the trial court was in error in this case. If the appellee's allegations with regard to the mailing of his answer were believed, then the failure of the post office to deliver the letters would constitute excusable neglect, unavoidable casualty, or other just cause. The record does not show why the court denied the appellants' motion for default but it is their burden to demonstrate that the court was in error. *Peoples Protective Life Ins. Co.* v. *Smith*, 257 Ark. 76, 89, 514 S.W. 2d 400 (1974). We do not find that this had been done.

Affirmed.

COOPER, J., not participating.

CLONINGER, J., concurs.

LAWSON CLONINGER, Judge, concurring. I concur in the result reached by the majority, but I disagree with its reasoning.

The majority cites no Arkansas case dealing with the issue before the Court which was decided subsequent to the adoption of the Arkansas Rules of Civil Procedure. Both *Perry* and *Burns*, relied upon by the majority, were decided on the basis of Ark. Stat. Ann. § 29-401 (Repl. 1962) and prior to July 1, 1979, the effective date of the Rules of Civil Procedure.

Section 29-401 provided only that a default judgment should be rendered only if there was no timely appearance or

pleading; Rules of Civil Procedure, Rule 55(a) makes that same provision, but Rule 55(b) adds a new dimension, providing:

> Manner of entering judgment. The party entitled to a judgment by default shall apply to the court thereof . . . If, in order to enable the court to enter judgment or to carry it into effect, it is necessary . . . to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings as it deems necessary and proper and may direct a trial by jury.

Rule 55(a) appears to make the entering of a default judgment mandatory when the defendant fails to plead or appear, but Rule 55(b) immediately authorizes the court, for any of the reasons enumerated, to conduct such hearings as it deems necessary and proper and may direct a trial by jury.

The only question on this appeal is whther the trial court was in error in *denying* appellants' motion for default judgment. Rule 55(c) has no bearing on the issue before the Court, because Rule 55(c) deals only with the power of the court to set aside a default judgment previously entered.

On appeal, the decision of the trial court will not be disturbed unless there is an abuse of discretion. Because of the state of the record in this case it is impossible to discern whether the trial court abused its discretion in denying the motion. The record contains no order; only the meager docket entry, "Default denied."

It appears unlikely that the trial court accepted the explanation of the attorney for appellee that the answer mailed to the clerk and the two copies mailed to appellants' attorneys were all lost in the mail, but the trial court exercised its discretion in presenting all the issues to the jury, and we are presented with no evidence that the court's discretion was abused. I would hold that in the absence of a showing that the trial court abused its discretion we must presume that there was no abuse. Since there is nothing in

the record before us which indicates the trial court erred I would affirm the judgment.

Robert TAYLOR *v.* William F. EVERETT,
Director of Labor

E 81-81 617 S.W. 2d 864

Court of Appeals of Arkansas
Opinion delivered July 1, 1981

MELVIN MAYFIELD, Chief Judge. The appellant in this case had been "laid off" from work five or six weeks and was receiving unemployment benefits. His employer called him back to work for a week during which he earned $549.69 but reported to the Employment Security Division that he was unemployed and had no earnings during that week. As a result, he received benefits in the amount of $100.00 to which he was not entitled.

The Employment Security Division determined that appellant received benefits because he willfully made a false statement or misrepresentation of a material fact, that he was liable to repay the $100.00 received, and was disqualified from receiving benefits for fifteen (15) weeks.

The appellant repaid the $100.00 but appealed the disqualification. Both the Appeal Tribunal and the Board of Review held against him.

The appellant testified that he did not intend to receive benefits to which he was not entitled. He said he had not been paid for the work he did during the week involved and therefore believed he was entitled to draw benefits for that week. He also testified that when he started drawing benefits he did not make a claim for the first week he was off work because he received a check that week for the work he had done the week before.

The Arkansas Employment Security law, enacted by the General Assembly of the state, provides that a claimant may appeal from a decision of the Board of Review to the Court of Appeals *"Where the findings of the Board of Review as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive and the jurisdiction of said court shall be confined to questions of law."*

The Arkansas Supreme Court and the Arkansas Court of Appeals have both held that findings of fact made by the board should be affirmed if supported by substantial evidence. *Terry Dairy Products Co., Inc.* v. *Cash*, 224 Ark. 576, 275 S.W. 2d 12 (1955); *Deatherage* v. *Daniels*, 267 Ark. 683, 590 S.W. 2d 62 (Ark. App. 1979).

The appellant worked a week and earned $549.69 but he filled out his card for that week saying he *did not work* and that he had no earnings.

Whether this was done willfully in order to receive unemployment benefits is a question of fact. This court does not know any more about that than the Board of Review knows and the law provides that the Board is to make the factual determination. It is the duty of this court to affirm that determination if supported by substantial evidence and the Supreme Court has said:

> Even though there is evidence upon which the Board of Review might have reached a different result, the scope of judicial review is limited to a determination whether the board could reasonably reach its results upon the evidence before it and a reviewing court is not privileged to substitute its findings for those of the board

> even though the court might reach a different conclusion if it had made the original determination upon the same evidence considered by the board. (Citations omitted.) Even if the evidence is undisputed, the drawing of inferences is for the board, not the courts. (Citation omitted.)

Harris v. *Daniels*, 263 Ark. 897, 567 S.W. 2d 954 (1978).

Affirmed.

CRACRAFT, COOPER and CLONINGER, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. This is an appeal from a decision of the Arkansas Board of Review which affirmed an agency determination that appellant had willfully made a false statement or willfully misrepresented a material fact when filing a claim for benefits. As a result of this finding, the Board disqualified appellant from receiving benefits for fifteen weeks under the provisions of Ark. Stat. Ann. § 81-1106 (h) (2) (Repl. 1976). That section also provides that:

> . . . any weekly benefits payable subsequent to the date of delivery or mailing of the determination shall be reduced 50% rounded to the next highest dollar and the remainder of maximum benefits shall be reduced accordingly. Provided that such reduction shall apply only to benefits payable within the benefit year of the claim with respect to which claimant willfully made a false statement or representation. Provided that such disqualification shall not be applied after 2 years have elapsed from the date of the delivery or mailing of the determination of disqualification under this section but all overpayments established by such determination of disqualification shall be collected as otherwise provided by this act.

The appellant was drawing unemployment benefits and filed a claim for the week ending February 16, 1980. The claim form contained an affirmation that the claimant had not worked that week and that he had had no earnings

during that week. Appellant had actually earned the sum of $549.69 but the testimony revealed that he was paid on a two-week basis and at the time he filed his claim he had not received any of that money. Appellant received the sum of $100.00 in unemployment benefits. The record reflected that when appellant first filed for benefits, he did not make a claim for a week at the end of which he received a check, although that check did not cover work actually done during that week, nor was it for wages for work performed during that week. Appellant has already repaid the $100.00 to the Department.

Arkansas Statute Annotated § 81-1103 (m) (Repl. 1976 & Supp. 1979), provides as follows:

> (m) Unemployment. (1) An individual shall be deemed "unemployed" with respect to any week during which:
> (A) he performs no services, and
> (B) no wages are payable to him with respect to that week, or if wages are payable to him for any week of less than full time work, such wages are less than one hundred and forty percent (140%) of his weekly benefit amount, and
> (C) he is not on vacation. . . .

In this case appellant testified that he believed since he had not drawn wages for a week, even though he had worked during that week, he was entitled to draw benefits. He likewise testified that he believed that on the front end, since he did draw wages at the end of a week during which he had done no work, he was not entitled to benefits during that week. Appellant was totally consistent in his approach to the requirements as to eligibility for benefits. The question in this case is whether or not appellant willfully made a false statement or willfully misrepresented a material fact when he filed his claim for benefits. The evidence is uncontradicted that appellant did file a claim for a week during which he was not entitled to benefits but his testimony does not support a conclusion that he *willfully* misrepresented a material fact. In reviewing cases from the Board of Review, we are required to affirm if there is any substantial evidence to support the findings of the Board. Ark. Stat. Ann. §

81-1107 (d) (7) (Supp. 1979). However, I do not believe that the Legislature intended for the mere act of filing a claim which contains a false or incorrect statement to constitute substantial evidence as it is defined by statute. If that were the case, every case where a claimant received benefits to which he was not entitled as a result of a false or incorrect statement would automatically subject him to the penalties under Ark. Stat. Ann. § 81-1106 (Repl. 1976).

Thus, I find that the substantial evidence rule requires evidence beyond the simple proof that a false or incorrect statement was made on a claim form. Since there is no other evidence in this record to support a finding of willful misrepresentation of a material fact, I would reverse and remand to the Board of Review with directions to enter an order modifying the original determination so as to set aside any disqualification of appellant.

I am authorized to state that Judge Cloninger and Judge Cracraft join in this dissenting opinion.

OFFICE OF EMERGENCY SERVICES, State of Arkansas, Division of Public Employee Claims *v.*
HOME INSURANCE COMPANY
Jerry CLANTON, Deceased, Employee
CITY OF PEA RIDGE, Employer

CA 80-541 618 S.W. 2d 573

Court of Appeals of Arkansas
Substituted Opinion on Denial of Rehearing
delivered July 1, 1981

Jerry James, for appellant.

W. W. Bassett, for appellee.

JAMES R. COOPER, Judge. This is an appeal from a decision of the Workers' Compensation Commission which affirmed the Administrative Law Judge's determination that, at the time of his death, Jerry Clanton was acting as an employee of the Benton County Office of Emergency Services and that therefore the State of Arkansas was liable for Workers' Compensation benefits for his widow and two minor children.

On April 7, 1977, Mr. Clanton and Mr. Charles Hardy, Pea Ridge City Administrator, and also a volunteer fireman were contacted at the Pea Ridge City Hall by Sam Spivey, the Fire Chief, and told that water was needed to fight a grass or brush fire at a farm some 4 1/2 miles out of town. The owner of the farm was a subscriber to the volunteer fire department and paid a monthly fee on his city water bill as did other subscribers. Mr. Spivey testified that when he told Hardy and Clanton this Clanton volunteered to take the fire truck to the fire. Spivey gave him directions by walkie-talkie and when Clanton arrived at the fire he started the pump at the back of the truck. The truck began to roll down a hill, Clanton chased it, and he was crushed against a tree by the truck, sustaining injuries which caused his death two days later.

At the time of his death, Mr. Clanton was a full-time salaried employee of the City of Pea Ridge. He was also a member of the Pea Ridge Volunteer Fire Department, and

was a qualified and registered emergency services worker with the Benton County Office of Emergency Services.

The question before the Administrative Law Judge and the full Commission was whether the Office of Emergency Services, State of Arkansas, or the City of Pea Ridge and its carrier, Home Insurance Company, was liable for the payment of benefits to the surviving widow and two minor children.

The City of Pea Ridge, through Home Insurance Company (both appellees here), provides Workers' Compensation insurance for certain city employees. Volunteer firemen are not included. Arkansas Statute Annotated § 11-1955 (c) (Repl. 1976) provides as follows:

> For the purpose of Workmen's Compensation coverage in cases of injury or death of an individual, all duly registered and qualified emergency service volunteer workers shall be deemed State employees within the meaning and requirements of Act 462 of 1949 as amended by Act 373 of 1951 [§§ 13-1402 — 13-1407, 13-1409 — 13-1413] and shall receive compensation, and their survivors shall receive death benefits in like manner as regular State employees for injury or death arising out of and in the course of their activities as emergency services volunteer workers.

The City of Pea Ridge and Home Insurance denied coverage on the premise that Mr. Clanton's death arose out of and in the course of his duties as an emergency services worker, and therefore he was covered as a State employee. The State argued that Mr. Clanton's death arose out of and in the course of his duties as a full-time salaried employee of the City of Pea Ridge.

The Administrative Law Judge found that on April 7, 1977, the relationship of employer-employee existed between the deceased and the Benton County Office of Emergency Services and that his death arose out of and in the course of his duties as an emergency services worker. The

full Commission agreed with the Administrative Law Judge and affirmed his decision.

The State of Arkansas, through the Public Employees Claims Division, argues that the decision that at the time of his death Mr. Clanton was acting as an emergency services worker is not supported by substantial evidence. Appellant further argues that the evidence is clear that Mr. Clanton's activities at his death were a function of a department of the City of Pea Ridge.

On appeal we must view the evidence in the light most favorable to the Commission's decision and uphold that decision if supported by substantial evidence. *Warwick Electronics* v. *Devazier*, 253 Ark. 1100, 490 S.W. 2d 792 (1973). Before we may reverse a decision of the Commission, we must be convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Bunny Bread* v. *Shipman*, 267 Ark. 926, 591 S.W. 2d 692 (Ark. App. 1980).

In this case Mr. Clanton had several jobs with different supervisors. He was an employee of the Pea Ridge Water, Street and Sewer Department, but was on call 24 hours a day to do whatever was needed to be done for the city. He was a volunteer fireman, serving under Mr. Spivey, the volunteer fire chief. He was also a member of the Benton County Office of Emergency Services under the direction of Mr. True, County Director.

At the time of his death, Mr. Clanton was four and one-half miles out of Pea Ridge, on the land of Mr. Webb, a subscriber to the Pea Ridge Fire Service, in possession of a fire truck owned by the City of Pea Ridge. he was there in response to a request by Mr. Spivey, the fire chief. No person with supervisory authority over him was present. Mr. Clanton turned on the pump to supply water to the firefighters, and was injured moments later when he tried to stop the runaway fire truck. Mr. Clanton died two days later from these injuries.

In *Southern Farm Bureau Cas. Co.* v. *Tuggle*, 270 Ark. 106, 603 S.W. 2d 452 (Ark. App. 1980), this Court outlined several factors to be considered in determining whether an employer-employee relationship exists:

> (1) the right to terminate employment before the job is finished;
> (2) the amount of compensation being calculated on a time basis;
> (3) which party furnished materials and equipment;
> (4) and the employer's ability to exercise some degree of control of the manner of doing the work.

Both parties agree that these factors provide the answer to the issue in this case, although they obviously disagree as to what the answer is. In the normal case where the question arises as to the existence of the employer-employee relationship, the four factors enumerated would be helpful. Here, however, neither party denies the existence of the relationship with *some* employer — they disagree as to which employer.

At the time of his death, Mr. Clanton could have been fired by the city, relieved as a volunteer fireman, or taken off the list of emergency services workers, with each action being taken by a different supervisor.

His pay was not calculated on a time basis, but he could have drawn $3.00 per run if he went to the site as a volunteer fireman. He was paid a monthly salary by the City of Pea Ridge.

The fire truck belonged to the City of Pea Ridge, but was used by the volunteer fire department under the direction of the fire chief, who was also a volunteer.

As to control, we note that his immediate supervisor in the water, sewer and street department, the mayor, city manager, or fire chief could have exercised control over him at the time of his death had they been present. Likewise, had the director of emergency services been present, he could have exercised a degree of control over Clanton.

In short, consideration of these four factors in light of the facts of this case is not very helpful.

The Emergency Services Act, Ark. Stat. Ann. § 11-1936(a) (Repl. 1976) defines emergency services as:

> ... the preparation for and carrying out of all emergency functions, by existing State and local governments other than functions for which military forces are primarily responsible, to prevent, minimize and repair injury and damage resulting from disasters caused by enemy attack, natural causes, man-made catastrophes or civil disturbances. ...

Subsection (b) of the same act provides:

> "Disaster" means any tornado, storm, flood, high water, earthquake, drought, fire, radiological incident, air or surface borne toxic or other hazardous material contamination, or other catastrophe, whether caused by natural forces, enemy attack or any other means, occurring anywhere in the State, which, in the determination of the Governor, is or threatens to be of sufficient severity and magnitude to warrant State action or to require assistance by the State to supplement the efforts and available resources of local governments and relief organizations in alleviating the damage, loss, hardship or suffering caused thereby, ...

As mentioned earlier, the Act provides workers' compensation coverage as State employees for emergency service workers injured or killed in the performance of emergency service duties. The Commission decided that Mr. Clanton's death was the result of and in the course of his employment as such a worker. After analyzing the facts, and the Act, we conclude that there is no substantial evidence in the record to support this finding by the Commission. We reach this result for two reasons.

First, Mr. Clanton's activities prior to his death did not involve a response to directions from the emergency services director; there had been no disaster declared, and, in fact,

there was no disaster or catastrophe as contemplated by the Emergency Services Act. We recognize that firefighting is specifically included in the list of functions which are designated as emergency services, but from a reading of the Act it is clear that this type fire was not the type contemplated by the Act. The testimony revealed the fire to have been a small grass or brush fire, covering two or three acres. There was no testimony indicating that it threatened lives or substantial property. The fire could have become such a threat, and possibly could have eventually reached the level of a "catastrophe" or "disaster" but it had not done so at the time of the accident. We do not believe that the Legislature intended, by the inclusion of "firefighting" in the list of emergency services, to make every fire, of whatever size, intensity, and location, a "disaster" under the Emergency Services Act.

Second, at the time of his death, Mr. Clanton was not involved in firefighting, either as an emergency services worker or as a member of the Pea Ridge Volunteer Fire Department. He was present at the fire, during normal working hours for the city, following a request by the volunteer fire chief, made in the presence of the City Administrator. He was killed while trying to preserve the city-owned equipment from damage. The Arkansas Supreme Court, in *Parrish Esso Service Center* v. *Adams*, 237 Ark. 560, 374 S.W. 2d 468 (1964), recognized that the protection of the employer's property was a legitimate duty of an employee. In that case, the employer went outside his employer's service station to secure some property during a storm, and he was injured when a gust of wind blew him into the air, carrying him some seventy-five feet before dropping him on the concrete. In that case, the Court stated:

> ... Certainly, there was a duty upon Adams, as an employee, to protect the property of his employer, and the protection that Adams was seeking to afford, could not have been done without leaving the building. The acts being performed were as much a part of his duties as though he had been waiting on a customer when the wind struck.

In *Bell* v. *Lindsey Wilson College*, 490 S.W. 2d 145 (Ky. 1973), the Kentucky Court of Appeals held that injury or death resulting from an effort by an employee to save or protect the employer's property arises out of and in the course of his employment. In that case, the employee was working as a truck driver for a college. He was directed to take the college-owned truck with a load of college-owned lumber to the college president's farm and store it in a barn on the land. The employee lived on the farm and share-cropped. While burning off a field, an activity which was personal to him, the fire spread and engulfed the barn. The employee got the keys to the truck and attempted to save it. He was killed trying to remove the truck from the barn. The Court found that his death arose out of and in the course of his employment with the college, and referred to Larson, Workmen's Compensation Law, Vol. I, § 28.11, p. 452.71, which states:

> Under familiar doctrines in the law relating to emergencies generally, the scope of an employee's employment is impliedly extended in an emergency to include the performance of any act designed to save life or property in which the employer has an interest. . . . It is too obvious for discussion that emergency efforts to save the employer's property from fire, theft, runaway horses, destruction by strikers, or other hazards are within the course of employment.

Ordinarily, our procedure would be to remand the case to the Commission for a determination as to whether Mr. Clanton was acting as an employee of the City or of the volunteer fire department, but in this case the Commission could make only one finding — that Mr. Clanton was protecting the property of his employer at the time of his death. Therefore, the case is reversed and remanded to the Commission with directions to enter an order holding the City of Pea Ridge and its carrier, Home Insurance Company, liable for the payment of workers' compensation benefits to Mr. Clanton's widow and children in the manner prescribed by law. See *Doyle's Concrete Finishers* v. *Moppin*, 268 Ark. 167, 594 S.W. 2d 243 (1980).

One other point was raised by appellee and must be dealt with. Appellee argues that, since Mr. Clanton was a municipal employee, the action of the Commission is not subject to judicial review under the provisions of Ark. Stat. Ann. § 81-1351 (Repl. 1976) as it existed at the time the claim was filed. That statute did provide that the action of the Commission with respect to a claim by an employee of a municipality was final and not subject to judicial review. The Legislature amended the statute by Act 597 of 1979 and deleted the section prohibiting judicial review in such cases. This claim was filed in 1977, and the Commission issued its opinion in October of 1980. Appellee urges that this modification of the statute affects substantial rather than procedural rights, and that a judicial review would violate the prohibition against such changes in substantial rights found in Ark. Stat. Ann. § 1-104 (Repl. 1976). We disagree. Appellee has cited us to no authority supporting the contention that this change affects substantial rights, and we do not think that it does. The change was a procedural one affecting the manner in which one could enforce the substantive rights conferred on claimants and employers under the Workers' Compensation Act.

Reversed and remanded.

MAYFIELD, C.J., would reverse and remand for the Commission to determine whether Mr. Clanton was an employee of the city or the volunteer fire department.

Fred TOWNSEND *v.* Jo Ann DOSS

CA 81-64 618 S.W. 2d 173

Court of Appeals of Arkansas
Opinion delivered July 1, 1981

Carl J. Madsen, for appellant.

J. R. Buzbee, for appellee.

JAMES R. COOPER, Judge. Appellee is the owner of real estate in Arkansas County, Arkansas and appellant is a real estate broker in Stuttgart, Arkansas. Appellee listed her real estate with appellant and the property was sold to a Mrs. Mahfouz, who assumed an existing loan on the property and agreed to pay the balance in cash. The warranty deed was recorded September 10, 1979, and $7,000.00 of the down payment, which was due November 20, 1979, has never been paid.

Appellee brought suit against appellant and Mrs. Mahfouz seeking to recover the $7,000.00 due on the down payment. A default judgment was entered against Mrs. Mahfouz. The trial court found appellant to have been negligent in his handling of the real estate transaction and granted a judgment in favor of appellee. From that judgment comes this appeal.

Appellant argues that the trial court erred in failing to give a directed verdict. The basis for this argument is that there was no proof establishing the standard of care owed by appellant to appellee. We have found no Arkansas case directly in point, nor have counsel for the parties cited us to such a case. Appellant's argument is founded on the premise that there was no contractual obligation breached by appellant; that there was no testimony as to regulations of the Arkansas Real Estate Commission which might have been violated; and there was no expert testimony which established the standard of care owed by a realtor to his customer under these circumstances.

While it is true that there was no specific evidence

presented to the court on the standard of care issue, we do not believe that such evidence was necessary to determine negligence, and therefore liability, of the broker in question.

The general rule is stated clearly in 94 A.L.R. 2d 468:

> It is the well-established rule that a real-estate broker, who is not a mere middleman, but is employed by a principal to act as agent in a real-estate transaction, is under a duty to exercise *reasonable care and skill*, or that degree of care and skill ordinarily employed by persons of common capacity engaged in the same business, and that a broker is liable to his principal for all consequences directly flowing from his failure to exercise such degree of *ordinary care* and skill in the handling of the matter entrusted to him. [Emphasis supplied.]

In *Morley* v. *J. Pagel Realty & Insurance*, 27 Ariz. App. 62, 550 P. 2d 1104 (1976), the court dealt with the question of whether a broker was under a duty to advise his clients that the balance of the purchase price, evidenced by an unsecured promissory note, should be secured by a mortgage. In that case, the court stated:

> Although this information (requiring a mortgage) might be beyond the average person, it is common knowledge in the real estate business. We think that as part of appellees' duty to effect a sale for appellants on the best terms possible and to disclose to them all the information they possessed that pertained to the prospective transaction, appellees were bound to inform appellants that they should require security for the Haydens' performance.

In *Lester* v. *Marshall*, 143 Colo. 189, 352 P. 2d 786 (1960), the Colorado Supreme Court held that where a broker's agent gratuitously undertook to close a real estate transaction, and assured the purchasers that they would receive a title free of encumbrances, and the purchasers relied on that promise, the broker was liable for a loss resulting from his failure to do what he promised. The court stated:

> Our conclusion that the evidence was sufficient to support the trial court's finding that there was an express undertaking by the defendants on which the plaintiffs relied to their damage renders unnecessary a consideration of the legal duties implicit in the relationship of broker to client.
>
> We deem it significant that the plaintiffs resided out of Denver and that they were thus dependent on the services of the defendants. Defendants, in turn, were agreeable to plaintiffs' leaving the arrangements to them since they did not recommend employment of counsel to examine the title and to render services at the time of the closing. The assurances given to the plaintiffs that everything would be taken care of prior to the closing; that they would get a title free of encumbrances; that the disbursements were made routinely; and that everything would be cared for after the closing, resulted in a quieting of any apprehension plaintiffs may have had, and a reliance on the defendants to perform whatever duties were requisite to complete the transaction without complications.

The court quoted from 2 Restatement, Agency, § 378 (1958), as follows:

> One who, by a gratuitous promise or other conduct which he should realize will cause another reasonably to rely upon the performance of definite acts of service by him as the other's agent, causes the other to refrain from having such acts done by other available means is subject to a duty to use care to perform such service or, while other means are available, to give notice that he will not perform.

In the case at bar, there was evidence from which the court could have found that appellant was aware of the prior financial problems of the purchasers; that appellee was concerned about their past history and the security for the balance of the down payment; that appellee expressed her concerns to appellant; that appellant told her she did not have to come to Stuttgart from Texas since he would handle the details of the transaction; that appellant assured appellee

that if the balance of the down payment was not paid she could get her house back; that appellant made absolutely no effort to secure (by mortgage or otherwise) the balance due, and that appellee had been damaged by the appellant's failure to act as promised.

The only explanation given by appellant was that he somehow believed that the savings and loan association (which prepared the deed and assumption agreement) was going to hold the deed rather than record it until a substantial sum had been paid on the amount due. We find no evidence to support the theory that this was an escrow situation; it was clearly a straight sale with an assumption of an existing mortgage as part of the consideration.

We believe that the evidence clearly supports the finding of the trial court that appellant was negligent in his handling of the transaction and that his negligence resulted in damage to Ms. Doss. We fail to see the need for expert testimony to establish the principle that a realtor should advise a client that her equity should be secured. This case is even clearer considering the assurances given Ms. Doss by Townsend that she could get her house back if there was a default. It would have been a simple matter to afford protection for Ms. Doss; appellant assured her she was protected; she was not protected and suffered a loss, and, since Townsend was the party who undertook to protect her from loss, he should bear the loss. We find no error, and therefore we affirm.

MAYFIELD, C.J., dissents.

James OXFORD *v.* Charles L. DANIELS,
Director of Labor, and MOORE COMPANY

E 80-194 618 S.W. 2d 171

Court of Appeals of Arkansas
Opinion delivered July 1, 1981

Thurston A. Thompson, for appellant.

Thelma Lorenzo, for appellees.

DONALD L. CORBIN, Judge. This is an appeal from the Arkansas Employment Security Division denying unemployment compensation to the appellant, James Odis Oxford, on the ground that he had voluntarily and without good cause connected with the work, left his last work. The decision was affirmed by the Appeal Tribunal and the Board of Review.

On or about January 17, 1980, the appellant was hired by the Moore Company of Springdale, Arkansas. His duties required him to pack tools into boxes for shipment. In March, 1980, the Moore Company transferred its packing function to another location and discharged appellant. On March 28, 1980, appellant filed for unemployment compensation and was found qualified to receive payments. On or about July 7, 1980, the appellee contacted appellant about accepting a position operating a grinder machine. Appellant was reluctant to accept the job as a grinder machine operator because he had poor eyesight in one eye and no kneecap on one of his knees. He reminded his prospective employer, the appellee's personnel officer, of these handicaps. Apparently, after conferring with the supervisor of the grinding operation, the personnel officer told appellant that they thought he could handle the job. Appellant worked three days and quit. He stated that he quit because standing in one place all day caused him to ache all over and he could not see well enough to perform the job properly.

Section 5(a) of the Arkansas Employment Security Law [Ark. Stat. Ann. § 81-1106 (a) (Supp. 1979)] provides that an individiual shall be disqualified for benefits "if he voluntarily and without good cause connected with the work, left his last work." A worker who leaves his work because of illness, injury, pregnancy, or other disability, may escape

disqualification under said section 5(a) if he makes reasonable efforts to preserve his job rights before quitting.

Ark. Stat. Ann. § 81-1106(c)(1) (Repl. 1976) provides as follows:

> In determining whether or not any work is suitable for an individual and in determining the existence of good cause for voluntarily leaving his work under subsection (a) of this section, there shall be considered among other factors, and in addition to those enumerated in paragraph (2) of this subsection, the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience and prior earnings, the length of his unemployment, his prospects for obtaining work in his customary occupation, the distance of available work from his residence and prospects for obtaining local work.

The sole question for us is whether there is substantial evidence to support the agency's finding that appellant did not have good cause connected with the work for leaving his job. We do not find there is substantial evidence to support the agency's finding.

Appellant was 54 years old with a seventh grade education. He had worked as a laborer during his entire lifetime and had never earned over $3.75 per hour. The appellant should not be penalized because he made a mistake and accepted the job in good faith, hoping that he could handle it and trusted his supervisors to take his handicaps into consideration and advise him as to his compatibility with the work to be assigned. The appellant could just as easily have declined the position offered and continued to draw unemployment compensation on the grounds that his visual defect and his infirmed leg made him incapable of successfully operating the machine. In fact, a letter from William Smiley, personnel officer with the appellee company, stated: "[I]t is my own personal opinion that through Mr. Oxford's desire to work he allowed himself to come to a job for which he was not physically able to maintain. . . . I agree with Mr. Oxford that he made an error

in judgment regarding his physical limitations. Additionally, I feel that if it were not for his own sincere efforts to obtain full time employment, this situation would not have occurred."

The Supreme Court of Arkansas in *Harmon* v. *Laney*, 239 Ark. 603, 393 S.W. 2d 273 (1965), quoting from *Dahman* v. *Commercial Shearing & Stamping Co.*, 170 N.E. 2d 302 (Ohio, 1960) stated, "This is to say, the act should be liberally construed so as to insure a subsistence bridge for those who have been separated from employment under conditions whereby they are ready, willing and able to work, but cannot conscientiously secure it during the period of separation." The Arkansas Supreme Court went on to state, "Strict constructions which result in defeat of the intended purposes of the Act will not be sanctioned by this court."

Another court has held that when, because of economic factors, workmen may be forced to experiment with work outside their fields in an effort to find some employment, such workers would not be barred from receiving benefits for making such laudable efforts. *Wojcik* v. *Board of Review*, 58 N.J. 341, 277 A. 2d 529 (1971), reported at 76 Am. Jur. 2d *Unemployment Compensation* § 69.

In the instant case, Mr. Oxford was entitled to believe that no other position would be available to him. For him to have made an effort in this instance to preserve his job rights would have required him to make what would have amounted to a futile gesture. He had been told that the grinding machine position was the only one available to him.

Reversed and remanded.

J. C. DICUS, Jr. and Ernestine DICUS
v. Arvilee ALLEN and Margie L. ALLEN

CA 81-43 619 S.W. 2d 306

Court of Appeals of Arkansas
Opinion delivered July 1, 1981
[Rehearing denied August 19, 1981.]

Glover, Glover & Walthall, for appellants.

Bob Frazier and *Fenton Stanley*, for appellees.

TOM GLAZE, Judge. This case is a boundary dispute between two adjoining landowners. Appellants initiated an action against appellees for ejectment in circuit court,

requesting the court to compel appellees to remove two mobile homes situated on appellants' property. Appellees defended the action below, affirmatively alleging adverse possession, acquiescence, laches, cancellation and reformation. On appellees' motion, the case was transferred to chancery court where it was tried and decided. The chancellor found against appellees concerning all their affirmative defenses. In addition, the chancellor determined that although there was no dispute that appellant had legal title to the property in their deed, they failed to present a correct survey which located the corners of the property on the ground. Thus, since the chancellor was unable to determine if the appellees' mobile homes were located on appellants' property, he dismissed appellants' complaint. Both parties appeal and, between them, raise six points for reversal.

We agree with the trial court's holding that appellees failed to show evidence which would support any of the defenses they interposed at trial. Appellees offered no proof of mutual mistake to substantiate their claim of reformation nor did they attempt to join all the necessary parties in an effort to prevail on this theory. Of course, this failure on appellees' part may well be due to their election to prove that they had acquired title to part of the appellants' property by adverse possession or acquiescence, contradictory defenses to their claim of mutual mistake.

Concerning the adverse possession claim raised by appellees, one of the appellees, Arvilee Allen, testified at trial that he was not claiming the disputed property by adverse possession. Rather, Allen stated that he and appellant Carl Dicus agreed on where the property line was located. The other evidence in the record certainly supports the court's finding (and Allen's testimony) that no adverse possession claim was intended. The appellants and appellees were good friends and neighbors commencing when they purchased adjoining properties in 1962 and until 1978 or 1979, the years in which several surveys were conducted on the parties' lands to determine property boundaries. Passage over appellants' property to and from the appellees' land was permitted without objection until 1979. In 1979, appellants had a survey prepared in connection with their attempt

to sell their property, and it was not until this time that ill feelings and adverse claims began to surface between the parties. From the evidence, appellees failed to offer evidence to prove the requisite passage of time and intent to show they held any land adversely against appellants.

From the evidence, including Mr. Allen's testimony, appellees' main contention at trial was that appellants had agreed to a dividing line and appellees argue their two mobile homes were placed and are now located on their side of this agreed line. Whether or not an agreement was reached between the parties was certainly in dispute, and based on conflicting testimony and evidence, the chancellor held that no such agreement occurred. The chancellor's finding on this issue of fact was not clearly erroneous or against the preponderance of the evidence, and consistent with Rule 52(a) of the *Arkansas Rules of Civil Procedure*, we will not set aside his finding. From a review of the record, we agree with the chancellor's decision to deny relief on each of the claims asserted by appellee.

Concerning the chancellor's decision to dismiss appellants' complaint, we must disagree. Although appellants raise four points for reversal, we need only discuss one point, which we find is dispositive of the parties' boundary dispute. The appellants and appellees purchased their respective tracts of property in 1962 from a common grantor, the uncle of appellee Margie Allen. The appellees bought nineteen acres and appellants purchased 1.5 acres located immediately west and adjoining the nineteen acre tract. The south boundary of the parties' properties runs along Highway 7. The north boundary of appellees' land is the quarter line. Appellants' north line is bordered by a 3.2 acre tract owned by W. L. Stover and Richard Baker. This 3.2 acre tract was previously owned by appellees and they sold it to Stover and Baker in 1978. Like appellees' tract, the north boundary of the Stover/Baker acreage is the quarter line. Stover also purchased a four acre tract in 1978, which is located immediately west of the tracts owned by Stover, Baker and the appellees. Its north boundary is the quarter line. All four of the tracts mentioned above are within the same quarter section and until 1978 when Stover and Baker purchased the

3.2 and four acre tracts, all of the tracts had been purchased without benefit of a survey.

In 1978, Stover and Baker hired Gary Whitfield, a registered land surveyor, to survey the 3.2 acre tract owned by appellees and also the four acre tract on the west. At the time of this survey, Whitfield showed appellees the corners of appellants' property. Whitfield testified that the east line of appellants' property ran through one of appellees' mobile homes and a second mobile home was located entirely on appellants' property. This apparently was the first clear indication anyone had that appellees may have mobile homes on the land of appellants. Based on the Whitfield survey, Stover and Baker purchased the 3.2 acre tract from appellees and the four acre tract from Golden Marine, Inc.

In 1979, appellants hired Whitfield to survey their tract which they decided to sell. Whitfield used the same points established in his 1978 survey, and his second survey again reflected that appellees' mobile homes were on appellants' land.

At trial, the appellees offered their own land survey expert, Boyd Cardin, who testified that Whitfield used the wrong bearings in establishing the west and east boundaries of the appellants' tract because they do not parallel. Cardin stated that a survey should parallel the nearest section line, and Whitfield failed to do so in his 1978 or 1979 surveys. Whitfield testified that no one, including the Corps of Engineers, which had surveyed this same area many times, had previously established the section line on the ground, and to do so he would have to grid the entire section. The chancellor's dilemma at this stage of the trial was: The legal description reflected in the deeds to all four adjoining tracts did not overlap and appeared accurate, but he determined it was impossible to establish the east and west boundaries of appellants' tract on the ground because a section line had not been found or established. Without a more accurate survey, the chancellor found he could not locate the east/west boundaries or the location of the two mobile homes relative to such boundaries. He proceeded to dismiss appellants' complaint.

The established rule of property is that the original United States Government survey is *prima facie* correct and surveys must conform as nearly as possible with the original government survey. *Carroll* v. *Reed*, 253 Ark. 1152, 491 S.W. 2d 58 (1973). In the instant case, none of the adjoining tracts had ever been purchased or sold relative to any survey until 1978, much less a survey which tied into points established by the United States Government. Under these facts, we find it unnecessary to require the parties to underwrite additional surveys to assure the north/south boundary lines are exactly parallel with the section line.

In 1978, the appellees relied on Whitfield's survey when they sold Stover and Baker the 3.2 acre tract immediately north of appellants' property. Whitfield testified that he shot the appellants' east boundary line to Highway 7 and knew then that the two mobile homes encroached on appellants' land. He informed the appellees of this fact and Whitfield said that they appeared satisfied with the survey. In any event, even appellee Arvilee Allen admits he conveyed the 3.2 acres based on the 1978 Whitfield survey. Thus, as early as 1978, Whitfield had established the corners of appellants' property but did not set the southeast corner until his 1979 survey. Even though these corners are aligned with the lines and corners of the 3.2 acres sold by appellees in 1978, they now choose to disavow the points established by the Whitfield surveys. We believe that it would be inherently unfair to permit appellees to take these inconsistent positions, and we, therefore, hold that they are estopped from rejecting the Whitfield survey when they had relied on it only one year before their dispute arose with appellants. See, *Omohundro* v. *Ottenheimer*, 198 Ark. 137, 127 S.W. 2d 642 (1939), and also 31 C.J.S. *Estoppel*, § 116.

The guides to locating boundaries are set forth in *McKinley* v. *Hilliard*, 248 Ark. 627, 454 S.W. 2d 67 (1970), wherein the court, quoting from *Ewart* v. *Squire*, 239 F. 34 (4th Cir. 1916) stated:

> In ascertaining location the guides in the order of importance are: (1) Natural objects; (2) artificial objects; (3) *adjacent boundaries*; (4) courses; (5) distances;

> (6) quantity. But the rule is flexible, and it does not control against the intention of the parties as shown by the description taken as a whole ... The order of the importance of the guides is manifestly the more flexible when the description of subdivisions of a tract is ascertained by protraction and not by actual survey. [Emphasis supplied.]

Consistent with the foregoing guidelines, the record reflects that the tracts adjoining appellants' property on the west, north and east sides have corresponding boundaries and descriptions. There are no overlaps or discrepancies in the legal descriptions of any of the four adjoining tracts. Moreover, under the Whitfield surveys, all of the adjoining owners have at least the same quantity of acreage called for in their respective deeds. When appellees' surveyor, Cardin, set out to check Whitfield's surveys, it was his duty solely to locate the lines of the original survey where title to land has been established under a previous survey. He cannot establish a new corner, nor can he even correct erroneous surveys of earlier surveyors. *McKinley* v. *Hilliard, supra.*

We reverse and remand this cause with directions that appellants' complaint be reinstated and a judgment be entered establishing appellees' east boundary in accordance with the Whitfield surveys. Since the Whitfield surveys reflect that appellees' two mobile homes encroach on appellants' property, the court must also order the removal of the homes as prayed for in appellants' complaint.

Reversed and remanded.

Gerald SWART *v.* TOWN & COUNTRY HOME CENTER, INC.

CA 80-499 619 S.W. 2d 680

Court of Appeals of Arkansas
Opinion delivered August 19, 1981
[Rehearing denied September 16, 1981.]

Hartman Hotz, for appellant.

Charles E. Hanks, for appellee/cross-appellant.

MELVIN MAYFIELD, Chief Judge. Town and Country Home Center, Inc. failed suit against Gerald Swart to recover $474.80, the balance alleged to be due on the purchase price of several appliances. Swart filed an answer and counterclaim alleging that one of the appliances, a kitchen range, was defective and that he was entitled to a credit on the amount due. Swart had been an employee of Town and Country and his counterclaim also alleged that Town and Country was indebted to him under the Fair Labor Standards Act for hours worked in excess of forty hours a week.

The case was tried by the court without a jury and the court held against Swart on his claim for overtime but gave him credit for $100.00 on the amount sought by Town and Country. Swart has appealed from the court's ruling as to his overtime claim and Town and Country has cross-appealed from the court's allowance of the $100.00 credit.

With regard to the credit, there was evidence by Swart that a claim for damages to the range was made against the truck line which delivered it and that $100.00 was paid on that claim. Swart was a repairman for Town and Country and he testified that his employer told him that if he would fix the stove they would give him the freight claim. The court allowed Swart credit for the $100.00 and we do not think this is contrary to the preponderance of the evidence.

As to the claim for overtime under the Fair Labor Standards Act, the point involved on this appeal concerns

the admissibility of the testimony and written report of a compliance officer of the Wage and Hour Division of the United States Department of Labor. This gentleman was called as a witness by Swart but the court sustained objections to his testimony and he never gave any evidence concerning an investigation he had made of Town and Country to check for compliance with the minimum wage and overtime standards of the federal law. Although there was some confusion surrounding the questions, objections, and rulings of the court, Swart is not in a position to pursue the matter in this appeal because there was no offer to show what the testimony of the witness would have been. Our Supreme Court has said, "We have said many times that the failure to proffer evidence so that we can see if prejudice results from its exclusion precludes review of the evidence on appeal." *Duncan* v. *State*, 263 Ark. 242, 565 S.W. 2d 1 (1978) and *Goodin* v. *Farmers Tractor & Equipment Co.*, 249 Ark. 30, 458 S.W. 2d 419 (1970). See also Rule 103(a)(2), Uniform Rules of Evidence.

After the objections were sustained to the witness' testimony, Swart then attempted to introduce into evidence the compliance officer's report. Again there was some confusion surrounding the offer, objections, and rulings concerning the report but it was not admitted. While the record does not disclose that the court was ever shown the report or advised of its contents, it appears in the transcript as a refused exhibit. The first page of the report is a letter addressed to Swart's attorney stating, "This is in response to your Freedom of Information Act request which was received in this office on May 27, 1980." In the narrative report enclosed with the letter under the heading "Complainant Information" appears the following: "The complaint received was anonymous alleging the firm did not pay time and one half for hours over 40 per week, which was substantiated." Attached to the narrative report is a page called "Wage Transcription and Computation Sheet" which apparently is a breakdown of hours claimed to have been worked by Swart and amounts claimed to be due to him although without

some explanation it is hardly understandable. And under the heading "Coverage" the following appears:

> The subject firm is engaged in the retail sale and repair of home appliances and televisions, etc.
>
> ADV for the firm is in excess of All employees covered in all weeks under 3(s) coverage.

The deletion above is apparently made in keeping with an explanation in the letter to Swart's attorney which read, "A deletion was made in the narrative report pursuant to Exemption 4 of the Freedom of Information Act and Department of Labor Regulations 29 CFR 70.24. This exemption permits the withholding of confidential financial information."

In response to Swart's cross-complaint for overtime under the Fair Labor Standards Act, Town and Country filed a general denial. It was, therefore, Swart's burden to show by a preponderance of the evidence that he had a claim under the provisions of the Act. *Fayetteville Linen Supply* v. *Brewer*, 245 Ark. 103, 431 S.W. 2d 458 (1968); *Wirtz* v. *Lieb*, 366 F. 2d 412 (10th Cir. 1966); *Razey* v. *Unified School District #385*, 470 P. 2d 809 (Kans. 1970). The only evidence in the record in this respect is the offered report of the compliance officer. It apparently says that coverage of the Act exists because of 29 U.S.C.A. § 203(s). For Town and Country to come within that provision it would have to be an enterprise "which has employees engaged in commerce or in the production of goods for commerce or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce" and whose "annual gross volume of sales made or business done is not less than $250,000." There were no other facts set out in the report to show that section 203(s) applied and even the monetary figure was deleted.

The report is, of course, hearsay. *Southern Farm Bureau Casualty Ins. Co.* v. *Reed*, 231 Ark. 759, 332 S.W. 2d 615 (1960); *New Empire Ins. Co.* v. *Taylor*, 235 Ark.

758, 362 S.W. 2d 4 (1962). But it is argued that it comes within the hearsay exception of Rule 803 (8) of the Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979). Under 803(8), "factual findings resulting from an investigation made pursuant to authority granted by law" are not excluded by the hearsay rule although under 803(8)(iv), "factual findings resulting from special investigation of a particular complaint, case or incident" are not within this exception to the hearsay rule. Since the report offered indicates the investigation resulted from an anonymous complaint, it would appear that subsection (iv) would apply. This provision of the Uniform Rules of Evidence adopted by Arkansas is not found in Rule 803(8) of the Federal Rules of Evidence and while we find no Arkansas appellate decision concerning subsection (iv) there is a decision about subsection (i) (investigative reports by police and other law enforcement personnel) which held that the written report of a deputy sheriff who investigated the death of an insured was excluded from the hearsay exception of Rule 803(8). *Wallin* v. *Ins. Co. of North America*, 268 Ark. 847, 596 S.W. 2d 716 (Ark. App. 1980). In our view the written report of the compliance officer was hearsay. It resulted from a "special investigation of a particular complaint" and was not excepted from the hearsay rule.

In addition, it is only the "factual findings" resulting from an investigation that come within the hearsay exception of Rule 803(8). Although one authority has suggested that under the Federal Rules of Evidence this does not mean "only facts as opposed to conclusions or opinions drawn from facts," the same authority also says "the extent to which Rule 803(8) sanctions the admission of investigative reports containing conclusions must also be determined on the basis of a case by case analysis." 4 J. Weinstein & M. Berger, *Weinstein's Evidence*, § 803(8) [03] at 803-204. As far as coverage of the Fair Labor Standards Act is concerned, there is absolutely no factual basis in the report to justify its conclusion that "all employees are covered in all weeks under 3(s) coverage" and in our opinion the trial court was correct in holding that the report was not admissible.

The judgment appealed from is affirmed.

COOPER, J., dissents.

THE FAUSETT COMPANY *v.* Sheldon RAND

CA 81-51 619 S.W. 2d 683

Court of Appeals of Arkansas
Opinion delivered August 19, 1981

Wright, Lindsey & Jennings, for appellant.

Wallace & Hamner, for appellee.

MELVIN MAYFIELD, Chief Judge. Sheldon Rand was one of several partners who owned a shopping center in Little Rock. The Fausett Company was the rental agent for the shopping center and also acted as the real estate agent for the partnership when the shopping center was sold in October of 1979.

After the sale, Rand brought suit against Fausett in the Circuit Court of Pulaski County alleging that he was entitled to $33,600.00 as his pro rata share of the selling price which Fausett had collected but refused to distribute to him.

Fausett's answer alleged that one of the tenants of the shopping center was Shelly Rand's Phase II, Inc., a store owned by Rand which had gone out of business owing the shopping center $8,265.63 for monthly rentals and other fees and dues, and that Rand had agreed this amount could be deducted from his portion of the money from the sale of the shopping center. The answer also alleged that even if Phase II was a corporation Rand conducted the business in such a manner that its corporate entity should be disregarded and Rand held individually responsible for the corporation's debt to the shopping center.

Rand subsequently filed a motion for summary judgment which was granted by the court and from which Fausett brings this appeal.

Fausett points out the familiar rules of law pertaining to motions for summary judgment: Summary judgment

should be allowed only when it is clear there is no issue of fact to be litigated; the burden is upon the moving party to demonstrate that there is no genuine issue of material fact; and even if the facts are not in dispute, if reasonable minds might differ as to conclusions to be drawn from those facts, summary judgment may not be entered. *Robinson* v. *Rebsamen Ford, Inc.*, 258 Ark. 935, 530 S.W. 2d 660 (1975); *Brown* v. *Aquilino*, 271 Ark. 273, 608 S.W. 2d 35 (Ark. App. 1980).

It is Fausett's argument that there are genuine issues of fact as to whether Rand agreed to the deduction of the amount owed by Phase II from his partnership distribution and as to whether Rand should be individually responsible for the obligations of Phase II on the basis that there should be a disregard of the corporate entity of Phase II.

In deciding the motion for summary judgment the trial court had before it in addition to the pleadings, answers to interrogatories, answers to requests for production of documents, responses to requests for admissions, affidavits, depositions, and many exhibits attached to the affidavits and introduced as part of the depositions. From these matters, the evidence with regard to Fausett's contention that Rand agreed to the deduction of the amount owed by Phase II, can be summarized as follows:

Edward K. Willis, president of Fausett Company, testified in a deposition taken May 29, 1980, that there was a sale under consideration in 1978. At that time he talked with Rand and they agreed that if the sale could be closed at the price that was in the offer, the sellers would guarantee the rents and other expenses owed by Phase II. The resolution of the financial matters involved would be accomplished by the deduction of an amount equal to approximately $8,000.00 from Rand's proceeds. That was a negotiated amount and represented roughly half of the money owed by Phase II at that time. That sale did not go through, but the shopping center was subsequently sold to a different buyer under an almost identical set of circumstances. Willis testified that when this subsequent sale was being negotiated he talked to Rand and the terms for the previous sale were still agreeable

as to the money owed by Phase II. After the sale was closed in October or November of 1979, he talked to Rand over the telephone about the final distribution of the proceeds due him from the sale. He said Rand told him to put it in a letter and a letter from Willis to Rand was made an exhibit to the deposition. The letter said that pursuant to their telephone conversation of that day Rand's share of the distribution from the sale of the shopping center was $33,600.00 less delinquent rents due by Phase II in the amount of $7,621.88, delinquent common area maintenance fees of $40.00, and delinquent merchants' association dues of $603.75, all of which totaled $8,265.63, leaving a net amount due to Rand of $25,334.37.

Willis further testified in his deposition that Rand was entitled to $25,334.37 but he did not get it because he did not sign the letter of December 3, 1979, which says in the final paragraph: "By our respective signatures, we are releasing any and all claims we have or may have in connection with the Galleria partnership or your lease with the Galleria Shopping Park." Willis said the letter was mailed to Rand because Willis wanted Rand's signature to acknowledge that the mathematical computations were correct.

In an affidavit attached to Rand's motion for summary judgment he admitted receiving the letter of December 3, 1979, but said the $8,265.63 was not his obligation but the obligation of Phase II.

We think the above evidence presents a genuine issue of fact. Rand contends the Statute of Frauds, Ark. Stat. Ann. § 38-101 (Repl. 1962), applies to any agreement to deduct Phase II's obligations from his share of the proceeds of the sale. It is our view, however, that the issue presented by the evidence is whether there was a new and original undertaking by Rand. Such an undertaking would not come within the provisions of the Statute of Frauds and since it would result in the sale of the shopping center there would be consideration to both Rand and Fausett. Rand would get his portion of the selling price but would give up the amount deducted. Fausett would receive the real estate agent's commission but according to the evidence would

have to advance the amount owed by Phase II so the sale could be closed.

In *Tyson* v. *Horsley*, 141 Ark. 545, 217 S.W. 776 (1920), there was testimony that Tyson had a claim on the land of John Elby for the payment of Elby's debt to him and that Horsley promised if Tyson would release his claim and allow Horsley to sell Elby's land, Horsley would pay Tyson the amount Elby owed him. Acting upon this agreement, Tyson released Elby and charged the account to Horsley. The court held that this evidence made an issue for the jury as to whether or not there was an original undertaking by Horsley upon a sufficient consideration to pay Tyson the debt due him by John Elby, and said:

> In *Jonesboro Hardware Co.* v. *Western Tie & Timber Co.*, 134 Ark. 543, we said: "We have several times held that a parol promise to pay the debt of another is not within the statute of frauds when it arises from some new and original consideration of benefit or harm moving between the newly contracting parties. We have also held that a waiver of legal right is a sufficient consideration to support a promise to pay the debt of another."

See also *Brown* v. *Morrow*, 124 Ark. 480, 187 S.W. 449 (1916) and *Frame* v. *Whittam*, 181 Ark. 768, 27 S.W. 2d 990 (1930).

We find, therefore, that the summary judgment should be reversed and the case remanded for a trial on the issue above discussed but we do not find that there is an issue to be litigated as to whether the corporate entity of Phase II should be disregarded and Rand held individually responsible for its obligations.

In that regard there is evidence in the record that Shelly Rand's, Inc. is a sixteen year old corporation with two shareholders. Sheldon Rand owns ninety-seven percent of the stock and his wife owns three percent. He is President. His wife is Secretary and Treasurer. There are no other officers or directors. The corporation owns and operates seven ladies' ready-to-wear stores in the Central Arkansas

area. Two of them operate under the name Lisa's Closet and the rest operate under the name Shelly Rand's.

Phase II is a separate corporation. Its correct legal name is Phase II, Inc. That was the name of the tenant in the shopping center lease. The trade name listed in the lease, however, was Shelly Rand's Phase II but the sign at the store and the advertising just said Phase II. In Rand's deposition he testified that Phase II was formed because it was a new type of business and he wanted to limit his own liability and the liability of the Shelly Rand corporation. Fausett's president, in his deposition, said he knew Phase II was a corporation but that Rand was a one-man show, operated several corporations, and operated them as he saw fit.

In its argument that the evidence presents a genuine issue of fact as to whether the corporate entity of Phase II should be disregarded and Rand held individually responsible for its obligations, Fausett cites three cases. *Black & White, Inc.* v. *Love*, 236 Ark. 529, 367 S.W. 2d 427 (1963); *Plant* v. *Cameron Feed Mills*, 228 Ark. 607, 309 S.W. 2d 312 (1958); and *Rounds & Porter Lumber Co.* v. *Burns*, 216 Ark. 288, 225 S.W. 2d 1 (1949). In each of these cases one corporation was held liable for the obligations of another corporation. Of course, our question here is whether there is a genuine issue of fact concerning the responsibility of Sheldon Rand — an individual — for the obligations of Phase II. We note, however, that each of the cited cases contains the statement: "It is only when the privilege of transacting business in a corporate form has been illegally abused to the injury of a third person that the corporate entity should be disregarded." That statement is in agreement with three cases cited by Rand which refused to hold a stockholder liable for the obligation of a corporation. In each of those cases the court held that such liability will be imposed only where the corporate structure has been illegally or fraudulently abused to the injury of a third person. *Banks* v. *Jones*, 239 Ark. 396, 390 S.W. 2d 108 (1965); *Parker, Inc.* v. *Point Ferry, Inc.*, 249 Ark. 764, 461 S.W. 2d 587 (1971); and *Thomas* v. *Southside Contractors, Inc.*, 260 Ark. 694, 543 S.W. 2d 917 (1976). For a general discussion, see 1

Fletcher, *Cyclopedia of the Law of Private Corporations*, § 41.3 (Supp. 1980).

We do not find any evidence that the corporate form of Phase II was illegally or fraudulently abused by Rand to any injury alleged by Fausett in this case. In the first place, the evidence in the record shows that Fausett is a corporation and that the corporation was one of the members of the partnership which originally owned the shopping center. But Fausett was not Phase II's landlord and Phase II has never owed Fausett any rent. Fausett is not here as a partner. Its president testified, "We're not suing Mr. Rand for back rent due, whether it's Phase II, him corporately or personally or whatever." And in the second place, Fausett — whether as one of the partners owning the shopping center or as the rental agent for the owners — knew that Phase II was a corporation. Fausett's president testified, "In my mind there is no question that we have a tenant that's Phase II, Inc., and that we're dealing with a corporation." Regardless of his testimony that Mr. Rand was a one-man show, the president of Fausett testified, "We should have required a personal endorsement. . . . And it was a mistake, obviously now, not to have done that."

The case must be reversed for a trial on the first issue discussed. As the record stands there is no genuine issue of fact to be tried on the second issue discussed. Also, since Fausett admits Rand is entitled to $25,334.37 of the money it is holding from Rand's share of the distribution from the sale of the shopping center, there is no issue to be tried with regard to that amount. Under Rule 56(d) of the Rules of Civil Procedure if judgment is not rendered on a motion for summary judgment the court should "make an order specifying the facts that appear without substantial controversy" and upon trial "the facts so specified shall be deemed established." *Young, Adm'r.* v. *Dodson*, 239 Ark. 143, 388 S.W. 2d 94 (1965); *Bonda's Veevoederfabriek, Etc.* v. *Provimi, Inc.*, 425 F. Supp. 1034 (1976).

Reversed and remanded for further proceedings consistent with this opinion.

Danny G. RICE *v.* Phillip G. KROECK

CA 80-483 619 S.W. 2d 691

Court of Appeals of Arkansas
Opinion delivered August 26, 1981

King & King, by: *Jim King*, for appellant.

No brief for appellee.

MELVIN MAYFIELD, Chief Judge. This is an appeal from a default judgment. The complaint alleged that the parties were formerly engaged in business together and in winding up their business affairs they were required to pay $8500.00 to a third party; that appellant and appellee each owed one-half of this amount but the whole amount was paid by appellee and the appellant has refused to reimburse him; and the appellee asks for judgment against appellant in the amount of $4250.00.

The appellant contends that default judgment should not have been entered against him because (1) the return of service on the summons shows that he was not properly served and (2) no evidence was introduced to establish the amount of the judgment. Because we agree with (2) we express no opinion as to (1).

To support his contention with regard to entry of judgment without proof of damages, the appellant cites *Greer* v. *Strozier*, 90 Ark. 158, 118 S.W. 400 (1909). That case was reversed because the trial court entered a default judgment for damages without hearing any proof as to amount. As early as *Thompson* v. *Haislip*, 14 Ark. 220 (1853), the Supreme Court of Arkansas said that the failure to appear and defend was a confession of the plaintiff's right to recover damages but it was not an admission of any particular amount of damages. And in *Mizell* v. *McDonald*, 25 Ark. 38 (1867), the court held that in a hearing to

determine the amount of damages after default a defendant has a right to cross-examine the plaintiff's witnesses and to introduce evidence in mitigation of damages. *Thompson* and *Mizell* have been cited with approval through the years. See *Clark* v. *Collins*, 213 Ark. 386, 210 S.W. 2d 505 (1948) and *Kohlenberger* v. *Tyson's Foods*, 256 Ark. 584, 510 S.W. 2d 555 (1974).

There may be a two-fold basis for the requirement that the amount of damages must be established. In *Thompson* v. *Haislip* the court did not cite any case or statute as authority and *Mizell* v. *McDonald* cited only *Thompson*. The real authority relied upon in *Thompson* may have been the general practice as established in England and followed in this country. In discussing the early English and American practice with regard to defaults, 6 *Moore's Federal Practice* par. 55.02[1] (2d ed. 1976) quotes from the case of *Thomson* v. *Wooster*, 114 U.S. 104, 5 S. Ct. 788, 29 L. Ed. 105 (1885). At 114 U.S. 113 that case said:

> It is thus seen that by our practice, a decree *pro confesso* is not a decree as of course according to the prayer of the bill, nor merely such as the complainant chooses to take it; but that it is made (or should be made) by the court, according to what is proper to be decreed upon the statements of the bill, assumed to be true. This gives it the greater solemnity, and accords with the English practice, as well as that of New York.

However, *Greer* v. *Strozier* cited Kirby's Digest, § 6137 (1904) which provided, "Allegations of value, or of amount of damage, shall not be considered as true by the failure to controvert them." That section was later compiled as Ark. Stat. Ann. § 27-1151 and has now been superseded by the Rules of Civil Procedure which provide in rule 8 (d) that "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied, either generally or specifically, in the responsive pleading." That rule was taken from Federal Rule of Civil Procedure 8 (d) which contains almost identical language and which has been relied upon as authority in holding that a default establishes liability but

not the extent of damages. *Geddes* v. *United Financial Group*, 559 F. 2d 557 (9th Cir. 1977); *Fehlhaber* v. *Indian Trails, Inc.*, 425 F. 2d 715 (3rd Cir. 1970).

So, regardless of the original basis, our case and statutory authority very clearly requires that the amount of the default judgment must be established by proof. The only exception that we know to this rule is in suits upon accounts where there is filed with the complaint a verified statement of the account under the provisions of Ark. Stat. Ann. § 28-202 (Repl. 1979). In that situation the statute provides that "[T]he affidavit of the plaintiff, duly taken and certified according to law, that such account is just and correct shall be sufficient to establish the same, unless the defendant shall, under oath, deny the correctness of the account either in whole or in part. . . ." See *Hershy* v. *MacGreevy & Yantis*, 46 Ark. 498 (1855) and *Walden* v. *Metzler*, 227 Ark. 782, 301 S.W. 2d 439 (1957).

Rule 55(b) of the Arkansas Rules of Civil Procedure deals with the "manner of entering judgment" by default and provides in part:

> If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings as it deems necessary and proper and may direct a trial by jury.

The language quoted above is the exact language found in rule 55 (b) (2) of the Federal Rules of Civil Procedure. Under the federal rule there is a provision for the clerk to enter judgment by default when the claim is "for a sum certain or a sum which can by computation be made certain" but that provision is not in our rule 55. We are, therefore, of the opinion that rule 55 of the Arkansas Rules of Civil Procedure did not change our law with regard to the necessity of proving damages to establish the amount of a default judgment.

The record in this case only contains the following matter: complaint, summons, judgment, docket sheet, notice of appeal and designation of record. There is, however, a presumption of regularity attendant upon every judgment of a court of competent jurisdiction. *Coleman* v. *State*, 257 Ark. 538, 518 S.W. 2d 487 (1975). But the judgment appealed from in this case does not state that it is based upon evidence heard by the court. It simply says "The court finds that the plaintiff is entitled to default judgment." In *Hershy* v. *Berman*, 45 Ark. 309 (1885), the court said "If there was anything in the record to indicate that oral proof was heard at the trial, we would presume that the decree is correct and affirm. . . ." And in *Dent* v. *Adkisson*, 184 Ark. 869, 874, 43 S.W. 2d 739 (1931), the court said:

> It is not to be doubted that on any issue made in the trial court, where testimony is taken and not preserved, the conclusive presumption arises that evidence was sufficient to sustain the finding and decree of the court. . . . no fair interpretation can be placed upon the language of the order of confirmation which would justify the inference that testimony was heard regarding the truth or falsity of the allegations contained in the petition. . . . and all that the record justifies us in concluding is that the chancellor heard no testimony.

Since the judgment here involved contained no recital that evidence was heard, we cannot presume otherwise. The judgment is reversed and the case remanded.

Donald Ray HACKETT *v.* STATE of Arkansas

CA CR 80-79 619 S.W. 2d 687

Court of Appeals of Arkansas
Opinion delivered August 26, 1981

E. Alvin Schay, State Appellate Defender, by: *Jack R. Kearney*, Deputy Appellate Defender, for appellant.

Steve Clark, Atty. Gen., by: *Arnold M. Jochums*, Asst. Atty. Gen., for appellee.

MELVIN MAYFIELD, Chief Judge. This is an appeal from a judgment of conviction for delivery of a controlled substance. Appellant was sentenced to eight years imprisonment and a fine of $5000.

The State contended that appellant sold marijuana to two undercover policemen in the presence of a confidential informant who arranged the sale. The alleged informant was not called to testify by the State but after the two policemen had testified and the State had rested, he was called by the defendant and denied that he was an informant. He testified that he did take the policemen to an apartment complex to help them find some marijuana, but he did not know they were policemen and was not working with them. He also admitted that he found a man who sold some marijuana to them and that he and the appellant were present when the sale was made, but he denied the appellant made the sale, received any money, or had any involvement other than that of a mere bystander.

On rebuttal the State called an investigator for the prosecuting attorney's office who testified that before the trial started that day the alleged informant came into his office, said he had been threatened, and expressed a fear for

his life. The investigator testified that the alleged informant gave the names of two people who had threatened him but neither was the defendant. The investigator also said that when the alleged informant was told the defendant's attorney was just outside the door in the prosecuting attorney's waiting room he jumped up and "started hollering that he was dead" and the investigator said he seemed "scared to death." The appellant contends that this testimony was hearsay and improper impeachment; that it concerned actions of the alleged informant and did not contradict his testimony; and that it was not admissible because it concerned a collateral issue.

In our opinion the trial court did not err in allowing this evidence to be introduced. In the first place, it was admissible for the purpose of impeachment. In *United States* v. *Briggs*, 457 F. 2d 908 (2nd Cir. 1972), the court said:

> There is equally little merit in Brigg's objection to the court's allowing an agent to testify that, despite his denials on cross-examination, Jeffries had said on two occasions that Briggs had threatened his life if he did not testify in an exculpatory manner. Whether the receipt of such threats be characterized as showing "bias," or "corruption," or "interest," their relevance as impeaching Jeffries' testimony is too apparent to require argument.

In *Goodwin* v. *State*, 263 Ark. 856, 568 S.W. 2d 3 (1978), our supreme court quoted from an earlier case that "The bias of a witness is not a collateral matter" and that "pecuniary interest, personal affection or hostility, sympathy or animosity, a quarrel or prejudice, may always be shown to discredit a witness."

So the investigator's testimony that the alleged informant said he had been threatened and feared for his life was admissible for impeachment purposes and this was not a collateral matter.

Insofar as the testimony of the investigator concerned "actions," it is clear that a witness' conduct as well as his

expressions may be shown to impeach credibility. *Mo. Pac. Transportation Co.* v. *Norwood*, 192 Ark. 170, 90 S.W. 2d 480 (1936); McCormick, *Evidence* § 40 (2d ed. 1972); 3A Wigmore, *Evidence* § 950 (Chadbourn rev. 1970). The investigator's statement that the alleged informant seemed "scared to death" is certainly in harmony with the statements "he looked to me like he was in a kind of semiconscious condition" held admissible in *Jewel Tea Company, Inc.* v. *McCrary*, 197 Ark. 294, 122 S.W. 2d 534 (1938) and "she didn't look too well" held admissible in *Missouri Pac. Railroad Co.* v. *House*, 205 Ark. 211, 168 S.W. 2d 421 (1943). These "opinions" are admissible as shorthand renditions or collective statements of the facts observed. See McCormick, supra, § 11 at 25 n.31. 2 S. Gard, *Jones on Evidence* § 14.2 at 581 n.9 (6th ed. 1972). And it has been held that evidence of fear may be presented "as a means of demonstrating a witness' bias, thereby tending to discredit him." *United States* v. *Cerone*, 452 F. 2d 274 (7th Cir. 1971), cert. denied, 405 U.S. 964, 92 S. Ct. 1168, 31 L. Ed. 2d 240 (1972).

As to the hearsay contention, the traditional view with regard to inconsistent statements is that even if the previous statement is hearsay and inadmissible as evidence of the facts stated it is nevertheless admissible for the limited purpose of impeaching the witness. McCormick, supra, § 34; *United States* v. *Palacios*, 556 F. 2d 1359 (5th Cir. 1977); *Comer* v. *State*, 222 Ark. 156, 257 S.W. 2d 564 (1953). And under that view the court is required, when requested, to limit the statement to the issue of credibility and to so instruct the jury if there is one. *Southwestern Bell Tel. Co.* v. *McAdoo*, 178 Ark. 111, 10 S.W. 2d 503 (1928). See Arkansas Model Criminal Instruction 202. Under the conditions of Rule 801 of the Rules of Evidence a prior statement is not hearsay and may be considered as substantive evidence in a civil case and this is also true in a criminal case if the statement was made under oath and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. But with regard to bias, the hearsay problem is generally disregarded either on the theory that the testimony comes under the state of mind hearsay exception of evidence rule 803(3), 3 J. Weinstein & M. Burger, *Weinstein's Evidence* § 607 [03] n. 14 (1978), or on the theory that it is offered to discredit a witness,

not to prove the facts stated, *Smith* v. *United States*, 283 F. 2d 16, 87 ALR 2d 394 (6th Cir. 1960), cert. denied, 365 U.S. 847, 5 L. Ed. 2d 811, 81 S. Ct. 808 (1961). However, as pointed out by Weinstein, supra, § 607 [03], even though the courts are very liberal in accepting testimony to show bias there are some limitations in this regard. One method available to control the extent of such proof is Rule 105 of the Uniform Rules of Evidence. That rule provides that when evidence admissible for one purpose but not for another is admitted, the court, upon request, shall restrict it to its proper scope and instruct the jury accordingly. In the case at bar, however, no request was made to limit the investigator's testimony and long before the Uniform Rules of Evidence our court held that such request was necessary. *Mo. Pac. Transportation Co.* v. *Norwood*, supra.

Also prior to the Uniform Rules of Evidence we had a statute which provided that evidence could not be introduced to show that a witness had made a statement inconsistent with his testimony in court until he had been asked about the previous statement and allowed to explain it. See *Harris Const. Co., Inc.* v. *Powers*, 262 Ark. 96, 554 S.W. 2d 332 (1977). The legislative act which adopted the Uniform Rules repealed that statute and the matter is now controlled by rule 613 which differs in some respects from the former statute. *Baysinger* v. *State*, 261 Ark. 605, 550 S.W. 2d 445 (1977). Also see Field, *A Code of Evidence for Arkansas*, 29 Ark. L. Rev. 1 (1975). But the rule does not apply (and neither did the statute) to evidence offered to show bias except as bias might appear from an inconsistent statement. Weinstein, supra, § 607 [03], says there is disagreement among the courts about the matter and three different approaches are used: (1) no foundation required; (2) a foundation is required where the alleged evidence of bias consists of a statement made by the witness; and (3) the rule requiring a foundation is extended to cover cases where the evidence of bias takes the form of conduct. The matter is also discussed in McCormick, supra, § 40. In *Goodwin* v. *State*, supra, which was decided before the Uniform Rules of Evidence were adopted, the Arkansas Supreme Court said "it seems that under these circumstances it was necessary that

Roberts first deny the statements which would indicate bias" but the court held that a sufficient foundation had been laid.

In the instant case the alleged informant was called by the defense and testified on direct that he had not been threatened but said he had heard a rumor that he better do what's right. On cross-examination he said the rumor was that he would be in a lot of trouble if he didn't tell the truth. After the investigator had testified on rebuttal the alleged informant was recalled by the defense and testified in surrebuttal that he was not apprehensive about testifying when he was in the prosecutor's office, that he was not afraid to testify, and that he had not jumped up or down. There was no objection as to a lack of foundation for the investigator's testimony and the alleged informant was certainly "afforded an opportunity to explain or deny" any testimony given by the investigator and that meets the requirement of Uniform Rule of Evidence 613.

The only other argument for reversal concerns the closing argument of the prosecuting attorney. The appellant recognizes the discretion of the trial judge with regard to closing arguments but contends that the argument here was such as to cause the verdict to be rendered upon passion and prejudice.

Appellant's abstract contains only one objection to the argument. This occurred when the prosecuting attorney told the jury that the confidential informant "came today to testify not because we subpoenaed him, but because somehow the defense found out who the confidential informant was, and then the man started receiving threats on his life." The objection was "He's arguing matters that are not in evidence." The record discloses that when the investigator for the prosecuting attorney's office was on the stand he was asked by defense counsel if his office had subpoenaed the alleged informant. The investigator said that he was not sure about the matter. The prosecuting attorney then stated in open court that the man had not been subpoenaed by the state. So the statement that the confidential informant came to court without being subpoenaed by the state was not

outside of record. The rest of the statement objected to was argument based upon evidence in the record.

Although no objection was made, we comment on one other portion of the argument. It is contended that the prosecuting attorney characterized the defendant as a dope pusher and criminal who sells dope to little children. We do not think the record will support this interpretation. The prosecuting attorney did say that police officers who do undercover work have a difficult job, they have no choice of people with whom they deal, they have to deal with criminals, people who smoke dope and sell it to children on the street, but that they do their jobs to the best of their ability. Without an objection, we cannot find this argument to be error when we consider that the state's case was based upon testimony of an undercover officer who was directly contradicted by his alleged informant and by the defendant and his witnesses.

In our view the record does not support the appellant's contention that the prosecuting attorney's argument caused the jury's verdict to be based upon passion and prejudice. We find no abuse of the trial court's discretion in controlling and supervising the arguments of counsel.

The judgment is affirmed.

William J. PALADINO *v.* STATE of Arkansas

CA CR 80-91 619 S.W. 2d 693

Court of Appeals of Arkansas
Opinion delivered August 26, 1981

E. Alvin Schay, State Appellate Defender, by: *Ray Hartenstein*, Chief Deputy Appellate Defender, for appellant.

Steve Clark, Atty. Gen., by: *C. R. McNair, III*, Asst. Atty. Gen., for appellee.

George K. Cracraft, Judge. The appellant, William J. Paladino, brings this appeal from a jury verdict finding him guilty of the crimes of burglary and theft of property. He maintains that the trial court erred in submitting the case to the jury on insufficiently corroborated testimony of an accomplice. We do not agree.

At the trial the witness, Larry Mason, testified that he and the appellant went to the house of one Urban Graves on the night of October 9, 1979. Mason entered the dwelling by prying open a window and unlocked a door through which the appellant entered. While in the house they appropriated

three guns, a chain saw, other tools and some "change" in a jar. After leaving the burglarized dwelling they went to a Dairy Queen near Deerwood. The witness remained in the Dairy Queen while the appellant took the guns and the chain saw across the street where he sold them to one Tiny Holloway. The witness then returned to the Dairy Queen and gave the appellant "$50 to $75" of the proceeds of the sale. The change was divided between them and spent. The witness kept those tools which had not been sold.

Unquestionably Mason was an accomplice. *Rhea* v. *State*, 226 Ark. 68, 288 S.W. 2d 34. As such, his testimony was subject to the provisions of Ark. Stat. Ann. § 43-2116 (Repl. 1977) which is as follows:

> *Testimony of accomplice* — A conviction cannot be had in any case of felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. . . .

When construing that statute in both *King* v. *State*, 254 Ark. 509, 494 S.W. 2d 476 (1973), and *Dunn & Whisenhunt* v. *State*, 256 Ark. 508, 508 S.W. 2d 555 (1974), the court declared:

> By its own language, the statute only requires that there be corroboration by evidence *tending* to connect the defendant with the commission of the offense and that this evidence go *beyond* a showing that the crime was committed and the circumstances thereof. We have, therefore, consistently held that the corroborating evidence need not be sufficient in and of itself to sustain a conviction, but it need only, independently of the testimony of the accomplice, tend in some degree to connect the defendant with the commission of the crime.

We find from the record that there was ample other testimony which independently tended to link the appellant

with the theft and burglary for which he was charged.

Urban Graves, the victim, testified that when he returned to his home he found evidence of entry through a window; that one of the back doors was standing open, and his guns, tools and change were missing. The sheriff officer who went to the scene of the crime testified that there was evidence that a window screen had been pried open and the window raised. He saw tracks outside the dwelling which indicated entry through the window. Tiny Holloway testified that he knew the appellant and had purchased three guns and a chain saw from him. While Holloway could not testify as to the exact date of the purchase, the jury could properly infer from his testimony that it took place near the date on which the burglary occurred. These items were subsequently sold by Holloway to others from whom they were recovered. The victim identified the recovered property as those stolen from his home, and Holloway positively identified the articles as the ones purchased by him from the appellant and sold by him to those from whom they were ultimately recovered.

While there was no direct evidence which placed the appellant inside the burglarized building, the evidence is clear that the dwelling was unlawfully entered and the articles unlawfully taken from it. This, coupled with the evidence that the appellant had the stolen articles in his possession, was sufficient to make a jury question independent of his accomplice's testimony. Possession of recently stolen property is sufficient to support a jury verdict of burglary and theft, even though there is no other evidence to show the unlawful entry with felonious intent. *Williams* v. *State*, 258 Ark. 207, 523 S.W. 2d 377 (1975); *Taylor* v. *State*, 254 Ark. 620, 495 S.W. 2d 532 (1973).

We find no error in the action of the trial court, and therefore, affirm its judgment.

Affirmed.

Raymond Edward THOMAS *v.* STATE of Arkansas

CA CR 81-25 620 S.W. 2d 300

Court of Appeals of Arkansas
Opinion delivered August 26, 1981

James E. Davis, for appellant.

Steve Clark, Atty. Gen., by: *Theodore Holder*, Asst. Atty. Gen., for appellee.

GEORGE K. CRACRAFT, Judge. The appellant, Raymond E. Thomas, was charged by information with the crimes of burglary and theft of property of the value in excess of $100. On the date set for trial, but before the jury was empaneled, the prosecuting attorney amended the information to include an additional count charging the appellant with having been convicted of felonies on two prior occasions and seeking enhanced sentences under Ark. Stat. Ann. § 41-1001 (Repl. 1977). The appellant was found guilty of the two initial charges and thereafter additional testimony was

taken on the "habitual offender" count. The jury returned a verdict which imposed enhanced sentences of ten years on the theft charge and fifteen years on the burglary. The appellant does not question the jury's verdict of guilt on the initial charges of burglary and theft. This appeal challenges only the sentences imposed, and advances four points of error in support of his position.

The appellant first contends that the trial court erred in permitting the information to be amended on the date of trial to include the "habitual offender" charge. He urges that this denied him that notice and opportunity to prepare and defend required by due process. We find no merit to this contention.

The record reflects that before the jury was empaneled the court held an in-chambers hearing at the request of the appellant's attorney. The purpose of the hearing was to ascertain in the record that the appellant fully understood the possible consequences of his refusal to accept a plea bargain recommended by his counsel. In the course of that hearing counsel explained to appellant the sentences which a jury might impose on the basic charges and the possible effect of a jury's finding of guilty on the amended charge of prior felony convictions. The appellant acknowledged that he fully understood the consequences and was steadfast in his refusal to enter the plea recommended by counsel. Neither appellant nor his counsel at that time made any objection to the amendment, requested a continuance or bill of particulars, or offered to make a showing of any prejudice resulting from that amendment. The first objection to the amendment was made after the jury had retired to consider its verdict on the basic charge; again no motion for continuance was made. Under the circumstances here present we find no error in permitting the amendment or in submitting the question to the jury.

Proper amendments of information are permitted at any time before a case is submitted to the jury so long as the amendment does not change the nature and degree of the crime charged and the accused is not surprised. *Washington*

v. *State*, 248 Ark. 318, 451 S.W. 2d 449; *Finch* v. *State*, 262 Ark. 313, 556 S.W. 2d 434.

An amendment adding a charge under the Habitual Offender Act creates no new offense or independent crime, but simply allows evidence on which the punishment may be enhanced in the event of conviction of the basic charge, *Finch* v. *State*, supra. Although such amendments are permitted, the appellant would have been entitled to a continuance or a bill of particulars if he had requested it. As no motion for continuance or bill of particulars was made and there was no showing, or offer to show, at any stage of the proceedings that prejudice would or did result from the amendment, we cannot say that the trial court erred in permitting this amendment and submitting the matter to the jury. *Finch* v. *State*, supra; *Washington* v. *State*, supra.

The appellant next maintains that the trial court erred in admitting into evidence certified copies of orders committing the appellant to the Department of Correction upon pleas of guilty to the crime of robbery on two prior occasions. The appellant objected on grounds that there was no proper foundation and the documents did not show that the appellant had been represented by counsel or knowingly waived that right. Over appellant's objection the docket sheets in the two cases were admitted for the limited purpose of showing that representation. We find no error.

In *Burgett* v. *Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), the Supreme Court of the United States declared that where enhanced sentence is sought to be imposed, records of prior convictions which are silent as to representation of counsel give rise to a presumption that the defendant was denied that right. Our courts, recognizing that mandate in *Klimas* v. *State*, 259 Ark. 301, 534 S.W. 2d 202 (1976), declared:

> It seems clear to us that when evidence, in whatever form, of a prior conviction is offered which is silent as to representation of the defendant by counsel or his waiver of the right of assistance of counsel, the state must first lay a foundation for its admission by

> evidence tending to show that defendant was, in fact, represented by counsel or that he had knowingly and intelligently waived his right to the assistance of counsel.

The clear purpose of the rule is to require that when a prior conviction is to be used for the purpose of enhancing punishment, the court must be convinced that the accused was not denied his constitutional right at the time of the earlier conviction.

The docket entries in question are as follows:

(Cause 10,567 — Robbery)
4-28-71 Plea of guilty as to Thomas
X Royce Weisenberger excused X
Plea taken under advisement X
Charles Potter appointed X
Same order as in 10,564 concurrent.

(Cause 10,564 — Robbery)
4-28-71 Plea of guilty as to Thomas
X Same order as in 10,567 X
Sentence of 15 years.

The captions on these sheets showed initial representation by Mr. Weisenberger, whose name was interlined and that of Mr. Potter substituted.

While these docket entries do not purport to recite all of the proceedings had at the time, they do demonstrate that the appellant was represented by Mr. Weisenberger when the plea of guilty was entered and that Mr. Potter was appointed to represent him before the plea was accepted and sentence imposed. Unlike *Klimas* and *Burgett* this record is not silent concerning legal representation. The testimony of the clerk and the docket entries certainly do not constitute that silence from which the presumption arises. *Reeves* v. *Mabry*, 480 Fed. Supp. 529 (W. D. Ark. 1979).

Ark. Stat. Ann. § 41-1103 (Repl. 1977) provides that a prior conviction for these purposes may be proved by "any

evidence that satisfies the trier of fact beyond a reasonable doubt that the defendant was in fact previously convicted." The question on appeal is whether there is substantial evidence from which a jury might have found those previous convictions. *Elmore* v. *State*, 268 Ark. 225, 595 S.W. 2d 218. Here the proof of prior convictions consisted of copies of orders of commitment from a court of competent jurisdiction, duly certified under seal. They were clearly admissible under Rule 902 (1), Uniform Rules of Evidence, and competent to prove prior convictions, provided the proper foundation for their introduction had been made. The foundation for their admission required in *Burgett* and *Klimas* was properly established by the docket entries of the court in those two cases. The docket entries so admitted into evidence were properly identified by the clerk of the court whose duty it was to keep and record such records. Under Rule 803(8), Uniform Rules of Evidence, such records of public officers are not hearsay. The trial court determined that the testimony of his clerk, based on docket entries made at the time, was proper for the jury's consideration. We find no sound basis for holding the court's determination in this regard to be erroneous. *Reeves* v. *State*, 263 Ark. 227, 564 S.W. 2d 503 (1978).

The appellant finally assigns as error the court's exclusion of the prosecuting witness's proffered testimony that he did not desire the appellant to be imprisoned for his crime. In his proffer of proof the witness stated that although he did not know the appellant, his wife had formerly been married to appellant's brother by whom she had the two children now living in the witness's household. He was concerned over the effect that imprisonment of their uncle might have upon these members of his household. The appellant contends that the evidence should have been admitted in mitigation of the sentence.

We agree with the trial court that the desires of the victim in this respect are not relevant to either the issue of guilt or of mitigating circumstances for the criminal act. In this case the guilt of the appellant was overwhelmingly proved by the evidence and freely and voluntarily admitted by him in a pre-trial statement. Criminal acts are punishable

by law, not for the benefit or satisfaction of the victim, but for the protection of society as a whole. The enhanced sentence provided by our law for multiple offenders is afforded for the protection of that society against one whose prior punishment does not appear to have deterred his criminal acts. *Conley* v. *State*, 272 Ark. 33, 612 S.W. 2d 722 (1981).

We affirm.

MAYFIELD, C.J., GLAZE and CORBIN, JJ., dissent.

MELVIN MAYFIELD, Chief Judge, dissenting. I do not believe the evidence was sufficient to show that appellant was represented by counsel at the time of his prior convictions.

I would remand this case to the trial court with directions to eliminate the enhanced sentence given for those prior convictions unless the state should prove within thirty (30) days that appellant was represented by counsel at the time they occurred.

DONALD L. CORBIN, Judge, dissenting. I must respectfully dissent. The United States District Court for the Eastern District of Arkansas in *Ellingburg* v. *Lockhart*, 397 F. Supp. 771 (E.D. Ark. 1975), made clear that a defendant had the right to notice prior to trial of the filing of a habitual offender charge. Failure to give the defendant adequate notice denied him his constitutional right to due process. In this cause the information was amended on the day of trial by the prosecutor's handwriting on the original information that the defendant had previously been convicted of two felonies. The handwritten amendment did not state when or where these felonies occurred or what the nature of these offenses were. The defendant was never arraigned on the amended information.

The *Ellingburg* decision makes clear that due process requires that an accused be informed of the charges against him and have an opportunity to enter a plea to the charges. Prejudice occurs because lack of notice not only affects the

ability to controvert enhancement allegations, but also might materially affect trial strategy. *Finch* v. *State*, 262 Ark. 313, 556 S.W. 2d 434 (1977) held that it would not reverse the action of a trial judge in denying a motion for a continuance following the State's amending its information after a trial had started to permit the imposition of more severe punishment, in the absence of a clear showing of abuse of discretion in the matter and in the absence of a showing of prejudice.

Appellant apparently made an objection to the amended information between the return of a verdict on the initial charges and the court instructing the jury on the enhancement. Fundamental due process requires more notice than one day to prepare for an enhancement charge.

BITUMINOUS INSURANCE COMPANY *v.* GEORGIA-PACIFIC CORPORATION, SOUTHERN CONTRACTORS, INC. and Lane E. COURSON and Diane COURSON, His Wife

CA 81-8 620 S.W. 2d 304

Court of Appeals of Arkansas
Opinion delivered September 2, 1981

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

Griffin, Rainwater & Draper, for appellees.

LAWSON CLONINGER, Judge. On September 15, 1979, appellee Lane E. Courson was an employee of Arkansas-Oregon Pneumatics, Inc., when he was injured while working on a screw conveyor installation at the panel board mill of appellee Georgia-Pacific Corporation at Crossett, Arkansas. Arkansas-Oregon Pneumatics had contracted to perform the installation work for Georgia-Pacific, and appellee Southern Contractors, Inc. had contracted with Georgia-Pacific to perform the electrical work. Courson suffered an amputation of his right foot and of his left leg near the hip when the screw conveyor, for reasons unknown, became operational.

Appellant Bituminous Insurance Company, as workers' compensation carrier for Arkansas-Oregon Pneumatics, has paid Courson's medical and rehabilitation expenses in the sum of $12,356.00, and disability payments at the rate of $112.00 per week.

Georgia-Pacific and Southern Contractors, through their liability carrier, Hartford Insurance Company and its attorney, Richard Griffin, negotiated a conditional settlement of their possible liability with the Coursons, subject to

court approval. Thereafter, Hartford's attorney prepared a complaint for Lane E. Courson and Diane Courson which was filed on May 8, 1980, in Ashley County Circuit Court. The complaint named Georgia-Pacific and Southern Contractors as defendants, alleged that Lane Courson's injuries were caused by the negligence of the defendants, and asked for damages in excess of $1,000,000. On May 13, 1980, Hartford's attorney filed a general denial as attorney for the defendants, and on May 21, 1980, a joint petition for approval of compromise settlement was filed by Lane Courson and Diane Courson, the plaintiffs, and Richard Griffin, as attorney for Georgia-Pacific and Southern Contractors, the defendants.

The proposed settlement provided for the release of all claims and causes of action which the Coursons might have against Georgia-Pacific and Southern Contractors, for the consideration of the sum of $60,000 to be paid to the Coursons upon approval of the settlement, the further sum of $10,000 to be paid ten years from May 26, 1979, and the sum of $850.00 per month commencing May 26, 1980, and continuing during the lifetime of Lane Courson. The settlement proposal provided that if Lane Courson died prior to May 26, 1990, the $10,000 would be paid to his designated beneficiary, and that if Lane Courson died prior to the expiration of twenty years from May 26, 1980, the monthly payments would be paid to a designated beneficiary until the expiration of the twenty-year period.

The proposed settlement further provided that the consideration paid was to be free and clear of any claim or lien by Lane Courson's employer or its compensation carrier, and provided that any and all subrogation rights of the employer, Arkansas-Oregon Pneumatics, or its carrier, Bituminous Insurance Company, should be preserved and recognized.

Bituminous, the appellant herein, was given notice of the filing of the petition and notified of the time set for a hearing on the petition. Bituminous filed an intervention alleging, among other things, that the Court was without jurisdiction for the reason that there was no real controversy,

that the action was commenced solely to use the Circuit Court as a forum to present the joint petition, and that the nature and basis of the proposed settlement was required to be approved by the Workers' Compensation Commission.

On May 23, 1980, the trial court, after a hearing, entered an order approving the compromise settlement, and in its appeal of that order, appellant contends that a fictitious court action commenced under the direction of a third-party tortfeasor does not give the court jurisdiction to hear a petition for settlement "around" the compensation insurance carrier.

We hold that the decision of the trial court was correct and its order is approved.

The Arkansas Workers' Compensation Law provides for third-party liability. Ark. Stat. Ann. § 81-1340(a)(1) (Repl. 1976) provides that the making of a claim for workers' compensation shall not affect the right of the employee to make a claim or maintain an action in court against the third party, but is subject to the carrier's right to notice and intervention, and a lien upon two-thirds of the net recovery for payment of the compensation period paid and to be paid. Subsection (a)(2) provides that the commencement of an action against the third party, or the adjustment of any such claim, shall not affect the right of the employee to recover compensation, but the recovery shall be applied, after cost of collection, one-third in every case to the employee. The remainder, as necessary, is applied to discharge the actual amount of liability of the carrier, and the excess shall belong to the employee. Subsection (c) provides that settlement of such claims under subsections (a) and (b) must have the approval of the court or the commission, except that the distribution of that portion of the settlement which represents the compensation payable under the Act must have the approval of the Commission.

Appellant contends, first, that only the Commission can determine compensation payable in the future, but acknowledges that the Arkansas Supreme Court, in the case of *St. Paul Fire and Marine Insurance Company* v. *Wood*,

242 Ark. 879, 416 S.W. 2d 322 (1967), recognized the right of the employee and the third-party tortfeasor, with court approval, to settle "around" the employer and his carrier, if the settlement preserved the carrier's right to proceed against the tortfeasor. The principle set out in the *Wood* case was confirmed in *The Travelers Insurance Company* v. *McCluskey*, 252 Ark. 1045, 483 S.W. 2d 179 (1972) and in *Liberty Mutual Insurance Company* v. *Billingsley*, 256 Ark. 947, 511 S.W. 2d 476 (1974). In *Billingsley* the Court noted that it could not be said that the statute affords the carrier a veto of any compromise not to its liking, and that the question of whether the proposed settlement was approved was properly addressed to the discretion of the Court.

Appellant also contends that the Circuit Court was without jurisdiction in *this* case; that in this case there was no actual controversy because the claim had been settled before the complaint was filed; and that the action was a fictitious one commenced solely to give the Court jurisdiction to approve the settlement in order to avoid submitting the determination to the Commission. We cannot say that there was no actual controversy in this case. The settlement agreement was a conditional settlement contingent upon approval by the Court. The procedure followed was irregular, in that the Coursons were never represented by counsel, but we are aware of no statute or case law which requires representation. Evidence presented in the trial court reveals that the negotiations were underway for six weeks, and that the Coursons knew Richard Griffin was the attorney for Hartford. Lane Courson testified that he and his wife were told they could retain independent counsel, that it was their choice not to do so, and that he requested Richard Griffin to prepare the complaint which he and his wife filed. The trial court was aware that Richard Griffin represented Georgia-Pacific and Southern Contractors in the settlement proceeding and of the assistance given the Coursons by Richard Griffin in the preparation of the complaint. The trial court specifically found that the Coursons fully understood the terms of the proposed settlement, and that they believed the proposed settlement was to their best interest.

It is obvious upon examination of the trial court's

findings that the trial judge carefully scrutinized the proposed settlement and satisfied himself that it was a fair and equitable settlement for the Coursons. We, also, are convinced that the Coursons have not been taken advantage of, in view of the uncertainties of personal injury trials; the Coursons might have obtained a more favorable award from a jury, or they may have recovered nothing. The trial court found, and we agree, that under the terms of the proposed settlement the Coursons or their estate are guaranteed a minimum of $274,000; if Lane Courson lives his normal life expectancy of 42 years, the total payments to him would be $498,400. In addition, the Coursons will continue to receive workers' compensation benefits and they have no obligation for an attorney's fee.

We find no abuse of discretion by the trial court and the judgment is affirmed.

MAYFIELD, C.J., concurs.

MELVIN MAYFIELD, Chief Judge, concurring. I concur in the decision of the majority because it is based upon prior decisions of the Arkansas Supreme Court.

However, settlements "around" the workers' compensation carrier's lien involve practical, social, and legal problems which, I believe, need to be given new and careful consideration.

A motion was made in this court to certify this matter to the Arkansas Supreme Court and was overruled. In retrospect it appears to me that that motion should have been granted since this case involves a question of significant public interest.

ARKANSAS EMPLOYMENT SECURITY
DIVISION *v.* John BEELER et al

CA 81-37 620 S.W. 2d 307

Court of Appeals of Arkansas
Opinion delivered September 2, 1981

Arkansas Employment Security Division, by: *Thelma Lorenzo*, for appellant.

No brief for appellees.

Brief for amicus curiae Workers' Compensation Commission by: *Robert R. Ross*, Deputy Atty. Gen.

DONALD L. CORBIN, Judge. John Beeler brought a claim pursuant to the Arkansas Workers' Compensation Act, Ark. Stat. Ann. § 81-1301, et seq. Mr. Beeler sought corroboration of certain parts of his testimony through testimony of an employee of the Employment Security Division. The information Mr. Beeler sought was contained on an Employment Security Division form and supplied to the Employment Security Division by him.

Upon the refusal of the Employment Security Division to voluntarily appear, Mr. Beeler obtained a subpoena duces tecum directing an Employment Security Division employee to appear and bring Mr. Beeler's record. The Employment Security Division moved to quash the subpoena and the motion was denied by the Administrative Law Judge. From that decision the Employment Security Division has taken this appeal. We modify the decision of the Workers' Compensation Commission.

The issue before us is whether all information obtained by the Employment Security Division from an individual or employing unit is confidential and cloaked with governmental privilege pursuant to Ark. Stat. Ann. § 81-1114(*l*) (Repl. 1976). We note that the General Assembly of Arkansas amended Ark. Stat. Ann. § 81-1114(*l*) by enacting Act 43 of 1981. However, this case involves the application of Ark. Stat. Ann. § 81-1114(*l*) before the enactment of Act 43 of 1981.

The Employment Security Division contends that the confidentiality of its records is based not on the right to privacy of the individual but on some form of executive privilege. We disagree with that contention.

Ark. Stat. Ann. § 81-1114(*l*) (Repl. 1976) reads in part:

> Except as hereinafter otherwise provided, information obtained from any employing unit or individual pursuant to the administration of this act, and determina-

> tion as to the benefit rights of any individual shall be held confidential and shall not be disclosed or be open to public inspection in any manner revealing the individual's or employing unit's identity.

We recognize that the privilege of public officers and employees against being compelled to disclose communications made to them in matters affecting individuals depends largely upon statutory enactment. A statutory provision forbidding disclosure of public information, reports, records, documents or other matters by public officials and public employees is generally upheld. 81 Am. Jur. 2d, *Witnesses*, § 287, pp. 303, 304.

Ark. Stat. Ann. § 81-1114(*l*) (Repl. 1976) also provides as follows:

> Any claimant (or his legal representative) shall be supplied with information from the records of the division, to the extent necessary for the proper presentation of his claim in any proceeding under this act with respect thereto; . . .

This provision seems to recognize that a claimant seeking benefits under the Employment Security Division program has some right to information from this file but that his access to or use of the information is limited to proceedings under the Employment Security Act.

Appellant has cited no reasoning for such a limitation except "to protect the great bulk of information which is accumulated by the Employment Security Division and, in so doing, to insure the Employment Security Division's ability to secure the information necessary for the proper administration of the Employment Security Law would not be impaired."

The Arkansas Workers' Compensation Act and the Employment Security Act are both social legislation to protect the interests of injured and unemployed workers. As such, the two acts should be construed as compatible and in aid of each other.

In the instant case, we construe the provisions of the Employment Security Law as codified at § 81-1114(*l*) (Repl. 1976) to be based on the right to privacy of the individual. We see no justification for the Employment Security Division to refuse to provide, pursuant to a subpoena duces tecum by the Workers' Compensation Commission, information that was furnished by the claimant to the Employment Security Division. The protection of the statute was waived by the individual upon his requesting the information which he provided. The identity of the employing unit and other collateral information obtained by the Employment Security Division in the ordinary course of its business would be privileged information.

We modify the decision of the Workers' Compensation Commission to allow the production of those written documents and information provided by the employee to the Employment Security Division; provided, however, the Employment Security Division shall delete all references to the identity of the employing unit.

Affirmed as modified.

Graham DOBBINS *v.* William F. EVERETT,
Director of Labor, and FIRST NATIONAL BANK

E 81-149 620 S.W. 2d 309

Court of Appeals of Arkansas
Opinion delivered September 2, 1981

DONALD L. CORBIN, Judge. Claimant, Graham Dobbins, appeals the decision of the Board of Review of the Employment Security Division denying him unemployment benefits. The Board of Review found that Mr. Dobbins was given the option of voluntarily resigning or being discharged. The Board of Review affirmed the agency determination which denied the claimant benefits under provisions of Section 5(a) of the Arkansas Employment Security Law, finding claimant voluntarily quit his last work for personal reasons.

The issue before this Court is whether there is substantial evidence to support the Board's finding that claimant voluntarily, and without good cause connected with the work, left his last work. We find no substantial evidence to support the determination of the Board of Review and reverse.

Claimant was employed as an Assistant Vice President and Loan Officer for First National Bank of Little Rock for a period of ten years ending August 27, 1980.

On May 12, 1980, claimant was transferred from the loan department to First National Mortgage Company, a subsidiary of First National Bank. He was assigned to a project that was to last approximately 90 days. It was the claimant's understanding that he would be transferred back to the loan department after the 90 days.

On August 26, claimant was informed by a Senior Vice President for First National Bank that he was being terminated because of a work slow-down in the loan department. At that time, claimant inquired about other positions and he was told there were none. At this meeting on August 26, claimant was also shown two memos written by the President of First National Mortgage Company which indicated that he had had some problems with

claimant's work during the 90-day project. Claimant described this as a misunderstanding and a "personality clash."

The Personnel Manager of First National Bank testified at the hearing that managers at First National Bank are usually given the opportunity to resign rather than be terminated. At the August 26 meeting, claimant chose to resign. He submitted his resignation letter which became effective on August 27th. At the hearing, the Personnel Manager testified that she could not say whether or not the claimant would have been terminated because of a work slow-down or because of his "personality clash" but she did testify that he would have been terminated.

As is the usual practice with First National Bank, claimant was given severance pay for one month which totaled $1,550. He was also paid for two weeks vacation time which he had accumulated. The claimant's total compensation was $2,417.33.

We quote with approval from the case of *In the Matter of Werner*, 44 N.C. App. 723, 263 S.E. 2d 4 (1980):

> Perceiving that well-intentioned employers may prefer to allow the unsuitable employee the dignity of resignation, we believe that there are strong public policy reasons for not discouraging employers from exercising this option. Employees who resign under such circumstances become unemployed "through no fault of their own." We therefore hold that such employees who quit or resign employment because they are asked by their employer to leave do not leave "voluntarily" within the meaning of G.S. 96-14(1). In this case, the employer's recommendation to resign, coupled with the clear implication that the employee would be discharged if she failed to offer her resignation, constituted an involuntary separation.

See also, *Anchor Motor Freight, Inc.* v. *Appeal Board*, 325 A. 2d 374 (Super. Ct. Del. 1974).

In the instant case, the claimant took the less severe, embarrassing and traumatic option of resignation rather than discharge. The resignation was induced under the pressure of the employer and was tantamount to a discharge and was not one that was voluntarily made within the disqualifying language of Section 5(a) of the Employment Security Act.

We reverse and remand to the Employment Security Division for the awarding of benefits less any offset pursuant to Section 5(f)(1).

Reversed and remanded.

COOPER, J., not participating.

John Joseph PAWLIK *v.* Geneva Josephine PAWLIK

CA 80-538 620 S.W. 2d 310

Court of Appeals of Arkansas
Opinion delivered September 2, 1981

Mark Cambiano, for appellant.

Howard C. Yates, for appellee.

TOM GLAZE, Judge. This appeal involves the Uniform Child Custody Jurisdiction Act and is the result of divorce and child custody actions filed in Illinois and Arkansas. The appellant, John Pawlik, first filed his action in McHenry County Circuit Court in Illinois, and appellee, Geneva Pawlik, subsequently filed a similar action in Conway County Chancery Court in Arkansas. The Conway County Chancery Court held that the Illinois court failed to obtain personal jurisdiction of the appellee and entered an order awarding permanent custody to appellee. The appellant contends on appeal that (1) the Arkansas court erred in its decision that the Illinois court had no jurisdiction over appellee and (2) since the Illinois action was pending before appellee filed her action, the Arkansas court erred in exercising jurisdiction.

The relevant facts are not in dispute. The parties and their two minor children lived in Illinois until 1979. The parties separated in October, 1979, and the appellee and the children moved to Conway County, Arkansas, in March, 1980. In May, 1980, appellant filed the Illinois action, and since he did not know the whereabouts of appellee, appellant obtained service by publication. In June, 1980, appellee filed her action in Conway County, Arkansas. Appellant entered his special appearance in the Arkansas action, contending that the Illinois court had jurisdiction of the parties and subject matter and requested the Arkansas court to dismiss appellee's action for want of jurisdiction. On August 1, 1980, the Arkansas court rejected appellant's contention and entered a temporary custody order awarding appellee the parties' children.

On August 28, 1980, the Illinois court entered a final judgment, granting appellant a divorce, denying alimony and awarding personal property to the respective parties,

and awarding custody of the children to appellant. On September 5, 1980, appellant petitioned to register the Illinois decree in the Arkansas action and requested the Arkansas court to recognize the Illinois judgment and to dismiss the Arkansas action. The Arkansas court held the Illinois judgment was not entitled to full faith and credit as it related to custody of the parties' children, and entered an order granting permanent custody to the appellee.

Contrary to appellant's contention, we believe the Arkansas court was correct in holding that service by publication was not sufficient to vest the Illinois trial court with jurisdiction to decide the child custody issue. Both Arkansas and Illinois have enacted the Uniform Child Custody Jurisdiction Act, and, under the Act and the facts of this case, either state may have acquired jurisdiction of this custody action between the parties. Each party (parent) has a legally protected personal interest in their children's custody and the due process clause will not permit them to be cut off by a court which has no jurisdiction over the objecting parent. See, R. Leflar, *American Conflicts Law*, § 243 (3d ed. 1977); *May* v. *Anderson*, 345 U.S. 528 (1953), and *Cooper* v. *Cooper*, 229 Ark. 770, 318 S.W. 2d 587 (1958). The primary issue before us is whether the Illinois court acquired personal jurisdiction of the appellee.

In the instant case, appellant obtained constructive service on appellee through publication in Illinois in accordance with Section 14 of the Civil Practice Act (Ill. Rev. Stat. 1975, Ch. 110 Par. 14). However, in the case of *Lain* v. *John Hancock Mutual Life Insurance Company*, 79 Ill. App. 3d 264, 398 N.E. 2d 278, 34 Ill. Dec. 603 (1979), the Illinois Appellate Court held that Section 14, by its own terms, is limited to *in rem* actions. The Illinois court stated further:

> ... The law is well settled that *a purely personal decree* is *not* binding against a nonresident who is notified of the proceeding by publication and who does not appear. *Wilson* v. *Smart* (1927), 324 Ill. 276, 155 N.E. 288; *Killebrew* v. *Killebrew* (1947), 398 Ill. 432, 75 N.E. 2d 855. [Emphasis supplied.]

Here, appellee was residing with the children in Arkansas, and appellant sought to deprive appellee of her personal right to possessory custody of the parties' children. Since appellant notified appellee of the Illinois proceeding by publication under Section 14 of the Illinois Civil Practice Act, we conclude this was not sufficient notice to vest the Illinois court with the personal jurisdiction necessary to award appellant the parties' children.

Next, we must decide whether the service and notice obtained by appellant in the Illinois action might be authorized under the Uniform Child Custody Jurisdiction Act.[1] As noted earlier, Arkansas and Illinois have adopted the Uniform Child Custody Jurisdiction Act, and each has, with one deviation, enacted the provision concerning the manner in which notice must be served on persons outside the state before the state can exercise jurisdiction over the non-resident persons. Interestingly enough, the Arkansas law permits notification by publication if directed by the court and in cases where other means of notification are ineffective. The Illinois law does not provide for publication. See Ark. Stat. Ann. § 34-2705 (Supp. 1981), and Ill. Rev. Stat. 1979, Ch. 40, Par. 2106. Both Arkansas and Illinois, however, adopted the Uniform Child Custody Jurisdiction Act's provision that authorized the notice to be served in the manner prescribed by the law of the place in which the service is made. Ark. Stat. Ann. § 34-2705(a)(2), and Ill. Rev. Stat. 1979, Ch. 40, Par. 2106(b)(2).

Since the Uniform Child Custody Jurisdiction Act as adopted in Arkansas appears to permit notification by publication, we must look to the Arkansas law to determine if the service by publication obtained by appellant in Illinois complies with Arkansas constructive service.[2] We find that it does not.

[1]Like Arkansas; Illinois has adopted a long-arm statute which requires personal service on persons outside the state. Since the appellant attempted to effect service only under Section 14 of the Illinois Civil Practice Act, it is not necessary for us to consider whether appellant could have acquired jurisdiction under the Illinois long-arm law.

[2]The constitutionality of notice by publication is not raised by the parties and it is unnecessary for us to consider this constitutional question

Rule 4(f) and 4(i) of the Arkansas Rules of Civil Procedure provide for service upon defendants whose whereabouts are unknown and for defendants who are served by mail or warning order and who have not appeared. Basically, Arkansas law requires a warning order to be published in a newspaper for four (4) consecutive weeks, and Illinois law requires only three (3) such publications. More importantly, Arkansas law requires a copy of the complaint and warning order be mailed, by return receipt requested, to the defendant, and an attorney *ad litem* must be appointed to defend the defendant and to inform him of the action. These procedures are not required under Illinois law, nor did the publication procedures followed by the appellant remotely comply with the Arkansas law.

We conclude that the Illinois court never acquired jurisdiction over the appellee under Illinois or Arkansas law to empower it to decide the issue of custody. Therefore, we hold the Arkansas trial court was not required to give full faith and credit to the Illinois custody order nor defer jurisdiction to the Illinois court action under the Uniform Child Custody Jurisdiction Act.

We affirm.

Affirmed.

COOPER, J., concurs.

MAYFIELD, C.J., dissents.

MELVIN MAYFIELD, Chief Judge, dissenting. I am troubled by both the approach and result of the majority opinion.

Both Arkansas and Illinois have adopted the Uniform Child Custody Jurisdiction Act. The general purposes of the act, set out in its very first section, include:

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in reaching a decision in this case. See, *Commissioner's Note*, Uniform Child Custody Jurisdiction Act (U.L.A.) § 5, and *In re Marriage of Blair*, 42 Colo. App. 270, 592 P. 2d 1354 (1979).

(1) avoiding jurisdictional competition and conflict with courts of other states;

(2) promoting cooperation with courts of other states so that a custody decree will be rendered in the state which can best decide in the interest of the child; and

(3) assuring that custody litigation will take place in the state where evidence concerning the child's care, training, and protection is most available and that a court *will decline to exercise jurisdiction* when the child and his family have a closer connection with another state.

To help accomplish those purposes, section 3 of the act provides for certain jurisdictional requirements to be met before a court makes a child custody determination. *As far as this case is concerned* that section of our act, Ark. Stat. Ann. § 34-2703 (Supp. 1981), provides that jurisdiction (1) is in the home state of the child or (2) in some other state *if* it is in the home state of the child for that state to assume jurisdiction because the child and one of his parents have a significant connection with the state and there is available substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

The home state is defined in the act as the state in which the child, immediately preceding the time involved, lived with his parents or parent for at least six consecutive months. It is not in dispute that Illinois is the home state. The parties were married there in 1975 and separated in 1979 and the appellee and her children had lived in Arkansas only three months when she filed suit.

Section 6 of the act, Ark. Stat. Ann. § 34-2706 (Supp. 1981), provides that a court of a state shall not exercise its jurisdiction *if* at the time of filing the petition a proceeding concerning the custody of the child is pending in another state exercising jurisdiction substantially in conformity with the act, *unless* the other state stays its proceedings because the second state is a more appropriate forum or for other reasons.

Everyone agrees that the Illinois suit was filed before the Arkansas suit. Moreover, the father filed a pleading in the Arkansas suit saying that the suit was pending in Illinois and asking that the Arkansas court follow its own act and defer to Illinois. This was filed and heard *before* the Arkansas court had made even a temporary custody order. But the Arkansas court refused to defer to Illinois and failed to follow section 34-2706(c), which provides that if a court is informed during the course of the proceeding that a proceeding concerning the custody of the child is pending in another state before the court assumed jurisdiction, it shall stay the proceeding and communicate with the other court to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with sections 19 through 20 of the act.

It seems clear to me that the failure of the Arkansas court to stay its proceedings and allow Illinois to decide which state was the more appropriate forum was contrary to both the letter and the spirit of the act and will surely be called to the attention of a court in some other state if ever a citizen of this state finds himself there with the situation reversed.

The Uniform Act was promulgated in 1968 by the National Conference of Commissioners on Uniform State Laws. With the enactment of Act 91 of 1979, Arkansas became the twenty-ninth state to adopt the act. See 3 UALR Law Journal, *Third Annual Survey of Arkansas Law*, 145, 239 (1980). The need and purpose of the Act is described in the Commissioners' Prefatory Note, 9 Uniform Laws Annotated 111-114.

> The judicial trend has been toward permitting custody claimants to sue in the courts of almost any state, no matter how fleeting the contact of the child and his family was with the particular state. . . . Also, since the United States Supreme Court has never settled the question of whether the full faith and credit clause of the Constitution applies to custody decrees, many states have felt free to modify custody decrees of sister states almost at random. . . .

> Under this state of the law the courts of the various states have acted in isolation and at times in competition with each other. . . .
>
> In this confused legal situation the person who has possession of the child has an enormous tactical advantage. . . . It is not surprising then that custody claimants tend to take the law into their own hands, that they resort to self-help in the form of child stealing, kidnapping or various other schemes to gain possession of the child. . . .
>
> To remedy this intolerable state of affairs . . . uniform legislation has been urged in recent years to bring about a fair measure of interstate stability in custody awards.

By its action today, this court is contributing to the situation just described by thwarting the solution offered in the legislative act. And why are we doing this? Apparently we say Illinois did not get proper service on the appellee. Of course, she knew and the Arkansas court knew that the suit had been filed in Illinois because the appellant filed a motion in the suit here and told them about it. I find it rather incongruous that this was not sufficient notice of the suit in Illinois but sufficient to constitute the entry of an appearance in Arkansas and to subject appellant to the jurisdiction of our court.

Or it may be that the majority opinion's reference to *in personam* jurisdiction means something was needed in addition to actual notice of the suit in Illinois. If the citation to *May* v. *Anderson*, 345 U.S. 528 (1953), suggests there must be personal jurisdiction of a parent in order to affect the custody status of the child, I would reply first that the question in that case concerned habeas corpus, not child custody, as Justice Frankfurter pointed out in his concurring opinion. Also, I find it hard to disagree with this statement in the dissent of Justice Jackson:

> Custody is viewed not with the idea of adjudicating rights *in* the children, as if they were chattels, but rather

> with the idea of making the best disposition possible for the welfare of the children. To speak of a court's "cutting off" a mother's right to custody of her children, as if it raised problems similar to those involved in "cutting off" her rights in a plot of ground, is to obliterate these obvious distinctions.

In oral argument, I understood appellant's attorney to say that footnote 30 in the opinion of *Shaffer* v. *Heitner*, 433 U.S. 186, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977) means that personal jurisdiction is not necessary to affect adjudications of status. Whatever footenote 30 means, the case traces the history of *in personam* jurisdiction from the 1878 case of *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L. Ed 565, and its requirement that a defendant be personally served in the state before a court of that state can exercise jurisdiction over his person or his personal duties or obligations. The history discussed shows the case development from the power concept of *Pennoyer* to the minimum contacts theory of *International Shoe Co.* v. *Washington*, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945), to the holding in *Shaffer* that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." So, even if personal jurisdiction of a parent is necessary, that can now be accomplished by meeting the jurisdictional requirements of the Uniform Act (this will satisfy the minimum contacts theory discussed in *Shaffer*) and by following the applicable statutory provisions with regard to service by publication. While actual notice could be required, service in the state *where the court acts* is not necessary in order to have *in personam* jurisdiction that will satisfy due process and entitle a judgment to full faith and credit.

In this case, jurisdictional requirements were met and actual notice was given. The Arkansas court should have deferred to the "home state" of Illinois where the first suit was filed. I would reverse and remand with directions to register and enforce the Illinois decree as to custody.

Bob H. GRAHAM *v.* STATE of Arkansas

CA CR 81-29 621 S.W. 2d 4

Court of Appeals of Arkansas
Opinion delivered September 2, 1981
[Rehearing denied October 7, 1981.]

Dodds, Kidd, Ryan & Moore, by: *Richard N. Moore* and *Judson C. Kidd*, for appellant.

Steve Clark, Atty. Gen., by: *Leslie M. Powell*, Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. The appellant was convicted of first degree murder in the shooting death of Charles R. Jacks. Appellant raises five evidentiary issues on appeal.

Appellant first argues that the trial court erroneously denied him the opportunity to prove certain inconsistent statements made by one of the State's witnesses, Gail Hewgley. We disagree. After Jacks' death, Hewgley had been interviewed by Little Rock Detective Larry Dunnington. Dunnington had prepared a typed summary of Hewgley's interview, but it was not signed by Hewgley or Dunnington. It was this summary statement which appellant attempted to

introduce at trial to show prior inconsistent statements attributed to Hewgley.

The rule is established that a witness may not be charged with a third party's characterization of his statements unless the witness has subscribed to them. *United States* v. *Leonardi*, 623 F. 2d 746 (2d Cir. 1980). Here, Hewgley, on one occasion, complained that her copy of her statement did not contain one of the comments read to her by appellant's counsel from Dunnington's summary. She testified that the summary statement was similar and could be the one she gave the police, but she did not remember exactly what she wrote down. In brief, the summary was not in her handwriting or signed by her. Nor was it acknowledged by Hewgley to be her statement. To be admissible, appellant was required to establish the authenticity of the summary statement by the officer who took Hewgley's statement and to show that Hewgley actually made the remarks attributed to her. See McCormick, *Evidence*, § 37 (2d ed. 1972), and *Dickinson Supply, Inc.* v. *Montana-Dakota Utilities Company*, 423 F. 2d 106 (8th Cir. 1970).

Appellant next contends the trial court erred in admitting extrinsic proof of prior inconsistent statements made by another State witness, Charles Sheridan. Officer Dunnington wrote a statement verbatim of Sheridan's oral statement, and Sheridan read, corrected and signed it. Moreover, unlike the Hewgley summary, Dunnington authenticated and established at trial that the statements contained in the summary he prepared were made by Sheridan. This was done before the court correctly admitted the Sheridan statement into evidence.

Thirdly, appellant urges that the trial court incorrectly sustained the State's objection to exclude the opinion of the arresting officer that appellant was "scared to death" at the time of arrest. Appellant contends that Rule 701 of the Uniform Rules of Evidence permits even lay witnesses to describe whether the defendant was angry, nervous or scared. While this may be true, we fail to see how it aids appellant in the relief he seeks. Appellant was convicted of first degree murder. A person commits first degree murder if, with the

premeditated and deliberated purpose of causing the death of another person, he causes the death of any person. See Ark. Stat. Ann. § 41-1502(1)(b) (Repl. 1977). To be admissible evidence must be relevant, *i.e.*, evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. See Rules 401 and 402, Arkansas Uniform Rules of Evidence. While appellant's state of mind was relevant at the time of the shooting, we fail to see the relevancy of testimony which depicts his state of mind *after* the shooting occurred. Although decided before adoption of our Uniform Rules of Evidence, the Supreme Court in *Prewitt* v. *State*, 150 Ark. 279, 234 S.W. 35 (1923) upheld the exclusion of testimony concerning defendant's appearance when he arrived at his doctor's office directly after shooting the deceased. The court held that too much time had intervened between the time of killing and when he saw the doctor and opportunity had then been afforded for reflection and dissimulation. Here, appellant testified that after the shooting he got in his van, took off down the alley, went over the Main Street bridge, got off at Washington Street, pulled over and stopped to get himself together and reloaded his gun while he sat there. All of these events occurred after the killing and before the arresting officer found him. Aside from the relevancy of this opinion evidence, the arresting officer testified later, without objection, that "he [appellant] was really scared." Thus, even if the arresting officer's shorthand description of how appellant was acting after Jacks' death was relevant, the record clearly reflects evidence appellant appeared scared. We conclude that the trial court correctly excluded this testimony since it was not relevant, and, indeed, even if it were, the excluded testimony was merely repetitious to that which was later presented by the same witness. See, *Nelson* v. *State*, 257 Ark. 1, 513 S.W. 2d 496 (1974), and *McMillan* v. *State*, 229 Ark. 249, 314 S.W. 2d 483 (1958).

The fourth issue raised by appellant concerns an objection by the State to a question posed by defense counsel to appellant. On appeal, appellant argues that the State at trial sought to show that prior to the shooting, appellant left Jacks and his companion, Bobby Smith, where their car was

parked and went to his van for the purpose of obtaining a gun to later use on Jacks or Smith. Appellant contends that his counsel's question was designed to show that his friend, Charles Sheridan, had remained with Jacks and Smith when appellant went to his van, and he merely returned to where the parties were parked to get Sheridan and to leave. The direct examination of appellant follows:

> Q. If Charlie Sheridan had followed you back to your van, what were you going to do at that point?
>
> A. I was going to take —
>
> Prosecutor: Your Honor, I object. I think that is just totally supposition.
>
> The Court: All right. The objection will be sustained.

The appellant made no proffer of evidence pursuant to Rule 103(a)(2) of the Arkansas Uniform Rules of Evidence, which is required unless the question clearly admits of an answer relevant to the issues. Whether a proffer was necessary in this instance is of no moment since we again conclude that appellant's answer would have been repetitive and cumulative, and he was not prejudiced by its exclusion. Although the State's objection was rather general, the trial court may properly exclude evidence if its exclusion is justified on any ground. *Howell* v. *Dowell*, 419 S.W. 2d 257 (Mo. App. 1967). See also McCormick, *Evidence*, § 52, and 88 C.J.S., *Trial*, § 124(b) (1955). Prior to the foregoing colloquy, appellant had testified he thought about Mr. Sheridan being over there (with Jacks and Smith) and appellant was going back to get him. He testified further that because the guys (Jacks and Smith) were giving him a strange reaction, he went over to his van, armed himself and "was going to get Mr. Sheridan and take him and get breakfast." Appellant had clearly expressed his intention, without objection, that he returned to get Sheridan and intended to take him to breakfast. We fail to see how appellant was prejudiced by the exclusion of what appears only to be cumulative or repetitive testimony. *Nelson* v. *State, supra*.

Finally, appellant contends that the State's evidence is insufficient to support the guilty verdict. Specifically, he argues the proof shows the shooting was justified under Arkansas law. Appellant relies in part on Ark. Stat. Ann. § 41-507(1) (Repl. 1977), which provides:

> A person is justified in using deadly physical force upon another person if he reasonably believes that the other person is ... (b) using or about to use unlawful deadly physical force.

Other relevant provisions of Ark. Stat. Ann. § 41-507 (Repl. 1977) as well as § 41-506 appear as follows:

> § 41-507(2). A person *may not* use deadly physical force in self defense *if he knows* that *he can avoid* the necessity of using that force with complete safety:
>
> (a) *by retreating* ...
>
> § 41-506(2). A person *is not* justified in using physical force upon another person *if*:
>
> (a) with purpose to cause physical injury or death to the other person, *he provokes* the use of unlawful physical force by the other person; [Emphasis supplied.]

In reviewing the evidence, we must affirm the lower court's verdict if there is any substantial evidence to support it. *Lunon* v. *State*, 264 Ark. 188, 569 S.W. 2d 663 (1978). In determining if evidence is substantial, we must also view the evidence in a light most favorable to appellee. When doing so, we conclude there is sufficient evidence to support the appellant's conviction of first degree murder and that he was not justified in shooting Jacks. The record reflects evidence to support the following sequence of events:

> Jacks, Smith and two women, Gail Hewgley and Janet Jeffords, met appellant at the Trinity Club. When the foursome decided to leave, appellant claimed Smith owed him some money so appellant followed the group

to their car. Smith did not pay appellant, and Smith said that appellant expressed "he'd fix us." Appellant then went to his van and the four men and women got in Jacks' car. Jacks started his car and began to leave when appellant approached the passenger side of the car and threatened the group with a gun. Jacks then tried to get out of his car but never made it before the gun was fired. Although there was evidence Jacks had a gun, Hewgley, Jeffords and Smith all testified that the appellant threatened them with a gun as they were preparing to leave, and the first shots all came from the passenger side of the car, where appellant was positioned.

The foregoing evidence substantially shows that appellant not only could have avoided returning to the Jacks car, but also he could have allowed the foursome to leave as they were prepared to do. Additionally, the proof is overwhelming that appellant was the first person to wield a gun and to threaten Smith and the others. We, therefore, hold the jury had sufficient evidence upon which to base its verdict of first degree murder and to reject appellant's claim of self-defense and justification.

Affirmed.

OUACHITA HOSPITAL and ST. PAUL FIRE AND MARINE INSURANCE COMPANY *v.* James MARSHALL

CA 81-107 621 S.W. 2d 7

Court of Appeals of Arkansas
Opinion delivered September 9, 1981

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

Samuel W. Harrell, Jr. of *Roberts, Harrell & Lindsey*, for appellee.

George K. Cracraft, Judge. This is a sequel to *Marshall* v. *Ouachita Hospital*, 269 Ark. 958, 601 S.W. 2d 901, decided by the Court of Appeals on July 9, 1980. The present appeal poses the question of whether the Court of Appeals should apply the same rule of law of the case as that consistently adhered to by the Supreme Court. In the original opinion the Court of Appeals reversed an award of the Workers' Compensation Commission apportioning disability between the employer and second injury fund under Ark. Stat. Ann. § 81-1313(f)(2)(ii), holding that section of the act to be inapplicable to the facts. The Supreme Court thereafter denied a petition to rehear and same was remanded to the Commission with directions to enter an award against the employer without apportionment.

On October 13, 1980, before action was taken by the Commission on the mandate from this court, the Supreme Court decided the case of *Chicago Mill & Lumber Co.* v. *Greer*, 269 Ark. 895, 606 S.W. 2d 72, in which it found § 81-1313(f)(2)(ii) applicable in a factual situation which appellant contends was similar to that in *Marshall*. The appellant argued before the Commission that as the *Greer* decision apparently overruled *Marshall*, the Supreme Court decision rather than our mandate should control. The Commission in its order recited that it had given due consideration to *Greer* and entered its order in accordance with the mandate. No additional proceedings were had before the Commission, and this appeal is presented on the

same facts as were before the court initially. By this appeal appellant contends the Court of Appeals should rule that it is not required to apply the same rule of the case as that of the Supreme Court and as the two cases are inconsistent, should again remand the case for entry of an order apportioning the disability. Appellee contends that the two cases are distinguishable but, in any event, the prior opinion of this court in this case is the law of the case and binding on this court pursuant to the same rules as the Supreme Court has adopted as to its own opinion.

The Supreme 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 it for adjudiciation except those proceedings had subsequent to its mandate. The Supreme Court has so held in a line of cases extending from *Fortenberry* v. *Frazier*, 5 Ark. 200 (1842), through *International Harvester Company* v. *Burks Motors, Inc.*, 252 Ark. 816, 481 S.W. 2d 351 (1972). In *Burks* it was again stated:

> Matters decided by us on the *Burks* appeal and on the petitions for rehearing are the law of the case and govern our action on this appeal to that extent, even if we were now inclined to say we were wrong in those decisions.

This rule is based on the fundamental concept that judgments must at some point become final and departure from that rule would only result in uncertainty, confusion and "incalcuable mischief." *Fortenberry* v. *Frazier*, supra; *St. Louis S.W. Railway Co.* v. *Jackson*, 246 Ark. 268, 438 S.W. 2d 41 (1969).

In support of his position that this court should not be bound by that law of the case rule, appellant cites cases from federal and sister state intermediate courts whose decisions are all subject to review by higher courts. These courts have reasoned that as their decisions are not final and the law of the case of the higher court is not the same as that of the intermediate court, they should reverse themselves on a second appeal where it appears that they may have erred on

the first. That reasoning cannot apply to the Arkansas Court of Appeals and to hold otherwise would make of this court what the Supreme Court has steadfastly declared was not intended. In *Daniels, Director* v. *Bennett*, 272 Ark. 275, 613 S.W. 2d 591 (1981), the Supreme Court stated:

> In considering whether to review decisions of Court of Appeals, we shall steadfastly adhere to the position we unanimously adopted in *Moose* v. *Gregory*, 267 Ark. 86, 590 S.W. 2d 662 (1979). That is, we do not regard the Court of Appeals as a purely intermediate court, "becoming merely an expensive and time-consuming level in the appellate structure." To the contrary, our goal is to assign separate areas of jurisdiction to each court. "Ideally," as we said in *Moose*, "*each court will be in effect a court of last resort, with its decisions having a desirable finality*. Ideally, it will be immaterial to the litigant whether his particular case goes to one court or the other. In either event both parties will have the benefit of an appellate review by a multi-judge court composed of judges having exactly the same qualifications. ... Our goal is to provide each litigant with the opportunity for one appeal, not two." (Emphasis added)

In *Moose* the court stated:

> Last May, after the General Assembly had created the new Court of Appeals, we further implemented Amendment 58 by adopting and publishing Rule 29 of the Rules of the Supreme Court and Court of Appeals. That rule tentatively defines both the separate jurisdictions of the two courts and the narrow grounds on which a decision of the Court of Appeals will be reviewed by the Supreme Court. Fundamentally, Rule 29 embraces four basic points:
>
> 1. Certain cases, set forth in Section 1 of the rule, should be appealed to the Supreme Court in the first instance.
>
> 2. All other cases should be appealed to the

Court of Appeals.

3. The Court of Appeals should transfer to the Supreme Court (a) any case that should have gone to the Supreme Court in the first instance and (b) any case that is found to involve an issue of significant public interest or a legal principle of major importance.

4. The Supreme Court may grant certiorari to review any case that should have come to the Supreme Court originally, that should have been transferred to the Supreme Court by the Court of Appeals, or that was decided in the Court of Appeals by a tie vote. (Otherwise the decision of the Court of Appeals will not be reviewed.)

In view of this declaration of our function within the judicial structure of this state we hold that the rule regarding "the law of the case" applied by the Supreme Court to its decisions should be applied in this court to cases before it on second appeal, even though our decisions are not entirely immune from further review in those situations set out in *Moose*. There is, therefore, nothing before us to review except the proceedings subsequent to the mandate. It is unnecessary for us to make a determination as to whether *Greer* overruled *Marshall* or is distinguishable from it. Under the rule we here announce we would apply the prior decision as the law of the case even if we were inclined to now say that the preceding Court of Appeals was in error in that opinion.

We affirm the award of the Commission entered on the mandate from this court.

Billy Ray COOK *v.* STATE of Arkansas

CA CR 81-47 621 S.W. 2d 224

Court of Appeals of Arkansas
Opinion delivered September 9, 1981
[Rehearing denied October 7, 1981.]

McArthur & Lassiter, P.A., by: *William C. McArthur*, for appellant.

Steve Clark, Atty. Gen., by: *William C. Mann*, Asst. Atty. Gen., for appellee.

DONALD L. CORBIN, Judge. On June 15, 1980, the appellant, Billy Ray Cook, attended a rock music festival in Cleburne County near Heber Springs, Arkansas. He engaged in "horseplay" with some male companions and cut Cleve Wooley with a knife. Appellant was charged with violating Ark. Stat. Ann. § 41-1601, battery in the first degree. On December 17, 1980, appellant was found guilty of battery in the first degree by a jury and his punishment was fixed at twenty years imprisonment and a $15,000 fine. We affirm.

Appellant raises three points for reversal. First, appellant argues that the trial court erred in allowing the State to place into evidence a conviction for assault with intent to kill for the purpose of testing his credibility.

During the State's cross-examination of appellant, the prosecuting attorney asked appellant about three prior convictions: burglary, attempted burglary and assault with intent to kill.

Arkansas Uniform Rules of Evidence 609(a) states the following:

> General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one [1] year under the law under which he was convicted, and the Court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or witness, or (2) involved dishonesty or false statement, regardless of the punishment.

Appellant contends that the introduction of the prior convictions of assault with intent to kill was error because (1) it is similar in nature to battery, the charge involved at the trial; (2) there were other convictions which could have been used to attack the appellant's credibility; (3) the nature of

assault with intent to kill does not affect the appellant's truthfulness or veracity; and (4) the prejudicial impact outweighed the probative value.

The introduction of prior convictions of a defendant under Rule 609(a) is for the purpose of attaching his credibility. The legitimate purpose of impeachment is to show background facts which bear directly on whether jurors ought to believe the accused rather than other and conflicting witnesses; not to show that the accused who takes the stand is a "bad" person. *Gordon* v. *U.S.*, 383 F. 2d 936 (1967). Rule 609 provides that the trial judge must determine if the probative value of a conviction outweighs its prejudicial effect to the accused. *Gustafson* v. *State*, 267 Ark. 278, 590 S.W. 2d 853 (1979).

In the instant case, appellant's trial counsel did not object to the introduction of this particular conviction but only to the form of the question and cannot, therefore, raise this issue the first time on appeal. *Hulsey* v. *State*, 261 Ark. 449, 549 S.W. 2d 73 (1977). In fact, appellant's trial counsel stated, "[N]othing is admissible as to prior convictions other than any conviction showing propensities for the same type of offense is my argument, and anything else I would object to." This is the point that the appellant's trial counsel should have relied upon to have the prior assault with intent to kill conviction excluded. We note that appellant is represented by different counsel on appeal. An argument for reversal will not be considered in the absence of an appropriate objection in the trial court. *Wicks* v. *State*, 270 Ark. 781, 606 S.W. 2d 366 (1980).

Appellant's second contention is that the trial court erred in allowing the State to improperly question him concerning prior convictions. During the cross-examination of the appellant, the Prosecuting Attorney introduced appellant's three prior convictions and asked if he had any others. The appellant replied that those were all that he could recall at the time. The Prosecuting Attorney then said, "Well, I'll give you some time to think."

Appellant maintains that this method of examining a

witness or party concerning prior convictions for the purpose of impeaching credibility is improper. Appellant contends that the answer given was sufficient response to the question and that if the prosecution had evidence of other convictions, it had a duty to produce it.

Under Rule 609, the prosecutor may, under certain circumstances, ask the accused about prior convictions but he must ask such questions in good faith. *Moore* v. *State*, 256 Ark. 385, 507 S.W. 2d 711 (1974); *Butler* v. *State*, 255 Ark. 1028, 504 S.W. 2d 747 (1974).

The prosecutor explained that he had information from the Pulaski County Prosecutor's office that indicated appellant may have been convicted of other violations under an alias. The trial court made the explicit finding that the question was made in good faith and we find no error here.

Finally, appellant alleges that the evidence was insufficient to sustain the conviction of appellant. Ark. Stat. Ann. § 41-1601(1)(a) provides the following:

> (1) A person commits battery in the first degree if:
> (a) with the purpose of causing serious physical injury to another person, he causes serious physical injury to any person by means of a deadly weapon; . . . .

The elements set forth in the statute are purpose, serious physical injury and use of a deadly weapon. Appellant admitted that the knife involved in the instant case is a deadly weapon pursuant to the statute, but disputes the State's proof as the other two elements — purpose and serious physical injury.

The "purpose" element was established through the testimony of three witnesses: Scott Skarda, Kent Skarda and Dr. Wesley Ashbrenner. Scott Skarda testified that he witnessed a scuffle, although he did not actually see the cut. He stated that after the scuffle he saw the appellant holding the knife and asking the victim, "if he wanted some more." This was also testified to by Kent Skarda. It could logically be inferred by the jury that appellant was referring to the

knife when he made this statement. Dr. Ashbrenner testified, during cross-examination by defense counsel, that the victim told him that his friends had done this to him on purpose.

The appellant further argued that the State failed to prove that the injury sustained by the victim was a "serious physical injury" within the meaning of the statute. Dr. Ashbrenner described the injury as extending from the "belly button" area around to the left hipbone, a length of about ten inches. He also described the wound as relatively extensive. He testified that the cut extended through the fat layer into the muscle layer, a depth of about three inches, but did not extend into the abdominal cavity. There was sufficient evidence of a serious physical injury to allow the jury to make its determination. In determining the sufficiency of the evidence on appeal, the Court views the evidence in the light most favorable to the appellee and affirms if there is any substantial evidence to support the jury's verdict. *Lunon* v. *State*, 264 Ark. 118, 569 S.W. 2d 663 (1978); *Chaviers* v. *State*, 267 Ark. 6, 588 S.W. 2d 434 (1979).

Affirmed.

MAYFIELD, C.J., concurs.

COOPER, J., not participating.

Tolbert S. BALLARD and Dorothy Edna BALLARD,
His Wife *v.* Garry CARROLL et al

CA 81-30 621 S.W. 2d 484

Court of Appeals of Arkansas
Opinion delivered September 9, 1981
[Rehearing denied October 7, 1981.]

Boswell & Smith, P.A., by: *Robert P. Plummer*, for appellants.

House, Holmes & Jewell, P.A., for appellees.

TOM GLAZE, Judge. This appeal is from a degree rescinding a sale of realty between the appellants, Tolbert S. Ballard and his wife, and the appellees, Garry Carroll, et al, and granting judgment in favor of the appellees for $23,780.92. We affirm.

W. F. Rector, Jr., who handled the purchase of the property for the appellees, first met Mr. Ballard in May,

1976, when Ballard contacted Rector about selling the Ballards' property. Mr. Rector was employed at Rector-Phillips-Morse Real Estate Company. Rector tried to sell this property for about ten months but was unable to do so. Rector then organized a group of investors, including himself, and they purchased the property in May of 1977. The appellants gave the appellees a warranty deed with lien retained on the property. The appellees, in turn, paid the appellants $20,000 as a down payment and gave them a promissory note for the balance of $70,000.

Major flooding occurred in Pulaski County in September of 1978 and Rector testified at trial that the property involved here was covered by nine feet of water. Rector commenced an investigation of the water problem after the September, 1978, flood but testified he did not learn of the flooding history of the property or how often it flooded until July, 1979. Before Rector completed his investigation, the property had again flooded, and this time he said that the water was at the level of the dirt of the carport, which was the highest point on the property.

On July 6, 1979, and after Rector ended his investigation, the appellees sued appellants to rescind the sale of the real property, claiming the appellants represented that the property did not flood. The appellants denied any misrepresentation and counterclaimed for foreclosure, alleging default by the appellees on their promissory note. The court rescinded the sale, and dismissed appellants' counterclaim. Additionally, the court ordered appellants to pay $23,780.92 to appellees and imposed a lien on the subject property to secure payment.

Appellants first argue the evidence does not support the chancellor's finding that they misrepresented the property sold to appellees. The chancellor made the following findings in his decree which we find pertinent to this issue:

> (3) Prior to the time of the sale, plaintiff, W. F. Rector, Jr., requested information from Tolbert Ballard about the property flooding, or if water stood on the property after rainfall. Tolbert Ballard represented

that the property did not, and would not accumulate water or flood and had adequate drainage. These representations were made to induce the sale of the property.

(4) The plaintiffs were not aware at the time of the purchase that the property had a history of flooding and relied on Tolbert Ballard's statements as to the condition of the property and purchased the property.

(5) The representations made by Tolbert Ballard to William F. Rector, Jr., as to the flooding and accumulation of water on the property were not true as Tolbert Ballard knew or reasonably should have known at the time the representations were made. Further, the evidence indicates Tolbert Ballard concealed the water problems from the plaintiffs.

(6) After the plaintiffs took possession of the property, they discovered the property was subject to periodic flooding. This flooding materially impaired the value of the property to the plaintiffs.

Chancery cases are tried *de novo* on appeal, and we do not reverse the chancellor's findings of fact unless they are clearly erroneous (clearly against the preponderance of the evidence). *Garot* v. *Hopkins*, 266 Ark. 243, 583 S.W. 2d 54 (1979), and Rule 52(a), Arkansas Rules of Civil Procedure.

In reviewing the facts in this cause, we do so in light of the law set forth in the case of *English* v. *North*, 112 Ark. 489, 166 S.W. 577 (1914), wherein the court, quoting from *Matlock* v. *Reppy*, 47 Ark. 148, 14 S.W. 546 (1886), set forth the following four tests to determine whether the rescission of contract upon the ground of fraudulent representations could be maintained:

(a) Was the fraud material to the contract; did it relate to some matter of inducement to the making of the contract?

(b) Did it work an injury?

(c) Was the relative position of the parties such, and their means of information such, that the one must necessarily be presumed to contract upon the faith reposed in the statements of the other?

(d) Did the injured party rely upon the fraudulent statements of the other, and did he have a right to rely upon them? *Matlock* v. *Reppy*, at 165.

The principles first adopted in *Matlock, supra*, were later applied in *Neely* v. *Rembert*, 71 Ark. 91, 71 S.W. 259 (1902). We believe it is instructive to briefly review the facts in *Neely*. Neely sold Rembert a 3,000 acre plantation and assured Rembert that only forty or fifty acres of the plantation contained coco grass. After the sale, Rembert discovered that coco grass covered 225 to 300 acres and patches of it were scattered over nearly all of the plantation. The Supreme Court in *Neely* affirmed the trial court's decision to rescind the sale of the plantation, stating:

> A vendor who makes a false statement regarding a fact material to the sale, either with knowledge of its falsity, or in ignorance of its falsity, when from his special means of information he ought to have known it, and thereby induces his vendee to purchase, to his damage, is liable, in action at law, for the damage the purchaser sustains through the misrepresentation, or to have the sale rescinded in a suit in equity, at the option of the purchaser.

We now turn our attention to the record before us to determine if there is sufficient evidence to support the chancellor's decision to rescind the contract between appellants and appellees in accordance with the tests laid down in *Matlock*. We must review the testimony in the light most favorable to the appellee, and indulge all reasonable inferences in favor of the decree. *Arkansas State Highway Commission* v. *Oakdale Development Corporation*, 1 Ark. App. 286, 614 S.W. 2d 693 (1981).

Rector testified that when he first looked at the subject property in May, 1976, he and Mr. Ballard did not walk all its corners. Rector did, however, notice the foundation of the house was several feet high, there were nine steps leading from the ground to the house and the air conditioner set on a pedestal. Rector asked Ballard why the house was high, and Ballard said he had set (built) it that high because of the

flood in 1927. Although Rector states he did not pursue this matter further, he did ask him if the property flooded. Ballard told Rector there had been a little water on the property in 1969, but the water was on the south end, which he called the wet weather creek. Rector testified he saw no signs of flooding around the house nor did he see any standing on the land in 1976 or 1977 during the period he had the property listed for sale and before he and appellees purchased it. Since Ballard had owned the property over thirty years and stated it had not flooded, Rector said that he did not make an independent investigation of a flood problem.

Contrary to Ballard's representations to Rector, William Henson, Chief Hydraulic Engineer for the Corps of Engineers, testified there had been four actual flood situations during the last ten years. Studies conducted by the Corps showed that the subject property is completely inundated at least once every ten years. Henson stated the south part of the property floods frequently and the middle part of the property probably floods every two or three years.

Ballard testified he bought the property in 1943 and the house was built originally in 1965. Although Ballard claimed that he did not misrepresent the property to Rector, his trial testimony does confirm much of what Henson stated and what the Corp's flood studies reflected. Ballard related there were times when water had come on the land but not up to the house. On two occasions, he admitted water covered the entire property, but he could not recall the dates.

On cross examination, Ballard's responses seem to indicate he believed it was Rector's responsibility to check out the property further because Rector was a real estate agent. The following exchange took place between Ballard and appellees' counsel:

Q. In 1976, when you hired Mr. Rector, you wanted — You listed this property at $95,000.00. Right?

A. At first, yes.

Q. *You were aware that the property flooded at that time* and you still wanted $95,000.00 for the property. Is that correct?

A. *Why sure.* Who wouldn't?

Q. All right. *Were you aware that if Mr. Rector had sold that property, with it flooding like that, that he could possibly have gotten himself into trouble for misrepresenting it?*

A. *If I'd been Mr. Rector, I'd a went further than — If it'd been my word for that — about that land I wouldn't — He should have went further than he did. Being where — The position he's in in real estate business.*

* * *

A. He sh — He's a real estate man and he didn't — He didn't — He didn't list that first for himself. He listed it to sell it to someone else.

Q. So, it'd have been all right if he had sold it to someone else?

A. And if it hadn't come this 1968, '78 flood he'd a still had it.

* * *

Q. Okay. I understand what you're telling me, I think. You're saying that you probably still would have sold that land to Mr. Rector if he hadn't found out that it flooded in '78. Right?

A. No. He'd a kept the land because it was in — It wasn't all that bad. [Emphasis supplied.]

When we review Ballard's above testimony, it becomes immediately apparent that Ballard possessed, at a minimum, a "buyer beware" attitude when dealing with Rector, and we believe the chancellor could have reasonably con-

cluded that Ballard intentionally concealed the water problem from the appellees. The chancellor found Ballard told Rector the property did not and would not flood. Obviously, the trial judge believed Rector's testimony and rejected Ballard's claim that he did not misrepresent the property. It is not necessary that evidence be undisputed in order to be clear and convincing if found by the fact finder to carry a conviction to the mind. *Kelly* v. *Kelly*, 264 Ark. 865, 575 S.W. 2d 672 (1979). We cannot say that Rector's testimony was not clear and convincing when reviewed in light of all the other evidence. The chancellor was in a superior position to judge the credibility of the witnesses. The Chancellor's findings are clearly supported by the evidence and we conclude that his decision is consistent with the law set forth in the cases of *Matlock, Neely*, and *English*.

Appellants next argue that the court erred in finding that the appellees had not waived their right to rescind the sale. Appellants rely on the case of *Herrick* v. *Robinson*, 267 Ark. 576, 595 S.W. 2d 637 (1980), wherein the Arkansas Supreme Court stated:

> One who desires to rescind upon the ground of fraud or deceit must, as soon as he discovers the truth, announce his purpose at once, adhere to it, and act with reasonable diligence, so that all parties may be restored to their original position as nearly as possible; if he continues to treat the property involved in the transaction as his own or conducts himself with reference to the transaction as though it were still subsisting and binding, he will be held to have waived the objection and will be as conclusively bound by the contracts as if the fraud had not occurred.

As discussed earlier, appellees presented evidence that Rector commenced an investigation of the water problem after the September, 1978, flood but did not learn of the flooding history of the property or how often it flooded until July, 1979. Appellees brought suit against appellants on July 6, 1979. In view of this evidence, we simply see no merit in appellants' waiver argument and agree with the

chancellor's finding that appellees acted promptly to set aside the sale.

Next, appellants argue that the chancellor erred in awarding the sum of $23,780.92 to the appellees. After holding that the sale was to be rescinded, the chancellor stated that the goal of the court was to return the parties to the same position as if the sale had never occurred. The chancellor found the appellees were entitled to the sum of $37,639.27 as follows:

(1) payments toward purchase price totaling $28,178.07;

(2) costs of necessary repairs (other than 1978 flood expenses), which totaled $1,847.06;

(3) costs of restoring the property after the 1978 flood of $5,736.92;

(4) taxes paid of $892.84;

(5) insurance premiums paid of $984.38.

The chancellor also found that appellants were entitled to deduct from the above total the rental income of the property totaling $9,358.35 and the commission of $4,500 which Rector received on the sale of the property.

Appellant cites the case of *Massey* v. *Tyra*, 217 Ark. 970, 234 S.W. 2d 759 (1950), in which the Supreme Court held: "[A] purchaser may not on rescission recover for expenditures made by him on the land after he knew or in good conscience should have known that the contract of purchase would be rescinded, at least when his expenditures add nothing to the value of land, . . ." We note, however, that the court in *Massey* held that the purchaser was entitled to recover his good faith expenditures, and it allowed the expenditures to be recovered even though they added nothing to the present value of the premises. Here, the chancellor found that the expenditures totaling $5,736.92 connected with the 1978 flood were in good faith. The misrepresentation by Ballard went to the very nature and

quality of the premises purchased and its fitness for the purpose for which the appellees made the purchase. Additionally, the sale agreement between the parties required the maintenance of the property, requiring the expenditure of $1,847.06, and it also required insurance to be purchased by appellees, requiring a premium payment of $984.38. We agree with the trial court that these expenses were incurred as a direct result of the misrepresentation of the flooding problem.

Finally, appellants contend that the chancellor erred in dismissing the counterclaim of the appellants as being without merit. They argue the chancellor should have ignored the material misrepresentation that induced the sale and allowed foreclosure on their counterclaim because appellees failed to maintain insurance on the property in the face amount of the indebtedness and to furnish Ballard with a copy of the insurance policy.

Appellees were obligated under the note to insure the premises against loss or damage due to fire with extended coverage in an amount at all times equal to or greater than the total balance owing on the note. Insurance was maintained by the appellees on the house the entire time the appellees owned it, and further, appellants admit receiving a copy of the replacement insurance policy after a request was made.

Appellants are correct in pointing out that appellees did change insurance companies during the time period the property was owned by appellees. However, the property was always insured. The insurance did not equal the balance due on the note, but the testimony reflects insurance was not available for more than the value of the home or $40,000. Further, the chancellor took judicial notice that an insurance company will not insure a home for more than its value.

The parties stipulated below that the house on the property was vandalized. The appellants offered testimony concerning the repairs which would be necessary to put the house in the same condition it was in at the time of the sale to

appellees. The chancellor, in his decree, ordered appellees to restore the property within a reasonable time after the property is transferred to the appellants. The chancellor provided that appellants could petition the court if appellees failed to restore the house. The record does not reflect that appellants have petitioned the chancellor regarding this issue, and we, therefore, do not disturb the chancellor's jurisdiction for any further relief on this issue.

We affirm.

Affirmed.

CLONINGER and COOPER, JJ., dissent.

CORBIN, J., not participating.

JAMES R. COOPER, Judge, dissenting. I respectfully dissent from the result reached by the majority in this case. Mr. Rector listed the property in question and attempted to sell it for about ten months. Mr. Rector then organized a group of investors, including himself, and they purchased the property in May of 1977. Twenty thousand dollars was paid down and the balance of the purchase price was secured by a promissory note and vendors lien. In September of 1978, the property flooded and a substantial amount of damage was done to the house in question. After that flood Mr. Rector investigated the potential for flooding on the property and in April of 1979, the property again flooded. In July of 1979, Mr. Rector and his group of investors sued for rescission, claiming that appellants misrepresented the property by claiming that it did not flood during periods of rain. Appellants denied the misrepresentation and counter-claimed for foreclosure. The trial court rescinded the sale and dismissed the counter-claim and ordered $23,790.92 to be returned to appellees by appellants.

In order to grant a rescission of a contract for a sale of property for misrepresentation, a court must find that (a) there was a misrepresentation of a material fact, (b) the plaintiffs relied on the material fact, (c) the plaintiffs were induced thereby to make the contract, (d) the information

relied upon by the plaintiffs would not be derived by their observation and experience, and (e) the misrepresentations injured the plaintiffs. *English* v. *North*, 112 Ark. 489, 166 S.W. 577 (1914).

The trial court found that Mr. Ballard had represented that the property did not and would not flood and that those representations were made to induce the sale of the property. The court also found that appellees were not aware of the history of flooding and relied on those statements; further the court found that Mr. Ballard knew the representations were not true and that the flooding did damage appellees by reducing the value of the property.

So that we might have a perspective as to the degree to which Mr. Rector may have relied on Mr. Ballard's representations, I have included in this dissent a copy of defendants' exhibits #1 and #7. These exhibits show two views of the house with a foundation which raises it several feet off the ground. The ventilation ducts under the house are approximately six feet off the ground as is the air conditioning unit which is mounted on a pedestal. There are nine steps leading up to the front and rear doors of the residence. Further it is unquestioned that this property is located in the vicinity of Fourche Creek. Mr. Rector testified that he was aware that Ballard had owned the property over 30 years and that he relied on Mr. Ballard's representations that the property was not subject to flooding. Even if Mr. Ballard misrepresented this fact, I find it impossible to believe that a person who is a licensed real estate broker and who has had prior experience in real estate matters in Pulaski County would not be under some duty to further investigate when faced with a house constructed as this one was. I also note that Mr. Rector testified that he had discussed the matter of flooding on the south end of the property with several potential buyers and that he believed the potential flooding was a factor in their decision not to buy the property.

The majority quotes from *Herrick* v. *Robinson*, 267 Ark. 576, 595 S.W. 2d 637 (1980) which holds that a person who wishes to rescind must, as soon as he discovers the truth,

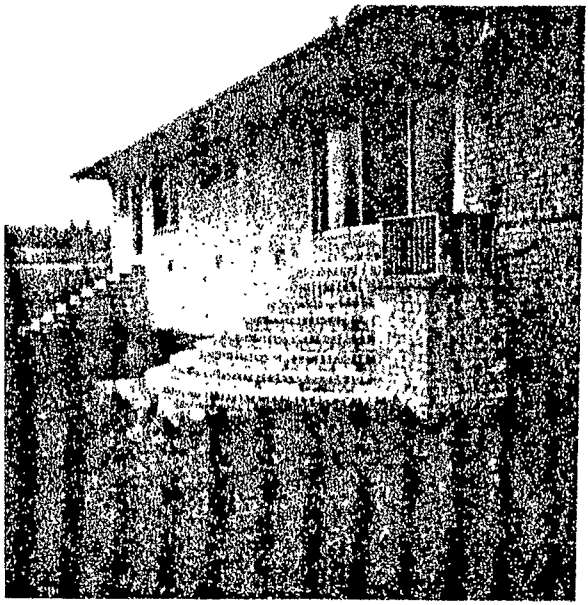
act with reasonable diligence to restore the parties to their original position. That case also indicates that if the individual continues to treat the property as his own then he may be held to have waived the objection. I think that is exactly the situation we are faced with here. Mr. Rector viewed the property some three years prior to the time suit was brought when he originally listed the property for sale. The manner in which the house is constructed was enough to put any reasonable man under considerable suspicion (if not to convince him totally) that the property was subject to flooding or, at the very least, that the person who built the house was terrified of the possibility of flooding. I then note that after Mr. Rector had purchased the property, the house did flood in September of 1978. Between September of 1978 and July of 1979, the appellees gave no notice of an intent to rescind nor did they complain of any fraud or deceit which had induced them into purchasing the property. It was only after the property had flooded again in April of 1979, that suit was finally brought. It seems obvious that appellees did not really consider the property to be subject to flooding until it had flooded a second time and they realized additional expenses were going to be necessary from time to time when the property did flood.

I would hold that there is simply no credible evidence that Mr. Ballard's misrepresentation, even if there was one, was sufficient to induce Mr. Rector to purchase the property. Further, a preponderance of the evidence does not support a finding that Mr. Rector relied on Ballard's representation in the face of the appearance of the house and its location in the city of Little Rock. Thirdly, I would reverse the Chancellor's decision because it is not possible in this case to restore the parties to the original position. Mr. Rector and his real estate firm charged a commission of $9,000.00 on the sale of this house to a group of investors headed by Mr. Rector. Mr. Rector personally retained $4,500.00 of that commission and Rector, Phillips, Morse, Inc., which was not a party to this lawsuit, received the balance. The Chancellor ordered that the $4,500.00 Mr. Rector received was to be accredited to Mr. Ballard, but no credit was allowed for the balance of the commission paid. Therefore, we have a situation where Mr. Ballard has paid $9,000.00 in commission through a broker

who was the vendee, and now since the vendee has been successful in rescinding the contract, he must still stand the loss of half the commission he paid. This is a totally inequitable result, and I disagree with it.

I would reverse and remand the case with instructions to allow appellees the alternative of bringing the payments current and continuing under their contract or granting a foreclosure on the counter-claim to appellants.

I am authorized to state that Judge Cloninger joins in this dissenting opinion.



DEFENDANTS' EXHIBIT NO. 1

DEFENDANTS' EXHIBIT NO. 7

Fred CHILCOTE *v.* BLASS, RIDDICK AND CHILCOTE and CONTINENTAL INSURANCE CO.

CA 81-144 620 S.W. 2d 953

Court of Appeals of Arkansas
Opinion delivered September 16, 1981

Eichenbaum, Scott, Miller, Crockett, Darr & Hawk, P.A., by: *Gary F. Liles*, for appellant.

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

MELVIN MAYFIELD, Chief Judge. During the summer of 1979, the appellant, an architectural student at the University of Arkansas, was employed by the architectural-engineering firm of Blass, Riddick and Chilcote. While playing softball for a team sponsored by the firm, appellant broke his leg. He filed a claim for workers' compensation which was denied, by a two to one decision of the commission, on the grounds that his injury did not arise out of and in the course of his employment.

Apparently, this is the first company-sponsored team injury claim to be considered by an appellate court in Arkansas and the matter has been ably presented by the briefs of both parties. The parties and the commission have devoted considerable attention to 1A Larson, *Workmen's Compensation Law* § 22.24 (1979), where it is said that four categories of tests have figured in company-sponsored team cases. Those tests as summarized in the commission's opinion are as follows:

(1) Whether the activities occur on the premises during working hours;

(2) The degree of employer initiative;

(3) The furnishing of money or equipment by the employer;

(4) The benefit to the employer from the activity.

The commission found that the injury involved in this case occurred during a game played after office hours at a local park — not on the employer's premises — and concluded that neither factor mentioned in the first test was present. As to the second consideration, the degree of employer initiative, the commission found that the test had been met. The finding of the commission with regard to the third indicator was "Blass, Riddick & Chilcote supplied jerseys, equipment and trophies and sponsored a picnic after the last game." The finding of the commission concerning the fourth category was "Eugene Chilcote testified that there were some advertising benefits derived but the main purpose of the team was employee fellowship." The commission's conclusion was:

> Taking into consideration the Arkansas Supreme Court holdings regarding recreational activity claims and in reviewing Larson's considerations of this question, we are of the opinion that the within claim should be denied and dismissed.

The appellant contends that the evidence here preponderates on the side of compensation as to each of the four tests proposed by Larson and that it is so strong as to the second and third tests that a finding of compensability is required without consideration of the other two.

The problem with appellant's contention is that these tests suggested by Larson are only factors involved in making the factual determination of whether the injury arose out of and in the course of employment. The commission has not, as suggested by appellant, failed to apply the applicable law to its own findings of fact. Larson's tests are not "law." He is simply presenting an overall view of the

results reached in reported cases with this type claim.

As the commission pointed out, injuries received during recreational activities have been considered by the Arkansas Supreme Court before. Larson, in earlier editions, has been cited by the court in *Woodmansee* v. *Frank Lyon Co.*, 223 Ark. 222, 265 S.W. 2d 521 (1954), where a high-ranking employee of the company was injured while on a duck hunt with some company salesmen. *Woodmansee* was discussed in *West Tree Service* v. *Hopper*, 244 Ark. 348, 425 S.W. 2d 300 (1968), where an employee sustained an injury on the employer's premises, during the lunch hour, when firing a rifle belonging to his foreman. Larson and *Woodmansee* were both discussed in *Wilson* v. *United Auto Workers*, 246 Ark. 1158, 441 S.W. 2d 475 (1969), where the employee died while swimming in the pool at a motel where he was required to stay while on his job.

In each of those cases the Supreme Court held that a factual determination was involved and affirmed the commission's decision. The case at bar presents a close question and the evidence is certainly sufficient to support a finding for the appellant, but the commission has found otherwise.

As we said in *Continental Ins. Co.* v. *Richard, Adm'x.*, 268 Ark. 671, 596 S.W. 2d 332 (Ark. App. 1980):

> The issue on appeal is not whether this court would have reached the same results as the Commission on this record, or whether the testimony would have supported a finding contrary to the one made; the question here is whether the evidence supports the findings which the Commission made. *Herman Wilson [Lumber] Co.* v. *Hughes*, 245 Ark. 168, 431 S.W. 2d 487 (1968). When the Commission makes a finding of fact, that finding carries the weight of a jury conclusion. *Taylor* v. *Plastics Research and Development Corp.*, 245 Ark. 638, 433 S.W. 2d 830 (1968). The decision of the Commission must stand if supported by substantial evidence. *American Can Co.* v. *McConnell*, 266 Ark. 741, 587 S.W. 2d 583 (Ark. App. 1979).

The decision of the commission is affirmed.

GLAZE, J., not participating.

Robert GILES *v.* DIRECTOR OF LABOR

E 81-48 621 S.W. 2d 10

Court of Appeals of Arkansas
Opinion delivered September 16, 1981

James R. Cromwell of *Central Arkansas Legal Services*, for appellant.

Carolyn Parham, for appellee.

MELVIN MAYFIELD, Chief Judge. The appellant was paid $186.00 in unemployment benefits by the Arkansas Employment Security Division to which he was not entitled. The agency issued an overpayment determination requiring the repayment of the benefits and the appellant appealed. The Appeal Tribunal upheld the agency, the Board of Review agreed, and appellant has now appealed to this court.

Ark. Stat. Ann. § 81-1107(f)(2) (Repl. 1976) provides as follows:

> If the Director finds that any person has received any amount as benefits under this act to which he was not entitled by reasons other than fraud, wilful misrepresentation, or wilful nondisclosure of facts, such person shall be liable to repay such amount to the fund or in lieu of requiring the repayment, the Director may recover such amount by deduction from any future benefits payable to such person under this act unless the Director finds that the overpayment was received without fault on the part of the recipient and its recovery would be against equity and good conscience. Provided further, that any person held liable to repay such an amount to the fund or to have such amount deducted from any future benefits payable to him shall not be liable to repay such amount nor shall recovery be made from any future benefits after one [1] year from the date the determination of the amount of the overpayment becomes final within the meaning of the provisions of subsection (d)(5) of this section.

The appellant does not contest the determination of overpayment but contends that he should not be required to repay the amount received because of that portion of the above provision which allows repayment to be excused if the director finds that the overpayment was received "without fault on the part of the recipient and its recovery would be against equity and good conscience."

The appeals referee held, and the board agreed, that the claimant was paid benefits to which he was not entitled because of a disqualification to receive benefits for a certain period. The reason for the disqualification is not specifically stated in either the referee's or the board's decision. However, in answer to a question by the appellant, the referee referred to a section of the statutes, and said, "It says that if you are disqualified for misconduct in connection with the work" and went ahead to explain the statute.

The reason for the disqualification, however, does not

appear to be an issue in this appeal since appellee's brief admits that the appellant was without fault in the overpayment. As stated in appellee's brief "The sole issue on appeal is whether recovery of the $186.00 by the Employment Security Division would be against equity and good conscience."

In that regard there is very little evidence in the record. The evidence does show that the appellant was drawing food stamps, that he and his wife were both unemployed, he couldn't pay his rent, his car was broken down and he couldn't get it fixed.

Even though appellant's testimony cannot be taken as undisputed, it cannot be arbitrarily disregarded and there appears no reason why it should not be regarded as true. If we accept as a fact that appellant was without fault in the overpayment and that his employment and financial situation is as he testified, there is no evidence to support a finding that repayment would not be against equity and good conscience.

The decision appealed from is reversed. The appellant does not have to repay the $186.00 and it cannot be deducted from future benefits.

CLONINGER, J., dissents.

CORBIN and GLAZE, JJ., concur.

DONALD L. CORBIN, Judge, concurring. I concur with the majority's opinion.

The Arkansas Supreme Court has held that a recipient may be required to repay unemployment benefits erroneously received even if the claimant is not at fault. *Whitford* v. *Daniels*, 263 Ark. 222, 563 S.W. 2d 469 (1978). The *Whitford* case indicated that one factor in determining equity and good conscience is the financial condition of the claimant. The claimant in *Whitford* was required to make repayment based on his testimony that he had a $4,000 savings account.

The objectives of employment security legislation were enunciated by the Supreme Court of the United States in *California Department of Human Development* v. *Java*, 402 U.S. 121 (1971). "Unemployment benefits," the Court stated, "provide cash to a newly unemployed worker at a time when otherwise he would have nothing to spend, serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity." Just as achievement of these objectives require prompt payment of benefits, so it must require the Employment Security Agency, in equity and good conscience, not to recover overpaid benefits from a claimant already living at bare subsistence level.

More than just a showing of hardship, however, may provide the necessary showing that equity and good conscience bar recovery of an overpayment. In *Gilles* v. *Department of Human Resources Development*, 113 Cal. Rptr. 374, 521 P. 2d 110 (1974), the Supreme Court of California construed a provision of the California Employment Security Act similar to Ark. Stat. Ann. § 81-1107(f)(2) (Repl. 1976). The California court found that, in determining whether equity and good conscience required waiver of recovery of overpayments, the employment agency should consider a number of elements. These included:

(1) the cause of the overpayment;

(2) whether the claimant received only normal unemployment benefits or some extra duplicative benefits;

(3) whether the claimant changed his position in reliance upon the receipt of benefits; and

(4) whether recovery of the overpayment, by imposing extraordinary hardship on the claimant, would tend to defeat the objectives of the Employment Security Act.

While I have no objection to the result of the majority opinion, I think it would be best to remand this matter to the Board of Review for another hearing and a determination

setting out the specific factors which the Board uses in deciding the issue of equity and good conscience.

Lawrence Clayton VERNON *v.* STATE of Arkansas

CA CR 81-59 621 S.W. 2d 17

Court of Appeals of Arkansas
Opinion delivered September 16, 1981

Henry J. Swift, for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns*, Asst. Atty. Gen., for appellee.

GEORGE K. CRACRAFT, Judge. The appellant, Lawrence Clayton Vernon, was found guilty of the criminal offense of theft by receiving in violation of Ark. Stat. Ann. § 41-2206 (Repl. 1977), and sentenced to nine years in the Department of Correction. It is from this judgment and the commitment order issued thereon by the trial court that the appellant brings this appeal. He urges five separate points of error. Only those facts necessary for an understanding of our ruling of each point of error alleged will be discussed herein.

I.

Danny Murrell testified that he had stolen some gold jewelry and that he and Sonny Barch then sold the items to appellant, Vernon. Both testified that they informed Vernon that the property was stolen at the time of the purchase. Over the objection of appellant they were permitted to testify that they were paid the sum of $125 in cash and given three bags of marijuana and some LSD in exchange for the stolen property. The appellant, while admitting in his brief that the evidence was relevant or "part of the res gestae as being part of the alleged consideration for the purchase," contends that it was not necessary to mention the controlled substances as the cash purchase price in excess of $100 had already been established, and that the additional evidence merely "provided a danger of prejudice."

We cannot agree. This evidence was admissible because it tended to establish the entire criminal transaction. Where acts are intermingled and contemporaneous with one another, then evidence of any and all of them is admissible to show the circumstances surrounding the whole criminal episode. *Polk* v. *State*, 252 Ark. 320, 478 S.W. 2d 738 (1972). While evidence of other crimes with which a defendant has not been charged are not ordinarily admissible, there are exceptions. While evidence of separate and isolated crimes, having no bearing on the charge under investigation may not be shown, evidence showing all of the circumstances connected with the particular crime charged may be shown,

even if in so doing other criminal offenses are brought to light. *Russell & Davis* v. *State*, 262 Ark. 447, 559 S.W. 2d 7 (1977).

II.

The appellant next contends that the trial court erred in permitting the introduction of evidence that on two prior occasions the appellant had purchased property from the witness which he knew was stolen, and made payment in marijuana or LSD. The court admitted the testimony under Rule 404(b) Uniform Rules of Evidence, for the sole and only purpose of showing motive, opportunity, intent, preparation, plan or lack of knowledge or mistake. The court gave cautionary instructions in which the jury was informed of the limited purpose for which that evidence might be considered.

We cannot say that it was error to admit the evidence. Where there is a question whether the crime was with guilty knowledge, evidence of other acts under similar circumstances is admissible as tending to show a system, design or guilty knowledge in the case on hand. *Caton & Headley* v. *State*, 252 Ark. 420, 479 S.W. 2d 537 (1972). The courts have also held that evidence of two or more crimes so related to each other as to show a general plan to deal in stolen goods is admissible. *Long* v. *State*, 192 Ark. 1089, 97 S.W. 2d 67.

Appellant contends that it was objectionable to permit testimony with regard to the controlled substances in payment for the earlier sales. We do not feel that under the circumstances here present the court erred in permitting the testimony. It was the position of the State that part of the consideration paid for the stolen goods for which appellant was specifically charged was delivery of a controlled substance. It was therefore permissible for the State to introduce evidence tending to show the method of procedure and medium of exchange used in appellant's general plan and course of dealing. *Singer* v. *State*, 195 Ark. 345, 112 S.W 2d 426. We find no merit to this contention.

III.

The appellant next argues that the court erred in failing to give a cautionary instruction at the time the testimony objected to in point two was admitted. The record reflects that during the argument in chambers the court indicated that he would permit the introduction of the testimony under Rule 404(b) Uniform Rules of Evidence, and give a "proper cautionary instruction at the proper time." At that time the court asked counsel if he desired to have the instruction given at the close of the State's case or at the end of the trial. Counsel indicated he would like to have it at both times. Both instructions told the jury that the evidence of previous similar offenses had been admitted into evidence for a limited purpose "and may be considered by you for the purpose of showing defendant's motive, design, habits and practices, guilty knowledge, mode and method of operation and for no other purpose. You may not consider such evidence as any evidence whatsoever tending to establish the guilt of the offense for which he is being tried." After giving the instruction the court asked appellant's counsel if that was satisfactory. Counsel answered it was. No other objection was made nor did counsel request of the court any further action. We find no error in the timeliness of the cautionary instruction.

IV.

The appellant next contends that the court erred in permitting the State to cross-examine the appellant concerning prior purchases of alleged stolen property from convicted felons. While the appellant was questioned on direct examination and denied knowing or having knowledge that the items in question had been stolen, he testified that he had never bought any stolen property. The State on cross-examination inquired as to specific sales from persons said to have been convicted felons. Appellant denied these transactions but made no objection at the time. He objects for the first time in this court contending that the three-fold test in *Gustafson* v. *State*, 267 Ark. 278, 590 S.W. 2d 853 (1979), had not been met. The appellant concedes that there was no objection to the cross-examination of the appellant

which he now challenges as improper. This court has on numerous occasions declared that it will not consider objections to evidence which are advanced for the first time on appeal. *Parker* v. *State*, 266 Ark. 13, 582 S.W. 2d 34 (1979).

V.

The appellant finally contends that the trial court erred in permitting the State in closing argument to make improper statements that the defendant was a "drug dealer" and a "fence" and that he "ought to be removed from the streets to prevent him from his continued sales of narcotics to teenagers." The record reflects that the defendant made an objection to the statements of the prosecuting attorney, which the court sustained, and immediately admonished the jury to disregard those statements in determining the defendant's guilt. The record does not indicate that the appellant moved for a mistrial or asked any other action of the court than that which was taken. We find no merit in this contention.

We affirm.

CORBIN and GLAZE, JJ., dissent.

TOM GLAZE, Judge, dissenting. I respectfully dissent. More specifically, I disagree with the majority's decision that the court did not err in permitting the State to cross-examine appellant concerning prior purchases of alleged stolen property from convicted felons. On cross-examination, the appellant was asked questions concerning six alleged incidents involving the purchase of stolen guns, watches and a stereo. These six alleged purchases were from five separate individuals on separate occasions. The appellant denied each question and incident propounded by the prosecuting attorney.

Admittedly, appellant's counsel did not object to any of the foregoing cross-examination. I believe, however, that we are obligated under Rule 103 (d) of the Uniform Rules of Evidence to take notice of errors which affect substantial rights although they were not brought to the attention of the

court. See *Wicks* v. *State*, 270 Ark. 781, 606 S.W. 2d 366 (1980). When the State presented its case in chief, it presented a witness who testified, over objection, that the appellant on two prior occasions purchased property which he knew was stolen. The majority in its opinion affirmed the trial court's admission of this testimony under Rule 404 (b) of the Uniform Rules of Evidence. *In toto*, our court has affirmed a trial court decision which permitted the State to introduce evidence of two unrelated, prior offenses, plus allowing the State to cross-examine the appellant regarding six other prior, unrelated alleged offenses. If this is not the classic "overkill" in prosecuting a case, I doubt that we will ever be faced with one.

In *Gustafson* v. *State*, 267 Ark. 278, 509 S.W. 2d 853 (1979), the Supreme Court recognized that Rule 608 (b) of the Uniform Rules of Evidence was intended to restrict the use of this type of information and evidence, especially in a criminal case. The use of such information can be highly prejudicial to a defendant in a criminal case and the *Gustafson* court clearly stated that three conditions must exist before this criminal information can be used on cross-examination. The trial court did not consider any of the conditions noted in *Gustafson*, and it clearly did not balance the probative value of the questions posed by the prosecutor against the prejudicial effect of the questions.

It is my firm opinion that the appellant was prejudiced by the evidence introduced by the State in its case, and the questions propounded to the appellant on cross-examination concerning the eight unrelated, prior, alleged offenses. If our court did not decide under these circumstances that the probative value of this type evidence and information was not substantially outweighed by any prejudicial impact, I am dubious that we ever will.

For these reasons, I would reverse.

Gary ROGERS *v.* Charles L. DANIELS, Director of Labor, and PERKINS & SON BODY SHOP

E 80-244 621 S.W. 2d 227

Court of Appeals of Arkansas
Opinion delivered September 16, 1981

JAMES R. COOPER, Judge. This is the second appeal of this case. In an opinion (not designated for publication) delivered March 11, 1981, we remanded this case to the Board of Review so that it could conduct a new hearing and

provide an opportunity for appellant to submit proof as to certain matters.

Appellant was initially denied benefits by the Agency because he indicated he had left his job in Texas on August 22, 1980, because of certain conditions in Texas. He specifically indicated that the cost of living in Texas was too high; that he wanted his daughter to go to a smaller school; that there were no hunting areas where he lived, and only one fishing lake, and that traffic was congested on his way to and from work. After the Agency denial, appellant wrote the Appeal Tribunal, stating that his real reason for quitting was to accompany his wife to a new job as a cook in a school cafeteria at Bodcaw, Arkansas. The Appeal Tribunal, in the original decision which was affirmed by the Board of Review, found that appellant voluntarily quit his last work without good cause connected with his work.

Under Ark. Stat. Ann. § 81-1106 (a) (Supp. 1981), a claimant shall not be disqualified if he quits his work "to accompany his spouse to a new place of residence if he has clearly shown, upon arrival at the new place of residence, an immediate entry into the new labor market and is, in all respects, available for suitable work." Since the question of whether appellant had immediately entered the labor market was not fully developed we remanded the case.

On remand, the Board of Review restated appellant's original statements concerning the cost of living and other factors in Texas and then found:

> After a study of the testimony presented, the Board of Review finds that the claimant did accompany his spouse to a new residence and that upon arrival at the new residence, he made an immediate entry into the new labor market, but it is evidence (sic) from the claimant's statements that the claimant had voluntarily decided to quit his last work for personal reasons made prior to his wife being under contract. The fact that his wife's contract became effective August 25, 1980, might have determined the date of claimant's termination, but the causes for the claimant quitting his job, as well as the causes for his wife being under

> contract, were for the personal reasons which the claimant confirmed throughout his testimony and cannot be considered to be within the intent or meaning of § 5(a) of the Arkansas Employment Security Law. The Board of Review rules that the claimant is disqualified for benefits under the provisions of the above section of the law.

Ark. Stat. Ann. § 81-1107(d)(7) provides that findings by the Board of Review, if supported by evidence are conclusive and the jurisdiction of this Court is confined to questions of law. It is obvious that the Board of Review determined both questions of fact and issue in favor of appellant, that is, that he did leave his prior employment to accompany his spouse to a new job, and that he did immediately enter the labor market. However, the Board of Review appears to have added a third requirement which we do not find in the statute. The Board indicated that where an individual seeks work at a new place of residence and is planning to leave prior to the time his spouse acquires a new job that somehow this should disqualify him as being contrary to the intent of the Employment Security Law. There is certainly no such requirement in the statute and we find that no such requirement is appropriate or allowable. In fact, the Board's comment that his causes for quitting his job as well as the reasons for his wife obtaining new employment were for personal reasons is confusing. It is extremely difficult to conceive of any set of facts where that would not be true. The decision of a family to relocate either because of a transfer or because of a desire to better themselves is always a personal decision and we can conceive of virtually no set of circumstances where the decision to move to a new place and obtain employment would not be denominated a personal choice. In any event, no such requirement appears in the statute and, since the Board of Review has specifically found that claimant met the requirements of Ark. Stat. Ann. § 81-1106 (a) (Supp. 1981), its decision must be reversed and the case remanded with instructions to award benefits to appellant as provided by statute.

Reversed and remanded.

CLONINGER, J., dissents.

Henry KETCHER et al *v.* MAYOR AND THE CITY COUNCIL OF NORTH LITTLE ROCK, Arkansas et al

CA 81-38 621 S.W. 2d 12

Court of Appeals of Arkansas
Opinion delivered September 16, 1981

Lanny K. Solloway, P.A., for appellants.

S. Graham Catlett of *Catlett & Stubblefield*, and *Hal Joseph Kemp*, for appellee General Properties, Inc.

Hal Joseph Kemp and *Charles E. Smith*, for appellee Lakewood Recreational Improvement District No. 4.

Jim Hamilton, for City of North Little Rock.

LAWSON CLONINGER, Judge. The Lakewood Addition in North Little Rock contains several lakes and other recreational facilities for the exclusive use of persons in the area. The lakes and other facilities are owned by appellee General Properties, Inc., and, for a nominal rental, leased to appellee Lakewood Property Owners Association, a non-profit corporation formed in 1951. Appellee Lakewood Recreational Improvement District No. 4 was created to assess and collect annual installments for the maintenance of the lakes and recreational facilities within the boundaries of the Addition.

On October 26, 1978, appellee North Little Rock City Council granted a petition by certain property owners within the Addition and established Lakewood Recreational District No. 4.

Appellants Henry Ketcher, *et al*, property owners in the District, commenced this action for an injunction and declaratory judgment, alleging defects in the formation of the District. On the day of trial, May 7, 1980, appellants

sought to amend and amplify their original complaint to allege that some of the lands owned by appellee General Properties, Inc. had been dedicated to the public in 1935 and that appellants have been deprived of due process in that they were not given personal notice of the formation of the proposed district. The trial court ordered appellants' amended complaint stricken under Rule 15(a), Ark. Rules of Civil Procedure, and that ruling of the trial court has not been appealed.

Appellees and appellants filed motions for summary judgment and at the hearing, testimony was taken on all disputed points. The trial court granted appellees' motion for summary judgment and denied appellants' motion and all of its claims for relief.

On this appeal, appellants argue three points for reversal:

1. The method of assessment proposed in appellees' petition for creation of the District is unconstitutional.

2. The trial court was in error, in determining whether a majority of the property owners in the District had signed the petition for formation, in that it failed to exclude properties alleged to be owned by General Properties, Inc., but which had in fact been dedicated to public use in 1935.

3. Notice requirements relating to the creation of the District are violative of due process and equal protection.

The decision of the trial court is affirmed in part and reversed in part.

The trial court specifically found that the method of assessment proposed by the District is not violative of Article 16, § 5, or Article 19, § 27 of the Arkansas Constitution, but we do not find it necessary to determine the correctness of that ruling. The issue of the method of assessment proposed was not properly before the trial court and is not before this Court on appeal, for the reason that it is only a proposal never adopted by an authoritative body.

Ark. Stat. Ann. § 20-109 (Repl. 1968) provides that in the ordinance creating an improvement district the city council shall appoint three owners of real property therein as commissioners, who shall compose a board of improvement for the district. In the ordinance creating Lakewood Recreational Improvement District No. 4, the North Little Rock City Council properly appointed three commissioners, but the record in this case does not reflect that any action was taken thereafter by the commissioners.

Ark. Stat. Ann. § 20-401 (Repl. 1968) provides that as soon as the board of improvement shall form a plan, and shall have ascertained the cost of the improvement, it shall report its findings to the city council. The city council shall then appoint three electors of the city, who shall constitute a board of assessment of the benefits to be received by each parcel of land by reason of the proposed improvement.

When the Board of Improvement created by the North Little Rock City Council proceeds to ascertain the needs of the District and the City Council then appoints members of the Board of Assessment, the Board of Assessment can at that time ascertain and assess benefits to be received by each parcel within the district. The Board of Assessment may conceivably adopt the method of assessment proposed by the owners of the property who petitioned for the creation of the District, or the method proposed may be ignored.

The Board of Assessment may or may not consider the method proposed by the petitioning owners, but until the Board of Assessment ascertains the needs of the District and assesses benefits there can be no question of the correctness of the assessments or the method employed brought before the courts.

It is significant that appellants did not appeal that portion of the trial court which struck appellants' amended complaint. The trial court, however, did find that appellee General Properties, Inc. is the owner of the lands proposed to be conveyed to the District. The trial court further found that the petition to form the District expresses the consent of a majority in assessed value of the owners of real property

within the District. Appellants urge on this appeal that if the value of lands dedicated to the public in 1935 is excluded, the petition fails to have the consent of a majority in assessed value of the owners.

Although the trial court struck the amended complaint of appellants, the Court would have been justified in considering the portion of the amended complaint regarding the alleged dedication in 1935 as only a clarification or amplification of appellants' original complaint. The trial court, also, would have been justified in finding that the issue was tried by the implied consent of the parties. Rule 15 (b), Ark. Rules of Civil Procedure. We consider the issue on this appeal because it was presented in the trial court with the implied consent of appellees.

In 1935 Justin Matthews, Sr. dedicated by Bill of Assurance three acres of the property within the confines of Lakewood Recreational Improvement District to the public forever as public parks and playgrounds. In 1947 the successor in title to the lands of Justin Matthews, Sr. executed and recorded an instrument whereby the purported 1935 dedication was withdrawn and cancelled before there had been any acceptance made by the public or in the public's behalf. There is nothing in the record to indicate that any objection to the withdrawal and cancellation was made prior to 1980.

The right of an owner of land dedicated to public use to revoke and cancel such dedication at any time before its acceptance has been uniformly recognized. In *Lester* v. *Walker et al*, 177 Ark. 1097, 9 S.W. 2d 323 (1928), it was held that when land is dedicated, "the revocation may be accompanied by an affirmative act in recalling it, or by abandonment ..." In *Mebane* v. *City of Wynne*, 127 Ark. 364, 192 S.W. 221 (1917), it was held that there having been no acceptance by or for the public, the dedication may become extinct by the express withdrawal by the owner, or by his death before acceptance or by the lapse of time.

In the case before the Court appellee General Properties, Inc. is the successor in title to the lands of Justin

Matthews, Sr., and the purported dedication to the public in 1935 was effectively withdrawn and cancelled in 1947 by the then-owner before acceptance by the public. The three acres was therefore properly included in determining the assessed valuation of property owned by the signers of the petition to form the District.

The issue of the constitutionality of the notice requirement relating to the creation of the District was not before the trial court, and it cannot be considered by this Court. *Sugg* v. *Continental Oil Co.*, 270 Ark. 882, 608 S.W. 2d 1 (1980). At the trial appellants attempted to raise the constitutional question regarding notice to the property owners by way of amendment to the complaint. The trial court found that prejudice to the appellees would result if appellants were allowed to amend their complaint and raise a new issue on the day set for trial.

The decree of the trial court is reversed on its finding that the method of assessment proposed in the petition for creation of the District is not unconstitutional, because the question was not properly before the Court. The decree is in all other respects affirmed.

COOPER and GLAZE, JJ., not participating.

SAFEWAY STORES, INC. *v.*
Charlotte McDOWELL

CA 81-167 621 S.W. 2d 15

Court of Appeals of Arkansas
Opinion delivered September 16, 1981

Tom Forrest Lovett, P.A., by: *Tom F. Lovett*, for appellant.

John W. Walker, P.A., by: *James P. Massie*, for appellee.

TOM GLAZE, Judge. This Workers' Compensation case involves one primary issue: whether the claimant's injury was substantially occasioned by her wilful intention to bring about the injury of another as contemplated under Ark. Stat. Ann. § 81-1305 (Repl. 1976). The relevant provisions of § 81-1305 provide:

> ... there shall be no liability for compensation under this Act ... where the injury or death from injury was substantially occasioned by ... wilful intention of the injured employee to bring about the injury or death of himself or another.

The Commission upheld the Administrative Law Judge's decision that the claimant's actions were not a bar to compensation benefits under § 81-1305. The Commission relied in part on certain legal principles enunciated in *Johnson* v. *Safreed*, 224 Ark. 397, 273 S.W. 2d 545 (1954). Appellant argues the Commission misconstrued the *Safreed* case, and that it incorrectly applied the rules adopted in *Safreed*. Moreover, appellant contends that if the Commission applied the correct law as provided in § 81-1305, as amended, and as required by the decision in *Safreed*, the evidence presented to the Commission would warrant a holding to deny benefits to claimant.

When the court rendered its decision in *Safreed*, § 81-1305 read that the injury in question must be "solely" occasioned by the wilful intent of the employee to injure himself or another. In 1976, the General Assembly amended the Act and substituted the word "substantially" for solely. Although we discuss the facts at bar in more detail later, we do not agree with appellant's argument that the evidence reflects that the injuries incurred by claimant were substantially occasioned by her attempt to inflict injury on a male customer leaving appellant's store. Nor can we accept appellant's contention that the legal principles enunciated in *Safreed* would bar the type conduct manifested by claimant in the case at hand. As noted by appellant, the court in *Safreed* stated:

> Of course, where the aggression of the claimant is so

> violent as to come within the express legislative exceptions of wilful misconduct or wilful intent to injure, he may not recover even though the assault arises out of the employment.

However, in the same paragraph in which the statement above appears, the court continued as follows:

> The applicable rule is stated in Larson's Workmen's Compensation Law, § 11.15(d), as follows: "The words 'wilful intent to injure' obviously contemplate behavior of greater gravity and culpability than the sort of thing that has sometimes qualified as aggression. Profanity, scuffling, shoving or other physical force not designated to inflict real injury do not seem to satisfy this stern designation. *Moreover . . . the adjective 'wilful' rules out acts which are instinctive or impulsive, so that even violent blows might fail to give rise to this defense if they were spontaneous and unpremeditated.*" [Emphasis supplied.]

Applying the provisions of § 81-1305, as amended, and the foregoing rule adopted in *Safreed*, the Commission found the acts of claimant essentially spontaneous and held her injury compensable. On review, we must now view the evidence in the light most favorable to the Commission's decision and uphold that decision if supported by substantial evidence. *Office of Emergency Services* v. *Home Insurance Company*, 2 Ark. App. 185, 618 S.W. 2d 573 (1981).

The claimant testified two male customers came to her check stand, and one of the men claimed he got glass in his foot. When she told him to check with store management, he said that he did not have to check with anybody, she was standing right there and that "he was going to sue some damn body . . ." The claimant asked the man if there was anything else he wanted and he said, "cigarettes." She explained that the man complained about the kind (brand) of cigarettes given him and during this exchange and her returning his change for payment of groceries, he called her a vulgar name. She then refused to wait on him and stepped

to the end of the counter where he pushed her and caused her to fall into the baskets. A fight ensued between the claimant and the two men and she related one man held her while the other hit her in the stomach. She stated that she grabbed one man's hair and held on to him.

Although the two men involved in the fight did not testify, four employees of appellant did. Three of these employees admitted they had not seen the events preceding the altercation but did see the ensuing fight. One of the employees did see her hit a man "as he was reaching for her," and claimant was positioned at the end of her check stand. A second employee heard claimant accuse one of the men of hitting her and another overheard one of the men state he "was going to bust her skull." None of these employees recalled the men striking claimant nor seeing her fall into the baskets. There was a variance in the testimony of the four employees when each related where claimant was positioned in the store when she physically encountered the two men. Testimony of one employee is consistent in this respect with that of claimant's while the testimony of the other three employees is in complete conflict with the account given by the claimant.

Where the evidence before the Commission is conflicting, it is within the province of the Commission to weigh the evidence and draw any appropriate inferences therefrom. *Hammer* v. *Intermed Northwest*, 270 Ark. 262, 603 S.W. 2d 913 (Ark. App. 1980). The Commission found that the dispute arose between the claimant and the two men over the sale of some cigarettes and that the evidence taken as a whole reflects that the acts involved in the altercation were spontaneous. We believe these findings and inferences were, indeed, appropriate, and we, therefore, affirm the Commission's holding.

Aside from the evidence mentioned above and which we believe substantially supports the Commission's holding, we also note that it may have considered the fact that the two men involved in the fight failed to testify. The Administrative Law Judge had concluded that the Commission was entitled to presume that the testimony of these witnesses

would have been negative to the appellant, and he cited the case of *Brower Manufacturing Company* v. *Willis*, 252 Ark. 755, 480 S.W. 2d 950 (1972). Since we conclude there is sufficient evidence to otherwise support the Commission's decision, any significance given the two men's absence is of no import. Suffice it to say, we do not agree that the facts at bar warrant the application of the rule in *Brower* and as relied on by the Administrative Law Judge.

Affirmed.

CORBIN, J., dissents.

Ronald L. SPICER *v.* STATE of Arkansas

CA CR 81-63 621 S.W. 2d 235

Court of Appeals of Arkansas
Opinion delivered September 23, 1981

Brown, Compton & Prewett, Ltd., by: *James M. Pratt, Jr.*, for appellant.

Steve Clark, Atty. Gen., by: *Arnold M. Jochums*, Asst. Atty. Gen., for appellee.

MELVIN MAYFIELD, Chief Judge. Appellant was found guilty of the charges of possession of marijuana with intent to deliver and delivery of marijuana. He was sentenced to ten years and a $10,000 fine on each charge with the sentences to be served consecutively.

In opening statement his attorney told the jury that appellant was a businessman whose business had fallen on hard times. During this period a "little old fuzzy faced scraggly looking boy" approached appellant with an easy way to make money. After repeated requests, the jury was told, appellant delivered some marijuana and was arrested by the boy who turned out to be an undercover state police officer.

After the State had rested, the appellant moved for a directed verdict on the ground that the evidence established he was entrapped. The motion was denied.

On direct examination the appellant told the jury that prior to November 16, 1979, he had never done anything illegal. At that time Deborah Dickinson introduced him to the boy who turned out to be an undercover police officer. She asked appellant to sell the boy some marijuana. "I had never been previously involved in a drug transaction," he said. But times were hard. He needed money. Deborah needed money. So he obtained seventy pounds of marijuana and sold it to the undercover agent. "This was my first and last in the drug business," he said.

On cross-examination the appellant was asked:

Mr. Spicer, isn't it true that you're guilty of possessing

marijuana with intent to deliver on October 7 of 1979, in Hope?

After an objection there was a discussion outside the hearing of the jury during which the court overruled the objection. When the question was asked again a motion for mistrial was made by appellant's counsel and it was denied by the court. The question was then answered as follows:

> I am not guilty at no time of — now, I'm not saying that they didn't charge me over there. But, I have never been guilty at no time, except what you know about.

The appellant's only point for reversal is that it was error for the court to allow the prosecuting attorney to ask the question set out above. Under the circumstances involved we do not think the court was in error.

As the Arkansas Supreme Court pointed out in the case of *Gustafson* v. *State*, 267 Ark. 278, 590 S.W.2d 853 (1979), Rule 608 (b) of the Uniform Rules of Evidence has made a very definite — even drastic — change in how a witness may be cross-examined. This is especially true in criminal cases because, in the past, it was proper to ask a defendant on cross-examination if he had been guilty of almost any crime. Rule 608 (b) has changed that. Under Rule 609, the credibility of a witness may be attacked by evidence that he has been convicted of certain crimes. But Rule 608 (b) says that specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility (other than conviction of a crime as provided in Rule 609) may not be proved by *extrinsic* evidence but may be inquired into on cross-examination.

However, *Gustafson* said that before specific instances of conduct may be asked about under Rule 608 (b), three conditions have to be met: (1) the questions have to be asked in good faith, (2) the probative value of the conduct must outweigh any prejudicial effect, and (3) the conduct must relate to truthfulness or untruthfulness. These conditions were again stated by the Supreme Court in *Divanovich* v. *State*, 271 Ark. 104, 607 S.W. 2d 383 (1980), and by the Court

of Appeals in *Harper* v. *State*, 1 Ark. App. 191, 614 S.W. 2d 237 (1981).

Two other important aspects of this matter are discussed in those cases. First, not every instance of misconduct relates to truthfulness or untruthfulness. As we said in *Harper*:

> *Gustafson* indicated that misconduct relating to truthfulness would include forgery, perjury, bribery, false pretense, theft, and embezzlement, but said, "Obviously, some misconduct would not bear on truthfulness. For example, murder, manslaughter or assault do not *per se* relate to dishonesty." And in *Divanovich* the court said, "Questions regarding appellant's violent nature and destruction of property are wholly unrelated to his propensity for honesty and, therefore, improper."

Also, it should be remembered that the acts of misconduct which may be asked about on cross-examination cannot be proved by *extrinsic* evidence. So, when the question is answered the matter is ended. If the answer is negative, no evidence of misconduct has been produced but a prejudicial question may have been asked. As *Gustafson* said, "a prosecutor, who seeks to have a defendant make an admission concerning a felony when there has been no conviction, hazards a reversal, absent a showing of probative value, because of the prejudicial nature of the question."

We do not agree with the State's contention that the question asked appellant on cross-examination was proper under Uniform Evidence Rule 404 (b). The State says it was proper because it had to do with appellant's prior knowledge and involvement with marijuana and was, therefore, relevant to the issue of entrapment. But the conduct was denied and there is no evidence in the record that it occurred. In *Spears* v. *State*, 264 Ark. 83, 568 S.W. 2d 492 (1978), relied upon by the State, there was evidence by a witness that he had purchased controlled substances from the appellant in that case. Since the appellant here did not admit guilt of the crime asked about and since there was no other evidence to

show it, there is no evidence to which Rule 404 (b) can apply.

However, we do agree with the State's contention that the question asked by the prosecuting attorney was permissible cross-examination.

In *Montague* v. *State*, 219 Ark. 385, 242 S.W. 2d 697 (1951), the defendant was charged with manslaughter as a result of an automobile collision. On direct examination he testified that he had not been arrested since he had been in West Memphis. On cross-examination he was asked if he had not been arrested for a traffic violation in Forrest City about a month before the wreck for which he was on trial and the court on appeal said:

> Counsel for the State had a right to question appellant on cross-examination as to prior arrests, in the circumstances, in an effort to show that he had not truthfully answered the above questions propounded by his own counsel on direct examination.

While that case was decided prior to the Uniform Rules of Evidence, the same result is reached in federal courts which have the same rule as our 608 (b).

In *United States* v. *McClintic*, 570 F. 2d 685 (8th Cir. 1978), the court said:

> The defendant, testifying in his own behalf, asserted that the first time in his life when he had done anything illegal was when he participated in organizing the Paper Place scheme in Rockford, Illinois. On cross-examination, however, the prosecutor inquired into the defendant's attempt in 1973 to sell a two-hundred dollar ring for $8,000. . . . The trial court ruled, over objection, that this inquiry was proper cross-examination. Defendant argues that it unfairly prejudiced him by presenting prior criminal acts which bore no relation to the issues at trial. We disagree.

> Moreover, the ring-swindle cross-examination was proper as impeachment by contradiction. C. McCormick, *McCormick on Evidence*, § 47 at 97 (2 ed. 1972). By painting a picture of himself as an innocent who succumbed to sympathy for Morrissey in the Rockford, Illinois scheme, the defendant invited cross-examination concerning this previous misconduct.

In *United States* v. *Contreras*, 602 F. 2d 1237 (5th Cir. 1979), *cert. denied*, 444 U.S. 971, the court said:

> Alvaredo testified on direct examination that he observed the DEA agent lift a "coke" spoon to his nose, and that he knew it was a "coke" spoon "because I have seen a bunch of them in Playboys and this and that."
>
> On cross examination, the prosecutor inquired into Alvaredo's knowledge of cocaine and related paraphernalia, at one point, asking whether Alvaredo had discussed with a DEA agent "going to Ft. Stockton to purchase large quantities of cocaine." Alvaredo denied the discussion, and the court properly overruled the defense's objection to the inquiry.
>
> Contrary to appellant's assertions, Rule 608 of the Federal Rules of Evidence is not applicable to this situation. This is not a case where specific instances of misconduct, totally unrelated to the witness' substantive testimony, were used in an attempt to impeach. Alvaredo's direct testimony revealed the alleged basis for his knowledge that the spoon he observed was a "coke" spoon. The government was entitled to test the credibility and factual foundation of that statement.

In *Carter* v. *Hewitt*, 617 F. 2d 961 (3rd Cir. 1980) the court in discussing Federal Rule of Evidence 608 (b) said:

> The principal concern of the rule is to prohibit impeachment of a witness through extrinsic evidence of his bad acts when this evidence is to be introduced by calling *other* witnesses to testify. Thus, Weinstein and Berger described the extrinsic evidence ban as follows:

> Courts often summarize the no extrinsic evidence rule by stating that "the examiner must take his [the witness's] answer." This phrase is descriptive of federal practice in the sense that the cross-examiner cannot call other witnesses to prove the misconduct after the witness' denial; it is misleading insofar as it suggests that the cross-examiner cannot continue pressing for an admission — a procedure specifically authorized by the second sentence of Rule 608 (b).

3 J. Weinstein & M. Berger, *Weinstein's Evidence* par. 608[05], at 608-22 (1978) (footnote omitted).

Similarly, McCormick writes:

> In jurisdictions which permit character-impeachment by proof of misconduct for which no conviction has been had, an important curb is the accepted rule that proof is limited to what can be brought out on cross-examination. Thus, if the witness stands his ground and denies the alleged misconduct, the examiner must "take his answer," not that he may not further cross-examine to extract an admission, but in the sense that he may not call other witnesses to prove the discrediting acts.

E. Cleary, *McCormick on Evidence* § 42, at 84 (2d ed. 1972) (footnotes omitted).

Thus, the great majority of the decisions finding violations of Rule 608 (b) do so when the extrinsic evidence that is challenged is obtained from a witness *other* than the one whose credibility is under attack. When, however, the extrinsic evidence is obtained from and through examination of the very witness whose credibility is under attack, as is the case here, we must recognize that the rule's core concerns are not implicated.

A limitation on the right to cross-examine about a

matter brought out by direct is found in evidence Rule 403 which allows the court to exclude evidence if its probative value is, among other factors, substantially outweighed by the danger of unfair prejudice or the misleading of the jury. See *United States* v. *Tom*, 640 F. 2d 1037 (9th Cir. 1981). And, of course, the court may always require a good faith showing on the part of counsel as suggested in *Gustafson* and *Harper*.

We think the state was entitled to challenge by cross-examination the appellant's testimony that he had never been involved before in a drug transaction. Appellant does not argue that the question was asked in bad faith and we see nothing in the record to so indicate.

Affirmed.

Hurley ASHCRAFT *v.* Paul QUIMBY and ROCKWOOD INSURANCE COMPANY

CA 81-153 621 S.W. 2d 230

Court of Appeals of Arkansas
Opinion delivered September 23, 1981

McMath & Leatherman, P.A., by: *Phillip H. McMath*, for appellant.

Shackleford, Shackleford & Phillips, for appellee.

GEORGE K. CRACRAFT, Judge. This is an appeal from a determination by the Workers' Compensation Commission that benefits claimed by the appellant had been barred by the statute of limitations provided in that act.

It was stipulated that the appellant sustained a compensable injury on May 28, 1974, while in the employ of the appellee, Paul Quimby. As a result of that injury to his hip the appellant underwent an operation in which four pins were inserted in his hip.

Following that surgery a disagreement arose between Drs. Blackwell and Logue as to whether or not he should have a total hip replacement at that time. In view of this disagreement a third opinion was sought of Dr. Sorrells. Dr. Sorrells agreed with Dr. Logue that total hip replacement should not be done at that time. All doctors agreed, however, that a total hip replacement might ultimately be required. In 1976 in a hearing before the Commission the administrative law judge stated in his opinion "the claimant will in all probability be in need of a total hip replacement in the future as a result of the compensable injury he suffered on May 28, 1974."

Thereafter on October 1, 1976, the Commission on an evaluation of forty percent permanent disability to the lower extremity, ordered that the claimant be paid a lump sum settlement for the balance of permanent partial disability. In May of 1977 the appellant underwent additional surgery for the insertion of a prostatic atroplasty of the left hip. Thereafter he returned on occasion to see Dr. Sorrells who furnished the last medical services to the appellant on March 29, 1978. No further medical services were sought by appellant until he returned to his original doctor in February of 1980. On March 11, 1980, total hip replacement surgery was performed.

On these facts the administrative law judge found that the last medical services furnished or compensation paid by anyone was March 28, 1978, and that no claim for additional services or compensation was made until February 1980. He concluded that Ark. Stat. Ann. § 81-1318 (b) barring by

limitation any claim made more than one year after the last payment of compensation or two years from the date of the injury is mandatory and that the earlier finding that hip surgery might become necessary did not toll the statute.

Appellant filed his notice of appeal to the full commission listing as his grounds (among other things):

> That the operation of March 11th for which this claim is made was a continuing medical treatment as a result of the injuries incurred on May 28, 1974, and that said continuing treatment was within the knowledge of the employer and carrier and the carrier should be estopped from asserting the statute of limitations.

No mention of the ground for reversal now relied on was then made. The full commission affirmed the findings and conclusions of the law judge.

Appellant appeals asserting that the expenses of the total hip replacement were not subject to the limitations of § 81-1318 (b) but are specifically exempt from the time limitations as a prosthetic device. In support of this contention appellant relies upon the provision of that section which is as follows:

> The time limitation of this section shall not apply to claims for replacement of medicine, crutches, artificial limbs and other apparatus permanently or indefinitely required as a result of a compensable injury, where the employer or carrier has previously furnished such medical supplies.

Appellant contends that the operation or total hip replacement of February 1980 falls within one of those categories listed in the exception, i.e. "artificial limbs or other apparatus permanently and definitely required."

The appellees contend that the appellant proceeded before the Commission on the issue of whether or not the March 1980 operation was continuing medical treatment as a result of the injuries incurred which was in the knowledge

of the appellees and had been mentioned by the administrative law judge in the 1976 hearing. It is their position that the issue now relied upon by the appellant was not raised before the Commission and cannot be raised here for the first time on appeal.

In response to that contention the present counsel for the appellant candidly admits that he did not represent the claimant during the hearing before either the administrative law judge or the full commission and does not know what points were argued but takes the position that the statute and applicable cases were cited throughout the proceedings.

Our examination of the record leads us to the conclusion that the issue now raised on this appeal was never brought to the attention of either the administrative law judge or the full commission. We agree with the appellees that if the same had been an issue more medical testimony would have been developed to determine exactly what surgical procedures were followed, why a P28 was substituted, whether it was merely a pain necessitated operation, or any additional surgery would be required. The only medical testimony with regard to the 1980 operation was a written report by Dr. Blackwell which at best informs us that an operation was performed to correct "the right hip prostatic changes with erosions," and that a "P28 total hip replacement was inserted." There was no testimony in the record as to what a "P28 hip replacement" is or why the procedure was required or its connection with the earlier surgery. The notice of appeal to the full commission filed after the administrative law judge's opinion of November 12, 1980, contains no reference to the issue now raised.

Our review of the record convinces us that this matter was presented to the Commission on the theory that the 1980 surgery was merely an extension of the original injury and appellees are estopped from now asserting the statute of limitations. Nowhere is there reference made to the issue of whether or not the operation of 1980 was an exception to the statute in question.

It is a well established appellate rule that grounds for

relief cannot be asserted for the first time on appeal. In *Palmer* v. *Cline*, 254 Ark. 393, 494 S.W. 2d 112 (1973), the court declared the rationale for that rule as follows:

> We must determine the issues upon the record that was made in the trial court. The facts essential to the question now argued were not pleaded in that court and therefore cannot serve as a basis for decision in this court.

The Supreme Court has held that this rule applies with equal force to appeals from Arkansas Workers' Compensation Commission. *Hawthorne* v. *Davis*, 268 Ark. 131, 594 S.W. 2d 844 (1980); *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W. 2d 360 (1979); *Jeffery Stone Co.* v. *Lester H. Raulston*, 242 Ark. 13, 412 S.W. 2d 275 (1967); *Murch-Jarvis Co., Inc.* v. *Townsend*, 209 Ark. 956, 193 S.W. 2d 310 (1946).

We affirm.

Catherine SIMS *v.* William F. EVERETT,
Director of Labor

E 81-185 621 S.W. 2d 229

Court of Appeals of Arkansas
Opinion delivered September 23, 1981

Appellant, *pro se*.

George K. Cracraft, Judge. The appellant, Catherine Sims, formerly lived in Arkansas but moved to Anchorage, Alaska, to accompany her husband who was in the armed forces. She obtained employment as a teacher upon arrival in Alaska in September of 1980. She was terminated from that employment in January of 1981 because she did not have certain credits required for teacher certification in that state.

She therefore enrolled in the University of Alaska in January and was taking the required three courses on Tuesdays, Wednesdays and Thursdays. The Tuesday and Wednesday classes were night classes, but her Thursday class began at 1:00 p.m. and continued until 3:00 p.m.

She made application for unemployment benefits while seeking other employment. She was initially disqualified by the agency as not able and available for work and appealed that determination to the Appeal Tribunal.

The tribunal found that her chances of finding work were greatly restricted due to the fact that she did have one day of classes in the afternoon, and if she found a daytime job those classes would prevent her from accepting employment. The tribunal declared her ineligible on finding that she was not fully able and available for work. The evidence touching on this point was as follows:

> Referee: If you got a job that required you to give up your schooling, would you do so?
>
> Claimant: The one that, yes because it's just that one class that I would . . .
>
> Referee: Okay so all you'd have to do is just give up the one class.
>
> Claimant: Right.

On her appeal from a determination of the tribunal, she stated to the Board of Review:

> I am willing to drop the 1:00 p.m. class if I'm offered a job. I need this class for certification to get a teacher position, but I will drop this class. The evening class would not interfere with my availability to work. The afternoon class could be rescheduled.

The Board of Review adopted the finding of the referee and affirmed his conclusion that she was ineligible because she was not fully able and available for work.

The basis for her disqualification was clearly stated to be that she was unavailable for work on the afternoon that she had classes. It is clear that she stated to both fact finding bodies that she would drop that class if it interfered with her work or if she was offered a job. There was nothing else in the record touching on the question of her availability.

The sole question for this court to determine on appeal from the Board of Review is whether there is substantial evidence to support the Board of Review's finding that the appellant was not fully able and available for work. *Oxford* v. *Daniels*, 2 Ark. App. 200, 618 S.W. 2d 171 (1981). Substantial evidence is valid, legal and persuasive evidence; such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Victor Industries Corporation* v. *Daniels*, 1 Ark. App. 6, 611 S.W. 2d 794 (1981).

We find no substantial evidence to support the finding of the Board of Review that this appellant was not fully able and available for work. To the contrary, the only evidence before it was to the effect that she would make herself available for offered employment by dropping the Thursday afternoon course which the agency determined to be the only impediment.

Reversed.

Harry BATEMAN *v.* STATE of Arkansas

CA CR 81-45 621 S.W. 2d 232

Court of Appeals of Arkansas
Opinion delivered September 23, 1981

Ronald Gene Killion and *Edgar G. Goodman*, for appellant.

Steve Clark, Atty. Gen., by: *Leslie M. Powell*, Asst. Atty. Gen., for appellee.

JAMES R. COOPER, Judge. Appellant was convicted of the crime of incest in violation of Ark. Stat. Ann. § 41-2403 (Repl. 1977) in Johnson County Circuit Court. The jury sentenced him to five years in the Department of Corrections. From that conviction comes this appeal.

As error, appellant argues that the trial court's reference

to the complaining witness as the "victim" was prejudicial, and that the court erred in failing to grant a mistrial in response to appellant's motion.

The question on appeal is whether the trial court abused his discretion in failing to grant a mistrial under these circumstances. *Chaviers* v. *State*, 267 Ark. 6, 588 S.W. 2d 434 (1979). A mistrial is an extreme remedy which should be utilized only as a last resort. *Price* v. *State*, 268 Ark. 535, 597 S.W. 2d 598 (1980). It is clear that the verdict of the jury should not be biased or affected by expressed opinions of the trial court. [*Sharp* v. *State*, 51 Ark. 147, 10 S.W. 228 (1889); *West* v. *State*, 255 Ark. 668, 501 S.W. 2d 771 (1973)], but we must look at the totality of the circumstances in determining whether or not the remark was so prejudicial that a mistrial should have been granted [*Peals* v. *State*, 266 Ark. 410, 584 S.W. 2d 1 (1979); *Vassar* v. *State*, 75 Ark. 373, 87 S.W. 635 (1905)]. In this case, the trial court should not have referred to the prosecuting witness as the "victim," but from a review of the record it is clear that the court was simply attempting to identify her for purposes of questioning the jury panel as to whether or not they were acquainted with her. Certainly, the court could have referred to her as the alleged victim and that would not have been error. Under all the circumstances, we do not view that comment by the trial court as prejudicial even though the term should not have been used. *Penton* v. *State*, 194 Ark. 503, 109 S.W. 2d 131 (1937); *Newberry* v. *State*, 261 Ark. 648, 551 S.W. 2d 199 (1977).

In addition, we note that no objection was made at the time the court made the reference, and in fact the motion for mistrial came only after the jury had been selected and sworn. During the course of voir dire, the prosecuting attorney referred to the complaining witness as the "victim" and no objection was registered either at that time or in the motion for mistrial. If there was error, it was either waived or was harmless and therefore we affirm.

Affirmed.

MAYFIELD, C.J., and GLAZE and CORBIN, JJ., dissent.

DONALD L. CORBIN, Judge, dissenting. I must respectfully dissent to the majority's opinion. I think that the trial court should have granted a mistrial.

A trial judge should be circumspect in his language at all times for his position before the jury is one of great influence. *Williams* v. *State*, 174 Ark. 752, 2 S.W. 2d 36. The Supreme Court of Arkansas in *Sharp* v. *State*, 51 Ark. 147, 10 S.W. 228, in reversing a conviction for second degree murder, made clear the effect an unguarded remark by the trial judge could have upon a jury. The Court in *Sharp, supra*, quoted the following from *People* v. *Williams*, 17 Cal. 146:

> The word *victim* in the connection in which it appears, is an unguarded expression, calculated, though doubtless unintentionally, to create prejudice against the accused. It seems to assume that the deceased was wrongfully killed, when the very issue was as to the character of the killing. ... When the deceased is referred to as "victim," the impression is naturally created that some unlawful power or dominion had been exerted over his person. And it was nearly equivalent, in effect, to an expression characterizing the defendant as a criminal. The court should not, directly or indirectly, assume the guilt of the accused, nor employ equivocal phrases which may leave such an impression. The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the court, and the great deference which they pay to the opinions and suggestions of the presiding judge, especially in a closely balanced case, when they can thus shift the responsibility of a decision from themselves to the court. A word, a look, or a tone may, sometimes, in such cases, be of great or even controlling influence.

Webster's Third International New Dictionary explains "victim" as "prey, quarry: victim applies to anyone who suffers either as a result of ruthless design or incidentally or accidentally." *Black's Law Dictionary* (5th ed. 1979) defines victim as "the person who is the object of a

crime or tort, as the victim of a robbery is the person robbed."

The reflection of such remark on the credibility of the prosecuting witness is apparent. Given the inherent meaning of the word "victim" and the context in which it was used, leaves no doubt that, *although unintentionally*, the court intimated to the jury panel its opinion that the prosecuting witness had been wronged in some way. Because of public abhorrence to the type of offense with which defendant was charged and the natural sympathy given a young girl in the setting involved, the slightest intimation by the presiding judge that her testimony merits belief carries a great influence with the members of the jury.

The degree of influence a presiding judge possesses in regard to a jury is not diminished simply because evidence is yet to be presented.

I am afraid that the use of general knowledge and understanding by each juror would not reduce the effect of the utterance in question, especially when one takes into account that the word "victim" describes one who had been legally or morally wronged. The danger of the reference is that it might instill sympathy in the hearts and minds of the jury in favor of the prosecuting witness while in the same instance harden their senses against the accused.

Finally, I note that the majority has disregarded 100 years of existing case law.

MAYFIELD, C.J., and GLAZE, J., join in this dissent.

Gerry SWAFFORD, Widower of Delores SWAFFORD, Deceased *v.* TYSON FOODS, INC.

CA 80-463 621 S.W. 2d 862

Court of Appeals of Arkansas
Opinion delivered September 23, 1981

Sam T. Heuer of *Davis, Bracey & Heuer, P.A.*, for appellant.

Davis, Bassett, Cox & Wright, for appellee.

Steve Clark, Atty. Gen., by: *Marion A. Humphrey*, Asst. Atty. Gen., *amicus curiae*.

LAWSON CLONINGER, Judge. The Arkansas Workers' Compensation Commission found that Delores Swafford, an employee of appellee Tyson Foods, Inc., died as the result of a compensable injury under the Arkansas Workers' Compensation Act, but that her husband, appellant Gerry Swafford, was not entitled to compensation benefits as her dependent because he was not incapacitated to support himself. The Commissioner awarded benefits to the two minor children of Gerry and Delores Swafford.

Ark. Stat. Ann. § 81-1302 (*l*) (Repl. 1976) defines "widow" as follows:

> 'Widow' shall include only the decedent's legal

wife, living with or dependent for support upon him at the time of his death.

Ark. Stat. Ann. § 81-1302 (m) (Repl. 1976) defines "widower" as follows:

> 'Widower' shall include only the decedent's legal husband who, at the time of her death, was living with and dependent upon her for support and was incapacitated to support himself.

Ark. Stat. Ann. § 81-1315 (Repl. 1976) provides in pertinent parts as follows:

> (c) . . . compensation for the death of an employee shall be paid to those persons who were wholly and actually dependent upon him in the following percentage of the average weekly wage of the employee, and in the following order of preference:
>
> First. To the widow if there is no child, thirty-five per cent (35%), and such compensation shall be paid until her death or remarriage. Provided, however, the widow shall establish, in fact, some dependency upon the deceased employee before she will be entitled to benefits as provided herein.
>
> To the widower if there is no child, thirty-five per cent (35%), and such compensation shall be paid during the continuance of his incapacity or until remarriage. Provided, however, the widower shall establish, in fact, some dependency upon the deceased employee before he will be entitled to benefits as provided herein.
>
> Second. To the widow or widower if there is a child, the compensation payable under the First above, and fifteen percent (15%) on account of each child.

It is clear that under § 81-1302, *supra*, a widow need only be *either* living with *or* dependent for support upon her husband at the time of his death to be entitled to compensation, while a widower must *both* be living with *and*

dependent upon his wife for support at the time of her death, *and be incapacitated to support himself*, to be eligible for the same compensation. It is equally clear that although § 81-1315 (c), *supra*, provides that compensation shall be paid only to those persons who are wholly and actually dependent upon the decedent, without distinction as to class, a widow is entitled to compensation *until her death or remarriage*, while a widower shall be paid *during the period of his incapacity or until remarriage*.

The Administrative Law Judge found that Ark. Stat. Ann. § 81-1302 (m) is unconstitutional as being in violation of the Equal Protection clauses of the Fourteenth Amendment to the United States Constitution, and Article II, Section 18, of the Arkansas Constitution, and awarded compensation to appellant and the two minor children. The Full Commission observed that the distinction made in the Act may be unconstitutional, but that it is for the courts and not for an administrative law judge or a quasi-judicial commission to declare the Act unconstitutional if, in fact, it is.

The issue raised by the appellant on this appeal is whether Ark. Stat. Ann. §§ 81-1302 (m) and 81-1315 (c) constitute impermissible gender-based discriminations against widowers under the Equal Protection clauses of the U.S. Constitution and the Arkansas Constitution. Appellee urges that even though the dependency section may well be unconstitutional, the decision of the Commission should be affirmed because from a factual standpoint appellant was not wholly and actually dependent upon the deceased as were the two minor children.

We find that Ark. Stat. Ann. §§ 81-1302 (m) and 81-1315 (c) are impermissible gender-based discriminations and that appellant was wholly and actually dependent upon decedent at the time of her death.

In a long line of cases the United States Supreme Court has not hesitated to strike down gender classifications that result in benefits or privileges being granted or denied on the basis of the sex of the qualifying person. In *Royster Guano*

Company v. *Virginia*, 253 U.S. 412 (1920), the Court stated that a classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. In *Reed* v. *Reed*, 404 U.S. 71 (1971), an Idaho statute which provided that in the appointment of an administrator "males must be preferred to females," was declared to be a violation of the Equal Protection clause.

In *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), a serviceman could claim his wife as a dependent without regard to whether she was in fact dependent upon him, but a servicewoman could not claim her husband as a dependent unless he was in fact dependent upon her for over one-half of his support. The discrimination was invalidated. The case of *Califano* v. *Goldfarb*, 430 U.S. 199 (1977) dealt with a Social Security Act provision granting survivor's benefits to a widow regardless of dependency, but providing the same benefits to a widower only if he had been receiving at least half of his support from his deceased wife. In declaring the provision invalid, the Court stated that "female insureds received less protection for their spouses solely because of sex."

Not every gender-based discrimination is set aside on constitutional grounds, but to escape invalidation it is necessary that they serve important governmental objectives and the discriminatory means employed must be substantially related to the achievement of those objectives. *Califano* v. *Wescott*, 443 U.S. 76 (1979) and *Orr* v. *Orr*, 440 U.S. 268 (1979).

At issue in the case of *Wengler* v. *Druggist Mutual Insurance Company, et al*, 446 U.S. 142 (1980) was the constitutionality of the provisions of the Missouri Workers' Compensation Laws which denied a widower benefits based on his wife's work-related death unless he was incapacitated or proved dependency, but granted a widow benefits without her having to prove either dependency or incapacitation. The only justification offered by the appellees for not treating males and females alike was the assertion that most women are dependent on male wage earners and that it is

more efficient to presume dependency in the case of women. The Court found that the Missouri law discriminated against men because it deprived them of survivor's benefits to which they would be entitled except for their sex, and it discriminated against women because it provided them with less protection for their spouses solely because of sex. The Court then observed:

> Surely the needs of surviving widows and widowers would be completely served either by paying benefits to all members of both classes or by paying benefits only to those members of either class who can demonstrate their need. Why, then, employ the discriminatory means of paying all surviving widows without requiring proof of dependency, but paying only those widowers who make the required demonstration?

The Arkansas Supreme Court has declared invalid a number of gender-based laws. In *Hatcher* v. *Hatcher*, 265 Ark. 681, 580 S.W. 2d 475 (1979), a statute providing for maintenance and attorney's fees for wives only was invalidated; in *Lucas* v. *Handcock*, 266 Ark. 142, 583 S.W. 2d 491 (1979), the Court ruled unconstitutional a statute which allowed illegitimate children to inherit from their mother and not their father, and in *Noble* v. *Noble*, 270 Ark. 602, 605 S.W. 2d 453 (1980) gender-based alimony and property division statutes were declared unconstitutional. Two recent Arkansas cases, *Hess and Morton* v. *Wims*, 272 Ark. 43, 613 S.W. 2d 85 (1981) and *Stokes* v. *Stokes*, 271 Ark. 300, 613 S.W. 2d 372 (1981), struck down gender-based statutes pertaining to the right of a widow, but not a widower, to take against the will and to receive dower interests and statutory allowances, and Article IX, Section 6 of the Constitution of the State of Arkansas relating to homestead.

In the case now before this Court it is obvious that the sections of the Workers' Compensation Act sought to be invalidated are gender-based discriminations. As the United States Supreme Court observed in *Wengler* the burden is on those defending a discrimination to make out a claim to justification. However, in this case no one attempts to justify

the discrimination; in fact, appellee agreed that there was probably an unconstitutional discrimination, and the Attorney General of the State of Arkansas, in its *amicus curiae* brief, concedes that the distinction between "widow" and "widower" may constitute an impermissible gender-based discrimination. In the face of what we find to be a gender-based discrimination, and in the absence of any showing that the discrimination serves an important governmental objective, we hold that the discriminatory sections of the Arkansas Workers' Compensation Act are violative of the Equal Protection clauses of the federal and state constitutions.

The secondary question presented is whether the constitutional defect should be cured by extending the rights of widowers or eliminating the rights of widows. In *National Life Insurance Company* v. *U.S.*, 277 U.S. 508 (1928), the United States Supreme Court observed that if extension is legislation it is nonetheless so because the operation can be performed by striking out certain words. That observation, of course, is correct, but appellant has cited no authority, and we are aware of none, which allow this Court to add to a statute so as to make it constitutionally correct. There is, however, authority for this Court to strike the offensive portions while leaving the remainder intact.

In *Brooks* v. *Wilson*, 165 Ark. 477, 265 S.W. 53 (1924), the Court stated:

> ... if any special provision of an act be unconstitutional and can be stricken out without affecting the validity of the residue of the act, it will be done, and the remainder of the act allowed to stand. *Cribbs* v. *Benedict*, 64 Ark. 555, 44 S.W. 707 (1897).

The Supreme Court of Arkansas stated in the case of *Borchert* v. *Scott*, 248 Ark. 1041, 460 S.W. 2d 28 (1970), as follows:

> ... The rule is stated in *Cotham* v. *Coffman*, 111 Ark. 108, 163 S.W. 1183 (1914), quoting from Cooley's Constitutional Limitations (6 ed.), in this language:

> ... Where therefore a part of the statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in the subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the Legislature would have passed the one without the other. ... If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with apparent legislative intent, wholly independent of that which was rejected, it must be sustained. ...

We have concluded that the Workers' Compensation Act and its sections are severable and that the offending portions of §§ 81-1302 (m) and 81-1315 (c) can be excised, leaving the remainder of the sections intact. We further conclude that it was the legislative intent to provide compensation for the death of an employee and that to make compensation available equally for a widow and a widower is more consistent with the legislative purpose than to exclude widows. The offending words in § 81-1302 (m) "... and was incapacitated to support himself ..." are therefore excised, which results in Ark. Stat. Ann. § 81-1302 (m) (Repl. 1976) providing as follows:

> 'Widower' shall include only the decedent's legal husband who, at the time of her death, was living with [or] dependent upon her for support.

The offending words of § 81-1315 (c) (Repl. 1976), "... during the continuance of his incapacity or ..." are therefore excised, which results in Ark. Stat. Ann. § 81-1315 (c) (Repl. 1976) providing as follows:

> First. To the widow if there is no child, thirty-five per cent (35%), and such compensation shall be paid until her death or remarriage. Provided, however, the widow shall establish, in fact, some dependency upon the deceased employee before she will be entitled to benefits as provided herein.

> To the widower if there is no child, thirty-five per cent (35%), and such compensation shall be paid until remarriage. Provided, however, the widower shall establish, in fact, some dependency upon the deceased employee before he will be entitled to benefits as provided herein.

We are aware of the fact that Act 290 of the Acts of Arkansas for 1981, abolishing the distinction between widow and widower in the Workers' Compensation Act, became effective on March 3, 1981. However, that Act is not effective retroactively and does not govern the rights between these parties.

The Administrative Law Judge found that appellant and the two children were wholly and actually dependent upon Delores' earnings and awarded benefits to appellant equal to thirty-five per cent of Delores' average weekly wage, and fifteen per cent to each child. The Commission found that Gerry and Delores Swafford and their two minor children were all living together at the time of Delores' death and that the entire family was dependent upon her earnings. Appellant was disqualified for benefits solely because he was not incapacitated to support himself.

In defining the term "wholly dependent" the Court, in *Chicago Mill and Lumber Company* v. *Smith*, 228 Ark. 876, 310 S.W. 2d 803 (1958), stated:

> It would be possible to construe this provision of the Act as depriving a widow or child of any compensation when, as here, the husband and father was completely void of any sense of his family obligation. But it is a rule that remedial legislation shall be liberally construed. We believe the Legislature used the term 'wholly dependent' in the sense of applying to those ordinarily recognized in the law as dependents, and this would certainly include wife and children.

In *Roach Manufacturing Company* v. *Cole*, 265 Ark. 908, 582 S.W. 2d 268 (1979), the deceased had been married and the couple had one daughter. Eleven months before his

death, the deceased left his wife and child and moved to Tennessee where he resided and worked without obtaining a divorce and without providing support to his wife and daughter. The wife supported herself and her child as best she could. Stating the rule that "remedial legislation shall be liberally construed," the Court awarded the daughter compensation on the grounds that she had a "reasonable expectation of future support." The Court did not award compensation to the wife since there was no factual proof of actual dependence. The Act had been amended by the Legislature in 1976 to require the surviving spouse to be "wholly and actually dependent" upon the deceased. The Court in *Roach* further stated:

> We assume — under our settled law we must assume — that the Legislature, in deciding to amend the statute, knew the meaning that we had attributed to 'wholly dependent.' ... It unavoidably follows that the addition of the word 'actually' was intended to change what amounted to a conclusive presumption of dependency under our prior cases. It follows at least that, when, as here, the widow and child were not living with the employee at the time of his death, there must be some showing of actual dependency.
>
> We have said, where there is no presumption of dependency, that dependency is a fact question to be determined in the light of surrounding circumstances. *Smith* v. *Farm Service Cooperative*, 244 Ark. 119, 424 S.W. 2d 147 (1968). ...

In the recent case of *Hunter Memorial Methodist Church* v. *Millirons*, 268 Ark. 975, 597 S.W. 2d 845 (Ark. App. 1980), Mrs. Millirons died as a result of a work-related occurrence and her claim was compensable. At the time of death Mrs. Millirons' average wage was $105.77 per week, and the claimant, her husband, earned approximately the same wages. The question on appeal was not only whether Mr. Millirons was entitled to compensation, but whether his five children were entitled to benefits as well. The Commission held that the five children of the deceased were entitled to recover benefits because they were actually

dependent upon their mother at the time of her death, however, the claimant was disqualified because he was not incapacitated to support himself at the time of his wife's death.

The record in this case reflects that both appellant and Delores were employed, and that all their earnings were used for the support of the family. Delores earned in excess of $5500 per year, and her contribution was approximately one-half of the family's total income. Appellant's income alone was not sufficient to support the family, and it was necessary for Delores to work.

The finding of the Commission on the issue of dependency must stand if supported by any substantial evidence, resolving all inferences in favor of the claimant. *Revere Copper and Brass, Inc.* v. *Birdsong*, 267 Ark. 922, 593 S.W. 2d 54 (Ark. App. 1979). The question is whether the proof supports the finding that was made, not whether it would have supported the contrary conclusion. *Roach Manufacturing Company* v. *Cole, supra.*

We find there was substantial evidence to support the findings of dependency made by the Commission.

The cause is remanded to the Commission with directions to enter an award for appellant for thirty-five per cent of the average weekly wage of Delores Swafford.

Fred C. RUSSELL *v.* INTERNATIONAL PAPER COMPANY

CA 81-40 621 S.W. 2d 867

Court of Appeals of Arkansas
Opinion delivered September 23, 1981

Youngdahl & Larrison, by: *James H. Larrison, Jr.*, for appellant and cross-appellee.

Brown, Compton & Prewett, Ltd., by: *James M. Pratt, Jr.*, for appellee and cross-appellant.

LAWSON CLONINGER, Judge. This Workers' Compensation appeal involves the same issues as did the case of *Gerry Swafford* v. *Tyson Foods, Inc.*, 2 Ark. App. 343, 621 S.W. 2d 862, which was decided by this Court today, and the two cases were consolidated for consideration by the Court. The decision in the *Swafford* case relating to the unconstitutionality of Ark. Stat. Ann. §§ 81-1302 (m) and 81-1315 (c) (Repl. 1976) and the statement of the law relating to dependency are adopted in full herein.

In the instant case Verna Russell died as a result of an admittedly compensable injury suffered while she was an employee of appellee International Paper Company. The Arkansas Workers' Compensation Commission denied death benefits to decedent's husband, appellant Fred C. Russell, declaring that but for the statutory requirement of incapacity for self-support appellant would be entitled to partial dependency benefits of fifty per cent (50%) of the amount allowable to a dependent spouse.

Appellee concedes that while Ark. Stat. Ann. §§ 81-1302 (m) and 81-1315 (c) are unconstitutional, benefits should be denied appellant because (1) deletion of the unconstitutional portion of the Act is not the proper way to equalize treatment for widows and widowers and (2) appellant failed to establish actual dependency on his wife for support.

Appellee urges that we cannot know the intent of the Legislature; that it can be argued that the Legislature might very well take the approach that the burden of showing incapacity for self-support should be placed upon widows as well as widowers.

In *Hatcher* v. *Hatcher*, 265 Ark. 681, 580 S.W. 2d 475 (1979) the Court held unconstitutional the statute allowing maintenance and attorney's fees to a wife, but not a husband, during the pendency of an action for divorce or alimony. Ark. Stat. Ann. § 34-1210 (Repl. 1962). The appellee wife in *Hatcher* argued that the Court should simply hold that the law applies to both wife and husband. The Court declined to so hold, stating that it is not the function of the court to legislate. However, in *Hatcher*, the offending statute recited that "during the pendency to an action for divorce or alimony, the Court may allow the wife maintenance and a reasonable fee for her attorneys . . ." Only by adding a word or words could this statute be made acceptable, and appellant has cited no authority for the proposition that words can be added in order to make a portion of a statute constitutionally correct. In a concurring opinion in *Borchert* v. *Scott*, 248 Ark. 1041, 460 S.W. 2d 28 (1970) Mr. Justice Fogleman observed:

> We are not authorized to declare an entire act, or even an entire section thereof, invalid because a part of the act or section is unconstitutional, unless all of the provisions of the act, or the section, are so dependent on each other that it *cannot* be presumed that the Legislature would have passed one without the other.

As this Court stated in *Swafford* v. *Tyson, supra*, we conclude that it was the legislative intent to provide compensation for the death of an employee and that to make compensation available equally for a widow and a widower is more consistent with the legislative purpose than to exclude widows. The provisions of the sections herein held to be unconstitutional are not so interdependent that it cannot be presumed that the Legislature would have passed one without the other.

Appellant and the decedent were both employed by appellee and their earnings were approximately equal. They had no dependents, and all the money received by both was pooled into one account and checks for their expenses were paid from one account. They owned a home, vehicles and cattle jointly, shared a ride to work, and since almost all of their money was spent on expenses they had been unable to accumulate any substantial savings. There had been little reduction in the regular monthly expenses.

Ark. Stat. Ann. § 81-1315 (i)(1) provides:

> (i) Partial dependency. (1) If the employee leaves dependents who are only partially dependent upon his earnings for support at the time of the injury, the compensation payable for such partial dependency shall be in the proportion that the partial dependency bears to total dependency.

Under the authorities we cited in *Swafford* v. *Tyson*, we find there was substantial evidence to support the finding of the Commission that appellant was entitled to partial dependency benefits of fifty per cent (50%).

The cause is remanded to the Commission with directions to enter an award for appellant for partial dependency benefits of fifty per cent (50%) of the amount allowable.

Harmon J. MAXWELL and Walsie Lear MAXWELL
v. Margie SUTTON

CA 81-54 621 S.W. 2d 239

Court of Appeals of Arkansas
Opinion delivered September 23, 1981

Felver A. Rowell, Jr., for appellants.

Gilbert A. Glover, for appellee.

TOM GLAZE, Judge. This appeal is the result of a feud between next door neighbors. Appellants and appellee filed actions against one another in the Conway County Chancery Court, each alleging the maintenance of a nuisance and requesting injunctive relief. The trial court dismissed appellants' claim but granted relief to appellee, enjoining appellants from harassing appellee by calling the Morrilton City Police Department. Appellants contend on appeal the evidence was sufficient to support their request to enjoin certain acts committed by the appellee, and they also argue

the chancellor erred in restraining the personal conduct of appellants.

Arkansas case law adopts the general rule that before a court of equity will enjoin either a public or private nuisance there must be some actual or threatened interference to property or rights of a pecuniary nature as distinguished from personal rights. *Smith* v. *Hamm*, 207 Ark. 507, 181 S.W. 2d 475 (1944). The court in *Smith* held further that although equity will not intervene by injunction to restrain acts that are merely criminal, this does not preclude injunctive relief against the commission of criminal acts which cause irreparable injury to the complainant's property or pecuniary rights.

In the instant case, the parties' allegations and evidence largely center on the other's personal conduct, which they contend amounts to a nuisance. However, neither appellants nor appellee alleged or showed that the conduct and acts of which they complained affected their respective property or pecuniary rights.

In *Webber* v. *Gray*, 228 Ark. 289, 307 S.W. 2d 80 (1957), our Supreme Court took a more relaxed view of the rule noted in *Smith* v. *Hamm, supra*, that equity has no jurisdiction to protect personal rights where no property rights are involved. In doing so, the court in *Webber* adopted the Massachusetts rule announced in *Kenyon* v. *City of Chicopee*, 320 Mass. 528, 70 N.E. 2d 241 (1946), and stated as follows:

> "We believe the true rule to be that equity will protect personal rights by injunction upon the same conditions upon which it will protect property rights by injunction. In general, these conditions are, that *unless relief is granted a substantial right of the plaintiff will be impaired to a material degree; that the remedy at law is inadequate; and that the injunctive relief can be applied with practical success and without imposing an impossible burden on the court or bringing its processes into disrepute.*" [Emphasis supplied.]

In applying the foregoing rule, the court determined that Gray had no remedy at law because the actions directed by Webber against Gray were not criminal even though Gray had been subject to almost incessant harassment by Webber over a period of years. Under these extraordinary circumstances, the court upheld an order enjoining Webber from committing certain acts of molestation against Gray.

When we apply the rule enunciated in *Webber* to the facts presented in the record before us, we have no problem in deciding that neither the appellants nor appellee were entitled to injunctive relief. As noted earlier, the parties failed to show that the conduct of which they complained in any way affected property or pecuniary rights. Moreover, the conduct and acts complained of by both appellants and appellee involve violations of criminal statutes, and they do have a remedy at law.

We first consider the action brought by appellants. The trial court correctly dismissed appellants' action not only because they have an adequate remedy at law, but they also failed to prove the allegations contained in their complaint. It was the burden of appellants to show through clear evidence that the conduct which took place on appellee's property was a nuisance. See *Green* v. *Smith*, 231 Ark. 94, 328 S.W. 2d 357 (1959). Appellants offered testimony to the effect that loud noises, drinking, fighting and obscenitites had occurred on appellee's property at all hours of the day and night. This testimony was contradicted by appellee and by testimony given by witnesses for appellee, including two neighbors who depicted her as a good neighbor. These neighbors denied that appellee had done any of the acts attributed to her by appellants. The chancellor dismissed appellants' action after considering testimony which was in great conflict. We must give due regard to the opportunity of the trial court to judge the credibility of the witnesses, and the findings of the chancellor will not be reversed unless clearly against a preponderance of the evidence. Rule 52, Arkansas Rules of Civil Procedure and *Andres* v. *Andres*, 1 Ark. App. 75, 613 S.W. 2d 404 (1981).

Next, the appellee brought her action alleging that

appellants harassed her by using loud and profane language, using obscene gestures, causing a fight, parading in front of their windows without adequate clothes and making frivolous calls to the police. On conflicting testimony, the trial court granted appellee a limited order which enjoined appellants from harassing the appellee by calling the police to her residence. We have little doubt that the chancellor was correct in his analysis that some of the calls made to law enforcement officials by appellants were intended to harass and seriously annoy the appellee. We are also convinced that appellee is afforded a remedy at law since this type conduct is covered by our Arkansas Criminal Code. See Ark. Stat. Ann. § 41-2909 (1) (e) (Repl. 1977).[1]

If appellants continue to pursue the telephone calls which the chancellor felt compelled to restrain, appellee may initiate a criminal action against appellants. The court in the *Webber* case held that chancery court was without power to restrain a party from filing a law suit for damages. We also believe that, under circumstances like those before us, chancery court cannot enjoin a party from calling the police or other law enforcement agency. To hold otherwise may cause some rather disastrous, even horrifying, results. If appellants abuse their personal rights on this issue, the criminal court can certainly make that decision.

In conclusion, we note that the trial court did not, and correctly so, attempt to restrain any of the other personal misconduct of the parties. Again, no property or pecuniary rights were shown to be affected. Suffice it to say that a review of the allegations made by the parties against one another are similar, *e.g.*, fighting, profanity, public drinking, and other acts of public disturbance. The Arkansas Criminal Code contains numerous provisions which punish this type conduct, and these matters may be laid to rest between the parties by their initiating appropriate criminal proceedings.

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[1]41-2909. Harassment. — (1) A person commits the offense of harassment if, with purpose to harass, annoy, or alarm another person, he:

* * *

(e) engages in conduct or repeatedly commits acts that alarm or seriously annoy another person and that serve no legitimate purpose.

We affirm the trial court's decision dismissing appellants' complaint, but we reverse its decision regarding appellee's action. We direct that appellee's complaint also be dismissed.

Affirmed in part and reversed and remanded in part.

MAYFIELD, C.J., not participating.

HARRISON FURNITURE and AMERICAN MUTUAL INSURANCE COMPANY *v.* Renard R. CHROBAK

CA 81-147 620 S.W. 2d 955

Court of Appeals of Arkansas
Opinion delivered September 16, 1981

Marian F. Penix of *Penix, Penix & Mixon*, for appellants.

Ken Reeves of *Pinson & Reeves*, for appellee.

GEORGE K. CRACRAFT, Judge. The appellants, Harrison Furniture and American Mutual Insurance Company, bring this appeal from an award of the Workers' Compensation

Commission contending that the award and finding of the Commission that the appellee, Renard R. Chrobak, was totally disabled is not supported by substantial evidence, and that the claimant is estopped to claim such disability by his conduct. We find no merit to these contentions. However, the appellants further assign as error the refusal of the Commission to apportion the disability between it, the last employer, and the Second Injury Fund, for disability resulting from a prior injury. We agree and remand the case for further proceedings.

Appellee has been afflicted since infancy with spastic left hemiparesis which manifested itself in a withered left hand, arm and leg. Both of his left extremities were smaller than his right and he walked with a limp. His left arm could not be rotated and he had little or no use of that hand. Despite this impairment he was gainfully employed by appellant until October 11, 1979, when he sustained a compensable injury in which one of his right fingers was severed and two others were so severely damaged that the right hand was rendered essentially functionless. Prior to that time he had referred to his right hand as his "bread and butter hand" and stated that before his second injury he could do as much with his one hand as most men could do with two. On evidence hereinafter discussed the Commission found that the appellee was permanently and totally disabled and that appellants were solely liable for all benefits, refusing to apportion the disability attributable to his prior impairment to the Second Injury Fund.

I.

The appellants first contend that the Commission's finding that the appellee was permanently and totally disabled is not supported by substantial evidence. In support of this position the appellants argue that the evidence of two medical experts indicated that the anatomical disability was less than total. While conceding that *Glass* v. *Eden*, 233 Ark. 286, 346 S.W. 2d 685 (1961), authorizes consideration of wage loss factors as well as medical testimony in total disability determinations, appellants argue that there is insufficient wage loss evidence to support the finding of the Commission. We do not agree.

On appeal from Workers' Compensation Commission the review by the Court of Appeals is limited to determining whether the decision is supported by substantial evidence, and in so determining, the court is required to view the evidence in the light most favorable to the decision of the Commission. Even where the evidence would support a conclusion different from that reached by the Commission the court will affirm the Commission unless it determines that reasonable minds could not reach that conclusion. *Purdy* v. *Livingston*, 262 Ark. 575, 559 S.W. 2d 24 (1977).

When the evidence is reviewed in that light we find that there was substantial evidence to support the findings of the Commission. The medical report of Dr. Garland indicates that there is "not a single activity requiring the use of the upper extremities" that appellee would currently be capable of performing. He found both the right and left hand to be essentially functionless and that neither would improve. Neither of the other doctors who testified appears to have taken into consideration the effect of his pre-existing disability of the left hand in making his determination of lesser anatomical disability and made findings only with respect to the second injury.

There was also testimony from the appellee and his wife that he could not now tie his shoes, dress himself, pick up things or do any type of work requiring hand or power tools or the lifting of heavy objects. It was his further testimony that he could not operate office machinery and had considerable difficulty in writing. He further testified as to his unsuccessful efforts to obtain employment at some twenty-five different places in the area in which he resided. He was unable to receive help from the Arkansas Rehabilitative Service. We cannot say that reasonable minds could not reach the conclusion that he was in fact totally disabled, despite the fact that he did return and attempt to work for the employer for a short time after the second injury.

II.

Prior to the hearing before the Workers' Compensation Commission the appellee had been seeking employment

and registered with the Employment Security Division, executing forms prepared by that agency which indicated that he was available, willing and able to work. There was evidence that he received benefits under the Employment Security Act. The appellants contend that as he drew unemployment benefits he should be estopped to now claim that he was and is permanently and totally disabled. While it does not appear that this issue was raised before the Commission and ought not be considered by us on appeal, we note that appellants have cited us no authority in support of the argument that registration for employment by an injured worker bars the right to benefits under the Workers' Compensation Act.

Both parties concede that Ark. Stat. Ann. § 81-1310 (g) (Supp. 1981), was not in effect at the time of claimant's injury and could not apply to his case. This section, which became effective January 1, 1981, would provide that no compensation for disability shall be payable to an injured employee under the Workers' Compensation Act with respect to any week or weeks for which he had been receiving benefits under the Employment Security Act or the unemployment insurance laws of any other state. Prior to this enactment the Workers' Compensation Act contained no such restriction nor have our courts so held.

III.

The appellants finally urge that the Commission erred in refusing to apportion the disability between the employer and the Second Injury Fund under Ark. Stat. Ann. § 81-1313 (2) (Repl. 1976). They maintain that the Commission erred in holding that the appellants were solely liable and that that portion of his disability attributable to his congenital impairment should have been apportioned against the Second Injury Fund. We agree.

In making the award against the appellants the commission found that appellee was in fact totally disabled, but that apportionment under Ark. Stat. Ann. § 81-1313(f)(2)(ii) was not authorized because appellee's pre-existing disability resulted from a congenital abnormality and was not work related and did not arise out of and in the course of his

employment. We agree with appellants' position that the Commission erred in so holding.

The question of whether apportionment was dependent upon the pre-existing disability being work related was squarely determined in *Chicago Mill & Lumber Co.* v. *Greer*, 270 Ark. 672, 606 S.W. 2d 72. In that case the claimant had a pre-existing amputation of his left leg. His amputation was not the result of a compensable injury. While working for Chicago Mill & Lumber Company he suffered an injury to his right leg which resulted in total disability. It was also expressly found by the Commission that the pre-existing amputation had independently caused disability prior to the second injury. The Court of Appeals affirmed the ruling of the Commission that the disability was not apportionable because the first injury was not a compensable one. In reversing the Court of Appeals, the Supreme Court said:

> Neither can we agree with the respondent Fund that the first injury must be an injury that would have been compensable under the act. It cites no cases so holding. However, it urges this is the interpretation compelled by the use of the words "disabilities" and "injuries" in the statute. Larson has discussed this matter in § 59-32:
>
>> Another attempt at narrowing the range of prior injuries covered has been the contention that only cases involving prior compensable disabilities were affected. This contention was based on a rather mechanical interpretation, arrived at by lifting the words 'prior disability' out of the second injury statute and applying to them the definition of 'disability' which appears elsewhere in the act. The Supreme Court of the United States rejected this artificial and technical reading of the provision, in the light of the well-known general purpose of the act, observing that 'From the attitude of experts in the field, one would not expect Congress to distinguish between two types of handicapped workers.'

> However, the prior impairment, although not actually a compensable disability, must have been of a physical quality capable of supporting an award if the other elements of compensability were present.

No contention is made that respondent Greer does not meet these requirements.

Nor does the fact that appellee's pre-existing infirmity resulted from a congenital abnormality affect the result. Unlike the congenital defects in *Wilson Hargett Construction Co.* v. *Holmes*, 235 Ark. 698, 361 S.W. 2d 634 (1962); *C. Finkbeiner, Inc.* v. *Flowers*, 251 Ark. 241, 471 S.W. 2d 772 (1971); and *McDaniel* v. *Hilyard Drilling Company*, 233 Ark. 142, 343 S.W. 2d 416 (1961), this appellee's disease was not latent. In making that distinction all our cases rely upon Larson's work on the subject. In *Larson's Workmen's Compensation Law*, vol. 2 § 59-32(c), he quotes from *Subsequent Injury Fund* v. *Industrial Accident Commission*, 56 Cal. 2d 842, 366 P. 2d 496 (1961):

> [T]he injury need not be reflected in actual disability in the form of loss of earnings . . . but if it is not, it should at least be of the kind which could ground an award of permanent partial disability.

He then concludes:

> We have here a close parallel to the distinction observed in apportionment cases between a prior condition *not in itself disabling* but capable of being "lighted up" into actual disability by the subsequent injury, which should *not* support involvement of the Second Injury Fund, and a prior condition *competent to produce independently some degree of disability* which *is* a proper case for Second Injury Fund liability. (Emphasis added)

This appellee's condition had "lighted up" and was independently causing some degree of disability long before the second injury.

From the cases it is clear that apportionment does not apply unless the prior impairment was independently causing disability prior to the second injury and continues to operate as such after the accident. *Wilson Hargett Construction Co.* v. *Holmes*, supra; *C. Finkbeiner, Inc.* v. *Flowers*, supra; *McDaniel* v. *Hilyard Drilling Company*, supra. It is also clear from *Greer* that the fact that the prior disability was not job related and did not arise out of or in the course of a covered employment does not affect the duty to apportion. In all cases arising after January 1, 1981, this result will be dictated by Ark. Stat. Ann. § 81-1313 (i) (Repl. 1976) (Supp. 1981) rather than the case law as herein declared. All parties to this action concede that as this injury resulted prior to that effective date, the amendment does not apply to this case.

We are therefore of the view that the appellants employer-carrier are liable only for that portion of the total disability attributable to appellee's injury while in their employ and that the Second Injury Fund is liable for all additional compensation provided by the statute. The case will be remanded to the Commission with directions to make that determination and order payment accordingly.

In making its award the Commission relied heavily upon language contained in the Court of Appeals opinion in *Marshall* v. *Ouachita Hospital*, 269 Ark. 958, 601 S.W. 2d 901 (1980). In view of the rather peculiar circumstances surrounding the case we feel that our refusal to follow *Marshall* insofar as it may be at variance with the rules announced in *Greer* requires comment on the history of the cases.

Greer was initially decided by the Court of Appeals on July 2, 1980.[1] The Supreme Court granted a petition for certiorari to review that decision as it was based upon a tie vote in the Court of Appeals. The following week, July 9, 1980, the Court of Appeals handed down its unanimous opinion in *Marshall* in which it applied the same rule as it had in *Greer* the week before.[2] The Supreme Court denied

[1]269 Ark. 895, 601 S.W. 2d 583.
[2]269 Ark. 958, 601 S.W. 2d 901.

certiorari in *Marshall*, presumably because it was a unanimous decision. The Supreme Court's opinion reversing the Court of Appeals in *Greer* was not handed down until October 13, 1980.[3]

As the Supreme Court refused to review *Marshall*, the decision of the Court of Appeals became final and the cause was remanded to the Commission with directions to deny apportionment. Pursuant to that mandate the Commission entered such an order. On appeal from that order we were asked to again remand the matter to the Commission with directions to follow *Greer* and order apportionment. This we refused to do in an opinion handed down in *Marshall* v. *Ouachita Hospital*, 2 Ark. App. 273, 621 S.W. 2d 7 decided September 9, 1981, assigning as our reason that the matters decided in the July 1980 opinion were the law of the case and should be followed even if we might then feel that the July 1980 opinion was in error. As stated in *St. Louis S.W. Railway* v. *Jackson*, 246 Ark. 268, 438 S.W. 2d 41, the law of the case rule may in some cases be a harsh one, but when weighed on the scales of justice the confusion and uncertainty which would result without use of the doctrine has been found to outweigh the possibilities of harshness.

In the case now before the court we are not encumbered by that rule. We are, however, bound to follow and apply the law as declared by the Supreme Court. We are unable to reconcile the language from *Marshall*, on which the Commission relied, with the declaration of the Supreme Court in *Greer*, and decline to follow *Marshall*.

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[3]270 Ark. 672, 606 S.W. 2d 72.

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