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Hazel BURKS, Widow of Harry BURKS *v.* ANTHONY TIMBERLANDS, INC.

CA 86-348 727 S.W.2d 388

Court of Appeals of Arkansas
Division I
Opinion delivered April 15, 1987

Quiggle and Thompson, by: *Morris W. Thompson* and *Reginald A. Rogers*, for appellant.

Bridges, Young, Matthews, Holmes & Drake, by: *Michael J. Dennis*, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Workers' Compensation Commission. Appellant, Hazel Burks, the widow of the deceased employee, Harry Burks, appeals the decision of the full Commission denying her death benefits. We affirm.

Mr. Burks was employed by appellee, Anthony Timberlands, on April 19, 1984, when he was shot by a fellow employee, Frank Bailey. Bailey was convicted of first degree murder and sentenced to twenty years in the Arkansas Department of Correction. Appellant brought this claim against appellee for

death benefits asserting that the argument between Burks and Bailey arose in the course of Burks's employment and was a result of his employment.

The evidence showed that Burks and Bailey argued during work on April 19, 1984. There was testimony that a brief struggle of sorts ensued and Bailey subsequently left work before quitting time. Approximately 3 hours later, Bailey met Burks away from the work place after both men had left work and shot him. A witness to the shooting testified that he did not hear the words spoken and could only say that one of the men raised his hands as if he was pleading for his life but the other man shot him anyway. There was also testimony that the two men had a confrontation at work that day after Bailey failed to immediately shut down an assembly line upon Burks's request. A witness heard Bailey tell Burks that he had not heard Burks's request. While the witnesses were able to tell by mannerisms and facial expressions that the two men were arguing, they could not hear the actual words that were spoken. One of the witnesses said that Burks "had his arm extended toward Bailey, which Bailey tried to ward off." Bailey then left, telling a supervisor that he was resigning because Burks had hit him.

The Administrative Law Judge found that appellant failed to show by a preponderance of the evidence that Burks's death arose in the course of his employment. Appellant appealed to the Commission. The full Commission affirmed the decision of the Administrative Law Judge, without dissent, and held that appellant failed to prove her contention that Burks's death arose out of his employment. The Commission concluded as follows:

> We do not know whether Bailey shot Burks because he was angry about being asked to shut down the line, because Burks allegedly cursed and/or struck him (or attempted to), or because of some personal reason having no connection with the employment. Rather, we can only find from the testimony that Bailey and Burks had words after Burks wanted the line shut down and Bailey delayed in doing so. Following this confrontation, we know that Bailey left the job and that he apparently went home and fetched his shotgun, taking it to the location where he encountered Burks on the latter's way home. We do not know what was

> said during the second confrontation or why Bailey shot Burks. Only Frank Bailey can explain his reasons for killing Burks, and no effort was made to obtain his testimony in person or by deposition.
>
> To surmise that the slaying was employment-related, even though no one heard the words of either quarrel, would be to engage in conjecture or speculation. Conjecture and speculation, no matter how plausible, cannot supply the place of proof. *Dena Construction Co.* v. *Herndon*, 264 Ark. 791, 575 S.W.2d 155 (1979).

Appellant argues two points for reversal: (1) The Commission erred in its analysis of the evidence establishing the causal relationship of the decedent to his job, and (2) the claim is compensable under the positional risk doctrine.

The Arkansas Supreme Court has dealt with the question of whether causal connection with the employment may be shown by connecting with the employment the subject matter of the dispute leading to the assault in the case of *Westark Specialities, Inc.* v. *Lindsey*, 259 Ark. 351, 532 S.W.2d 757 (1976). In *Westark* the court held that injuries resulting from an assault are compensable where the assault is causally related to the employment, but that such injuries are not compensable where the assault arises out of purely personal reasons. The court quoted 1 Larson, *The Law of Workmen's Compensation* § 11, and held that assaults arise out of the employment either if the risk of assault is increased by the nature or the setting of the work, or if the reason for the assault was a quarrel having its origin in work, and a causal connection with the employment may be shown by connecting the subject matter of the dispute leading to the assault with the employment. *Westark*, 259 Ark. at 353, 532 S.W.2d at 759.

The burden is upon the claimant to prove that the injury arose in the course of the employment and additionally, that it grew out of or resulted from the employment. *Bagwell* v. *Falcon Jet Corp.*, 8 Ark. App. 192, 649 S.W.2d 841 (1983). On appeal the evidence is viewed in the light most favorable to the finding of the Commission and is given its strongest probative value in favor of its order. The issue is not whether the evidence would support a contrary finding. The extent of our inquiry is to

determine if the finding of the Commission is supported by substantial evidence and even where a preponderance of the evidence might indicate a contrary result we will affirm if reasonable minds could reach the Commission's conclusion. It is also well settled that the Commission is better equipped by specialization, insight, and experience to translate, analyze, and determine issues and to translate evidence into findings of fact. *Ridgeway Pulpwood* v. *Baker*, 7 Ark. App. 214, 646 S.W.2d 711 (1983).

In *Westark* the Commission found that the claimant's injury was compensable and the Arkansas Supreme Court affirmed. In that case two of the claimant's co-employees, Brown and Yutterman, were observed in an argument by their foreman. Brown was fired by the foreman. After being discharged, Brown waited outside the building for Yutterman to get off work and then asked him "why he had gotten him fired." An argument ensued between them. The claimant and his uncle had walked to the uncle's car where it was parked on a lot, adjacent to the building, regularly used and made available to the employees. They got into the car and were endorsing their pay checks when the claimant unexpectedly suffered a bullet wound to one of his eyes from a gun fired by Brown. The claimant and his uncle testified that as they sat in the car endorsing their checks they observed Brown and Yutterman standing by the corner of the building engaged in an argument. The uncle testified that Brown had a gun pointed toward Yutterman's head. Yutterman slapped at Brown and then the uncle heard the gun fire. The bullet hit his car and he heard the claimant exclaim that he was hit in the eye. The court found that there was substantial evidence that the claimant's injury was the result of a work-related quarrel arising out of and causally related to his employment.

In the case at bar the testimony concerning the subject matter of the dispute was from witnesses who saw the arguments, but who did not hear what was said during those arguments. The shooting did not occur immediately during the on-the-job argument but occurred after work and off the employer's premises. There was testimony that there was another argument at the time of the shooting, yet there was no testimony concerning the subject matter of that argument.

The Commission found that appellant did not establish that the death arose out of the course of the employment and we find that there is substantial evidence to support that finding. The claimant has the burden of proving that the injury arose out of the course of the employment and appellant did not meet this burden.

The positional risk argument made by appellant has no merit. Larson's treatise explains that the theory behind this risk is that when one finds himself at the scene of an accident, not because he voluntarily appeared there but because his employer required him to be there, the injuries he may suffer by reason of such accident "arise out of the course of the employment, if it be that he was employed and his employment required him to be at the place of the accident when the accident occurred." 1 A. Larson, *The Law of Workmen's Compensation* § 10.22 (1986). This theory is not applicable here because the risk the decedent was exposed to was neither neutral nor did the shooting occur at a place the employer required the decedent to be. *See Adkins* v. *Teledyne Exploration Co.*, 8 Ark. App. 342, 652 S.W.2d 55 (1983); 1 Larson, *The Law of Workmen's Compensation*, § 6.50 (1986). Therefore, we find no merit in appellant's second argument for reversal.

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

Affirmed.

JENNINGS and COULSON, JJ., agree.

FARMER'S INSURANCE COMPANY *v.* Gary BUCHHEIT

CA 86-235 727 S.W.2d 391

Court of Appeals of Arkansas
Division II
Opinion delivered April 15, 1987

Wootton, Glover, Sanders, Slagle, Parkerson & Hargraves,

P.A., by: *Kenneth Breckenridge*, for appellant.

Lane, Muse, Arman & Pullen, by: *Richard S. Muse*, for appellee Gary Buchheit.

Henry M. Britt, for appellee Tony Usdrowski.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Workers' Compensation Commission holding appellee entitled to continuing temporary total disability and medical treatment and authorizing a change of physicians.

The appellee suffered a fractured vertebra on June 22, 1984, when a plywood board on which he was standing on a roof broke and he fell twenty-two feet to the ground, landing first on his heels then on his buttocks. At the first hearing, held November 12, 1984, it was determined that appellee was entitled to temporary total disability benefits and it was agreed that he would be examined by an orthopedic surgeon, Dr. Austin Grimes. A subsequent hearing was held on July 24, 1985, at which appellee contended he was entitled to continuing temporary total disability benefits and medical care. Appellant contended appellee's healing period had ended and that a change of physicians from his treating physician to Dr. Jeff Carson, a chiropractor, was unauthorized.

The administrative law judge held that even though appellee admitted having worked for a couple of months between the first and second hearings, his injury severely limited his social and work activities and he was entitled to further medical treatment and temporary total disability, excepting the dates he had worked. The law judge also held that the change to Dr. Carson was authorized because appellee had followed the statutorily outlined procedure. The full Commission affirmed. For reversal, appellant argues that the decision was not supported by substantial evidence and the facts do not support the Commission's order that appellee was entitled to a retroactive change of physicians.

The record shows that subsequent to his compensable injury appellee contracted infectious mononucleosis. He admitted that delayed his healing period, but he also testified that he still suffered from severe pain and stiffness in his back. His girlfriend testified that some mornings the appellee was so stiff and sore she had to help him get up, and on one occasion, she had to physically

carry him to the car and take him to the doctor because his legs were asleep. Appellee admitted he had attempted to work, first for a grocer, then for an automobile body repair shop. He testified that he tried to work because he was short of money but was forced to quit each job because of physical limitations caused by his injury and because the work was so strenuous.

Various doctors who submitted medical reports on appellee's condition confirmed the fractured vertebra but indicated it should have healed. One doctor stated that he could not understand why appellee was still having pain and suggested it might be caused by other reasons; however, he did not speculate as to what those other reasons might be. At the time of the last hearing, appellee was not on medication and was consulting only the chiropractor, Dr. Carson, who, he insisted, was the only doctor who had improved his condition at all since his injury.

Appellant first argues that the Commission's decision awarding temporary total disability is not supported by substantial evidence and that fair minded persons with the same evidence before them could not have reached the same conclusion. *Stephens* v. *St. Vincent Infirmary*, 15 Ark. App. 209, 691 S.W.2d 190 (1985); *Snow* v. *Alcoa*, 15 Ark. App. 205, 691 S.W.2d 194 (1985).

Findings of the Workers' Compensation Commission are viewed in the light most favorable to the decision reached by the Commission; the testimony is given its strongest probative force in favor of the action of the Commission; and the decision carries the weight of a jury verdict. *Artex Hydrophonics, Inc.* v. *Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). The Commission has the duty of weighing medical evidence as it does any other evidence and if that evidence is conflicting, the resolution of the conflict is a question of fact for the Commission. *Jones* v. *Scheduled Skyways, Inc.*, 1 Ark. App. 44, 612 S.W.2d 333 (1981). After a thorough review of the record, we cannot say the decision awarding temporary total disability is not supported by substantial evidence.

Next, appellant argues the facts do not support the Commission's decision that the appellee was entitled to retroactive approval of a change from his medical doctor to a chiropractor. Appellant cites *Wright Contracting Co.* v. *Randall*, 12 Ark.

App. 358, 676 S.W.2d 750 (1984), and *American Transportation Co.* v. *Payne*, 10 Ark. App. 56, 661 S.W.2d 418 (1983), which held that under Act 290 of 1981, which amended Ark. Stat. Ann. § 81-1311, the Commission no longer had broad discretion to retroactively authorize a change of physicians. However, this argument ignores Act 444 of 1983, which added a specific provision authorizing a change to a chiropractor without seeking permission of the Commission. That addition is found in Ark. Stat. Ann. § 81-1311 (Supp. 1985) and states "if the change desired by the claimant is to a chiropractic physician, the claimant may make the change by giving advance written notification to the employer or carrier."

The record contains a copy of a notice stating that appellee desires to change physicians from Dr. Grimes to Dr. J. J. Carson, and the receipt of the notice is acknowledged by the signature of appellee's employer, Tony Usdrowski. Although the notice is undated, appellee testified he began seeing Dr. Carson on March 13, 1985, and was given the notice to take to his employer who then signed it. The Commission found that the provisions of Act 444 of 1983 had been sufficiently complied with and we find substantial evidence in the record to support this finding of fact.

Affirmed.

COULSON and COOPER, JJ., agree.

David MILLER *v.* STATE of Arkansas

CA CR 86-192 727 S.W.2d 393

Court of Appeals of Arkansas
Division I
Opinion delivered April 15, 1987

William R. Simpson, Jr., Public Defender, *Donald K.*

Campbell, III, Deputy Public Defender, by: *Didi Harrison*, Deputy Public Defender, for appellant.

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

BETH GLADDEN COULSON, Judge. Appellant, David Miller, was convicted of driving while intoxicated. His sole ground for reversal on appeal is that the trial court erred in finding that the arresting officer had sufficient probable cause to stop him as he was driving. We find no error on the trial court's part, and, accordingly, we affirm its judgment.

Appellant was arrested in the early morning hours of November 9, 1985. Officers of the Jacksonville Police Department had received a call concerning a fight in progress with weapons on a nightclub parking lot. Patrolman Charles Jenkins arrived at the scene shortly afterward and was told by a nightclub employee that the two men involved in the fight had left five or six minutes earlier. According to the employee, one of the men was very drunk, had been using a long club on his opponent, and had left in a black Ford pickup truck. Jenkins then radioed to the other police units working in Jacksonville at the time to look for "a black Ford pickup truck, with one white male."

About two or three minutes after hearing the broadcast, Sergeant John Clark saw a black Ford pickup truck about three-fourths of a mile from the site of the nightclub. Clark radioed for a backup before stopping the vehicle. While following the pickup, Sergeant Clark observed the driver negotiate several curves in an erratic manner and travel through one sharp curve down the center of the road.

In the meantime, Officer John Wooley had also heard the call and saw the black pickup run through a stop sign. As he was pulling out in pursuit, he noticed Sergeant Clark's patrol car move in behind the truck. Officer Wooley then backed up Sergeant Clark, who turned on his blue lights and stopped the vehicle. Sergeant Clark approached the pickup from the driver's side and saw appellant, from whom a strong odor of intoxicants came, sitting in the driver's seat. When appellant got out of the passenger compartment, as requested, he stumbled to the back and held on to the vehicle for support. Without administering a

field sobriety test, Sergeant Clark placed appellant under arrest for DWI first offense and transported him to the police department. Following a municipal court conviction, appellant appealed to Pulaski County Circuit Court, where he was found guilty and sentenced to ten days in jail with one day credited and nine days suspended, fined $250, and assessed court costs. From that decision this appeal arises.

Appellant argues that, under *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 284, *cert. denied*, 459 U.S. 882 (1982), and this court's decision in *Van Patten* v. *State*, 16 Ark. App. 83, 697 S.W.2d 919 (1985), the trial court erred in finding that Sergeant Clark had sufficient probable cause to make an investigatory stop of his vehicle. It is his contention that the totality of the circumstances test, as enunciated by the Arkansas Supreme Court in *Hill*, was not satisfied by the circumstances of the present case.

Recently, in *Reeves* v. *State*, 20 Ark. App. 17, 722 S.W.2d 880 (1987), we had occasion to review the line of cases dealing with investigatory stops. We noted that Fourth Amendment protection "against unreasonable searches and seizures" extends to persons driving down the street. It has been held, however, as we observed in *Reeves*, that, consistent with the Fourth Amendment, police may stop persons on the street or in their vehicles in the absence of either a warrant or probable cause under limited circumstances. *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Leopold* v. *State*, 15 Ark. App. 292, 692 S.W.2d 780 (1985). One of those limited circumstances involves the investigatory stop. *Reeves*, 20 Ark. App. at 21.

The test to be applied in determining whether an investigatory stop has been made consistent with the mandates of the Fourth Amendment is a balancing of the nature and quality of the intrusion against the importance of the governmental interests alleged to justify that intrusion. *Reeves*, 20 Ark. App. at 22; *Van Patten* v. *State*, 16 Ark. App. at 85, citing *United States* v. *Hensley*, 496 U.S. 221 (1985). Where felonies or crimes involving a threat to public safety are concerned, the government's interest in solving the crime and promptly detaining the suspect outweighs the individual's right to be free from a brief stop and detention. *Van Patten, supra.* This policy consideration appears in A.R.Cr.P. Rule 3.1, which provides in part that:

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

In determining the reasonableness of the officer's suspicion, A.R.Cr.P. Rule 2.1 provides the following definition:

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

The Arkansas Supreme Court has stated that "[t]he common thread which runs through the decisions makes it clear that the justification for the investigative stops depend[s] upon whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating the person or vehicle may be involved in criminal activity." *Hill* v. *State*, 275 Ark. at 80.

In *Hill*, a police radio broadcast described a late model maroon Ford Thunderbird bearing a license plate with dark blue or black lettering on a white background. The court found that the police had reasonable suspicion to make an investigatory stop of the appellant's recent model maroon Ford Thunderbird displaying an Oklahoma license plate with a white background and dark letters. The court noted additionally that it was not likely that another vehicle of that description was in the Montgomery-Garland County area at that time.

In contrast to the specificity of the description approved by the Supreme Court in *Hill*, this court found the information provided in *Van Patten* v. *State, supra*, "extremely general" in nature. There, two separate police radio dispatches were broadcast; one notified units of a "loud party" at an apartment

complex, and the other indicated that the person causing the disturbance may have left the scene in a brown Jeep. The arresting officer testified that he had observed a Jeep of that description in the vicinity of the disturbance, that the driver was not committing any traffic violations, but that he stopped the vehicle anyway. In reversing the appellant's conviction, we stated that we did not think the officer had "specific, particular or articulable reasons to suspect that a felony or a misdemeanor involving danger of injury to persons or property had been committed." 16 Ark. App. at 86.

We distinguished *Van Patten* in *Reeves* v. *State, supra*, where we affirmed a conviction that followed an arrest made in an investigatory stop. In *Reeves*, the police dispatcher advised officers to be on the lookout for a Jeep, the driver of which was said to be shooting fireworks out of the window and was "possibly DWI." Not only a license number but the name of the vehicle's owner was given. The arresting officer testified that, after noticing that the appellant took an unusually long time to pull out of a parking lot onto a highway and verifying the license number, he followed the Jeep for four blocks. Because of the slow rate of speed at which the appellant was traveling and his occasional weaving, the officer concluded that the driver was probably under the influence of alcohol. On the basis of these combined factors, we held that the circumstances amounted to "specific, particularized, and articulable reasons indicating that the person or vehicle may [have been] involved in criminal activity." *Reeves*, 20 Ark. App. at 23. The totality of the circumstances in the present case also constitutes specific, particularized, and articulable reasons indicating that appellant was involved in criminal activity—driving while under the influence of alcohol.

Here, after receiving information about an altercation on a nightclub parking lot, Patrolman Jenkins broadcast a notice concerning a white male, armed with a club or similar weapon, driving a black Ford pickup truck. No license plate number was available. By itself, this description is as general in character as the brown Jeep in *Van Patten.*

What distinguishes this case from *Van Patten*, however, is the particular set of circumstances which, in our case-by-case approach, we now address. Appellant was not stopped for, nor

was he later charged with, the fight on the parking lot. Instead, Officer Clark witnessed him in a black Ford pickup driving around several curves in an erratic manner and taking one especially sharp one down the middle of the road. At this point the stop was made. We found an arresting officer's observation of a driver moving slowly and occasionally weaving sufficient as specific, particularized, and articulable reasons for concluding that the driver was operating his vehicle while intoxicated in *Reeves* v. *State, supra.* The basis for a reasonable suspicion of intoxication is no less compelling in the instant case.

It is important to emphasize that, once Officer Clark observed appellant's unsteady driving, the original reason for watching for a black Ford pickup—the parking lot brawl—receded to the point of secondary importance. Officer Clark testified that he had two purposes in stopping the truck; one was to investigate the incident at the nightclub, and the other was to apprehend a person who was apparently driving while under the influence of alcohol. However, Officer Clark stated that even if he had not received any information regarding the disturbance at the club, he probably would have pulled appellant over anyway because of his erratic driving.

Appellant points out that he was not charged with running a stop sign, despite Officer Wooley's testimony that he observed him fail to stop at a four-way stop sign. But Officer Wooley provided backup on the arrest, and the instances of irregular driving witnessed by Officer Clark amounted to sufficient cause to stop appellant on suspicion of DWI. As for appellant's insistence upon the fact that he was not speeding, we would simply note that in *Reeves* v. *State, supra*, no speeding was involved or traffic violations committed.

Under the totality of the circumstances test, we believe that the arresting officer acted properly in making an investigatory stop of appellant's truck and that the trial court committed no error in this respect.

Affirmed.

CORBIN, C.J., and JENNINGS, J., agree.

FIRST STATE BANK OF WARREN, ARKANSAS *v.* George DIXON d/b/a DIXON LUMBER & BUILDERS SUPPLY

CA 86-477 728 S.W.2d 192

Court of Appeals of Arkansas
En Banc
Opinion delivered April 22, 1987

Robert E. Garner, for appellant.

Clint Huey, for appellee.

DONALD L. CORBIN, Chief Judge. Appellant, First State Bank of Warren, Arkansas, appeals the jury's award of damages to appellee, George Dixon, d/b/a Dixon Lumber Company &

Builders Supply, contending there was not substantial evidence to show that appellee gave appellant a stop-payment order in a sufficient manner as to afford appellant a reasonable opportunity to act. We affirm.

On April 15, 1980, appellee called appellant bank to stop payment on a check he had written earlier that day. He gave appellant's employee, Frances Hargis, the correct account number, check number, date, and payee of the check but misstated the amount of the check as $1,828.73. The correct amount of the check was $1,868.15. A few weeks later, appellee received his bank statement and discovered the bank cashed his check despite his stop-payment order. He notified appellant and requested that appellant credit his account for the amount of the check. Appellant refused, and appellee filed suit for recovery of the check amount.

The record reflects appellee testified that when he gave appellant's employee, Frances Hargis, his stop-payment order, he stated it was his only check written to the payee and that it was drawn for $1,800.00 plus dollars. He stated that he was not advised by anyone at the bank that it needed the exact amount of the check in order to stop payment on it. He testified Frances Hargis advised him not to worry about it, that payment on it was stopped. Frances Hargis testified for appellant that appellant's stop-payment requests were computerized, and appellant had to have the exact amount of a check in order to stop payment. She stated that when appellee called her to stop payment on the check, she told him she would need the exact amount. The information she put on the stop-payment order, she testified, was the figure appellee gave her.

Arkansas Statutes Annotated § 85-4-403 (Add. 1961) provides as follows:

> (1) A customer may by order to his bank stop payment of any item payable for his account but the order must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it prior to any action by the bank with respect to the item described in Section 4-303 [§ 85-4-303].
>
> (2) An oral order is binding upon the bank only for

> fourteen [14] calendar days unless confirmed in writing within that period. A written order is effective for only six [6] months unless renewed in writing.
>
> (3) The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a binding stop-payment order is on the customer.

The Committee Commentary to the above statute is pertinent and provides:

> 2. The position taken by this section is that stopping payment is a service which depositors expect and are entitled to receive from banks notwithstanding its difficulty, inconvenience and expense. The inevitable occasional losses through failure to stop should be borne by the banks as a cost of the business of banking.

Appellant contends that the necessity of the exact amount of a check for which a stop-payment order is requested is critical because the computerized system it utilizes is a key feature of identification in its stop-payment procedure. We believe this argument, if allowed to prevail, would be inconsistent with the intent of the General Assembly in enacting Arkansas Statutes Annotated § 85-4-403. The commentary previously quoted indicates that the legislature clearly contemplated the burden being placed on the bank in the event of loss in such instances as the case at bar.

The issue of whether or not appellee's stop-payment order was received in such manner as to afford appellant a reasonable opportunity to act upon it was submitted to the jury based upon instructions which included:

> If you find that the [appellee], George Dixon, has complied with [Arkansas Statutes Annotated § 85-4-403], then the burden falls on Mr. Dixon to prove the actual amount of his loss; however, if you find that Mr. Dixon failed to give the [appellant] a stop payment order in sufficient time and manner as to afford the [appellant] reasonable opportunity to act, then you must find in favor of the [appellant], First State Bank.
>
> You are instructed the [appellant] admits that on

> April 15, 1980, the [appellee] told an employee of the [appellant] he desired to stop payment on his check number 1346 drawn on the [appellant] bank on April 15, 1980, in an amount in excess of $1800.00 payable to Lloyd's Chevrolet-Olds.
>
> You are the sole judges on the issue of whether the [appellant] bank failed to exercise ordinary care in the transaction with the [appellee]. If you find the [appellant] failed to exercise ordinary care, then your verdict should be for the [appellee] in the amount you find by a preponderance of the [sic] [appellee] has lost.

After hearing the conflicting testimony of the parties and the instructions of the court, the jury found for appellee. It is within the province of the jury to believe appellee's theory over appellant's version, and on appeal, we only consider whether there is any substantial evidence to support the jury's findings. *Petrus Chrysler-Plymouth* v. *Davis*, 283 Ark. 172, 671 S.W.2d 749 (1984). We hold there was substantial evidence to support the jury's decision that appellee gave his stop-payment order to appellant in a sufficient manner so as to afford appellant a reasonable opportunity to act upon it.

Affirmed.

Larry D. MAYNARD *v.* STATE of Arkansas

CA CR 86-30 727 S.W.2d 858

Court of Appeals of Arkansas
En Banc
Opinion delivered April 22, 1987

Thomas M. Carpenter, Esq., for appellant.

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

JOHN E. JENNINGS, Judge. Larry Maynard was convicted in Baxter County Circuit Court of delivery of a controlled substance, after a jury trial. The State's evidence included the testimony of an accomplice, William Cunningham. The sole argument on appeal is that the evidence corroborating the accomplice's testimony was insufficient as a matter of law. We

affirm.

At the outset we note that Maynard did not raise the issue of the sufficiency of the corroborating evidence at the trail court level, by motion for directed verdict or otherwise. Furthermore, he acquiesced in the court's instruction which left this issue to the jury. Although *Harris* v. *State*, 262 Ark. 506, 558 S.W.2d 143 (1977) is authority for the proposition that under these circumstances we need not reach the issue of the sufficiency of the corroboration, we nevertheless decide this case on the merits, as did the supreme court in *Harris*.

The requirement that an accomplice's testimony be corroborated is statutory. Ark. Stat. Ann. § 43-2116 (Repl. 1977) provides in part:

> 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.

The case law dealing with the application of this statute was well set out in *King* v. *State*, 254 Ark. 509, 494 S.W.2d 476 (1973):

> 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.
>
> While the corroborating evidence must do more than raise a suspicion of the defendant's guilt, it need not be direct, but may be circumstantial, so long as it is substantial, and tends to connect the defendant with the commission of the offense. Even though one circumstance of a combination of several circumstances might not be suffi-

> cient, all of the circumstances in evidence may constitute a chain sufficient to present a jury question as to their adequacy as corroboration of the accomplice. The question of sufficiency of the corroborating evidence to justify submission of the question of a defendant's guilt must, of necessity, be governed by the facts and circumstances of the particular case, having regard for the nature of the crime, the character of the accomplice's testimony and the general requirements with respect to corroboration. Where the circumstantial evidence tending to connect the defendant with the offense is substantial, the question of its sufficiency, along with the testimony of the accomplice, becomes one for the jury. (Emphasis in original and citations omitted.)

This last principle is perhaps sometimes overlooked. The sufficiency of the corroborating evidence will frequently be a question of fact, for the jury, rather than a question of law for this court. *See McClure* v. *State*, 214 Ark. 159, 215 S.W.2d 524 (1948). *See also* Comment, *The Impact of the 1976 Criminal Code on the Law of Assessorial Liability in Arkansas*, 31 Arkansas Law Review 100 (1977). This is the reason for AMCI 402 and 403, the vehicles through which the trial court is obliged to present the issue to the jury. On appeal, our inquiry is, or should be, not whether we view the corroborating evidence as sufficient, but whether there is substantial evidence to support the jury's finding that the corroborating evidence was sufficient. And in determining whether there is substantial evidence to support the jury's finding that the corroborating evidence was sufficient, we need only consider testimony lending support to the jury verdict and may disregard any testimony that could have been rejected by the jury on the basis of credibility. *Hill* v. *State*, 285 Ark. 77, 685 S.W.2d 495 (1985).

In this case Maynard and Cunningham were under investigation by the police for selling drugs. An informant, Charles Beta, was used to make the drug purchases. Maynard was charged for a delivery of marijuana to Cunningham that took place on February 25, 1984. On that day Cunningham was arrested as he returned home from what he testified was a trip to see Maynard to get a new supply of marijuana to sell. Cunningham's car was searched, under a warrant, and a large plastic bag

containing 34 small bags of marijuana was found. Eleven of Maynard's fingerprints were found on five bags. Cunningham's fingerprints were found on none of the bags. Cunningham testified that Maynard knew he was suspected of dealing in drugs and that in January he asked Cunningham to go into business with him. Maynard would supply drugs and refer customers to Cunningham. Cunningham would be paid on a commission basis. Cunningham further testified that he obtained about a pound of marijuana a week from Maynard for resale, that Maynard weighed and bagged the marijuana, and that he sold to customers who said "Larry sent me," a signal prearranged by Maynard. He testified that Maynard came to his house the week of February 17 to pick up money in order to go north to buy more drugs. He also testified that on February 25 he went to Maynard's and obtained the 34 bags of marijuana subsequently found in his car.

Beta testified that on February 17 he attempted to buy marijuana from Maynard, but Maynard told him he was not selling and referred him to Cunningham. He said that he bought a quarter ounce of marijuana from Cunningham on February 17, after he told him that he knew Maynard. Beta testified that he had purchased drugs from Maynard in the past, had seen marijuana weighed and bagged at Maynard's house on several occasions, and that Cunningham had never had to weigh or bag the marijuana he sold. He also testified, without objection, that Maynard and Cunningham were working together.

Maynard admitted handling the bags of marijuana but said this was only because he was trying to decide which one to buy. He admitted to making a trip north, to Illinois, in February, but testified that this was to pick up a jeep, not to buy drugs. Maynard testified that he had no scales, but the lady with whom he lived, Jane Chastain, testified that there was a set of scales there, which were used only for cooking.

Laying aside Cunningham's testimony, surely the corroborating evidence tends to connect Maynard with the commission of the crime. On these facts the sufficiency of the corroborating evidence was a fact question for the jury to decide. The jury's finding that the corroborating evidence was sufficient is supported by substantial evidence.

Maynard relies heavily on *Pollard* v. *State*, 264 Ark. 753,

574 S.W.2d 656 (1978) and *Holloway* v. *State*, 11 Ark. App. 69, 666 S.W.2d 410 (1984). Neither case is controlling. *Holloway* was a burglary case. There was no accomplice and therefore no issue as to the sufficiency of corroborating evidence. The issue in *Holloway* was whether the presence of one fingerprint on a piece of broken glass found outside a home which had been burglarized was substantial evidence to support a subsequent burglary conviction. We held that it was not. Here the conviction does not rest upon one fingerprint. It rests upon the testimony of the accomplice Cunningham, as corroborated by the fingerprint evidence, which is much more persuasive here, as well as the testimony of Beta, Chastain, and Maynard himself.

In *Pollard*, the supreme court reversed a conviction for manufacturing marijuana, holding that the corroborating evidence presented only suspicious circumstances. Here, however, we are persuaded that the corroborating evidence does more than merely raise a suspicion that Maynard may be guilty. It tends to connect him with the commission of the offense, as required by the statute.

Affirmed.

CRACRAFT, J., concurs.

COULSON and MAYFIELD, JJ., dissent.

GEORGE K. CRACRAFT, Judge, concurring. I concur with the result reached by the majority, but I would not reach the merits of this case.

The record here does not disclose that the appellant ever raised the question of corroboration of the accomplice's testimony in the trial court. Our courts have consistently held that where there is a particular defect in the State's proof which might have been corrected had an objection been made, the absence of the objection prevents the point from being raised for the first time on appeal. *Johnson* v. *State*, 290 Ark. 46, 716 S.W.2d 202 (1986); *Janes* v. *State*, 285 Ark. 279, 686 S.W.2d 783 (1985). In *Harris* v. *State*, 262 Ark. 506, 558 S.W.2d 143 (1977), the court specifically held that, where the State's proof is achieved by the uncorroborated testimony of an accomplice, the absence of an objection on that ground at trial waives the omission.

BETH GLADDEN COULSON, Judge, dissenting. I strongly disagree with the conclusion reached by the majority that the corroborating evidence in this case does more than merely raise a suspicion of the appellant's guilt. While I have reservations even as to the tendency of the corroborating evidence to connect the appellant with the crime charged, there is the additional requirement that the corroborating evidence be substantial. In light of our definition of that term, I am persuaded that there was no substantial evidence which would support a finding by the jury that the corroborating evidence was sufficient. Therefore, I respectfully dissent.

As the majority opinion correctly points out, "[w]hile the corroborating evidence must do more than raise a suspicion of the defendant's guilt, it need not be direct, but may be circumstantial, *so long as it is substantial and tends to connect the defendant with the commission of the offense.*" (Emphasis added.) *King* v. *State*, 254 Ark. 509, 494 S.W.2d 476 (1973). This position comes from the stipulation in Ark. Stat. Ann. § 43-2116 (Repl. 1977) that the corroborating evidence must do more than show that the offense was committed, and the circumstances thereof. Placing these requirements into the context of our appellate review, the majority states that "our inquiry is, or should be, not whether we view the corroborating evidence as sufficient, but whether there is substantial evidence to support the jury's finding that the corroborating evidence was sufficient."

This court defines substantial evidence as evidence which is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other; it must force or induce the mind to pass beyond mere suspicion or conjecture. *Phillips* v. *State*, 17 Ark. App. 86, 703 S.W.2d 471 (1986). As is noted by the majority, we must lay aside all of the testimony of the accomplice, Cunningham, because we are concerned only with whether there was such other evidence corroborating Cunningham's testimony as would force the mind to pass beyond mere suspicion and conjecture as to the appellant's delivery of the confiscated marijuana. The evidence must, "independently of the testimony of the accomplice," tend to connect the appellant with the commission of the offense.

Turning to the evidence, we find that a search warrant had

been executed at the Cunningham residence. Cunningham returned home while the search was in progress and his automobile was then searched. A large plastic bag containing thirty-four smaller bags of marijuana was found. The appellant's fingerprints were found on five of the smaller bags. The majority then states that the informant, Beta, testified that Cunningham and the appellant were working together. Yet, the record shows that Beta also testified that while he knew that the appellant delivered marijuana to Cunningham, he could not prove it and could not say that there were such deliveries. The informant also admitted that he could not remember any direct words or conversations as to a working relationship between the appellant and Cunningham, and he knew they were working together just through rumors and seeing them together. I find it impossible to say that these facts constitute substantial evidence to support a jury's finding connecting the appellant with the crime charged.

The majority places reliance upon the fact that after Beta tried to purchase marijuana from the appellant but was told by the appellant that he no longer sold marijuana, Beta was referred to Cunningham. Thereafter, Beta apparently went to Cunningham's residence and purchased marijuana; he also told Cunningham that he knew the appellant. While this testimony, when viewed in light of all of the other evidence, might tend to connect the appellant to Cunningham, I fail to see how it can be said that independently of Cunningham's testimony it is of such character as to force the mind beyond speculation that the appellant was connected with the crime of delivery of the marijuana in question. That the informant had previously purchased drugs from the appellant and had seen marijuana weighed and bagged at the appellant's residence in the past, if used to connect the appellant to the crime charged, surely cannot be said to do more than merely raise a suspicion of the appellant's guilt as to the confiscated marijuana.

The majority opinion, much like the appellee's brief, sets forth in detail the testimony of the accomplice, Cunningham. Yet, the focus of this appeal must be on the corroborating evidence and upon the question of whether that evidence is substantial. *King, supra.* As to the appellant's trip north, there was no showing that the appellant either purchased marijuana on that trip or returned to this state with any marijuana—much less

the marijuana found in Cunningham's car. Moreover, I find no evidence, other than the accomplice's testimony, that the marijuana in question came from the appellant's residence—the location of the suspect scales referred to by the majority. The fingerprints, of course, do no more than merely raise a suspicion of delivery by the appellant, and suspicion alone is not enough.

I find the appellant's reliance upon *Pollard* v. *State*, 264 Ark. 753, 574 S.W.2d 656 (1978), highly persuasive. As was emphasized in *Pollard*, the evidence produced by the State may have been voluminous, and there may have been plenty of evidence that something of a suspicious nature was going on. Yet, I ask the same question asked by the court in that case. When we apply the law to the facts in this case, where is the evidence, aside from the accomplice's testimony, that the appellant delivered a controlled substance? 264 Ark. at 756. I find that I must give the same answer given in *Pollard*; it is simply not there.

Because the corroborating evidence was not such that, independently of the accomplice's testimony, it would force the mind to pass beyond mere suspicion and conjecture, it fails to meet the test set out by the majority that it be substantial evidence. As such, it was insufficient as a matter of law and does not support the jury's finding to the contrary. In accordance with our supreme court's decision in *Pollard, supra*, the judgment should be reversed and the cause dismissed.

MAYFIELD, J., agrees.

Katherine R. COOK *v.* SOUTHWESTERN BELL TELEPHONE COMPANY

CA 86-233 727 S.W.2d 862

Court of Appeals of Arkansas
Division II
Opinion delivered April 22, 1987

Branch & Thompson, by: *Robert F. Thompson*, for appellant.

Patricia J. Nobles, D.D. Dupre, Garry S. Wann, and *Barbara Womack*, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Workers' Compensation Commission holding appellant's claim for permanent partial disability benefits barred by the two-year statute of limitations contained in Ark. Stat. Ann. § 81-1318(b) (Repl. 1976).

Appellant fell at work on March 26, 1983, injuring her right knee. However, it was not until her knee collapsed on April 16, 1983, that appellant realized the extent of her injury. Her knee cap was removed by Dr. C. Leon Hay on April 18, 1983, and she was paid full benefits until released to return to work on October 11, 1983. She was not given a permanent partial disability rating at that time and did not again consult her doctor about her knee until May 7, 1985.

She testified, however, that although she went back to work at the same job, she continued to have pain in her knee and it gradually got worse. Then, on April 9, 1985, appellant retained Robert F. Thompson, an attorney, who wrote a letter to the Workers' Compensation Commission the same day. After identifying the appellant, her employer, and the WCC claim number, the body of the letter stated in full:

> We have been employed to assist Katherine R. Cook in connection with unpaid benefits in the above matter. If you would be kind enough to send me a copy of your file so that we may evaluate the matter, it would be greatly appreciated. If there is any charge for the copying in this connection, please send a statement with the material.

The Commission responded on April 11, 1985, with a letter to Mr. Thompson acknowledging his letter and stating that a notation would be made in the file that he was serving as attorney of record for appellant. On June 25, 1985, Mr. Thompson formally requested a hearing.

It was stipulated at the hearing that appellant had sustained a compensable injury, that the statute of limitations began to run on April 19, 1983, and that appellant had sustained a twenty per cent (20%) anatomical disability to the right lower extremity. The only issue was whether Thompson's April 9, 1985, letter constituted the filing of a claim for compensation. The law judge concentrated on the words "employed" and "unpaid benefits" contained in the letter, and on the Commission's response, and concluded that the letter effectively gave notice that appellant was making a claim for further benefits and, therefore, the claim was not barred by the statute of limitations. The full Commission reversed, holding that counsel's letter was not specific enough to be considered a claim for benefits and, therefore, the claim was barred on April 19, 1985.

On appeal to this court, the appellant cites *Long-Bell Lumber Co.* v. *Mitchell*, 206 Ark. 854, 177 S.W.2d 920 (1944), in support of her contention that the letter of April 9, 1985, constituted a claim. In that case, the Arkansas Supreme Court said that the Commission was correct in treating certain correspondence between the claimant and the Commission as tantamount to the filing of a claim. In so holding, the court stated:

> In our Workmen's Compensation Law, formalities are frowned on. A reading of §§ 18, 19 and 27 thereof is convincing of this statement. The spirit of the law, *inter alia*, is to afford a speedy and simple form of relief to, or settlement of the claims of, those injured. (71 C.J. 247.) The act is to be liberally construed to effectuate its purposes; and the correspondence was notice of claim.

206 Ark. at 857.

Appellant also cites Larson's treatise on worker's compensation law, which both parties agree states:

> At the minimum, the informal substitute for a claim should identify the claimant, indicate that a compensable injury has occurred, and convey the idea that compensation is expected.

See 3 Larson, *Workmen's Compensation Law* § 77A.41 (1983). The appellant argues that her attorney's letter met the criteria set out by Larson for stating a claim: it named the employee and the employer, referred to the open compensation file by number, and stated that the attorney had been employed to assist the appellant in seeking additional benefits.

The Commission, however, relied upon *Little* v. *Smith*, 223 Ark. 601, 267 S.W.2d 511 (1954), and quoted the following language of the court in that case taken from an old volume of *Corpus Juris*:

> The claim must nevertheless be direct and unequivocal, and show that a claim for compensation is being made; be understandable, where filed with the commission it must call for some immediate action by the commission. It must apprise the employer that the employee has sustained injuries of such character as to entitle him to compensation and that the benefits of the act are being claimed.

223 Ark. at 606.

We do not believe that the *Little* case is applicable in the instant case. In the first place, the claim in *Little* was made on behalf of the surviving parents of the deceased employee after the one-year statute of limitations had expired. The Arkansas Supreme Court was considering correspondence between the em-

ployer, the Commission, and the Chambers Claims Service. This correspondence had been held by the circuit court to constitute notice of a claim, but the appellate court noted that the correspondence only related to investigations following the *employer's* report to the Commission of the death of an employee and held that the correspondence could not constitute a claim for compensation since none of it came from the deceased's relatives or any representative of them. In the second place, the type of information referred to in the *Little* case is information that might be needed in an original claim but, in the instant case, the letter written by appellant's attorney on April 9, 1985, was not an original claim but a claim for additional benefits.

We have held that the purpose of the statute of limitations in workers' compensation cases is to permit prompt investigation and treatment of injuries. *St. John* v. *Arkansas Lime Co.*, 8 Ark. App. 278, 651 S.W.2d 104 (1983). It is clear from the record in this case that the employer was given immediate notice of the injury and fully investigated the claim at the time it occurred. Further, the evidence discloses that the claim was accepted as compensable and the employee was paid full benefits during her healing period. She then went back to work for the appellee, her work activities since then have been easily observable, and the appellee has stipulated that appellant is entitled to receive a 20% permanent partial disability award for the scheduled injury to her leg unless her claim is barred by limitations. The appellee, however, argues that the letter by appellant's counsel was not specific enough to constitute a claim. Under the facts of this case, we simply do not agree.

Our decision is consistent with our holding in the recent case of *Arkansas Power and Light Co.* v. *Giles*, 20 Ark. App. 154, 725 S.W.2d 583 (1987), where we held that the statute of limitations was tolled by a claim for *additional* benefits. In that case, we relied upon *Sisney* v. *Leisure Lodges, Inc.*, 17 Ark. App. 96, 704 S.W.2d 173 (1986), where we held a claimant's timely filing for rehabilitation benefits and additional permanent disability payments also tolled the statute for her later-requested medical benefits. To hold otherwise, we said, would "invoke a measure of precision uncalled for by the broad language of the statute and unsupported by the case law of this state."

We hold, in the instant case, that because this was not an original claim for compensation and the employer was fully aware of the injury and its compensability, counsel's letter notifying the Commission that he had been employed to assist the claimant in connection with unpaid benefits, and listing the claimant's name, the employer's name, and the WCC file number was sufficient to constitute a claim for additional benefits. Since that letter was filed within the two-year period allowed by Ark. Stat. Ann. § 81-1318(b) (Repl. 1976) in which to file claims for additional compensation, we reverse the Commission's decision that the claim was barred by limitations and we remand this matter for determination of the merits of appellant's claim.

Reversed and remanded.

COOPER and COULSON, JJ., agree

Ray WOMACK *v.* FIRST STATE BANK OF CALICO ROCK

CA 86-277 728 S.W.2d 194

Court of Appeals of Arkansas
Division I
Opinion delivered April 22, 1987

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Greg Stephens of *Hilburn, Bethune, Calhoon, Harper & Pruniski, Ltd.*, and *Gary Vinson*, for appellant.

Barrett, Wheatley, Smith & Deacon, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a deficiency judgment of $16,384.80 entered against appellant Ray Womack. On January 13, 1984, appellant's son, Coy Womack, obtained a $31,301.00 loan from appellee First State Bank of Calico Rock (Bank). As security for the loan, he pledged a used

1974 Wilson trailer, a used 1973 White truck, a used 1974 Challenger mobile home, and another used 1974 Wilson trailer. Appellant Ray Womack also signed the note. Subsequently, the Bank and Coy agreed to substitute a used 1979 Ford tractor for the last listed Wilson trailer. Coy Womack defaulted on the note, the collateral was repossessed and sold, and suit was filed against both Coy and Ray Womack for the deficiency. When Coy filed for bankruptcy and moved to Texas, the Bank proceeded against Ray Womack.

Appellant first argues that the trial court erred in admitting into evidence a handwritten note purporting to establish that the sale of the collateral was conducted in a commercially reasonable manner. Appellee's only witness was Danny Moser, vice-president of the Bank, who testified to the making of the note, the default, the repossession, the demand for payment, and the notice of sale published in a local newspaper. When Moser attempted to testify about the parties present at the sale, the bids made and the terms of the sale, appellant objected and, on voir dire examination, the witness disclosed that he had not been present at the sale and had learned everything he knew about the sale from the bank president, Davey Wyatt. Appellant's objection to Moser's testimony about what took place at the sale was sustained as inadmissible hearsay. Appellee then introduced two pieces of paper containing the bank logo at the top on which were notations handwritten in ink. Moser identified these as being written by Wyatt, who had been present at the sale, and contended they showed who attended the sale and what prices had been bid for each item. These two memos were admitted, under the business records exception to the hearsay rule, as evidence that the sale was commercially reasonable. Appellant argues that admission of this evidence was error and that without it there was no proof that the sale was conducted in a commercially reasonable manner. We agree with appellant that these notations did not meet the criteria necessary to be admissible under the business records exception to the hearsay rule.

A.R.E. Rule 801 defines hearsay as a statement, other than one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted. Rule 802 provides that hearsay is not admissible. Rule 803 sets out numerous exceptions to the hearsay rule where evidence is held

admissible because of its innate reliability. One of these exceptions is known as the "business records exception."

In *Cates* v. *State*, 267 Ark. 726, 589 S.W.2d 598 (Ark. App. 1979), it was explained that under the business records exception seven factors must be present for a record to be admissible. The document must be: (1) a record or other compilation (2) of acts or events (3) made at or near the time the acts occurred (4) by a person with knowledge (or from information transmitted by such a person) (5) kept in the course of a regularly conducted business (6) which has a regular practice of recording such information (7) all as shown by the testimony of the custodian or other qualified witness.

When we apply the facts of the case at bar to these criteria, the memos fail to qualify as a business record for at least two reasons. Even if we accept the Bank's assertion that these notes, jotted down on what appear to be loose pages taken from a memo or scratch pad, were intended by the president of the bank to preserve the terms of a sale of collateral which the Bank would later be required to prove was conducted in a commercially reasonable manner in order to collect a deficiency judgment, there is no evidence in the record to indicate that these notations were made at or near the time the sale took place. Moser simply testified that the notes were written on stationery from one of the bank's note pads and that he recognized the handwriting as Wyatt's. And, in the second place, the record is devoid of any evidence from which we can conclude that Moser was the custodian of the records or otherwise a qualified witness through which these papers could be introduced.

When these notes are excluded, the only evidence that the sale was conducted in a commercially reasonable manner is the notice published in the newspaper and that alone is insufficient to support a proper sale. Therefore, we reverse the award of a deficiency judgment. However, our ruling does not require dismissal. The general rule is to remand common law cases for new trial; it is only when the record affirmatively shows that there can be no recovery on remand that we dismiss. *St. Louis Southwestern Railway Co.* v. *Clemons*, 242 Ark. 707, 415 S.W.2d 332 (1967). Where there is a simple failure of proof, justice would demand that the case be remanded to allow the

appellee an opportunity to supply the defect. *Pennington* v. *Underwood*, 56 Ark. 53, 19 S.W. 108 (1892). *See also Follett* v. *Jones*, 252 Ark. 950, 481 S.W.2d 713 (1972); *Colonial Life & Accident Insurance Co.* v. *Whitley*, 10 Ark. App. 304, 664 S.W.2d 488 (1984).

Because we are remanding this case, other issues that may arise on retrial will be discussed. First, we examine what constitutes a commercially reasonable sale. Ark. Stat. Ann. § 85-9-504(3) (Supp. 1985) of the Uniform Commercial Code provides:

> Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable.

At this point, we call attention to the recent case of *First State Bank of Morrilton* v. *Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987), where the Arkansas Supreme Court held that if collateral is not disposed of according to the Code, the creditor is not entitled to a deficiency judgment. This case should be remembered while considering the rulings in previous cases dealing with this subject.

Whether a sale was conducted in a commercially reasonable manner is a fact question to be determined from the facts of the particular case under consideration. *Becknell* v. *Quinn*, 592 F. Supp. 102 (E.D. Ark. 1983). It seems to be generally understood that when the debtor was not given written notice of the time and place of the sale, the sale was not conducted according to the provisions of the Code. *See Hallett, supra; Rhodes* v. *Oaklawn Bank*, 279 Ark. 51, 648 S.W.2d 470 (1983); *Universal C.I.T. Credit Co.* v. *Rone*, 248 Ark. 665, 453 S.W.2d 37 (1970); *Barker* v. *Horn*, 245 Ark. 315, 432 S.W.2d 21 (1968); and *Norton* v. *National Bank of Commerce*, 240 Ark. 143, 398 S.W.2d 538 (1966).

Other situations in which a sale has been held not to have been commercially reasonable include when the creditor removed

the motor from a repossessed combine and lent it to another customer for several months, thus rendering the combine unsalable for that period of time, *Henry* v. *Trickey*, 9 Ark. App. 47, 653 S.W.2d 138 (1983); when the sale was conducted after a short advertising period, the equipment was complex and the auctioneer was given no technical assistance, and there was a great disparity between the price received and the estimated value of the collateral, *United States* v. *Conrad Publishing Co.*, 589 F.2d 949 (8th Cir. 1978); when there was minimal publicizing of the sale, short notice, no preparation of the collateral, and a large discrepancy between the sale price and the fair market value, *Connex Press, Inc.* v. *International Airmotive, Inc.*, 436 F. Supp. 51 (D.D.C. 1977); *see also Farmers and Merchants Bank* v. *Barnes*, 17 Ark. App. 139, 705 S.W.2d 450 (1986); and when there was an absence of any notice to the public, the sale was conducted at the creditor's office with only the creditor's employees present, and the creditor purchased the collateral, *Benton* v. *General Mobile Homes, Inc.*, 13 Ark. App. 8, 678 S.W.2d 774 (1984).

While a low price is not conclusive proof that a sale has not been commercially reasonable, a large discrepancy between sales price and fair market value "signals a need for close scrutiny" of the sale procedures. *Connex Press, supra*; Ark. Stat. Ann. § 85-9-507(2) (Supp. 1985). In White & Summers, *Uniform Commercial Code*, § 26-11 (2d ed. 1980), the authors suggest that even in cases which cite the failure to give proper notice as the reason for holding that a sale was not commercially reasonable, the true, though unarticulated reason, may be an insufficiency of the sale price. Footnote 117 states:

> Although courts frequently rely on lack of notice, they seldom mention any causal connection between the debtor's injury and his failure to receive notice; there is no suggestion that he would have redeemed or have been otherwise moved to action by receipt of a notice. Hidden among the facts are some interesting data on the resale prices. See, e.g., *Norton* v. *National Bank of Commerce*, 240 Ark. 143, 398 S.W.2d 538, 3 UCC 119 (1966) (car purchased for more than $350 in September resold for $75 in January); *Baber* v. *Williams Ford Co.*, 239 Ark. 1054, 396 S.W.2d 302, 3 UCC 83 (1965) (car purchased in

> August for at least $882, including interest but not including downpayment, and resold, apparently in December, for $210); *Braswell* v. *American Nat'l Bank*, 117 Ga. App. 699, 161 S.E.2d 420, 5 UCC 420 (1968) (car purchased for $2,195, excluding interest but including downpayment, and resold, apparently after only a few months, for $850); *Central Budget Corp.* v. *Garrett*, 48 A.D.2d 825, 368 N.Y.S.2d 268, 17 UCC 327 (1975) (car purchased for over $1,600 sold at auction three months later for $300).

The authors conclude that given an unusually low sale price little more is needed for the courts to find the sale commercially unreasonable.

Sale price was recently discussed by the Arkansas Supreme Court in *Thrower* v. *Union Lincoln-Mercury, Inc.*, 282 Ark. 585, 670 S.W.2d 430 (1984).

> [Section] 85-9-507(2) states in part: "The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner." Also, whether the collateral is sold wholesale instead of retail is not necessarily determinative of commercial unreasonableness. . . Any difference between the fair market value and the price actually received, however, is ordinarily a material consideration, but this fact must be examined in light of all aspects of the sale to determine commercial reasonableness.

282 Ark. at 590 (citations omitted). *See also, Harper* v. *Wheatley Implement Co., Inc.*, 278 Ark. 27, 643 S.W.2d 537 (1982).

We next discuss the appellant's argument that the trial court erred in refusing to hold that he was discharged from liability because the promissory note sued upon had been materially altered. It was undisputed that after appellant had signed the note the Bank and Coy Womack agreed to delete the last item of collateral, a used 1974 Wilson trailer, and substitute a used 1979 Ford tractor, without appellant's knowledge or consent. It was also undisputed that the Bank discovered when it was repossess-

ing the collateral that this Ford tractor had a prior lien against it for $22,000. Appellant contends that this alteration on the face of the note discharged him. He relies on *Merchants National Bank of Fort Smith* v. *Blass*, 282 Ark. 497, 669 S.W.2d 195 (1984), as support for this contention. In that case, the court stated that, "Arkansas has adopted the well settled principle of law 'that a material alteration in the obligation assumed, made without the assent of the guarantor, discharges him.' " Other cases are relied on by appellant as support for the same proposition.

Appellant continues this argument, in a different vein, by contending he should be released from liability under Ark. Stat. Ann. § 85-3-606(1)(b) (Add. 1961) because, by substituting the encumbered tractor for the unencumbered trailer, the Bank impaired its collateral. That section provides:

> (1) The holder discharges any party to the instrument to the extent that without such party's consent the holder
>
> . . .
>
> (b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

Appellee responds to these arguments by insisting that appellant was not a guarantor but a comaker and thus jointly liable on the note. It also argues that appellant cannot be discharged from liability unless the alteration of the note was both material and fraudulent. And appellee contends that, in any event, the appellant would be discharged only to the extent of the value of the collateral released by appellee.

As to the guarantor versus comaker issue, we do not agree with appellee's argument that Ark. Stat. Ann. § 85-3-416 (Add. 1961) prevents appellant from being treated as a guarantor in this case. That section of the Uniform Commercial Code does not require that words of guaranty must be used before one can be treated as a guarantor. It only explains the meaning and the effect of certain expressions of guaranty. The "Comment to Uniform Commercial Code," appearing under this section, makes this clear by stating that the purpose of the section is to state "the commercial understanding as to the meaning and effect of words of guaranty added to a signature." The issue in the

instant case is whether the appellant was an accommodation party under section 85-3-415 of the Code. White & Summers, *Uniform Commercial Code*, § 13-12 at 517-18 (2d ed. 1980), states that:

> Under the Code the word "surety" includes all "guarantors" and all "accommodation parties." A "guarantor" differs from an "accommodation party" only because he has added some words to his signature and has so altered (slightly or greatly) the liability he would have had if he had simply put his signature on the instrument as a mine-run accommodation party. Section 3-415(1) defines an accommodation party as "one who signs the instrument in any capacity for the purpose of lending his name to another party to it." Section 3-415(2) tells us that an accommodation party "is liable in the capacity in which he has signed." Thus an accommodation party may appear on the instrument as a maker, acceptor, drawer or indorser and his liability is governed by the Code sections on the contracts of parties who sign in these capacities.

The question of whether one is an accommodation signer was discussed in *Riegler* v. *Riegler*, 244 Ark. 483, 426 S.W.2d 789 (1968). That case holds that the issue is one of fact and the burden of proof is on the party claiming to be an accommodation signer. *Riegler* v. *Riegler* was cited by the Supreme Court of Rhode Island in *Kerney* v. *Kerney*, 386 A.2d 1100, 1102 (R.I. 1978), where that court stated that "the most significant element in determining whether a party to a note is an accommodation party is the intention of the parties: but if no intention is expressed "the purpose of the note becomes the significant element" and where a person "receives no direct benefit from the execution of the paper it is likely that he will be regarded as an accommodation party." *See also Farmers State Bank of Oakley* v. *Cooper*, 608 P.2d 929 (Kan. 1980), where the court applying the "proceeds" and "purpose" tests found the defendant's status to be one of accommodation since he received no benefits from the proceeds of the instrument and his signature was needed by the maker of the note in order to obtain the loan.

In the instant case, we hold that the question of whether appellant was an accommodation signer is an issue of

fact to be decided on the evidence presented in the retrial of this case. We do not agree with appellant's contention that the doctrine of judicial estoppel is involved here or that the doctrine prevents the guarantor versus comaker issue from being decided in the new trial.

On the issue of appellant's discharge from liability because of alteration of the note, we think the law needs to be put in proper focus in order to reveal the factual issues to be presented to the fact finder. First, we look at Ark. Stat. Ann. § 85-3-407, which deals with the alteration of an instrument. Section (1) of that statute provides that any alteration is material if it changes the contract in any respect, and section (2) provides that against any person other than a subsequent holder in due course, an alteration by the holder that is both material and fraudulent discharges any party whose contract is thereby changed unless that party assents or is precluded from asserting the defense; and section (2)(b) provides "no other alteration discharges any party." Also, Comment (3)(b) to the statute states that a material alteration does not discharge any party unless it is made for a fraudulent purpose. Moreover, in the *Merchants National Bank of Fort Smith* v. *Blass* case, *supra*, the court said:

> We agree with the Appellant that the alterations on the face of the note in question, when taken alone, did not discharge Appellee from liability. Ark. Stat. Ann. § 85-3-407(2)(a) (Add. 1961), expressly provides that to discharge a party to the contract an alteration must be both fraudulent and material. Here, there is no evidence of fraud.

282 Ark. at 499. *See also, Bank of Ripley* v. *Sadler*, 671 S.W.2d 454, 458 (Tenn. 1984) ("We agree that a finding that an alteration is both material and fraudulent is necessary to discharge a surety . . .").

Of course, we do not know what evidence will be presented in the retrial of this case but even if there is no evidence of a fraudulent alteration, the question of appellant's discharge is not completely answered. We must now look at Ark. Stat. Ann. § 85-3-606 (Add. 1961). White & Summers, *Uniform Commercial Code*, § 13-14 at 524-25 (2d ed. 1980), discusses this section as follows:

> Section 3-606(1)(a) specifies changes in the legal relationship between debtor and creditor that discharge the surety. When, without the surety's consent the holder "releases or agrees not to sue . . . or agrees to suspend the right to enforce . . . the instrument or collateral or otherwise discharges" the principal debtor, the surety is discharged . . .
>
> . . .
>
> Under section 3-606(1)(b) the surety is also discharged when, without his consent, the creditor "unjustifiably impairs any collateral for the instrument."

The case of *Bank of Ripley* v. *Sadler*, 671 S.W.2d 454 (Tenn. 1984), which we have previously cited, is also applicable on this point. In that case, the appellee, Sadler, endorsed a note made to a bank by two of his employees who were buying his construction business. The employees defaulted on the note and the bank sued Sadler for the balance due. It was held that Sadler was an accommodation party to the note and that he was not discharged under the provisions of section 3-407 of the Commercial Code because there was no fraudulent alteration of the note by the bank. The court then considered section 3-606 of the Code. The bank had granted the employees an extension of the note and had raised the interest rate from 9½% to 10%. Although Sadler contended that he had not agreed to this action by the bank, the court held that "the terms of the note permitted the extension agreement." 671 S.W.2d at 458. The court found that the increase in interest rate was not fraudulent under section 3-407 of the Code but did not discuss section 3-606 as to this point. However, it is plain that this increase in interest rate did not violate section 3-606(1)(a) as it did not release the makers of the note or suspend the right to enforce the note. The court did, however, discuss section 3-606(1)(b) which provides for the discharge of a party to the note "to the extent" that without such party's consent the holder unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

The impairment issue mainly involved the bank's release of the title to a pickup truck, so that it could be sold by makers of the note, plus a check from an insurance company

received by the makers for the fire loss of another vehicle. These vehicles were part of the collateral securing the note to the bank. The proceeds of the sale and the check were given to the bank for application on the note. Sadler argued that this "unjustifiably" impaired the collateral for the note as it affected the assets of the business and his right of subrogation against the collateral. The court made two findings that have special significance in the instant case. One, it was held that the test of whether a secured party has unjustifiably impaired collateral not in his possession is "that of reasonable care under all the relevant circumstances of the case." Two, it was held that if impairment does occur the discharge of the surety is *pro tanto* only. This last holding is in keeping with section 3-606 which provides that a party's discharge is "to the extent" that the collateral is unjustifiably impaired. This was also the view taken by the court in *Farmers State Bank of Oakley* v. *Cooper*, 608 P.2d 929 (Kan. 1980), and *Sadler* and *Cooper* also hold that the burden of proving the monetary extent to which the collateral has been impaired is upon the party claiming the impairment. Our own case of *Van Balen* v. *Peoples Bank & Trust Co.*, 3 Ark. App. 243, 626 S.W.2d 205 (1981), also held that the amount of the impairment of the collateral is the limit of the right to be discharged. And we also said that section 3-606 of the Code, Ark. Stat. Ann. § 85-3-606 (Add. 1961), places the burden of proving the collateral was unjustifiably impaired and the extent thereof upon the party who seeks a discharge of all or part of his obligation.

We pause here to note that *Van Balen* discussed a point that appears sure to arise in another trial of the instant case. The opinion refers to a case where impairment of the collateral (failure to perfect a lien on pledged corporate stock) did not effect a discharge upon a guarantor because it was shown that the stock had no value. This is significant in the present case both on the question of extent of the impairment and its *pro tanto* discharge, and as to the reasonableness of the Bank's action, under all the circumstances, in substituting the Ford tractor for the Wilson trailer as collateral on the note in this case.

We also point out that we have carefully considered the cases of *National Bank of Eastern Arkansas* v. *Collins*, 236 Ark. 822, 370 S.W.2d 91 (1963); *Spears* v. *El Dorado Foundry, Machine & Supply Company*, 242 Ark. 590, 414 S.W.2d 622 (1967); and

Moore v. *First National Bank of Hot Springs*, 3 Ark. App. 146, 623 S.W.2d 530 (1981). These cases, and others like them, are relied upon by the appellant for their holdings that a guarantor, or surety, is a favorite of the law and his liability is not to be extended beyond the express terms of his agreement and that a material alteration of the obligation, without his assent, will discharge him. None of those cases, however, involved the obligation of a guarantor or surety as fixed by the Uniform Commercial Code. The agreements in those cases were guaranty agreements made by the parties outside of and not governed by the provisions of the Commercial Code. Moreover, the alterations of the obligations guaranteed were such that entirely new obligations were created and, under those circumstances, the guarantors or sureties were fully discharged. Even under the Code, this result can be possible in a proper case. *See Langeveld* v. *L.R.Z.H. Corporation*, 376 A.2d 931 (N.J. 1977), where the court read the Code as providing for release of a surety, where the collateral has been unjustifiably impaired, to the extent that the impairment "can be measured in monetary terms." However, the court said:

> The effect of the impairment upon one secondarily liable may or may not be translatable into dollars. There may be clear prejudice without precisely calculable loss. This will normally result in the discharge of the surety.

376 A.2d at 937.

Finally, appellant argues the trial court erred in not setting aside the judgment after it was learned that another attorney from the firm which represented the Bank at trial (different attorneys represent the Bank in this appeal) had represented Coy Womack when repossession of the collateral first began. The appellant, Coy's father, only discovered this previous relationship some two months after the entering of the judgment against him. He then filed a motion to have the judgment set aside for this reason. The motion was denied. Appellant contends Rules 1.7 and 1.9 of the Model Rules of Professional Conduct, *see* 287 Ark. 499, 702 S.W.2d 326 (1985), prohibit counsel from representing a client when he may have a conflict of interest and cites numerous cases stating this rule. He asserts that because an attorney made a few phone calls on behalf of Coy Womack when the Bank first began repossessing the collateral, the attorney's

firm should have declined subsequent representation of the Bank in the deficiency action. Appellant directs us to no cases, and we have found none, in which a conflict of interest by counsel was held to be grounds for setting aside a judgment.

Rule 1.7 provides that a lawyer shall not represent a client if the representation will be directly adverse to another client unless he reasonably believes the representation will not adversely affect the relationship with the other client. The appellee submits that this rule has not been violated as its trial counsel never represented appellant and the representation of Coy Womack ceased long before trial counsel accepted representation of the Bank in this case.

Rule 1.9 prohibits a lawyer of a former client from subsequently representing another person in the same or substantially related matters. Appellee contends this rule has not been violated because it was not in effect at the time of this trial and that the introduction to the rules states their purpose will be subverted if they are invoked by opposing parties as procedural weapons. Under the circumstances, we cannot say that the trial court's refusal to set aside the judgment in this case was erroneous. Since the attorneys who represented appellee at the trial have now been permitted to withdraw, this issue should not arise in the retrial of this case.

Because of the error in admitting into evidence the written notes alleged to have been made by the president of the appellee Bank at the time of the sale of the collateral, the judgment is reversed and the case remanded for a new trial. We have attempted to fully discuss the law with respect to the issues which we think may arise in a new trial. We remand for a new trial consistent with the law set out in this opinion.

Reversed and remanded.

CRACRAFT, J., agrees.

JENNINGS, J., concurs.

William T. SMITH, et al. *v.* ARKANSAS STATE HIGHWAY COMMISSION

CA 87-26 728 S.W.2d 202

Court of Appeals of Arkansas
Opinion delivered April 22, 1987

Q. Byrum Hurst, Jr., for appellant.

Philip N. Gowen, for appellee.

PER CURIAM. The appellee has moved to dismiss this appeal from a judgment of the Garland County Circuit Court, rendered after the appellee had answered and been notified of the trial date and after the trial court's order setting aside the judgment.

The appellee correctly states that an order setting aside a default judgment is not a final order from which an appeal will lie. *See Schueck Steel, Inc.* v. *McCarthey Brothers Co.*, 289 Ark. 436, 711 S.W.2d 820 (1986). However, a judgment rendered after the defendant has answered and after a trial at which he failed to appear is not a default judgment under ARCP Rule 55. *Dawson* v. *Picken*, 1 Ark. App. 168, 613 S.W.2d 846 (1981). Since the judgment set aside by the trial court was not a default judgment, but rather a judgment entered after trial, we treat the trial court's order as one granting a new trial. Because this is a final and appealable order, the appellee's motion to dismiss the appeal is denied. *Day* v. *Day*, 20 Ark. App. 48, 723 S.W.2d 378 (1987); Ark. R. App. P. 2(a)(3).

Motion denied.

Almeta M. SAVAGE *v.* Teresa McCAIN

CA 86-483 728 S.W.2d 203

Court of Appeals of Arkansas
Division II
Opinion delivered April 29, 1987

Gary D. Person, for appellant.

Martin, Vater & Karr, by: *Charles Karr*, for appellee.

JAMES R. COOPER, Judge. This case presents a question concerning the relative rights of the two survivors to a checking account and a certificate of deposit held in the names of three persons as joint tenants with rights of survivorship. Leo Savage died on July 22, 1985, survived by the appellant, his wife for eight years prior to his death, and also survived by the appellee, his daughter by a previous marriage. At the time of his death, he had a checking account and a certificate of deposit with combined balances of $19,776.73. The day after Leo Savage's death, the appellant closed out the checking account and transferred the money to an account in her name only. Approximately one month later, the appellant cashed in the certificate of deposit and likewise deposited the funds in her separate account. The appellee brought this action against the appellant alleging a constructive trust and seeking to recover a portion of those funds. From the chancellor's order directing the appellant to pay to the appellee a sum equal to one-half of the funds in the checking account and certificate of deposit as of the date of Leo Savage's death, the appellant brings this appeal. For the reasons set out below, we affirm the chancellor's decree.

The appellee testified that her father had included her name on a joint account for several years in the past because her father wanted her to have access to the funds if she needed them. She stated that, once her father married the appellant and moved to Fort Smith, he and the appellant opened the joint accounts in question, and after they had signed the signature cards for the accounts, the deceased took the signature cards to the appellee for her signature as well. She testified that her father would have wanted her to have half of the money in both of the accounts even though she made no contributions to either the checking account or the certificate of deposit. However, the appellee also admitted that the appellant, as a surviving joint tenant, had the complete right to withdraw all of the funds after Leo Savage's death. The appellant testified that the appellee's name was on the joint account for "emergency purposes only" and that the funds deposited in the checking account and the certificate of deposit were contributed solely by the appellant and the deceased. We find it important to note that the appellant admitted that she withdrew the funds after the appellee made demand upon her for one-half of the amounts. The appellant testified that she knew

that any one of the three on the signature card could withdraw all of the money at any time and stated she believed the decedent intended for her to have such funds. Neither the appellant nor the appellee testified as to any agreement they had with respect to the accounts in question, and the appellant stated that she and the appellee had never discussed the accounts until after Leo Savage's death.

The parties do not dispute that, pursuant to Ark. Stat. Ann. sections 67-552 (Supp. 1985) and 67-1838 (Repl. 1980), the accounts in question were held by the decedent, the appellant, and the appellee as joint tenants with right of survivorship, and that, upon the decedent's death, the two survivors continued as joint tenants, and either could withdraw all of the funds in question. However, these statutes and the cases interpreting them concern the obligation of the financial institution in dealing with such funds. Although the bank or savings and loan may rightfully pay all the funds to either of the two survivors, it does not necessarily follow that either survivor may withdraw such funds without accounting to the other survivor for such action. Here, the chancellor found that a peculiar relationship of mutual trust and confidence existed between the surviving co-tenants, and that the appellee was intended to have a beneficial interest in these accounts. In holding that the appellant was liable to the appellee for half of the account balances, the chancellor further found that the appellant had over-reached the appellee and, accordingly, imposed a constructive trust upon the funds in question.

Constructive trusts arise and are imposed in favor of persons entitled to a beneficial interest against one who secures legal title either by an intentional false oral promise to hold title for a specified purpose and, having thus obtained title, claims the property as his or her own, or one who violates a confidential or fiduciary duty, or is guilty of any other unconscionable conduct which amounts to constructive fraud. *Horton* v. *Koner*, 12 Ark. App. 38, 671 S.W.2d 235 (1984). In *Andres* v. *Andres*, 1 Ark. App. 75, 613 S.W.2d 404 (1981), this court held that there must be a confidential duty or fiduciary relationship to establish a constructive trust.

Based upon our review of the record, we cannot say that the chancellor's finding of a confidential relationship was clearly

erroneous. *Andres, supra*; ARCP Rule 52(a). We therefore affirm his imposition of a constructive trust.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

Anthony Wayne THOMPSON *v.* STATE of Arkansas

CA CR 86-177 727 S.W.2d 865

Court of Appeals of Arkansas
Division II
Opinion delivered April 29, 1987

Attaway & Shumaker, by: *Rick C. Shumaker*, for appellant.

Steve Clark, Att'y Gen., by: *Robert A. Ginnaven, III*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was found guilty, by a jury, of theft of property. As a habitual offender he was sentenced to ten years in the Arkansas Department of Correction. On appeal, the appellant argues that the trial court erred in refusing to grant a mistrial after the prosecuting attorney referred to him as a habitual criminal in closing arguments. We affirm.

During the case in chief for the defense the appellant testified and admitted during direct examination that he had pled guilty to two separate charges of theft in 1981 and 1982. He further stated that he pled guilty to the 1981 and 1982 charges because he was guilty, and that he pled not guilty in the case at bar because he was not guilty. During closing arguments, the prosecuting attorney referred to the prior convictions and made the following remarks:

> Basically ladies and gentlemen, this is a very serious case, one passed Ms. Thane.[sic] But two, we have before us an habitual criminal. We have someone who cannot keep his hands off someone else's property. He has been convicted not once, but twice. Now he is before you a third time and he hasn't learned his lesson to this date.

At that point the defense counsel asked to approach the bench, but this discussion between the attorneys and the judge is not part of the record. The prosecuting attorney then resumed his argument and, after asking the jury to impose a serious punishment, indicated to the jury that he would be talking with them again. The court interrupted and the defense attorney made "the same

objection" which the trial court overruled.

After the jury left the courtroom to deliberate, the appellant requested a mistrial, which was denied. The trial court then offered to recall the jury and instruct them again, but the appellant's counsel stated that it was not necessary. However, he did request that his motion for a mistrial be preserved.

The appellant now argues that the mistrial should have been granted because the prosecuting attorney was attempting to persuade the jury to consider his prior convictions as character evidence in violation of A.R.E. Rule 404(b). He further argues that no instruction would cure this error.

The general rule is that the prosecutor may not assert that the defendant's character is questionable where there is no adequate justification in the evidence. *Gustafson* v. *State*, 267 Ark. 830, 593 S.W.2d 187 (1980); *Conti* v. *State*, 10 Ark. App. 352, 664 S.W.2d 502 (1984). It is also a fundamental rule that the closing arguments of counsel must be confined to the questions in issue, the evidence introduced at trial, and all reasonable inferences and deductions which can be drawn therefrom. *Simmons* v. *State*, 233 Ark. 606, 346 S.W.2d 197 (1961); *see also Conti, supra*. The trial judge has a very broad latitude of discretion in supervising and controlling arguments of counsel, and his action is not subject to reversal unless there is manifest gross abuse of that discretion. *Parker* v. *State*, 265 Ark. 315, 578 S.W.2d 206 (1979). Even when the remarks are improper, they may not be of such magnitude as to constitute reversible error. *See Gustafson, supra*, where the State referred to the defendant as an "escapist"; *Miller* v. *State*, 250 Ark. 199, 464 S.W.2d 594 (1971), where the State referred to the defendant as a "con artist"; and *Maxwell* v. *State*, 279 Ark. 423, 652 S.W.2d 31 (1983), where the State referred to the defendant as a "rapist, thief and escapee." Furthermore, the trial court is in a better position to judge and observe the prejudicial impact of closing arguments to a jury than is the appellate court. *James* v. *State*, 11 Ark. App. 1, 665 S.W.2d 883 (1984).

In the case at bar the jury was instructed that the remarks of counsel are not evidence, and that the prior convictions testified to were to be considered for credibility and not guilt or innocence. Those instructions, given by the court immediately

before arguments of counsel began, were sufficient to cure any impropriety on the part of the prosecutor. *Conti, supra.*

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

Lowell Wayne "Sonny" BARKER *v.* STATE of Arkansas

CA CR 86-167 728 S.W.2d 204

Court of Appeals of Arkansas
Division II
Opinion delivered April 29, 1987]
[Rehearing denied May 27, 1987.]

[redacted]

William C. McArthur, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant was charged with the first degree murder of Barry Baker. The men engaged in a fight during which Baker received twenty-three stab wounds, three of which were serious enough to cause his death. After the fight, Baker drove to the Searcy police station where he collapsed in the parking lot. He died later that night at the hospital. The jury found appellant guilty of murder in the second degree and fixed his punishment at 20 years in the Department of Correction and a fine of $15,000.00. One of the points raised in this appeal is the sufficiency of the evidence.

In *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), the Arkansas Supreme Court held that when there is a challenge to the sufficiency of the evidence, we must review that point prior to considering any alleged trial errors and, in doing so, we must consider all the evidence, including any which may have been inadmissible, in the light most favorable to the appellee.

There is evidence in the record showing that Julie Underhill had been dating Baker for several years. She claimed appellant

had been harassing her for some months, following her frequently, and annoying her at work. On October 23, 1985, Ms. Underhill saw appellant near a car wash in Searcy while she was washing her car. She thought he was following her and she called the police. Officer Gary Hogue responded and stayed with her until she finished washing the car. She then drove to Baker's home in Bald Knob and told him that the appellant was bothering her again. Baker left to find appellant and was next seen at the Searcy police station with the multiple stab wounds.

Appellant testified that he was going about his business on October 23, 1985, when a car began following him very close to his rear bumper. He said he attempted to lose it but could not, so he drove out into the country. On Fairview Road, the car attempted to pass and pulled up beside him. They were approaching a one-lane bridge so appellant stopped and the other car did too. Appellant said that both men got out of their cars and, after they exchanged some words about the car-wash incident, Baker hit him and they began to fight. Appellant testified that he attempted several times to get away but Baker kept on coming. He said that after Baker had got him down and banged his head against the ground, he got loose and pulled out his pocket knife and threatened Baker with it if he did not stop. He said Baker just stood there for a moment looking at him, then jumped him again. Appellant testified that he went down on his back and stuck Baker in the stomach. They rolled around and he guessed he cut Baker in the back a few times. He then broke free and tried to walk away, but Baker jumped on his back and drove his face into the ground. Appellant said his nose began to bleed; they rolled around some more; Baker got on top and had his hands against appellant's face and he could not breathe, so he struck up at Baker twice and guessed he hit him with the knife somewhere in the side. He started "poking" at Baker and finally got loose. Both men then jumped up and Baker got in his car, turned it around in the road and left the scene. The autopsy showed that Baker's jugular vein had been severed, his lung, spleen and liver had been punctured, and that he bled to death.

Appellant went to a car wash and cleaned up some, went to the house of a friend, who testified he helped stop appellant's nose bleed, and after 15 to 20 minutes, appellant went to his brother's house where he was taking a bath when police arrived and

arrested him. There was testimony by a doctor, who examined appellant shortly after his arrest, that appellant had no cuts, abrasions, or lacerations that required treatment or attention.

The drawing of inferences from the testimony is for the jury and it has the right to accept such portions of the testimony as its members believe to be true and reject those they believe to be false. *Richie* v. *State*, 261 Ark. 7, 545 S.W.2d 638 (1977); *see also Faulkner* v. *State*, 16 Ark. App. 128, 132, 697 S.W.2d 537 (1985). In viewing the evidence on appeal, we look at it in the light most favorable to the appellee, *Stout* v. *State*, 263 Ark. 355, 565 S.W.2d 23 (1978), and the evidence is sufficient if the jury's verdict is supported by substantial evidence. *Milburn* v. *State*, 262 Ark. 267, 555 S.W.2d 946 (1977).

A person commits murder in the second degree if he knowingly causes the death of another person under circumstances manifesting indifference to the value of human life, or with the purpose of causing serious physical injury to another person, he causes the death of any person. Ark. Stat. Ann. § 41-1503(1)(b) and (c) (Repl. 1977). Appellant claimed the defense of justification, contending he believed the use of deadly force was necessary to defend himself from Baker's attack. This defense is afforded under Ark. Stat. Ann. § 41-507 (Repl. 1977), but the statute requires that there be a reasonable belief that the situation necessitates the defensive force employed and the defense is available only to one who acts reasonably. *Kendrick* v. *State*, 6 Ark. App. 427, 431, 644 S.W.2d 297 (1982).

Considering the number and extent of the wounds inflicted by appellant, his own testimony that he got completely loose from Baker one time before pulling his knife, the fact that there is no mention of any weapon in Baker's possession, the evidence of no sign of injury to appellant, and the fact that 14 of the 23 stab wounds received by Baker were in his back, we think there is substantial evidence from which the jury could find the appellant guilty of murder in the second degree.

Appellant's first point on appeal is that the trial court erred in excusing a prospective juror for cause. During voir dire, one man indicated that he would have great difficulty in voting to send someone to prison. The prospective juror was excused for cause at the request of the prosecution, and the trial court stated it was

because the man seemed to have difficulty with his answers to some questions on voir dire and because he had made a disclosure on his questionnaire that he had been involved in some sort of criminal trial other than traffic but did not disclose what kind. Appellant argues there was no showing of bias and this juror should not have been excused.

The determination of the existence of actual bias is a matter for the trial court and we will not reverse absent an abuse of discretion, *Henslee* v. *State*, 251 Ark. 125, 127, 471 S.W.2d 352 (1971), which must be demonstrated by the appellant, *McFarland* v. *State*, 284 Ark. 533, 548, 684 S.W.2d 233 (1985). The state is, of course, entitled to a fair and impartial jury. *Stephens* v. *State*, 277 Ark. 113, 115, 640 S.W.2d 94 (1982). When actual bias is in question, the qualification of a juror is within the sound discretion of the trial judge because he is in a better position to weigh the demeanor of the prospective juror and his response to the questions on voir dire. *Linell* v. *State*, 283 Ark. 162, 164, 671 S.W.2d 741 (1984). The record shows that the prospective juror here told the prosecuting attorney he did not think he could ever sentence someone to the penitentiary and that it would make him uncomfortable to have to consider a range of punishment of from ten to forty years or life in prison. A prospective juror need not admit bias before the court may excuse him. *Fleming* v. *State*, 284 Ark. 307, 310, 681 S.W.2d 390 (1984). We cannot say the court abused its discretion in excusing this prospective juror in the instant case.

Next, appellant argues the trial court erred in allowing into evidence a tape recorded statement made by Baker. When Baker arrived at the Searcy police department, officers immediately determined his injuries were extremely serious. One officer observed blood spurting from Baker's neck. A tape recorder and camera were obtained and Baker's comments were recorded while officers and emergency medical technicians were attempting to control his bleeding. During this time Baker named appellant as his assailant, said they had been having problems over a girl, and that he did not know what had been used on him or how badly hurt he was until "now." Several people testified to Baker's statements and the tape recording was played for the jury. Appellant argues the trial court erred in admitting this recording either as a dying declaration or an excited utterance.

We find no error.

A.R.E. Rule 804(b)(2) provides:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (2) Statement under belief of impending death. A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

Appellant asserts Baker did not know he was dying. The record discloses, however, that Baker made statements several times to officers and medical personnel such as, "Please don't let me die" and "Oh God, Oh God." These statements could certainly be considered as evidence that he understood the gravity of his situation. To be admissible under this exception, the belief of imminent death need not be shown by the declarant's express words alone. It can be supplied by inferences fairly drawn from his condition. *Boone* v. *State*, 282 Ark. 274, 279, 668 S.W.2d 17 (1984).

We think the statements were also admissible as excited utterances, defined by A.R.E. Rule 803(2) as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Appellant suggests too much time had elapsed after the fight for this exception to apply. However, Baker was severely wounded, bleeding profusely, in pain and dying from injuries he had quite recently received in a fight. Clearly the court could find that he was still under the stress of the event. Preliminary questions concerning the admissibility of evidence are determined by the trial court under the provisions of A.R.E. Rule 104. We find no error in the court's ruling allowing the introduction of the recorded statement of Baker.

Next, appellant argues the trial court erred in allowing into evidence pictures taken of Baker in the police station parking lot, at the hospital, and at the autopsy. Appellant concedes that some of the pictures were admissible to illustrate the severity of the wounds. He argues, however, that pictures taken at the hospital

and the morgue were not admissible because they were highly prejudicial, inflammatory, and did not represent the true nature of Baker's wounds because of medical and surgical procedures performed in an attempt to save his life. Appellant contends the probative value of these pictures was far outweighed by the danger of prejudice and of confusing and misleading the jury. *See Fisher* v. *State*, 7 Ark. App. 1, 643 S.W.2d 571 (1982); A.R.E. Rule 403.

The admissibility of photographs is within the sound discretion of the trial court and it will not be reversed absent a manifest abuse of that discretion. *Henderson* v. *State*, 279 Ark. 414, 420, 652 S.W.2d 26 (1983). A photograph is admissible to corroborate the testimony of a witness, show the nature and extent of the wounds or the savagery of an attack, or when useful in enabling a witness to better describe objects portrayed or the jury to better understand the testimony. *Earl* v. *State*, 272 Ark. 5, 10, 612 S.W.2d 98 (1981). We think the photographs taken at the hospital were admissible to show the extent of the wounds because the neck, back and abdominal wounds were not observable in the pictures taken in the parking lot. In addition, the chief medical examiner of the Arkansas Crime Lab, who made photographs during the autopsy performed by him, testified that those photographs would help him demonstrate the nature and extent of the wounds. He said this is an instance in which we have to know where the real stab wounds are and what has been done in surgery to understand the nature of the wounds, and he pointed out clearly which were original wounds and which were alterations made by the medical procedure in the hospital. Furthermore, it is evident that the trial judge did exercise discretion in admitting the photographs because he refused to admit some that were offered.

Simply because photographs are gruesome is insufficient reason to exclude them. *Smith* v. *State*, 282 Ark. 535, 540, 669 S.W.2d 201 (1984). Even inflammatory photographs are admissible in the sound discretion of the trial court if they tend to shed light on any issue or are useful to enable the jury to better understand or corroborate the testimony. *Fairchild* v. *State*, 284 Ark. 289, 293, 681 S.W.2d 380 (1984). We find no error in the introduction of the pictures of Baker.

Appellant's next argument is that the trial court erred in admitting into evidence a knife found at his brother's house when the appellant was arrested. The knife was found on the cabinet in the bathroom where appellant was bathing, along with a blood-stained shirt and jeans. Although the crime lab was unable to detect any blood on the knife, the medical examiner testified that the victim's wounds were consistent with those which would have been inflicted by that kind of knife. At trial appellant said he did not know if that was his knife but it looked like his and could be the one he injured Baker with. On appeal, appellant contends the knife was not properly identified, no corroboration was presented that connected it with the crime, and that its probative value was outweighed by its prejudicial effect. It is well established that the determination of the relevancy of evidence is within the trial court's discretion and that the appellate court will not reverse absent a showing of abuse of that discretion. *James* v. *State*, 11 Ark. App. 1, 8, 665 S.W.2d 883 (1984). Even if this knife were not the fatal weapon, the similarity between it and the weapon used would make appellant's identity as the attacker more probable than it would be without the evidence. *See Fountain* v. *State*, 273 Ark. 457, 461, 620 S.W.2d 936 (1981). We find no error in admitting the knife into evidence.

Appellant also argues that the trial court erred in allowing Dr. Randy McComb to testify in violation of the physician-patient privilege. After appellant's arrest he was taken to the emergency room at the White County Memorial Hospital to be examined for injury. At trial, the emergency room physician, Dr. McComb, testified he found no serious injuries when he examined the appellant and saw no cuts, abrasions, or lacerations that needed treatment or attention. The appellant contends this testimony violated the physician-patient privilege as set out in *Baker* v. *State*, 276 Ark. 193, 637 S.W.2d 522 (1982). We do not agree. In that case, the Arkansas Supreme Court made it clear that under A.R.E. Rule 503 "the real protection is aimed at preventing a doctor from repeating what a patient told him in confidence." The emergency room doctor did not testify to any confidential information given to him by the appellant in this case. But appellant contends that when the Arkansas Supreme Court held the Uniform Rules of Evidence had been unconstitutionally adopted, *see Ricarte* v. *State*, 290 Ark. 100, 717 S.W.2d

488 (1986), it reinstated the broader previous law which encompassed all conceivable information a physician could have about a patient. *See National Benevolent Society* v. *Barker*, 155 Ark. 506, 244 S.W. 720 (1922). Suffice it to say that appellant did not object to the doctor's testimony on this ground at the trial and did not submit this argument to the trial court. In *Halfacre* v. *State*, 290 Ark. 312, 718 S.W.2d 945 (1986), the court held that *Ricarte* v. *State* "does not provide a remedy unless the issue of the validity of the uniform rules was raised in the trial court." *See also Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

Next, appellant argues that the trial court erred in allowing the state to cross-examine a defense witness about his knowledge of two misdemeanor convictions appellant had for harassing Julie Underhill. Mickey Smith, a defense witness, had testified that appellant had a reputation for being a quiet, peaceful man. On cross-examination, the state inquired whether the witness was aware of the two convictions. Appellant argues this questioning violated A.R.E. Rule 609, which provides certain limitations on impeachment by evidence of conviction of a crime. Again, we disagree. Rule 609 applies only when one is attempting to show that the witness himself has been convicted of a crime. Applicable to the situation at hand is A.R.E. Rule 405(a) which provides that when evidence of character or a trait of character of a person is admissible inquiry may be made on cross-examination into relevant specific instances of conduct. The distinction between these two rules was explained in *Reel* v. *State*, 288 Ark. 189, 702 S.W.2d 809 (1986):

> The policies behind rule 405(a) are, however, distinguishable from those underlying rule 609(a). The purpose of the cross examination of a character witness with respect to a prior offense is to ascertain the witness' knowledge of facts which should have some bearing on the accused's reputation. If the witness does not know that an accused was previously convicted of a crime, the witness' credibility suffers. If he knows it but then disregards it in forming his opinion of the accused, that may legitimately go to the weight to be given the opinion of the witness.

288 Ark. at 191. *See also Wilburn* v. *State*, 289 Ark. 224, 711 S.W.2d 760 (1986) (holding that by producing a character

witness the appellant opened the door to evidence which might otherwise have been inadmissible). As pointed out in *Reel* v. *State*, an instruction limiting the use of the information gained by the cross-examination of the character witness would assist the jury in placing the testimony in its proper light. That, however, was not made an issue in the present case.

Finally, appellant argues that it was error to deny the admission of testimony by his brother and sister-in-law that when appellant appeared at their house he said that Baker chased him, ran him off the road, and persisted in giving him a beating. He contends these statements were "excited utterances" and admissible under A.R.E. Rule 803(2). In the first place, the abstract does not show that these witnesses were ever asked questions that would have elicited this information. Furthermore, we do not find a proffer of the testimony they would have given. There must, of course, be a proffer of the evidence excluded for us to find error, *Duncan* v. *State*, 263 Ark. 242, 565 S.W.2d 1 (1978), unless its substance was apparent from the context within which the questions were asked, A.R.E. Rule 103(a)(2). However, even if we accept what appellant says in his argument would have been the testimony of his brother and sister-in-law, we find no error in denying its admission into evidence.

In *Tackett* v. *State*, 12 Ark. App. 57, 670 S.W.2d 824 (1984), we said the basis of this exception to the hearsay rule is that a person who experiences a startling event and is still under the stress of the excitement of the event when statements are made by him will not make false statements. The evidence here discloses that a substantial amount of time had passed between the fight and appellant's arrival at his brother's home. Appellant had driven into town, had cleaned his face at a car wash, had driven to Mickey Smith's house to tell him about the incident and see what he had to say about it, and after 15 or 20 minutes at Smith's house, had driven to the brother's house but had presence of mind enough to throw a handgun out of the car window before arriving there.

In *Marx* v. *State*, 291 Ark. 325, 724 S.W.2d 456 (1987), the Arkansas Supreme Court said "it was for the trial court to determine if the statement was made under the stress of excitement, an excited utterance, or after Marx had calmed

down." 291 Ark. at 334. Under the circumstances in the case at bar, we do not think the trial court abused its discretion in refusing to admit the testimony it is suggested would have been given by appellant's brother and sister-in-law. *Marx* v. *State*; A.R.E. Rule 104(a).

Affirmed.

COOPER and COULSON, JJ., agree.

Alma Jean McCOY on Behalf of George McCOY and James McCOY, Jr., Minors *v.* PRESTON LOGGING, et al.

CA 86-329 728 S.W.2d 520

Court of Appeals of Arkansas
En Banc
Opinion delivered May 6, 1987

Baim, Gunti, Mouser, Bryant & Desimone, for appellant.

Shackleford, Shackleford & Phillips, P.A., for appellee.

BETH GLADDEN COULSON, Judge. This appeal is from a decision of the Workers' Compensation Commission reversing the Administrative Law Judge's award of dependency benefits to George McCoy and James Junior McCoy III.[1] The appellant, Alma Jean McCoy, acting on behalf of the two minor children, argues that there is no substantial evidence to support the Commission's finding that the children were not entitled to benefits as dependents of the deceased, James Rogers.

We find substantial evidence to support the Commission's finding that George McCoy and James Junior McCoy III were not the acknowledged illegitimate children of the deceased, James Rogers, but rather, were the legitimate children of Alma Jean McCoy and James McCoy, Jr. However, the appellant makes the additional argument that the children are entitled to dependency benefits as "foster children" of the deceased. While it appears that this argument was not presented to the Administrative Law Judge, and there is no discussion of the issue in the Commission's order, the appellee has conceded that the Commission heard argument by the parties on this point. Because the Commission has failed to set out its findings of fact in this regard, the case must be remanded.

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[1] Although the style of this case identifies one of the minor children as James McCoy, Jr., he is correctly named on his birth certificate as James Junior McCoy III and will be referred to as such hereafter.

James Rogers died on December 11, 1984, after sustaining an accidental injury which arose out of and in the course of his employment. Alma Jean McCoy testified that she and James Rogers cohabited from early 1970 until the time of the accident, that they were never married, but that she gave birth to four boys during those fourteen years. The appellant also candidly admitted that she was married to James McCoy, Jr., at the time she began cohabiting with James Rogers and that James McCoy, Jr., did not obtain a divorce from the appellant until April of 1975. This appeal concerns only two of the four boys born to Alma Jean McCoy. George McCoy was born on November 18, 1970, and James Junior McCoy III was born on March 29, 1975.

Alma Jean McCoy testified that James Rogers was the father of the boys, that James Rogers had acknowledged that the children were his own, and that James McCoy, Jr., had obtained the divorce because of the relationship between Alma Jean McCoy and James Rogers. Friends and co-workers of the deceased testified that James Rogers had acknowledged that he had four sons and that Alma Jean McCoy was the mother of those boys. The appellant further testified that while the deceased would sometimes help with the rent, groceries, and clothing for the children, he did not furnish too much — "like on a weekend . . . he would give the kids a little spending money and stuff like that."

The birth certificates for George McCoy and James Junior McCoy III show the father to be James McCoy, Jr. The appellant conceded that she signed those certificates and that she was the one who had supplied the information recorded on those birth certificates. The Commission, in reliance upon cases from the supreme court and from this court, found that George McCoy and James Junior McCoy III were the legitimate children of Alma Jean McCoy and James McCoy, Jr., and that they were not entitled to benefits as the dependents of the deceased, James Rogers.

On appeal, this court will affirm the Commission's decision if there is any substantial evidence to support the ruling. We review and interpret the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission. We give the testimony its strongest

probative force in favor of the action of the Commission. To reverse, we must find that fair-minded persons with the same facts before them could not have reached the conclusion arrived at by the Commission. *Franklin Collier Farms* v. *Chapple*, 18 Ark. App. 200, 712 S.W.2d 334 (1986). 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 is whether the evidence supports the findings which the Commission made. *Bankston* v. *Prime West Corp.*, 271 Ark. 727, 610 S.W.2d 586 (Ark. App. 1981).

The statutory provision which sets forth the order of preference for the payment of compensation for the death of an employee to beneficiaries such as widows and children is Ark. Stat. Ann. § 81-1315 (Supp. 1985). Compensation can be paid to a "child" provided that the particular child was wholly and actually dependent upon the deceased employee and the individual comes within the definition of "child" set forth in Ark. Stat. Ann. § 81-1302(j) (Repl. 1976), which provides:

> "Child" means a natural child, a posthumous child, a child legally adopted prior to injury of the employee, a stepchild, an acknowledged illegitimate child of the deceased or spouse of the deceased, and a foster child. "Child" shall not include married children, unless wholly dependent upon the deceased.

It is well established that one of the strongest presumptions known to the law is that a child born to a legally married woman is the legitimate child of the husband. *Spratlin* v. *Evans*, 260 Ark. 49, 538 S.W.2d 527 (1976). The presumption is so strong that it can only be rebutted by the strongest type of evidence — such as conclusive evidence of the husband's impotency, or nonaccess between the parties at the time of conception. 260 Ark. at 55.

The appellant's testimony that James Rogers was the father of the two boys bastardizes children presumed legitimate by the foregoing presumption; as such, the testimony is incompetent. *Bankston* v. *Prime West Corp.*, 271 Ark. 727, 610 S.W.2d 586 (Ark. App. 1981). Also, the testimony of the friends and coworkers is legally insufficient to overcome the presumption.

Estate of Wright v. *Vales*, 1 Ark. App. 175, 613 S.W.2d 850 (1981). Excluding the appellant's testimony and recognizing that the testimony of the friends and co-workers is insufficient, we are left with the unambiguous information recorded on the birth certificates and with the fact that the children were born to Alma Jean McCoy prior to her divorce from James McCoy, Jr. In light of these facts, the Commission correctly determined that George McCoy and James Junior McCoy III were not the acknowledged illegitimate children of the deceased, James Rogers, but rather, were the legitimate children of Alma Jean McCoy and James McCoy, Jr.

In her brief before this court, the appellant argues that if we find that the two boys were not "technically" the acknowledged illegitimate children of the deceased, James Rogers, there is ample evidence that they were "foster children" in that James Rogers was their substitute parent. *Ellis* v. *Ellis*, 251 Ark. 431, 472 S.W.2d 703 (1971). The appellee contends that the issue is not properly before this court because it was not presented to the Administrative Law Judge and was not discussed in the Commission's order. It is conceded, however, that the Commission heard argument by the parties on this point.

Commission Rule 25(b), which relates to the scope of review on appeal to the Commission, provides as follows:

> All legal and factual issues should be developed at the hearing before the Administrative Law Judge or single Commissioner. The Commission may refuse to consider issues not raised below.

In *American Transportation Co.* v. *Payne*, 10 Ark. App. 56, 661 S.W.2d 418 (1983), this court noted that Rule 25 does not preclude the Commission from reviewing issues not appealed from or not raised at the administrative law judge level if it so chooses. 10 Ark. App. at 61. The Commission reviews cases appealed from the administrative law judge level *de novo*, and the duty of the Commission is not to determine whether there was substantial evidence to support the Administrative Law Judge's decision; rather, it must make its own findings in accordance with a preponderance of the evidence. Hence, while the Commission has the statutory authority to require that parties specify in their notice of appeal to the Commission all issues to be presented, this

does not negate the Commission's authority to hear argument on other issues. In the present matter, the Commission exercised its discretion to hear argument on the foster child issue but failed to set out its findings on that issue.

We have previously emphasized that the review function of this court becomes meaningless if in its order the Commission fails to set out its findings of fact and the evidence in support of those findings. *Wright* v. *American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986). We do not deem a full recitation of the evidence to be required, so long as the Commission's findings include a statement of those facts the Commission finds to be established by the evidence in sufficient detail that the truth or falsity of each material allegation may be demonstrated from the findings. The Commission's statement must contain the specific facts relevant to the "contested issue or issues" so that this court may determine whether the Commission has resolved those issues in conformity to the law. *Wright, supra.*

Because the Commission elected to hear argument by the parties on the foster child issue but failed to set out its findings in that regard, we are not in a position to make a meaningful review on this point. Therefore, we remand and leave to the Commission's discretion (1) whether to decide this issue on the record as has been made or on a record that includes additional evidence and (2) whether to accept new briefs or hear new arguments. Within a reasonable period of time, the Commission shall certify its findings on this issue to this court.

Remanded.

Arlie EVANS *v.* NORTHWEST TIRE SERVICE and TRI-STATE INS. CO.

728 S.W.2d 523

Court of Appeals of Arkansas
Opinion delivered May 6, 1987

Jay N. Talley, for appellant.

Michael H. Mashburn, for appellees.

PER CURIAM. Arlie Evans has filed a motion for a rule on the clerk, apparently pursuant to Rule 5 of the Rules of the Supreme Court and Court of Appeals, asking that the clerk be required to file a transcript from the Arkansas Workers' Compensation Commission as the record on appeal to this court. Attached to the

motion is a letter to appellant's attorney from the deputy executive director of the Commission stating "that the record has been prepared" but that "our office failed to prepare the record within the statutory 90-day time frame."

This same issue was presented to this court in the case of *Davis* v. *C & M Tractor Company*, 2 Ark. App. 150, 617 S.W.2d 382 (1981). In that case, we granted the motion for a rule on the clerk because the statutory procedure for filing appeals from the Commission directly in the Court of Appeals was new and we followed what we thought to be the "spirit" of the decisions of the Arkansas Supreme Court in similar circumstances which had allowed a "short period of grace" before the statutory provisions were routinely applied. We pointed out, however, that "it should be obvious that this action cannot be relied upon in the future."

Our opinion in *Davis* also suggested that, since there was no authority for the Commission to extend the 90-day period in which the record could be filed in the appellate court, certiorari might be a vehicle whereby an extension could be accomplished, or, we said, "perhaps the answer is a promulgation of a rule by the Supreme Court." This is the first time this matter has been presented to us since the *Davis* case and, according to the Commission's letter, was caused by a severe backlog in its transcript preparations.

Under these circumstances, we have decided to grant appellant's motion and are directing the clerk to file the transcript as the record on appeal in this case. We wish to emphasize, however, that we are granting the motion simply because we have heretofore failed to secure the promulgation of a rule taking care of this situation. That rule has now been promulgated and is quoted at the end of this opinion.

We call specific attention to the fact that it is the obligation of the attorney for appellant to see that the record on appeal is filed within the proper period of time. Such attorneys have an obligation to keep in mind the time period involved and to comply with the following rule without depending upon the Commission or anyone else to advise them of the time element involved. This is clearly the thrust of our decision in *Davis* and definitely forecasts our future intentions with regard to the filing of the record on appeal from decisions of the Commission.

Supreme Court of Arkansas Per Curiam opinion, issued March 30, 1987, reads as follows:

> Effective this date Rule 26 of the Arkansas Supreme Court and Court of Appeals is changed to be as follows:
>
> When jurisdiction is conferred by filing, within the time allowed for appeal, a dated and certified copy of the order or judgment appealed from, the clerk of the Supreme Court or Court of Appeals may, upon authorization by the court, issue a writ of certiorari to the clerk of the trial court, the reporter, or any other person charged with the duty of preparing the record on appeal, directing that any omissions or errors in the record be corrected. The writ shall order that the record be completed and certified within thirty days and the explanation for any default in complying with the writ must be made on the return thereof within the time directed. This procedure may be used in appeals of civil, criminal, and administrative agency or commission cases.

Motion for rule on the clerk is granted.

Raymond Henry RACHEL *v.* Christine S. RACHEL

CA 86-434 729 S.W.2d 16

Court of Appeals of Arkansas
Division I
Opinion delivered May 13, 1987
[Supplemental Opinion on Denial of Rehearing July 15, 1987.*]

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* Mayfield, J., concurs; Cracraft, Cooper, and Jennings, JJ., dissent.

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

Tarvin & Byrd, by: *John R. Byrd*, for appellee.

DONALD L. CORBIN, Chief Judge. Appellant brings this appeal from a divorce decree entered by the Ashley County Chancery Court. He brings five points for reversal. First, appellant contends the chancery court lacked jurisdiction because residence of the appellee was not corroborated as required under Arkansas Statutes Annotated Section 34-1208 (Repl. 1962); second, appellant claims that the chancellor erred in awarding appellee a divorce because there was not sufficient corroboration of her grounds for divorce; third, appellant contends appellee did not establish sufficient grounds to entitle her to a divorce; fourth, appellant contends the award of alimony by the chancellor was erroneous; finally, appellant claims the chancellor abused his discretion in awarding attorney's fees to appellee. We agree with appellant that appellee failed to corroborate her grounds for divorce. Accordingly, appellee's cause of action must fail, and we reverse and dismiss.

Appellee brought this action for divorce against appellant, who answered and counterclaimed. Shortly before trial, the parties entered into a stipulation agreement reciting that only four major areas of disagreement remained between them for resolution by the court, and appellant withdrew his counterclaim. At the beginning of the trial, the chancellor stated that he understood appellant was waiving the requirement of corroboration of grounds and requested that any decree which might eventually be entered take care of the written waiver required by Arkansas Statutes Annotated Section 34-1207.1 (Supp. 1985).

Nevertheless, appellant never executed a writing waiving grounds for divorce, and appellee offered no corroboration of grounds at trial.

Section 34-1207.1 provides in pertinent part as follows: "[h]ereafter in uncontested divorce suits corroboration of plaintiff's ground or grounds for divorce shall not be necessary nor required. In contested suits corroboration of the injured party's grounds may be expressly waived in writing by the other spouse." The statute is clear and unambiguous: a party seeking a divorce must prove and corroborate grounds unless the other party to the divorce action *expressly* waives corroboration *in writing.*

"Divorce is a creature of statute and can only be granted when statutory grounds have been proved and corroborated." *Russell* v. *Russell*, 19 Ark. App. 119, 121, 717 S.W.2d 820 (1986); *Harpole* v. *Harpole*, 10 Ark. App. 298, 664 S.W.2d 480 (1984); *Copeland* v. *Copeland*, 2 Ark. App. 55, 616 S.W.2d 773 (1981). However, "[i]n a contested divorce case, the required corroboration of grounds for divorce may be slight." *Russell, supra*, at 121; *Hilburn* v. *Hilburn*, 287 Ark. 50, 696 S.W.2d 718 (1985). "This court has defined corroboration as testimony of some substantial fact or circumstance independent of the statement of a witness which leads an impartial and reasonable mind to believe that the material testimony of that witness is true." *Russell, supra*, at 121; *Anderson* v. *Anderson*, 269 Ark. 751, 600 S.W.2d 438 (Ark. App. 1980). We review chancery cases *de novo* on appeal, and findings of the chancellor will not be reversed unless clearly erroneous or clearly against a preponderance of the evidence. *Andres* v. *Andres*, 1 Ark. App. 75, 613 S.W.2d 404 (1981); ARCP Rule 52(a).

The record reflects that appellee testified to facts which, if believed, might entitle her to divorce. However, upon review of the record in this case, we cannot find one scintilla of evidence tending to even slightly corroborate any of appellee's grounds for divorce. Nor can we find any express written waiver by appellant of the requirement that appellee corroborate her grounds, regardless of any understandings verbalized by the parties prior to trial of this case. Accordingly, the decision of the chancellor was clearly erroneous, and we reverse and dismiss on appellant's Point

II. Since appellee's cause of action must fail for lack of corroboration of her grounds for divorce, we need not address appellant's remaining points for reversal.

Reversed and dismissed.

MAYFIELD and COULSON, JJ., agree.

Supplemental Opinion on Denial of Rehearing
July 15, 1987

733 S.W.2d 743

DONALD L. CORBIN, Chief Justice. Both appellant, Raymond Henry Rachel, and appellee, Christine S. Rachel, have filed petitions for rehearing.

Appellee has filed a petition for rehearing contending there was substantial compliance with Arkansas Statutes Annotated § 34-1207.1 (Supp. 1985) requiring written waiver of corroboration of grounds and secondly, that appellant is precluded from relief on appeal under the doctrines of invited error and estoppel.

Appellant also filed a petition for rehearing contending the case should be reversed and remanded for the sole purpose of recovery and restitution of property taken and sums paid under the erroneous decree. We deny the petitions for rehearing but desire to elucidate the issues.

Law regarding the formation and dissolution of marriage is clearly defined in historical precedent. In *Maynard* v. *Hill*, 125 U.S. 190 (1888), the Supreme Court said: "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature." The New York Court of Appeals, in *Fearon* v. *Treanor*, 272 N.Y. 268, 5 N.E.2d 815 (1936), made a similar statement: "Marriage is more than a personal relation between a man and woman. It is a status founded on contract and established by law. It constitutes an institution involving the highest interests of society. It is regu-

lated and controlled by law based on principles of public policy affecting the welfare of the people of the state." More recently the United States Supreme Court has said in *Boddie* v. *Connecticut*, 401 U.S. 371, 376 (1971):

> As this Court on more than one occasion has recognized, marriage involves interests of basic importance in our society. . . . It is not surprising, then, that the States have seen fit to oversee many aspects of that institution. Without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval.

Arkansas has historically followed the rationale behind the above cases as evidenced by statute and case law. "A divorce proceeding is one in which the public is interested. The parties can waive nothing essential to the validity of the proceeding, and all statutory requirements must be observed." *Widders* v. *Widders*, 207 Ark. 596, 182 S.W.2d 209 (1944).

"Divorce is a creature of statute and can only be granted when statutory grounds have been proved and corroborated." *Russell* v. *Russell*, 19 Ark. App. 119, 717 S.W.2d 820 (1986). "This court has defined corroboration as testimony of some substantial fact or circumstance independent of the statement of a witness which leads an impartial and reasonable mind to believe that the material testimony of that witness is true." *Russell, supra*, at 121. The purpose of requiring corroboration is to prevent parties from obtaining a divorce by collusion. *Anderson* v. *Anderson*, 269 Ark. 751, 600 S.W.2d 438 (Ark. App. 1980).

In *Calhoun* v. *Calhoun*, 3 Ark. App. 270, 272, 625 S.W.2d 545 (1981), it was eloquently stated that in a contested divorce:

> The rule of this state, long established and uniformly adhered to in our decisions is that while both parties are competent to testify in a divorce action, in order to justify the granting of a divorce the testimony of the complaining spouse must be corroborated by some witness other than the parties to the action. That corroboration may not be supplied by the defending spouse as divorces are not granted upon the uncorroborated testimony of the parties

> or their admissions of the truth of the matters alleged. [citations omitted].

In *Calhoun*, citing *Jackson* v. *Bob*, 18 Ark. 399 (1857), it was observed that in any ordinary adversary suit a complainant may obtain a decree upon the declarations or admissions of the defendant. *Calhoun* further quoted from *Jackson* this principle: "It is because of the interest which the public have in the marriage relation, that suits for divorce, in the respects above stated, are not governed by the rules of evidence applicable in ordinary suits." *Id.* at 272.

Act 267 of 1981 provides a spouse may waive in writing the necessity of corroborating the injured party's grounds even where suits are contested. Ark. Stat. Ann. § 34-1207.1. Regardless of whether a divorce is contested or uncontested, the injured party must always prove his or her ground(s) for divorce as set forth in Arkansas Statutes Annotated § 34-1202 (Supp. 1985). In other words, existing statutory law does not allow a spouse to stipulate to or waive grounds for divorce. *Harpole* v. *Harpole*, 10 Ark. App. 298, 664 S.W.2d 480 (1984).

Inasmuch as the law does not permit the offending spouse to corroborate the grounds of the complaining spouse, it certainly does not follow that the offending spouse may waive corroboration of grounds. Justice Fogleman stated as follows in *McNew* v. *McNew*, 262 Ark. 567, 559 S.W.2d 155 (1977):

> We have already indicated that we feel that the requirement of corroboration is still applicable and appropriate. We have so considered it in *Adams* in 1972, in *Welch* in 1973, and in *Dunn* in 1973. There is nothing that calls upon this court to engage in the judicial activism that would be required for our nullifying that requirement. The fact the legislature has not seen fit to abolish the rule is not sufficient, particularly in view of the fact that there has been legislative amendment of the divorce statutes at least 24 times, one of which was the amendment of the pertinent section, Ark. Stat. Ann. § 34-1207 (Supp. 1975), in 1969, to eliminate the requirement of corroboration on all except one ground for divorce, in uncontested cases. . . . It is best that changes in the divorce law be left to that branch of government which is the repository of all powers of

> government not vested in the other two branches, and which is most representative of the people, the ultimate sovereign.

Id. at 572.

In the instant case, the chancellor stated that he understood appellant was waiving the requirement of corroboration of grounds and requested that the party drawing up the decree take care of the written waiver. A written waiver was never prepared or signed, nor did appellee incorporate the waiver into the decree as directed by the chancellor. Appellee negligently failed to prove her case by her failure to prepare a waiver for appellant's signature or to comply with the chancellor's direction to put the waiver in the decree. Arkansas law requires proof and corroboration of grounds unless there has been an effective waiver of corroboration. The effect of affirming the decree in the case at bar without an effective waiver as required by law would be to grant appellee a divorce without proof of grounds. This would be contrary to the very cornerstone of divorce law in Arkansas.

For over 100 years Arkansas law has required corroboration of grounds in a divorce action. *Dunn* v. *Dunn*, 255 Ark. 764, 503 S.W.2d 168 (1973); *Dunn* v. *Dunn*, 219 Ark. 724, 244 S.W.2d 133 (1951); *Owen* v. *Owen*, 208 Ark. 23, 184 S.W.2d 808 (1945); *Goodlett* v. *Goodlett*, 206 Ark. 1048, 178 S.W.2d 666 (1944); *Davis* v. *Davis*, 163 Ark. 263, 259 S.W.2d 751 (1924); *Sisk* v. *Sisk*, 99 Ark. 94, 136 S.W. 987 (1911); *Rie* v. *Rie*, 34 Ark. 37 (1879); *Jackson* v. *Bob*, 18 Ark. 399 (1857). Corroboration of grounds has been required since 1869, when Arkansas adopted the Kentucky Code. *See* Ky. Code, Divorce § 458 [codified in Gantt's Digest, Divorce § 2200 (1874)], *Harpole* v. *Harpole*, 10 Ark. App. 298, 664 S.W.2d 480 (1984).

The law regarding the necessity for corroboration has undergone several changes within the last twenty years. In 1969 the legislature carved one exception eliminating the necessity of corroborating grounds in uncontested divorce suits. *See* Ark. Stat. Ann. § 34-1207.1. Again in 1981, a change was made allowing for written waiver of corroboration in contested divorce actions if signed by the offending spouse. *Id.* The legislature saw fit to carve these narrow exceptions into divorce law in Arkansas. These modifications reflect its response to divorce actions in our

contemporary society. Historically, our courts have been reluctant to interfere with law as it is laid down by the legislative body of our government, and as evidenced through case law, courts have refrained from engaging in judicial activism in divorce law.

The *Morrow* v. *Morrow*, 270 Ark. 31, 603 S.W.2d 431 (Ark. App. 1980), opinion recognizes the long-standing rule that divorce is a creature of the legislature requiring strict adherence, and proof of grounds and corroboration thereof is jurisdictional:

> The law has long been settled that divorce shall not be granted upon the uncorroborated testimony of a party to the suit except in an uncontested case. Ark. Stat. Ann. § 34-1207 (Repl.), eliminates the requirement of corroboration of ground in uncontested cases.
>
> The Arkansas Supreme Court has consistently adhered to the rule announced in *Rie* v. *Rie*, 34 Ark. 37 (1879) that a divorce will not be granted unless the grounds are corroborated by evidence other than the testimony of the parties. The rule was modified in 1969 by the enactment of § 34-1207 which eliminates the requirement of corroboration in uncontested divorce cases. It is significant the legislature did not see fit to make the 1969 amendment applicable to the establishment of grounds in contested cases, but specifically limited the application to uncontested cases. As recently as *Dunn* v. *Dunn*, 255 Ark. 764, 503 S.W.2d 168 (1973) and *McNew* v. *McNew*, 262 Ark. 567, 559 S.W.2d 155 (1977) the court reiterated the requirement of corroboration of grounds for divorce.

Id. at 32.

We find no merit to appellee's contention that there was substantial compliance with Arkansas Statutes Annotated § 34-1207.1, and our decision to reverse on this point is reaffirmed.

Appellee also contends in her petition for rehearing that appellant is precluded from relief on appeal under the doctrines of invited error and estoppel. Under the invited error doctrine, the appellant may not complain on appeal of an erroneous action of the chancellor if he has induced, consented to or acquiesced in that action. *Briscoe* v. *Shoppers News, Inc.*, 10 Ark. App. 395, 664 S.W.2d 886 (1984). This doctrine is inapplicable in the

instant case because there was no erroneous action by the chancellor. The record reflects the chancellor properly followed the law by directing the party preparing the decree to reduce the waiver to a writing. Therefore, we find no merit to this contention in appellee's petition.

Appellee further argues appellant is estopped to challenge the validity of the decree because he accepted benefits thereunder. We are not persuaded by this argument, because this case involves a failure to substantially comply with a statute. Arkansas Statutes Annotated § 34-1207.1 is clear and unambiguous: a party seeking a divorce must prove and corroborate grounds unless the other spouse expressly waives corroboration *in writing*.

In her petition, appellee asserts that in the alternative this court should not have reversed and dismissed this action but remanded the case to the trial court for further disposition. In *Ferguson* v. *Green*, 266 Ark. 556, 565, 587 S.W.2d 18 (1979), the supreme court stated that "It has been the invariable practice of this court not to remand a case to a chancery court for further proceedings and proof where we can plainly see what the equities of the parties are, but rather to render such decree here as should have been rendered below." Under these circumstances we do not find it necessary to remand for further proceedings.

The petitions for rehearing are denied.

MAYFIELD, J., concurs.

CRACRAFT, COOPER, and JENNINGS, JJ., dissent.

MELVIN MAYFIELD, Judge, concurring. For reasons thought to be good and sufficient, this state has long required corroboration of the grounds for divorce. In recent years, the Arkansas legislature has modified that requirement. Ark. Stat. Ann. § 34-1207.1 (Supp. 1985) provides that corroboration may now be *waived in writing* in contested cases. It is unfortunate that the instant case proceeded to final decree without complying with the statute. However, the statute is easy to understand and easy to comply with. Given the history of the requirement for corroboration in Arkansas, I believe the courts should enforce the statute as enacted by the legislature.

I concur in the supplemental opinion denying rehearing in

this case.

GEORGE K. CRACRAFT, Judge, dissenting. I would grant the petition for rehearing and affirm the decree as entered. I fully agree that divorce is a creature of statute and that, prior to the enactment of Act 267 of 1981, divorce in contested cases could only be granted on proof of a statutory ground duly corroborated. That enactment retained the requirement of proof of statutory grounds but relaxed the requirement of corroborating testimony so that Ark. Stat. Ann. § 34-1207.1 (Repl. 1985) now reads as follows:

> Hereafter in uncontested divorce suits corroboration of plaintiff's ground or grounds for divorce shall not be necessary nor required. In contested suits corroboration of the injured party's ground may be expressly waived in writing by the other spouse.

No one questions that appellee adequately proved her ground for divorce. The issue on appeal was whether corroboration of her ground had been waived within the meaning of the statute. I conclude that it had.

At the commencement of the hearing, the chancellor stated in the record:

> Also, the Court has been advised by Mr. Draper [appellant's attorney] that [appellant] will waive corroboration of the grounds for absolute divorce by [appellee] in accordance with the statute. Since the Court feels that for safety's sake that waiver should be in writing, *we'll do it on the record here* then, and whoever prepares the decree from this proceeding will specifically put a provision *in the decree*, so that we will have a written waiver, so to speak. [Emphasis added.]

The record reflects that, at the time the court made that statement, appellant was present in person and by his then attorney. No protest or denial of the court's statement by anyone present is recorded. Both parties proceeded to trial on the theory that the appellant would prove a statutory ground for divorce, but that corroboration of that ground would not be required. The chancellor decided the issue on that same basis.

Although Ark. Stat. Ann. § 34-1207.1 (Supp. 1985) does provide that the waiver of corroboration may be in writing, the reasons advanced for holding that the waiver here was not effective are, in my opinion, a bit narrow and certainly inappropriate for a court of equity and good conscience. It is inconceivable to me that we should hold that a right which can be waived in writing cannot be waived as effectively by stipulation made in open court and dictated into the record by the chancellor himself. Oral stipulations made in open court which are taken down by the court reporter and acted on by the parties and the court are valid and binding, and it is not necessary that an agreed statement admitted by the parties to be true in open court be signed by the parties or their attorneys. *Linehan* v. *Linehan*, 8 Ark. App. 177, 649 S.W.2d 837 (1983). In 83 C.J.S. *Stipulations* § 4(b)(2) (1953), it is stated:

> Statutes and court rulings requiring stipulations to be in writing do not apply to stipulations made in open court or before a master, although it has been said to be the better practice to have them reduced to writing. . . . Stipulations made in open court have been very generally regarded as just as obligatory as though reduced to writing and executed with every legal formality. [Footnotes omitted.]

See also 73 Am. Jur. 2d *Stipulations* § 2 (1974).

In many instances, our courts have held that a good-faith, substantial compliance may satisfy statutory procedural requirements. To cite one example among many, Rule 3(e) of the Rules of the Arkansas Rules of Appellate Procedure requires that a notice of appeal "shall . . . contain a statement that the transcript, or specific portions thereof, have been ordered by the appellant." In *Wise* v. *Barron*, 280 Ark. 202, 655 S.W.2d 446 (1983), the notice of appeal did not contain that statement even though the record had in fact been ordered. The court held that there had been substantial compliance with the requirement and allowed the appeal to proceed. *See also Brady* v. *Alken, Inc.*, 273 Ark. 147, 617 S.W.2d 358 (1981), where substantial compliance was also held to satisfy the requirement of a written statement. Here, the record itself shows that the waiver was in fact made, albeit not carved in stone.

There is another compelling reason why I believe the

decision in this case is manifestly unjust. The appellant was present in court when the court recited the parties' stipulation and made no protest. He ought not now be heard to say that the waiver was invalid. It is obvious that neither the appellant nor the court would have proceeded to judgment on this basis without appellant's acquiescence in that procedure. Even if the action of the chancellor in recognizing an oral stipulation of the waiver was incorrect, it is well settled under the doctrine of invited error that one may not complain on appeal of an erroneous action of the chancellor if he has induced, consented to, or acquiesed in that action. *Missouri Pacific Railroad Co.* v. *Gilbert*, 206 Ark. 683, 178 S.W.2d 73 (1974); *Kansas City Southern Railway* v. *Burton*, 122 Ark. 297, 183 S.W. 189 (1916); *Briscoe* v. *Shoppers News, Inc.*, 10 Ark. App. 395, 664 S.W.2d 886 (1984); *J. I. Case Co.* v. *Seabaugh*, 10 Ark. App. 186, 662 S.W.2d 193 (1983).

The prevailing opinion finds the invited error rule inapplicable "because there was no erroneous action by the chancellor. The record reflects the chancellor properly followed the law by directing the party preparing the decree to reduce the waiver to a writing." In my opinion, those judges denying the rehearing could only have misread or misinterpreted the chancellor's statement in implying that he required counsel to supply a written waiver as a condition to his acceptance of it. The chancellor did *not* direct that the waiver be reduced to a writing. His statement as quoted here should speak for itself. He stated that the waiver was being made on the record and merely requested counsel to see that the precedent recited that the waiver had been made in open court. If counsel had done exactly what the court requested, there would have been no written waiver such as the prevailing opinion seems to require because the parties did not and would not have *signed* the decree.

The fact that the waiver was not subsequently alluded to in the decree as requested the court should not alter our result. If the stipulation in open court was in fact a waiver, the failure to subsequently comply with the court's initial directive is a matter to which the trial court might have directed its attention, but it certainly is not a basis for reversal on appeal. The ancient and honorable maxim that equity treats as done that which ought to have been done might lend some support to this proposition.

If, however, we must rule that the form rather than substance controls in this instance, the injustice is compounded by the court's order dismissing the case completely. It has long been a general rule that, where there has been a simple failure of proof, the case should be remanded in order to give the party an opportunity to supply the deficiency. This rule has been applied in both circuit and chancery cases. *Colonial Life & Accident Insurance Co.* v. *Whitley*, 10 Ark. App. 304, 664 S.W.2d 488 (1984); *Moore* v. *City of Blytheville*, 1 Ark. App. 35, 612 S.W.2d 327 (1981). Where an equity case has been heard on the evidence, or there has been a fair opportunity to present it, the appellate court is not usually required to remand the case solely to give either party an opportunity to produce other evidence. However, the court does have the power to remand any case in equity for further proceedings, including the hearing of additional testimony, where the parties have tried the case on an erroneous theory and the chancery court has decided the case on that theory. In such cases, the court on appeal may exercise its discretion to remand in order that the pertinent facts not fully developed may be ascertained. *Simmons First National Bank* v. *Wells*, 279 Ark. 204, 650 S.W.2d 236 (1983); *Brizzolara* v. *Powell*, 214 Ark. 870, 218 S.W.2d 728 (1949); *Moore* v. *City of Blytheville, supra.* Here, both parties tried the case on the theory that corroboration of grounds of divorce would not be required and had been waived. The chancellor decided the case on that assumption. For this reason, the appellee offered no corroborative proof that appellant's conduct had rendered her condition in life intolerable, which, if true, would certainly be susceptible of proof.

I do not argue that in cases where a party negligently fails to prove his case, this opportunity should be afforded. I am of the opinion, however, that, in those cases where the absence of proof is not due to neglect of the parties, but to misunderstandings, which are not only shared by opposing counsel but by the court as well, such a rule should be applied. I would grant the rehearing and affirm the decree as entered. In the alternative, I would remand the matter for further proof corroborative of appellee's grounds for divorce.

I am authorized to state that Judges Cooper and Jennings join in this dissent.

JOHN E. JENNINGS, Judge, dissenting. There can be no doubt that the result we reach in this case is manifestly unjust. If the law mandated the result we reach, we would have no choice. It doesn't and we do. This is not a difficult case. Its correct resolution requires only the application of well known and accepted principles of law.

Mr. and Mrs. Rachel were married for 30 years and have a grown daughter. Mr. Rachel left his wife in 1982, and lived with another woman for two years. Despite this, Mrs. Rachel took him back and tried to reconcile. He stayed home approximately five months and then began seeing another woman in Bastrop, Louisiana, sometimes for weeks at a time. Mrs. Rachel filed for divorce, alleging adultery.

It is clear that on the morning of trial, Mr. Rachel's lawyer advised the court in chambers that Mr. Rachel would waive corroboration of grounds in accordance with the statute. This was confirmed by the trial judge in open court with all parties present. The chancellor proceeded on this basis and awarded a divorce to Mrs. Rachel and made a division of the parties' property. He also awarded alimony and attorney's fees to Mrs. Rachel.

Because Mr. Rachel was dissatisfied with the amount of alimony and attorney's fees awarded, he did not file a separate written waiver of corroboration of grounds as he had assured the court he would do. Instead, Mr. Rachel took an appeal arguing that, while he orally waived corroboration of grounds, the statute requires that the waiver be in writing and therefore the chancellor erred in granting Mrs. Rachel the divorce.

In our original opinion in this case we agreed with Mr. Rachel and reversed and dismissed the divorce action, thus returning Mrs. Rachel to wedded bliss.

I agree with much of Judge Cracraft's dissent. I agree that a stipulation waiving corroboration of grounds made in open court is the functional equivalent of a written waiver. I also agree that the doctrine of invited error is applicable. The majority says that the doctrine is inapplicable because the chancellor did not commit error. I was under the impression that we reversed and dismissed this case because of our perception that the chancellor erred in awarding Mrs. Rachel a divorce on the ground there had

not been strict compliance with the statutory requirement of a written waiver. Finally, I agree that this case can be correctly resolved by applying the equitable maxim, "equity treats as done that which ought to have been done." This principle is a part of our law. *Walden* v. *Holland*, 206 Ark. 401, 175 S.W.2d 570 (1943).

But in my view the most powerful argument for granting the petition on rehearing is the principle of estoppel. The basic concept is that a person may be precluded from questioning the validity of a divorce decree if, under the circumstances of the case, it would be inequitable to permit him to do so. In the *Law of Domestic Relations* § 11.3, at 305 (1968), Professor Clark formulates the principle concisely:

> [I]f the person attacking the divorce is, in doing so, taking a position inconsistent with his past conduct, or if the parties to the action have relied upon the divorce, and if, in addition, holding the divorce invalid will upset relationships or expectations formed in reliance upon the divorce, then estoppel will preclude calling the divorce in question.

See also Restatement (Second) of Conflicts § 74 (1971). These basic principles are well established in Arkansas law. In *Anderson* v. *Anderson*, 223 Ark. 571, 575, 267 S.W.2d 316, 318 (1954), a divorce case, our supreme court said:

> The whole principle of equitable estoppel is that when a man has deliberately done an act or said a thing, and another person who had a right to do so has relied on that act or words and shaped his conduct accordingly, and will be injured if the former can repudiate the act or recall the words, it shall not be done. (quoting *Baker-Matthews Lumber Co.* v. *Bank of Lepanto*, 170 Ark. 1146, 282 S.W. 995 (1926))

In *Mason* v. *Urban Renewal*, 245 Ark. 837, 840, 434 S.W.2d 614, 615 (1968), the court said:

> We find it unnecessary to consider appellants' contentions because each of the appellants shared in benefits from the decrees of the trial court. One who shares in the fruits or benefits of a judgment or decree is estopped to challenge its validity, even where there is a want of jurisdiction of the

subject matter.

See also Morgan v. *Morgan*, 171 Ark. 173, 283 S.W. 979 (1926), and *Butts* v. *Butts*, 152 Ark. 399, 238 S.W. 600 (1922).

Clearly on the facts of this case Mr. Rachel is estopped to challenge the validity of this divorce decree.

The majority's explanation as to why estoppel is inapplicable is particularly unsatisfying. The majority says that estoppel does not apply because there was no waiver in writing as required by the statute. It fails to recognize that waiver and estoppel are separate concepts.

The majority opinion is based on platitudes and general statements from clearly inapplicable cases. As Holmes said in *Lochner* v. *New York*, 198 U.S. 45 (1905), general propositions do not decide concrete cases. The majority goes to great lengths to establish that it was the law for many years in this state that corroboration of grounds was essential and could not be waived, before noting, almost as an aside, that the legislature has now changed that rule to provide that corroboration of grounds can be waived in *any* divorce action whether contested or uncontested. In *McNew* v. *McNew*, 262 Ark. 567, 559 S.W.2d 155 (1977), from which the majority quotes, the question the court dealt with was whether it ought to judicially abolish the requirement of corroboration in contested cases. The court held that it would be unwise to do so. Of course *McNew* was decided before the legislature provided for waiver of corroboration in contested cases in 1981. So was *Morrow* v. *Morrow*, 270 Ark. 31, 603 S.W.2d 431 (1980), cited by the majority. It is fair to say that the action the legislature took in 1981, was a legislative overruling of the majority opinion in *Morrow*. No case cited by the majority is factually similar to the case at bar. No case cited by the majority deals with the issue of estoppel.

As Justice David Newbern, then a judge of this court, said in dissent in *Morrow*, "the majority appears to attribute to the corroboration requirement a sacredness which I find unjustifiable." 270 Ark. at 36, 603 S.W.2d at 434. The majority correctly recognizes that the sole reason behind the requirement of corroboration is to prevent collusion. It is abundantly clear that there was no collusion in this case.

We do not know whether these litigants may have remarried. We do not know what has become of their property, long since divided by the chancellor. If there were some compelling reason to leave these unfortunate litigants dangling in the wind, I would be forced to agree. Because no such reason exists, I respectfully dissent from the denial of the petition for rehearing.

I am authorized to state that Judges Cracraft and Cooper join in this dissent.

Raymond Randy GREEN *v.* STATE of Arkansas

CA CR 86-197 729 S.W.2d 17

Court of Appeals of Arkansas
En Banc
Opinion delivered May 13, 1987
[Rehearing denied June 10, 1987.]

Donald A. Forrest, Deputy Crittenden County Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *J. Blake Hendrix*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. Two cases are consolidated under one number in this appeal. In one case, the appellant was convicted in a jury trial on August 4, 1986, of breaking or entering and theft of property. He was also charged as a habitual criminal, and after the jury returned a verdict of guilty, the jury was instructed with regard to the habitual criminal charge; evidence of prior convictions was introduced; and after further deliberation, the jury returned a verdict fixing punishment at eight years for breaking or entering and 30 days for theft of property.

The other case involves one of the prior felony convictions introduced in evidence. This is a judgment dated July 1, 1981, which states that appellant entered a plea of guilty to "aggravated robbery with firearm," and that "imposition of sentence is suspended for ten years," subject to certain conditions set out in the judgment. At the beginning of the trial on August 4, 1986, the judge stated he noticed that a revocation petition had been filed asking that the suspended imposition of sentence entered in July of 1981 be revoked because the conditions of that suspended sentence had been violated. The judge suggested that he consider the revocation petition upon the same evidence presented in the breaking or entering and theft of property case and, after that case was completed, that he then make a decision on the revocation petition.

No objection was made to proceeding as the court suggested,

and after the jury had returned a verdict of guilty in the breaking or entering and theft of property case, the court revoked the suspended imposition of sentence entered in 1981 and sentenced the appellant to ten years in that case and ordered that it run consecutive to any sentence fixed by the jury in the breaking or entering and theft of property case.

On appeal, the appellant makes two arguments. First, he contends that the trial judge should have recused because (1) he was the prosecuting attorney when the 1981 aggravated robbery with firearm charge was filed, (2) he negotiated a plea with the appellant's attorney in that case, and (3) he represented the state when that matter was presented to the court. Second, the appellant says that he was denied due process of law because the same judge, who had previously prosecuted him on the aggravated robbery conviction, determined that his statements to the police, when he was arrested for breaking or entering and theft of property, were voluntary and admissible for use by the jury to convict appellant; and that the judge himself used the statements and the conviction to revoke appellant's suspended sentence.

We first consider the question of whether we should reverse the conviction for breaking or entering and theft of property. Appellant's argument on that issue is based upon the proposition that the only evidence linking him to the breaking or entering consisted of his own statements which the trial judge should have suppressed.

In our opinion, even without appellant's statements, there was ample evidence to support his conviction for breaking or entering and theft of property. The manager of a convenience store in West Memphis testified that on the morning involved he got to the store about 5:30, and upon going outside the building on the west side, he saw a man putting a Weed Eater down on the ground behind a building across the street. The manager identified the Weed Eater, which was produced in court, and testified that it was kept in a storage building at the rear of the store. He said he knew it was in the storage building at 6:30 the night before, and that the next morning after he saw the man with it, he called the police and gave them a description of the man. An officer testified that he arrested appellant in the vicinity of the store and that appellant matched the description, given by the

radio dispatcher, of a man running from the location of the store.

In addition to the above testimony, the officer who first stopped the appellant testified that appellant asked what he had done and was told that someone matching his description had just taken something from the convenience store. The officer testified that appellant immediately said that the door was open, that he took the Weed Eater, and that he was going to sell it and buy some dope. The trial judge held that this was a voluntary and spontaneous statement, that it was not made in response to questioning, and that it should not be suppressed.

Appellant argues, however, that because the judge had been the prosecuting attorney when appellant was convicted in 1981, the appellant was denied due process of law. We do not understand that it is claimed that the judge was actually biased or prejudiced against appellant. Indeed, appellant's brief states that apparently neither the judge nor anyone else even remembered that he was the prosecuting attorney in 1981. In fact, the only evidence in that respect was his signature on the guilty plea and sentence recommendation filed in the 1981 case. The appellant's brief specifically states that "nobody could be expected to remember every case he handled" but that this case should be reversed because of the "potential bias" that is present. This is the "suggested" violation of due process involved in this case.

Appellant relies upon *Dyas* v. *Lockhart*, 705 F.2d 993 (8th Cir. 1983) and *Dyas* v. *Lockhart*, 771 F.2d 1144 (8th Cir. 1985). The first opinion remanded the district court's denial of writ of habeas corpus for that court to make a determination of whether the petitioner had personally waived a state judge's disqualification, resulting from his relationship to the prosecuting attorney and his deputies, and if the disqualification was not waived, the district court was to provide the petitioner a hearing in which he would have the opportunity to prove that the state judge was actually biased. Upon remand, the district court found that petitioner did not knowingly waive his objection to the judge's disqualification, although he knew of the judge's relationship to the prosecuting attorneys, but the court found no actual prejudice or bias against the petitioner. In the second opinion, the United States Court of Appeals again remanded the case to the district court. This time the district court was directed to consider certain

specified actions of the state trial judge along with any other instances of prejudice in the record suggested by the petitioner.

■ We do not believe the above cases mean that we should reverse the instant case. The actions of the state trial judge that the court in *Dyas* specified should be reviewed for actual bias or prejudice are not even present in the instant case. Applicable here is the case of *Jordon* v. *State*, 274 Ark. 572, 626 S.W.2d 947 (1982), where the Arkansas Supreme Court held that the trial judge was not disqualified because he had actively prosecuted the appellant in three of the four prior felony convictions relied on for the enhancement of punishment. *Jordon* also pointed out that the Arkansas Constitution, article 7, section 20, providing that a judge shall not preside in a case in which he has been of counsel, relates to the case being tried. The judge in the instant case was never "of counsel" in the breaking or entering and theft case now under discussion. Also Canon 3C(b) of the Code of Judicial Conduct, see 35 Ark. L. Rev. 247, 256 (1981), was not violated in this case since the judge here had never "served as lawyer in the matter in controversy." (The "controversy" is the breaking or entering and theft of property case now under discussion.) The verdict of guilty was returned by the jury and the sentence was fixed by that verdict. We find no actual or potential bias in the case under discussion that could offend due process.

The revocation, however, presents a different situation. That matter was decided by the trial judge, not by a jury. The judge revoked the suspended imposition of sentence judgment entered in July 1981 in the aggravated robbery with firearm case; he sentenced the appellant to ten years in the Arkansas Department of Correction upon the revocation of that suspended sentence; he was the prosecuting attorney who represented the State of Arkansas at the time the suspended imposition of sentence was entered in July of 1981; and he signed the plea and sentence recommendation filed in that case and agreed to by the defendant and his counsel.

■■ Canon 3C(b) of the Code of Judicial Conduct provides that a judge should disqualify in a proceeding "in which his impartiality might reasonably be questioned, including but not limited to instances where he served as a lawyer in the matter in controversy. . . ." Clearly the revocation hearing falls within

this provision. In *Adams* v. *State*, 269 Ark. 548, 601 S.W.2d 881 (1980), the Supreme Court of Arkansas said of the provision pertaining to a judge's relationship to a lawyer in the case being tried:

> We hold that Canon 3C is applicable in criminal cases as well as civil cases, that it is applicable at the arraignment stage of a criminal proceeding, that it applies even though the prosecuting attorney and circuit judge each is a duly elected public official, that no request to disqualify and no objection for failure to disqualify is necessary to be made either by a trial attorney or by a party representing himself, that the trial judge must take the initiative to disqualify or, in the alternative, to comply with the procedure set out in Canon 3D, that this Court can, on its own initiative, examine the record to notice compliance or noncompliance, and that failure to comply is reversible error.

269 Ark. at 549-50.

Although we do not mean to impugn the integrity of the trial judge, we believe the law simply required a disqualification under the circumstances relating to the revocation case. We, therefore, affirm the judgment in the breaking or entering and theft of property case (Circuit Court No. CR-86-122) but reverse the judgment in the revocation case (Circuit Court No. CR-80-248B) and remand that matter to the trial court.

CORBIN, C.J., COOPER and CRACRAFT, JJ., concur.

JAMES R. COOPER, Judge, concurring. Although I am compelled to agree with the majority opinion that *Adams* v. *State* requires that we reverse this case, I think this case demonstrates that the rule in *Adams* needs to be modified.

First, the judge in the case at bar apparently did not remember that he had been the prosecuting attorney at the time the earlier plea agreement was approved by the then circuit judge; there is no evidence that the present prosecuting attorney was aware of that fact; and defense counsel stated that he was unaware of that fact. Second, no objection to the trial judge hearing the matter was ever brought to the attention of the court, and we do not usually reverse on trial errors which were not

presented to the trial court and which are raised for the first time on appeal. *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980). Third, we do not reverse for error unless the appellant can demonstrate prejudice, *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984), and there is no demonstration of prejudice in the case at bar.

In *Adams*, the Supreme Court essentially said that the appearance of impropriety (by the failure to recuse) was sufficient to mandate reversal. There, as in the case at bar, the decision did not turn on demonstrated prejudice, and *Adams* leaves no room for this Court to consider whether prejudicial error occurred. *Berna* was decided in 1984, four years after *Adams*, and changed the rule concerning prejudicial error. Prior to *Berna*, the rule in Arkansas was that error was presumed to be prejudicial unless the appellate court could say with confidence that the error was not prejudicial. *Chapman* v. *State*, 257 Ark. 415, 516 S.W.2d 598 (1974); *McCauley* v. *State*, 257 Ark. 119, 514 S.W.2d 391 (1974).

Finally, the rulings in *Adams* and in the case at bar present an opportunity for defense counsel, knowing that the trial judge once acted as prosecuting attorney in a similar situation as to the one at bar, to fail to bring the matter to the trial court's attention, see what result is reached in the revocation (or other type proceeding), and then, if the result is unsatisfactory, perfect an appeal in what will, under *Adams*, require an automatic reversal. (I do not mean to imply that counsel in the case at bar knew the facts; I only point out a potential problem area and emphasize the reason our rules and case law require an objection, even on questions of constitutional import, before a matter will be considered on appeal.)

I concur, but I believe the Supreme Court's holding in *Adams* should be reexamined in light of *Berna*.

CORBIN, C.J., and CRACRAFT, J., join in this concurring opinion.

Gerald M. JOHNSTON and Charlotte JOHNSTON, Husband and Wife *v.* Kenneth D. SORRELS and Catherine M. SORRELS, Husband and Wife; Elsie SORRELS; and CENTRAL ARKANSAS PRODUCTION CREDIT ASSOCIATION

CA 86-409 729 S.W.2d 21

Court of Appeals of Arkansas
Division I
Opinion delivered May 13, 1987

Ball, Mourton & Adams, by: *Phillip A. Moon*, for appellants.

Sherman & Walker, by: *Jonathon P. Sherman, Jr.*, for appellees.

BETH GLADDEN COULSON, Judge. The appellants, Gerald and Charlotte Johnston, purchased land at a mortgage foreclosure sale. This appeal is from a decree dismissing the appellants' complaint in equity which sought to reform the property descriptions in certain mortgages, various foreclosure documents, and a commissioner's deed to reflect lands allegedly omitted by mutual mistake of the appellees. The chancellor dismissed the complaint for want of equity on the grounds that purchasers at a foreclosure sale who are not parties to the mortgage being foreclosed cannot maintain an action for reformation absent some act on the part of the mortgagor causing a bid on the property which would not otherwise had been made. We find that the chancellor erred in dismissing the complaint and reverse and remand.

Beginning sometime in 1976, separate appellee Kenneth Sorrels and his mother, separate appellee Elsie Sorrels, executed a series of mortgages to the First State Bank of Morrilton, Arkansas. Subsequently, Kenneth Sorrels sought a loan from separate appellee Central Arkansas Production Credit Associa-

tion (CAPCA), which obtained a mortgage on part of the Sorrels property after making the loan and obtaining a release from the bank. CAPCA filed a petition in foreclosure after payments on the loan were not made when due. The decree of foreclosure was entered in December of 1982. All documents pertaining to the foreclosure contained the property description found in CAPCA's mortgage.

A foreclosure sale was held on January 21, 1983, and the appellants placed the highest bid through an agent. Approximately two years after the foreclosure sale, the appellants discovered that the legal description contained in the mortgages, the foreclosure documents, and the commissioner's deed did not include a 29.41 acre tract of land which the appellants thought had been part of the land sold at the foreclosure sale. The appellants' complaint in equity sought reformation of all relevant documents on the theory that, whereas it had been the clear intent of CAPCA and the Sorrels to include the 29.41 acre tract as part of the land being mortgaged, the tract had by mutual mistake been omitted from the legal description in the mortgages and all subsequent documents.

At trial, Don Guess of CAPCA testified that he and Kenneth Sorrels viewed the property to be mortgaged and that Sorrels represented that the land comprising the 29.41 acres was included. Guess also testified that the loan would never have been made had not the 29.41 acre tract and the improvements thereon been subject to the mortgage. Although Guess testified that he made no representations to the appellants as to what land was included in the foreclosure sale, he conceded that he had previously shown the property to others and had represented that the 29.41 acre tract was part of the land to be sold and that he would have made the same representation to the appellants.

Other evidence indicated that Kenneth Sorrels did not claim an interest in the property until after it was discovered that the 29.41 tract was not included in the legal descriptions. Also, there was testimony that Kenneth Sorrels requested that he be given time after the sale to remove certain items from the property now in dispute. While neither the appellants nor the Sorrels attended the sale, the agent bidding on behalf of the appellants testified that representations were made at the sale that the property being

sold comprised that part of the Sorrels farm land which would have included the 29.41 acre tract.

The chancellor found that the evidence would have supported an action for reformation on the part of CAPCA. However, he determined that the appellants were not entitled to reformation of the mortgages because they were neither parties to the mortgages nor had they shown that the mortgagors (the Sorrels) engaged in any conduct causing a bid on the property which would not otherwise have been made. We find this to be an unduly restrictive interpretation of the cases governing the right of a purchaser at a foreclosure sale to maintain an action for reformation of documents necessary to his chain of title when: (1) it has been determined that the mortgagor and the mortgagee by mutual mistake omitted certain land from the description in the mortgage instrument, and (2) the evidence presents a question of fact as to whether the purchaser intended to buy the property as described.

It is well established that when land is held pursuant to a deed of trust or mortgage so as to secure a debt, and by mutual mistake the parties have omitted from the legal description a tract of land intended to be conveyed, a party to the mutual mistake who subsequently purchases under a decree of foreclosure is entitled to reformation of the deed of trust or mortgage, the decree, and the commissioner's deed so as to include the omitted tract. *Foster* v. *Richey*, 192 Ark. 683, 93 S.W.2d 1258 (1936); *Allen* v. *McGaughey*, 31 Ark. 252 (1876). Testimony warranting such reformation must be clear, concise, and convincing, though it need not be undisputed. Reformation is predicated upon the equitable maxim that equity treats that as done which ought to be done. *Foster, supra.*

As was noted by the chancellor, the facts before us do not involve a purchaser who as mortgagee, for example, would have been a party to the mutual mistake and thereby be able to establish the element of privity necessary to maintain an action for reformation. Yet, it is equally well settled that the concept of privity does not restrict reformation in this jurisdiction only to those who were parties to the mistake. *Commonwealth Building & Loan Association* v. *Wingo*, 189 Ark. 1033, 75 S.W.2d 1008 (1934); *Modica* v. *Combs*, 158 Ark. 149, 249 S.W. 567 (1923);

Blackburn v. *Randolph*, 33 Ark. 119 (1878).

In *Blackburn*, a deed of trust conveying a plantation had been executed so as to secure a debt. The plantation was sold after the debt went unpaid. By mistake, a tract of land had been omitted in the description of the lands in the deed of trust; this omission carried forward into each successive sale of the plantation. The final grantee sought reformation of the deed as against a judgment creditor who had caused an execution to be levied on the omitted tract of land. As to the argument that there was not such privity between the grantee and the original grantor as would permit an action for reformation, our supreme court stated that the equity of the complainants would not fail so long as in each conveyance there had been a mutual mistake whereby each party actually supposed that the particular piece of ground was described when in fact it was not. The court went on to state that:

> What is meant when the cases say that the mistake will only be corrected between the original parties and those claiming under them in privity, is, in effect, that the court will not interfere in favor of subsequent purchasers who were simply ignorant of the former mistake and may be presumed to have intended to take by the description used. . . .

33 Ark. at 125.

Modica v. *Combs, supra*, involved a void description and not an omission; also, the purchaser at the foreclosure sale was the beneficiary under the deed of trust. However, the court permitted reformation by a subvendee of the purchaser at the sale. In discussing *Blackburn*, the court stated that the rule in this jurisdiction was that the purchaser at a mortgage foreclosure sale under the power contained in the mortgage, and his vendee, were as much entitled to reform for a perpetual mistake in the mortgage constituting his chain of title as any other subvendee. 158 Ark. at 154. Courts of equity would reform a void description in a mortgage "not only at the instance of the mortgagee, but also at the instance of a purchaser at the foreclosure sale under the power or his vendee." *Id.* at 154-155.

In *Commonwealth Building & Loan Association, supra*, the purchaser at a foreclosure sale was allowed to reform a

release deed given by a grantor to the grantee who had mortgaged the land being foreclosed. The description in the release deed did not convey the land which the grantor and grantee intended to have released and which the grantee intended to mortgage and the purchaser (mortgagee) intended to buy. The court cited the following language from the *Blackburn* opinion:

> Where a mistake in description of land occurs in a series of conveyances, under such circumstances as would entitle any one of the vendees to a reformation as against his immediate vendor, the equity will work back through all, and entitle the last vendee to a reformation against the original vendor. . . .

189 Ark. at 1037.

In light of the discussion in *Blackburn* and the requirements set forth in *Foster, supra*, the following can be said to apply to the right of a purchaser at a foreclosure sale or one claiming under him to maintain an action for reformation of documents necessary to the chain of title. First, the party seeking reformation must be able to introduce such clear, concise, and convincing evidence as would present a question of fact as to whether the omission, void description, or other similar deficiency occurred either by mutual mistake of the parties to the instrument sought to be reformed or by mistake of one of the parties and the inequitable conduct of the other. Second, if the party seeking reformation was not a party to the instrument sought to be reformed, he must be able to introduce additional evidence raising a question of fact as to whether he was simply ignorant of the former mistake and intended to buy the property as described or whether he had assumed, for example, that the particular piece of land was described when in fact it was not.

These requirements having been met, the fact finder must then determine whether as between each successive party there has been such a mutual mistake of fact or mistake by one and inequitable conduct by another as would actually warrant reformation under the facts of the case. Reformation on the part of the purchaser should not be foreclosed simply because the purchaser was not a party to the instrument sought to be reformed or because he did not place his bid in reliance upon some act on the part of the mortgagor. We find that the chancellor erred when

having determined that the evidence warranted an action for reformation on the part of CAPCA, he dismissed the appellants' complaint absent a finding that they were simply ignorant of the mistake and intended to buy the property as described.

Although the appellants argue that under our *de novo* review we are in a position to decide these issues and enter a final judgment, we find that the chancellor's superior position as fact finder warrants our remand of the case. Therefore, we reverse and remand to allow the chancellor to enter his findings of fact and such conclusions of law as are not inconsistent with this opinion.

Reversed and remanded.

CORBIN, C.J., and MAYFIELD, J., agree.

Sydney Anne TOLHURST *v.* Tommy REYNOLDS

CA 86-479 729 S.W.2d 25

Court of Appeals of Arkansas
Division I
Opinion delivered May 13, 1987

Ray Owen, Jr., for appellant.

David B. Switzer, for appellee.

BETH GLADDEN COULSON, Judge. Appellant, Sydney Anne Tolhurst, appeals a decision of the Garland County Circuit Court in her bastardy action against appellee, Tommy Reynolds. On appeal, appellant asserts that the circuit judge abused his discretion in refusing to admit certain evidence of blood tests and that the trial court erred in finding that appellant failed to meet her burden of proof. We find no error and affirm.

On August 29, 1984, appellant filed this action against appellee alleging that he is the father of a male child born to her out of wedlock on October 27, 1981. The parties submitted to blood tests, and the Garland County Court found appellee to be the father of the minor child. Appellee then appealed for a *de novo* trial before the Garland County Circuit Court.

At the trial before the circuit court, appellant sought to introduce the blood tests to which the parties had submitted. The blood samples were drawn by a laboratory in Hot Springs and were forwarded to Roche Biomedical Laboratories, Inc., in Burlington, North Carolina. At trial, Ronald C. Barwick, an associate director at Roche who supervised the medical technologists performing the tests, testified concerning the tests. Appellee objected to the introduction of these test results as hearsay. The

circuit court declined to admit the tests and held that appellant had failed to meet her burden of proof. On appeal, appellant asserts that the tests were admissible under Ark. Stat. Ann. Section 34-705.2 (Supp. 1985).

A trial judge's determination as to the admissibility of evidence will not be reversed on appeal in the absence of abuse of that discretion. *J. B. Smith* v. *Chicot-Lipe Insurance Agency*, 11 Ark. App. 49, 665 S.W.2d 907 (1984). *See also Wildwood Contractors* v. *Thompson-Holloway Real Estate Agency*, 17 Ark. App. 169, 705 S.W.2d 897 (1986).

Ark. Stat. Ann. Section 34-705.2(A) provides as follows:

> A written report of the test results by the duly qualified expert performing the test certified by an affidavit duly subscribed and sworn to by him before a notary public, may be introduced in evidence in illegitimacy actions without calling such expert as a witness. If either party shall desire to question the expert in the case where he has performed the blood tests, the party shall have him subpoenaed within a reasonable time prior to trial.

Here, Barwick testified that he did not actually perform or verify the tests, or make the conclusions thereon. Barwick testified that the actual testing of the blood was done by technicians under his direction using methods that he had established. Scott Foster, another associate director at Roche, verified the results, although he did not personally perform the tests.

Appellee asserts that the blood test results were not admissible under Section 34-705.2 because Barwick and Foster did not personally perform the blood tests. We agree that the statute requires that the person performing the test make the verification thereon. The first rule to be applied in statutory construction is to give the words in the statute their usual and ordinary meaning. When a statute is plain and unambiguous, we must give effect as it reads. *Chandler* v. *Perry-Casa Public Schools District Number 2*, 286 Ark. 170, 690 S.W.2d 349 (1985); *Mourot* v. *Arkansas Board of Dispensing Opticians*, 285 Ark. 128, 685 S.W.2d 502 (1985). In the instant case, appellant cannot rely upon Section 34-705.2 for admission of the blood tests

into evidence through Foster, the person who verified the test results, because he did not perform them.

The test results were also not admissible through the testimony of Barwick, because he did not perform the tests. We agree with the trial court that, without admission into evidence of the blood tests, appellant failed to satisfy her burden of proof. In bastardy actions, the mother's burden of proof is a preponderance of the evidence. *McFadden* v. *Griffith*, 278 Ark. 460, 647 S.W.2d 432 (1983).

As noted above, the child was born on October 27, 1981. Appellant testified that she had sexual intercourse with appellee in the first part of February, 1981. She stated at trial that she believes appellee is the father of her son because she did not have sex with anyone other than appellee and Jerry Montgomery between December 15, 1980, and March 1, 1981. Appellant also testified that blood tests had excluded Jerry Montgomery as a possible father of the child. Appellant admitted, however, that she told Jerry Montgomery in January of 1981 that she thought she was pregnant by a man named Lonnie Davis. Appellee denied ever having had sexual intercourse with appellant and testified that appellant had informed him that she was pregnant by a man in Little Rock named Lonnie. Jerry Montgomery testified that he had sexual intercourse with appellant in the early part of February, 1981, and that appellant had told him that she was pregnant by someone from Little Rock.

In light of the above, we cannot say that the trial judge abused his discretion in refusing to admit the blood tests into evidence or in holding that appellant failed to sustain her burden of proof.

Affirmed.

CORBIN, C.J., and MAYFIELD, J., agree.

Larry R. WILLIAMS and Karen R. WILLIAMS, His Wife *v.* ARKANSAS STATE HIGHWAY COMMISSION

CA 85-530 730 S.W.2d 245

Court of Appeals of Arkansas
En Banc
Opinion delivered May 20, 1987

Howell, Price, Trice, Basham & Hope, P.A., by: *Max Howell* and *William H. Trice, III*, for appellant.

Thomas B. Keys and *Philip N. Gowen*, for appellee.

DONALD L. CORBIN, Chief Judge. Appellants, Larry R. Williams and his wife, Karen R. Williams, appeal a Howard County jury verdict of $50,000 for the condemnation in fee of twenty acres of land owned by appellants and taken by appellee, Arkansas State Highway Commission. We reverse and remand.

Appellee condemned twenty acres of a 222-acre tract owned by appellants for the relocation of Arkansas State Highways No. 4 and No. 27 around the southeast area of Nashville, Arkansas, commonly known as the "Nashville Bypass." Before the taking, the 222 acres fronted Arkansas State Highway 4 on the north and Arkansas State Highway 27 on the west. The area acquired by appellee ran north and south almost in the middle of the 222-acre tract. After the taking, the property retained its highway frontage, and gained frontage on the new bypass with four access points on both the east and west sides of the facility. This was in keeping with the specifications contained in appellee's Declaration of Taking and right-of-way plans filed in this action. Witnesses for the landowners testified to damages ranging from $403,000 to $423,000, whereas appellee's testimony alleged damages in the amount of $43,500.

The only issue raised by appellants is whether or not the trial court erred in refusing to instruct the jury as follows:

> DEFENDANTS' [APPELLANTS'] INSTRUCTION NO. A
>
> You are instructed that the Arkansas State Highway Commission is taking the Williams' property for a controlled-access facility as defined by Arkansas law. A controlled-access facility as defined in Arkansas Statutes Annotated Section 76-2202 by law is ". . . a highway or street especially designed for through traffic, and over, from, or to which owners or occupants of abutting land or other persons have no right of easement, or only a controlled right of easement of access, light, air or view, by reason of the fact that their property abuts upon such controlled-access facility or for any other reason." As a matter of law, the Williams have no legal right of access to the controlled access facility from their abutting land other than by permission of the Arkansas Highway Department. The Arkansas Highway Department can permit access to

> the highway only at certain locations designated in the plans filed in this case with the declaration of taking. The Arkansas Highway Department can revoke permission any time in the future as conditions may require. Arkansas Statutes Annotated Sections 76-2202, 2203, 2204.

Appellants' assignment of error is founded upon their argument that the jury was entitled to an instruction defining a controlled-access facility. They state the jury was entitled to know their property was condemned as a controlled-access facility and that appellee took all rights of ingress and egress with the exception of certain access points. Appellants argue the above proffered instruction correctly defines a controlled-access facility and sets forth the governing law. They state that right of access is a property right which a landowner cannot be deprived of without just compensation.

On the other hand, appellee contends that appellants have a legal right of access from their abutting lands to the bypass, and that right is not based upon the whim of the Arkansas State Highway Commission. Appellants' right of access rests upon appellee's official plans filed with the court. Appellee argues appellants' instruction was misleading in that it informed the jury appellee could revoke permission of the access at any time. The proffered instruction did not inform the jury that appellants would have a new cause of action if appellee revoked its permission. Appellee points out in its brief that there was never a controversy at trial as to the access points contained in its plan nor was there a contention on appellants' part that the facility was not constructed in accordance with the plan.

Arkansas Statutes Annotated § 76-2202 (Repl. 1981) defines a controlled-access facility as follows:

> A controlled-access facility is defined as a highway or street especially designed for through traffic, and over, from, or to which owners or occupants of abutting land or other persons have no right or easement, *or only a controlled right of easement of access*, light, air or view, by reason of the fact that their property abuts upon such controlled-access facility or for any other reason. Such highways or streets may be freeways open to use by all customary forms of street and highway traffic; or they may

> be parkways for [from] which trucks, buses, and other commercial vehicles shall be excluded. [emphasis added].

The record in the case at bar as abstracted reflects that the jury was not instructed by the trial court on the definition of a controlled-access facility. We believe the above emphasized language of § 76-2202 refers to and includes a partially controlled-access facility.

Both parties to this litigation cite us to the case of *Arkansas State Highway Commission* v. *Arkansas Real Estate Co., Inc.*, 243 Ark. 738, 421 S.W.2d 883 (1967), wherein the Arkansas State Highway Commission condemned a right-of-way in fee simple for a controlled-access highway across the landowners' property. The Highway Commission proffered an instruction defining a controlled-access highway in the language of the statute and stating that the highway had been constructed in accordance with certain plans on file with the highway department. The instruction further stated that if the Commission should in the future change the highway in such a way as to damage the landowners, the landowners would have a new cause of action. The landowners contended that this instruction was not perfectly drawn insofar as the record did not justify the court in telling the jury unequivocally that the controlled-access facility had been constructed in accordance with the plans. The supreme court reversed, holding that the substance of the proffered instruction should have been given. The court pointed out that in view of the necessity of a new trial, the Commission, upon proper proof, would be entitled to a correctly worded charge on the point.

This court stated in *Dodson Creek, Inc.* v. *Fred Walton Realty Co.*, 2 Ark. App. 128, 620 S.W.2d 947 (1981), that a litigant is entitled to have his theory of the case submitted to the jury and that it is the duty of each litigant to prepare and request a correct instruction embodying it. We further stated that a trial court is not required to give an instruction which needs explanation, modification or qualification.

We believe appellants' proffered instruction should have been given in the instant case because it was a correct statement of the law as embodied in case law and statutory authority. It was a clear expression of appellants' theory of the case, and it needed no explanation, modification or qualification.

Under the facts of the case at bar, there was no controversy as to whether the facility had been built according to the Highway Commission's plans and specifications; therefore, it would seem that the Highway Commission, upon request, and in addition to the instruction proffered by appellants, would have been entitled to express their theory of the case utilizing language found in *Arkansas State Highway Commission* v. *Arkansas Real Estate Co., Inc., supra*, instructing the jury that if the Commission should in the future change the highway in such a way as to damage the landowners, the landowners would have a new cause of action.

Accordingly, we reverse and remand for a new trial.

MAYFIELD, J., concurs.

JENNINGS and CRACRAFT, JJ., dissent.

MELVIN MAYFIELD, Judge, concurring. I concur in the reversal and remand of this case. The point presented by the briefs is not difficult. Both parties agree that the Commission has taken, for highway purposes, a strip of land out of the center of 222 acres owned by the appellants. The strip taken completely severs the 222-acre tract and was taken in fee simple; however, the declaration of taking does provide access, at two separate points, from each side of the remaining tract to the highway to be constructed. Although the point is not in dispute in this case, it should be noted that the Arkansas Supreme Court has held that the "lessened accessibility" from one side to the other of severed property is a compensable element of damages. *Arkansas State Highway Commission* v. *Wallace*, 249 Ark. 303, 459 S.W.2d 812 (1970). Also, in *Arkansas State Highway Commission* v. *Marshall*, 253 Ark. 212, 485 S.W.2d 740 (1972), where the Commission took 31.7 acres in fee simple from a 60-acre tract leaving four residuals of 5 to 15 acres each, the court said that the lands were taken to construct a controlled-access highway facility which impaired the access rights of abutting landowners and noted it had said in a previous case that the right of access is a property right for which the owner cannot be deprived without just compensation, and the court specifically refused to reconsider its position on that issue.

The only question presented by the parties in this case is

whether the appellants' requested instruction, set out in the majority opinion, should have been given to the jury. The appellee's contention is that the instruction is wrong at the point where it says that appellants "have no legal right of access to the controlled access facility from their abutting land other than by permission of the Arkansas Highway Department." The appellee's argument is that the appellants *do have a legal right of access* from their abutting land, "not based on the whim of proper authority in the Highway Department" but on the official plans of the Department filed in the trial court. Also, appellee says the instruction did not tell the jury that if the access given by the plans were "revoked" the appellants would have a new cause of action.

I think the majority opinion is clearly correct in holding that the trial court erred in refusing to give appellants' requested instruction. What the appellee really says is that the trial court did not err in refusing to give the instruction because the instruction is not a complete statement of *all the law*. It has been recognized that "it is generally impossible to state all the law in one instruction," *Williams* v. *Cooper*, 224 Ark. 317, 321, 273 S.W.2d 15 (1954), and that it is not error to refuse to give an instruction when the subject is covered by other instructions given, *Hopper* v. *Denham*, 281 Ark. 84, 88, 661 S.W.2d 379 (1983). However, in the present case, there was no instruction given by the court dealing with the issue of the Highway Department's right to change the points of access to the controlled-access facility. In view of the fact that Ark. Stat. Ann. § 76-2203 (Repl. 1981) allows controlled-access facilities to be altered under certain conditions and that the Supreme Court of Arkansas has held that "lessened accessibility" from one side to the other of property severed by a highway is an element of damages, and that the access of abutting landowners to a highway constructed across their land is a property right that cannot be taken without just compensation, I think the jury was entitled to know that it was possible for the appellants' access to the highway to be changed. In my view, it was the appellee's responsibility—not the appellants' responsibility—to request the instruction about the right to bring a new cause of action if the existing access points are changed.

The dissenting opinion raises some questions not raised by the appellee. It suggests the appellants' requested instruction was

not completely correct. Indeed, it suggests that it was misleading and not "impartial, and free from argument." However, even if any of these suggested defects are valid, they could have been eliminated if the appellee had requested an instruction to tell the jury that the appellants would have the right to bring a new cause of action if the existing access points were changed. But the Arkansas State Highway Commission does not argue that the appellants' instruction contained these suggested defects. Based on what the Commission thought proper to contend in this case against citizens whom it serves, I agree that the judgment in this case should be reversed and remanded.

JOHN E. JENNINGS, Judge, dissenting. Today we discover error where none exists, and return this case to the circuit judge to retry it before another jury. The instruction which we require to be given on retrial is neither necessary nor appropriate.

The landowners' requested instruction is set out in the majority opinion. It is a combination and rephrasing of parts of three statutes. The majority decision is based on the premise that, in an adversary proceeding, each side is entitled to present its theory of the case to the jury by way of instructions. It accurately identifies the landowners' theory of the case, *i.e.*, that they were entitled to compensation for denial of the right of access to the new highway. The problem is that the landowners' theory of the case is wrong, as a matter of law.

It is true that when a controlled access highway is built over an existing road to which the abutting landowner had access, the landowner is entitled to compensation for the loss of access brought about by the change. *See* 3 Nichols, *The Law of Eminent Domain* § 10.2211[2], at 398 (Rev. 3d ed. 1985), and *Arkansas State Highway Commission* v. *Kesner*, 239 Ark. 270, 388 S.W.2d 905 (1965). It is also true that the lessened accessibility from one side to another of severed property is a compensable element of damages. *Arkansas State Highway Commission* v. *Marshall*, 253 Ark. 212, 485 S.W.2d 740 (1972). But where an entirely new limited-access highway is built and there is no loss of access to a prior existing highway, the landowner is not entitled to compensation for the loss of access to the new highway. The state should not have to compensate the owner for the loss of a right of access which he never had. *See* Clarke, *The Limited Access*

Highway, 27 Wash. L. Rev. 111, 122 (1952).

The Wisconsin Supreme Court clearly stated the distinction in *Carazalla* v. *State*, 269 Wis. 593, 71 N.W.2d 276 (1955) (opinion on motion for rehearing):

> [T]he limiting of access to a public highway through governmental action results from the exercise of the police power, and that in the case of a newly laid out or relocated highway, where no prior right of access existed on the part of abutting land owners, such abutting land owners are not entitled to compensation. On the other hand, . . . where an existing highway is converted into a limited-access highway with a complete blocking of all access from the land of the abutting owner, there results the taking of the pre-existing easement of access for which compensation must be made through eminent domain.

269 Wis. at 608B, 71 N.W.2d at 278.

The denial of access to a new freeway does not amount to a taking, and every state which has considered this issue has so held, with the possible exception of Alabama. *See* Stoebuck, *The Property Right of Access Versus the Power of Eminent Domain*, 47 Tex. L. Rev. 733, 740 (1969). *See also* 3 Nichols, *The Law of Eminent Domain* § 10.2211[4] at 402.9.

Another equally serious difficulty with the offered instruction is that it tells the jury that the highway department can revoke its grant of limited access to the highway at "any time in the future as conditions may require" without telling the jury that this would give rise to a new cause of action for the landowners. The jury might well have inferred from the instruction that they ought to compensate the landowner in this trial for the possible revocation of access rights in the future. *Arkansas State Highway Commission* v. *Arkansas Real Estate Co., Inc.*, 243 Ark. 738, 421 S.W.2d 883 (1967), lends no support to the majority's decision. Although the supreme court there approved the giving of a definition of a controlled-access highway in the language of the statute, the instruction included the language that the landowners would have a new cause of action should the commission change the highway in the future so as to damage them. Because the instruction in the case at bar was incomplete, it was

misleading. It is not error to refuse to give an offered instruction which is incomplete. *Reynolds* v. *Ashabranner*, 212 Ark. 718, 207 S.W.2d 304 (1948). Nor is it error to decline to give a misleading instruction. *Arkansas State Highway Commission* v. *Lewis*, 258 Ark. 836, 529 S.W.2d 142 (1975).

The landowners may have sought this instruction because of the persistent argument by the highway commission that this was a "partially controlled-access" highway. The landowners are correct as matter of law that under Ark. Stat. Ann. § 76-2202 (Repl. 1981) this is a "controlled-access facility." But assuming the landowners were entitled to have the court give the statutory definition of a controlled-access facility, they may not complain of the court's failure to give the defining instruction, because the instruction they offered was clearly wrong. *Dodson Creek, Inc.* v. *Fred Walton Realty*, 2 Ark. App. 128, 620 S.W.2d 947 (1981).

The case at bar bears some similarity to *State* v. *Frost*, 456 S.W.2d 245 (Tex. Civ. App. 1970). *Frost* was an eminent domain case in which the landowner requested, and the trial court gave, an instruction, apparently in statutory language, telling the jury of the highway commission's legal authority to restrict access to a controlled-access highway and to deny access in the future.

The Texas court of civil appeals said:

> [W]e feel that the trial court's giving of instruction number 5 to the jury is reversible error, and so confused and abridged the appellant's position in this case that a new trial is required. . . . [T]he instruction would lead the jury to award non-compensable damages under the police powers and the laws of the State. . . . The jury might logically have believed that access was then being taken away by the State Highway Commission, and that damages should be assessed accordingly. . . . Of course, Sec. 2 of said statute above, does empower the Highway Commission to alter or deny access except at specific points designated by the Highway Commission, but right of compensation of the landowner is given if and when such powers are invoked. There is clearly no requirement that such powers ever be exercised.

456 S.W.2d at 256.

The adoption of the Arkansas Model Jury Instructions for civil cases provides guidance for the trial courts in many areas. Eminent domain is one of the areas of the law which is not covered by AMI. The supreme court has directed that when instructions must be used which do not appear in AMI they shall be "simple, brief, impartial, and free from argument." *Twin City Bank* v. *Isaacs*, 283 Ark. 127, 672 S.W.2d 651 (1984). The offered instruction was not impartial.

Finally, the instruction was abstract and therefore need not have been given. *Arkansas State Highway Commission* v. *Lewis*, 258 Ark. 836, 529 S.W.2d 142 (1975).

For the reasons stated, I respectfully dissent. I am authorized to state that Judge Cracraft joins in this opinion.

CRACRAFT, J., joins.

Dow Richard PURSLEY *v.* STATE of Arkansas

CA CR 86-242 730 S.W.2d 250

Court of Appeals of Arkansas
Division II
Opinion delivered May 20, 1987

Leon Holmes, for appellant.

Steve Clark, Att'y Gen., by: *J. Blake Hendrix*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Judge. Dow Richard Pursley was convicted of having unlawfully entered and remained on the premises of Dr. William F. Harrison on three successive Fridays. He does not deny his guilt of criminal trespass but contends that it was error under the circumstances in this case for the trial court to refuse to give a proffered instruction on the so-called "choice of evils defense." We conclude that there was no error and affirm the convictions.

Arkansas Statutes Annotated § 41-504(1) (Repl. 1977) provides as follows:

> Conduct which would otherwise constitute an offense is justifiable when:
>
> (a) the conduct is necessary as an emergency measure

to avoid an imminent public or private injury; and

(b) the desirability and urgency of avoiding the injury outweigh, according to ordinary standards of reasonableness, the injury sought to be prevented by the law proscribing the conduct.

The commentary to this section states that conduct that would ordinarily be criminal may be excused because of extraordinary attendant circumstances, and that such circumstances permit a comparison of the injury caused by the criminal offense with the public or private injury the actor seeks to prevent. This section, however, is to be narrowly construed and applied. *Koonce* v. *State*, 269 Ark. 96, 598 S.W.2d 741 (1980). The commentary to this section lists some illustrative situations which might permit recourse to this rule: (1) destruction of buildings or other structures to keep fire from spreading; (2) breaking levees to prevent the flooding of a city, causing, in the process, flooding of an individual's property; and (3) temporary appropriation of another person's vehicle to remove a seriously injured person to a hospital. Other similar situations which might give rise to the defense were recognized in *Koonce* v. *State, supra*. In all of the illustrative situations set out in the commentary and in *Koonce*, the actor finds himself in an emergency situation requiring emergency measures which would not be permitted under less urgent circumstances. The evidence in this case, when viewed in the light most favorable to the appellant, bears no similarity to any of these examples.

In order for the choice of evils defense to be available, there must be proof of extraordinary attendant circumstances requiring emergency measures in order to avoid an imminent public or private injury. Here there was no proof of extraordinary attendant circumstances. Appellant lived in Springdale, Arkansas, where he engaged in the practice of counseling. From his experience in counseling young women who had undergone abortions, he had formed a belief that serious psychological consequences could result and that those contemplating abortion should be advised by him of the possible results of and alternatives to such a procedure. On the three Fridays mentioned in the information (and may other prior occasions), he had intentionally come to Fayetteville and stationed himself on public property

near the clinic. As women went into the clinic, he followed them onto the private property to express his views to them despite repeatedly being told not to do so. He did not find himself faced with extraordinary or unexpected circumstances requiring a choice of action. Without regard to alternative measures, he had deliberately placed himself near the clinic in anticipation of events which he knew would occur and with his choice of action already determined.

Nor was there proof of an imminent danger of injury to the women. There was no evidence that any of them were either pregnant or had come to the clinic for an abortion. Dr. Harrison testified that he was a physician engaged in the practice of obstetrics and gynecology—"delivering babies and taking care of female reproductive organs." No evidence that he was not so engaged was offered by the appellant or sought on cross-examination of Dr. Harrison.

It is well settled that, where the evidence does not support an instruction, it should be refused. Even if the instruction contains a correct statement of the law, it is not error for the trial judge to refuse it if there is no basis in the evidence for giving it. *Clark* v. *State*, 15 Ark. App. 393, 695 S.W.2d 396 (1985); *Wilson* v. *State*, 9 Ark. App. 211, 657 S.W.2d 558 (1983).

Appellant also contends that the trial court erred in excluding evidence of instances of abortion's harmful results observed by him in his practice as a counselor. He argues that this evidence would establish the injury he was seeking to avoid. In view of our conclusion on the first point, we do not address that argument.

Affirmed.

COOPER and JENNINGS, JJ., agree.

Wentford H. LAMB *v.* STATE of Arkansas

CA CR 86-237 730 S.W.2d 252

Court of Appeals of Arkansas
Division II
Opinion delivered May 20, 1987

Paul Petty and *Robert Meurer*, for appellant.

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

JOHN E. JENNINGS, Judge. Wentford Lamb was convicted of DWI in Jacksonville Municipal Court. He appealed to circuit court and was again convicted. On appeal he argues that he was illegally arrested. We affirm.

Lamb was attempting to enter the Little Rock Air Force Base when he was stopped by Roger Allman, a security guard. Allman testified that Lamb swerved to miss some traffic cones and stopped. When Allman approached him he noticed that Lamb smelled of alcohol and his speech was slurred. Allman asked for and received permission to move Lamb's car. He then took Lamb to the guard shack, told him to stay there, and called the Jacksonville Police Department. He told Lamb that he was being detained for suspected DWI.

Sherry Jordan, a Jacksonville police officer, responded to the call. When she got there she advised Lamb of his rights and gave him a field sobriety test, which he did not pass. She then arrested Lamb for DWI and took him to the Jacksonville Police Department. He registered .23 on the breathalyzer test.

Lamb's argument on appeal is that Allman could not have validly arrested him because he was not a certified law enforcement officer under the provisions of Ark. Stat. Ann. §§ 42-1001—42-1009 (Repl. 1977 and Supp. 1985), and that Jordan

could not have validly arrested him as she had no jurisdiction on federal property.

Assuming that appellant is correct in his argument that he was illegally arrested, an illegal arrest is neither a bar to prosecution nor a defense to a valid conviction. *United States* v. *Crews*, 445 U.S. 463 (1980); *Webster* v. *State*, 284 Ark. 206, 680 S.W.2d 906 (1984); *Van Daley* v. *State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987). It may constitute a basis for a motion to suppress, but that issue is not before us. Although this case may be superficially similar to *Brewer* v. *State*, 286 Ark. 1, 688 S.W.2d 736 (1985), that case is distinguishable. In *Brewer*, the supreme court reversed a DWI conviction where it was shown that the officer who charged the defendant was not qualified to issue the citation. Clearly here the citation was issued by Officer Jordan and there is no claim that she lacked authority to do so.

Affirmed.

CRACRAFT and COOPER, JJ., agree.

CARPENTER *v.* HORACE MANN LIFE INSURANCE CO., et al.

CA 86-195 730 S.W.2d 502

Court of Appeals of Arkansas
Division II
Opinion delivered May 20, 1987
[Supplemental Opinion on Denial of Rehearing June 24, 1987.*]

ERRATA

21 ARKANSAS APPELLATE REPORTS at page 112

Detach at perforation, moisten the back, and paste over the first seven lines of the text on page 112 of *Lamb v. State:*

could not have validly arrested him as she had no jurisdiction on federal property.

■ Assuming that appellant is correct in his argument that he was illegally arrested, an illegal arrest is neither a bar to prosecution nor a defense to a valid conviction. *United States v. Crews,* 445 U.S. 463 (1980); *Webster v. State,* 284 Ark. 206, 680 S.W.2d 906 (1984); *Daley v. State,* 20 Ark. App. 127, 725

Howell, Price, Trice, Basham & Hope, P.A., for appellant.

Martin Law Firm, by: *Thomas A. Martin*, for appellees.

MELVIN MAYFIELD, Judge. Appellant, Carey Carpenter, was the primary beneficiary of the will of Monica Johnson and the beneficiary, either directly or indirectly, as trustee of The High Foundation, of seven life and accident insurance policies totaling $145,000.00. Monica Johnson died in 1977 as the result of an automobile accident. This is an appeal by Carpenter from decisions of the chancery and probate courts holding that all the documents involved were executed by Monica while under undue influence exerted by Carpenter and, therefore, that she died intestate with her sole and only heir being her son Bryan Patrick Johnson; that the designation of Carey Carpenter and/or The High Foundation as beneficiaries of the life insurance policies was void; and that any proceeds from the insurance policies, interpled into the registry of the chancery court, should be paid to the Estate of Monica Johnson. We affirm.

Monica Johnson, nee Hubbell, was the oldest of six children. She was reared in Minnesota as a Catholic, attended parochial schools, and was considered by her family to be very religious. After finishing high school, she became a registered nurse. In 1965 she married Pat Johnson who converted to Catholicism but later professed to be an atheist. Monica and Pat had one child, a son, who was born about a year after their marriage. Monica

worked and put Pat through vocational school and college. In the early 1970s, they moved to Chicago where Monica began searching for "something more" in the spiritual realm. She met Carey Carpenter at a lecture early in 1973 when a nurse she worked with suggested she go hear him speak.

An immediate correspondence began between Carpenter and his wife and Monica. Carpenter professed to be a teacher, writer and counsellor. His doctrine is somewhat unclear from the record but appears to have involved delving into the metaphysical in an effort to get closer to God and included reincarnation, soul mates, and meditation. He apparently did not advocate the study of the Bible. He did advocate tithing, however, to support his work and The High Foundation, which was an organization he founded in 1966, and in her letters, Monica expressed a desire to tithe but an inability to do so because of resistance from her husband.

Carpenter's wife, Sherry, wrote letters to Monica in which she claimed that Carpenter was able to transmigrate, did not have to eat or perform other bodily functions, could heal himself and others, and had other supernatural powers. Sherry said Carpenter usually did not perform these acts openly because it took so much of his energy and, if people became aware of his powers, they would then focus on his miracles instead of his teachings. From testimony of his other followers, it appears that Carpenter and Sherry also convinced his "disciples" that he could control their lives from afar and, if they didn't want bad things to happen to them, they must give more and more of their money to him for his "work."

Carpenter owned a farm near Harrison where he lived with Sherry, a girl named Renee (who became his third wife after Sherry died in an automobile accident in 1980), and various other women who came and went. Sherry and Renee kept the house and garden while the other women worked, but all the earnings were given to Carpenter.

In December 1973, Monica received a letter from Carpenter which referred to an enclosed letter from Sherry and astrological charts for Monica, Pat and Bryan which Sherry had prepared. Carpenter stated, "I think you will find her to be a very capable counselor via astrology and intuition, . . ." In her letter Sherry refers to Bryan, then 8 years old, and states, "It might truly be

best for all concerned if he died young for he might well be reincarnated with a better motivation." In astrological charts for each of them, Sherry predicted increasing marital discord through 1974 and up to July 1975, at which time one of the charts has the entry, "Favorable period for success and satisfaction with achievements, good time to begin undertaking new friendships, promotion, . . ." The chart also predicted that Bryan would suffer many disappointments and that his death would most likely be tragic—possibly suicide.

As predicted, Monica and Pat's marriage deteriorated rapidly as Monica's desire to give Carpenter more and more money created severe problems. Monica returned to nursing in order to have her own money to give to Carpenter; and in 1973 and 1974, she gave Carpenter increasing amounts of her earnings. As a result, Pat began withholding more and more of his income from the family budget. In late 1974 and early 1975, letters between Monica and Carpenter reflect that she and Pat were having serious marital problems and that Carpenter was encouraging Monica to get a divorce and move to Arkansas to join his "family." In July of 1975, Monica and Pat were divorced. She gave custody of Bryan to Pat, and subsequently moved to Arkansas to live with Carpenter and his extended "family" and obtained a job at Yellville as a nurse. By this time she was giving Carpenter approximately 75% of all her earnings. In return, he provided her with a house in Harrison, utilities and a car. Monica spent her weekends at the farm helping with the children, gardening, cooking, and keeping house.

In 1976 and 1977, Monica purchased seven life and accident insurance policies, totaling $145,000.00 ($195,000.00, if the double indemnity clause were held to be effective). All except one were payable to either Carpenter individually or The High Foundation. The other policy was payable to Monica's estate. On April 12, 1977, Monica executed, in the office of a Harrison attorney, her "Last Will and Testament" in which she named Carpenter executor and principal beneficiary of her estate and left nothing to her son, then age 11, or to any of her other relatives.

In November 1977, Monica went to Denver, Colorado, to investigate the possibilities of opening an office there from which to teach Carpenter's philosophies and recruit more disciples for

him. She also applied for a nursing position at several of the Denver hospitals. While in Denver, Monica rented a car and drove to Vail, Colorado, where she intended to spend a few days resting. She wrote Carpenter on November 30, 1977, and complained that the car seemed to need a front-end alignment, and on December 1, 1977, the car was discovered about 100 feet off the roadway. Monica's purse, with money and credit cards intact, was found in the car, but an extensive search produced no trace of her. Her body was found by hikers in April 1978 near where her car had been found. It was determined that she died of exposure.

After Monica's death, Carpenter made demand on the insurance companies for payment of the policies as beneficiary, trustee for The High Foundation, or executor of Monica's estate. Pat Johnson notified the insurance companies of a claim on behalf of his and Monica's son, Bryan, and eventually seven lawsuits were filed plus a matter in probate court pertaining to the will that had been filed for probate. All suits were consolidated for trial and judgment was rendered in all the cases on September 30, 1985. The transcript consists of twenty-three volumes.

In addition to the evidence summarized above, the trial judge also heard the testimony of two psychologists who had reviewed all the letters between Monica and her parents and between Monica and the Carpenters; had reviewed the depositions of Carey Carpenter and several of his former disciples; and had also interviewed some of the witnesses and parties. Both psychologists concluded that Monica had a very dependent personality, was searching for a father figure to care for her and that Carpenter fit her needs perfectly. They pointed to letters in which Monica expressed her feeling that she was part of Carpenter's "family" after her divorce and evidence that Carpenter treated her as such. Both testified that it was not their belief that Carpenter had actually, knowingly attempted to extort money from Monica or other women. It was their opinion that he was not intentionally a "con artist" but that his teachings had this effect on gullible women and he did nothing to dissuade their belief in him and, in fact, encouraged them to give him money for his "work" and free him from the necessity of holding a job so he could devote his entire time and energy to his teaching and writing. Both psychologists concluded that because of Carpen-

ter's mental hold on Monica, the veiled threats that if she left him something terrible might happen to her, and because she believed he was Jesus Christ on earth and could will things, both good and bad, to happen to people, she was not free to fully exercise her own independence and to think for herself. Thus, they concluded that when Monica made Carpenter and/or The High Foundation the beneficiary of her will and insurance policies, she acted irrationally and under the undue influence of Carpenter.

On appeal, Carpenter first argues that the order on September 3, 1981, admitting Monica's will to probate, was res judicata on the issue of the validity of the will and, therefore, his motion for summary judgment should have been granted on that issue. Summary judgment is proper only when there is no genuine issue as to any material fact. *See* ARCP Rule 56.

An order dated September 3, 1981, entitled "Agreed Order Probating Will and Appointing Personal Representative," provides in pertinent part:

> 1. That there has been filed a notice of proceedings to probate the decedent's Will by Garvin Fitton, on behalf of Bryan Patrick Johnson, a minor, and no additional petition has been filed for appointment of a personal representative herein. That the parties agree that the Petition of Carey Carpenter and the Cross-Petition on behalf of Bryan Patrick Johnson may be heard and decided forthwith.
>
> . . . .
>
> 4. That the instrument offered for probate was executed in all respects according to law and has not been revoked; that a petition contesting such Will has been filed herein in behalf of the child of Decedent.
>
> 5. That Petitioners have agreed that First Bank and Trust Co. of Mountain Home, Arkansas, an Arkansas banking corporation, insured by the FDIC, should serve as the Administrator with Will Annexed.
>
> IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the proffered instrument be, and hereby is, admitted to probate as the Last Will of Decedent; that First Bank and Trust Co. of Mountain Home,

> Arkansas, a banking corporation insured by the FDIC, be, and hereby is, appointed to serve as Administrator with Will Annexed herein without bond, and that Letters of Administration be issued to said administrator.

This order is signed by Boone County Probate Judge Stephen W. Luelf and is approved as to form by Thomas D. Ledbetter, attorney for Carey Carpenter, and Garvin Fitton, attorney for Bryan Patrick Johnson.

The appellant argues that the above order admits the will to probate, and that Ark. Stat. Ann. § 62-2120 (Repl. 1971) requires the probate judge to find that the testator was competent and acting without undue influence, fraud or restraint before admitting a will to probate. Thus, it is argued, these findings were made, no appeal was taken from them, and these issues were res judicata; therefore, appellant's motion for summary judgment should have been granted. The trial judge overruled the motion, however, and held that the express language of the above order admitted the will "conditionally," that the issues involved in the will contest were reserved, and that the conduct of the parties in continuing to participate in the probate case by filing pleadings and briefs belied the assertion that the order admitting the will to probate disposed of the probate case once and for all.

From our review of the record and order in this case, we cannot say the court's ruling that the order admitting the will to probate did not dispose of the will contest was clearly erroneous. This is especially true in light of the provisions of Ark. Stat. Ann. § 62-2015 (Repl. 1971) which allows the court to vacate or modify its orders until the time for appeal after the final termination of the administration of an estate has elapsed. Thus, even if the court had felt the order was res judicata on the validity of the will, it could have vacated its September 3 order because the probate case was still open. It seems clear that the order recognized that the will was being contested and it was admitted to probate conditionally, while expressly reserving for a future trial on the merits the issue of who would ultimately receive the benefits of the estate. We find no error in the court's overruling of appellant's motion for summary judgment.

Appellant's next argument is that the court erred in not finding that Bryan Johnson lacked privity to challenge or modify

the insurance contracts. Contending Bryan was not a party to any of the contracts, appellant asserts he lacked standing to challenge the validity of the designation of beneficiary on the insurance policies. However, an agreed order dated October 29, 1982, and signed by the judge on November 24, 1982, provides:

> 1. That Carey Carpenter and Bryan Patrick Johnson are adversaries asserting conflicting interests in this Estate, based on allegations of the invalidity of the Will of Monica Catherine Johnson, deceased, and asserting conflicting interests in the proceeds of certain insurance policies on the life of Monica Catherine Johnson, deceased.
>
> 2. That the several positions of the adversaries, Carey Carpenter, on the one hand, and Bryan Patrick Johnson, on the other are adequately represented by counsel of their individual choosing.
>
> 3. Both the attorneys for Johnson and the attorney for Carpenter agree that First Bank & Trust Co., the personal representative herein, has at all times prior hereto acted prudently and responsibly in its capacity as personal representative. Said attorneys also agree that the attorneys for Johnson and the attorney for Carpenter could properly and efficiently represent their respective positions in the suits herein pending; and that First Bank & Trust Co. has no responsibility in the prosecution of any claim, action or demand herein pending nor for the prosecution of any claim on behalf of the estate.
>
> 4. That First Bank & Trust Co. has been appointed Administrator of the Will annexed as an accommodation to the Court and is to be a mere "stakeholder" should the litigation now pending herein, or elsewhere, result in the acquisition of any assets by the Estate.
>
> IT IS THEREFORE THE JUDGMENT, ORDER, AND DECREE of this Court that the Administrator with the Will annexed, the said First Bank & Trust Co., shall have no personal responsibility or liability save and except the management of any assets which might ultimately come into its hands and possession by virtue of the several lawsuits now pending or which may hereinafter be brought

relating, directly, or indirectly, to the death of Monica Catherine Johnson, or otherwise.

The final judgment in this case states that the content of an off-the-record conversation between the court and all attorneys was noted in the record by the court and amounted to an adoption of the pleadings of Bryan Johnson by the Estate; and that no objection was made on behalf of appellant. The final judgment also states that the parties had agreed that the issues raised were in actuality between Carpenter and Johnson and that the attorneys for those parties could adequately develop those issues and that the Personal Representative (The Bank) would be a stakeholder only and not an active participant. The judgment states that this agreement was set out in an order dated October 29, 1982, and signed November 24, 1982, therefore, Carpenter's argument at trial that Bryan lacked standing to challenge the beneficiary designations in the insurance contracts was moot. We think the court's judgment represents a fair reading of the above order and we cannot say the court's decision that appellant's argument was moot is clearly erroneous.

Finally, appellant argues that the findings of fact by the chancellor are clearly against a preponderance of the evidence. Appellant recounts much of the evidence and contends that it shows only that Monica felt great love for Carey and Sherry Carpenter and wanted to leave her bounty to Carpenter to support his work. He contends the chancellor's findings that Monica was in a "weakened mental condition," that she had made no provisions for her eleven-year-old son, and that the presumption of undue influence was not overcome by the evidence are clearly against the preponderance of the evidence. In summary, he contends the finding that Monica was unduly influenced to make Carpenter the beneficiary of her will and insurance policies was clearly erroneous.

Undue influence which avoids a will is not the influence which springs from natural affection or kind offices, but is such as results from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of his property, and it must be specially directed toward the object of procuring a will in favor of particular parties. *Rose* v. *Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984). Whether a will was procured by

undue influence is a question of fact for the trier of fact. The evidence, whether direct or circumstantial, should be permitted to take a very wide range. The nature of the relations and dealings between the testator and the beneficiaries, the extent of the property of the testator, his family connections, the claims of particular persons upon his bounty, the situation and mental condition of the testator, the nature and contents of the will itself and the circumstances surrounding its execution are among the numerous facts from which fraud and undue influence may be inferred or disproved. *Sanger* v. *McDonald*, 87 Ark. 148, 112 S.W. 365 (1908). Where the provisions of a will are unjust, unreasonable and unnatural, doing violence to the natural instinct of the heart, to the dictates of parental affection, to natural justice, to solemn promises, and to moral duty, such unexplained inequality is entitled to great influence in considering the question of testamentary capacity and undue influence. *Brown* v. *Emerson*, 205 Ark. 735, 170 S.W.2d 1019 (1943). Evidence of an unnatural disposition of his property by a testator is admissible to show a mind easily susceptible to undue influence. *Howell* v. *Miller*, 173 Ark. 527, 292 S.W. 1005 (1927).

Furthermore, as stated in *Tobin* v. *Jenkins*, 29 Ark. 151 (1874):

> And as regards undue restraints, it may be proper to remark that it is not necessary that the mind should act under influences at the time brought to bear, or then employed, but they may be such as to have at a previous time been so fixed and impressed as to retain their controlling influence at the time the act is done. Nor is such restraint necessary to be effected by force or intimidation; for it has been held, upon authority, that if the mind acts by force of long training to submission, so that the will of another is adopted for its own, and without reflection, the party thus influenced is incompetent to contract.

29 Ark. at 157-58.

Finally, as observed by Judge McHaney in *Hyatt* v. *Wroten*, 184 Ark. 847, 43 S.W.2d 726 (1931):

> Undue influence is generally difficult of direct proof. It is generally exercised in secret, not openly, and, like a

> snake crawling upon a rock, it leaves no track behind it, but 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 purpose.

184 Ark. at 853.

Appellant directs us to isolated evidence in the record which, he contends, supports his arguments that Monica acted only out of natural love and affection for him, his work, and his family. He insists he never encouraged her to make a will or buy insurance naming him as beneficiary. However, without repeating the evidence in any greater detail than has already been done, suffice it to say that a consideration of the record as a whole supports a finding that appellant, whether intentionally or not, was a very skillful manipulator of emotionally immature, needy, dependent women who were looking for someone to control their every action and who had not found that need fulfilled by the husband or father in their lives. The record supports a finding that there was a systematic alienation of Monica Johnson from her husband, son, parents, and siblings, and replacement in her affections of the appellant, claiming to be Christ on earth, and that this resulted in his virtual enslavement of her through the manipulation of her mind and emotions. The record also supports a finding that the ultimate result was that Monica Johnson lacked the mental capacity to make a will or designate insurance beneficiaries as her own agent, free of the influence of appellant. We cannot say that the decision of the trial judge was clearly against the preponderance of the evidence.

Affirmed.

CRACRAFT and COOPER, JJ., agree.

Supplemental Opinion on Denial of Rehearing
Delivered June 24, 1987

MELVIN MAYFIELD, Judge. The appellant's petition for rehearing quotes a sentence from our opinion and contends it shows that we have misconstrued the Probate Code. The sentence quoted states: "This is especially true in light of the provisions of Ark. Stat. Ann. § 62-2015 (Repl. 1971) which allows the court to vacate or modify its orders until the time for appeal after the final termination of the administration of the estate has elapsed." Appellant points out that the statute contains the following limitation on the stated right to vacate or modify: "except that no such power shall exist . . . to set aside the probate of a will after the time allowed for contest thereof." Appellant's petition then states that the will in this case was admitted to probate on September 3, 1981, and that Ark. Stat. Ann. § 62-2114(b)(2) (Repl. 1971) would require a contestant of the will to file his objections within six months after the first publication of the notice of the admission of the will to probate. Since that period expired long before the judgment holding the will void was entered on September 30, 1985, the appellant claims the Septem-

ber 3, 1981, order admitting the will to probate was final and could not be set aside on September 30, 1985.

We concede that the sentence quoted in appellant's petition for rehearing is unclear. It was meant to point out that because a contest of the will had already been filed at the time the will was admitted to probate on September 3, 1981, there was no time period in which the contest had to be filed; therefore, the court could vacate or modify its order admitting the will to probate, for good cause, at any time within the period allowed for appeal after the final termination of the administration of the estate.

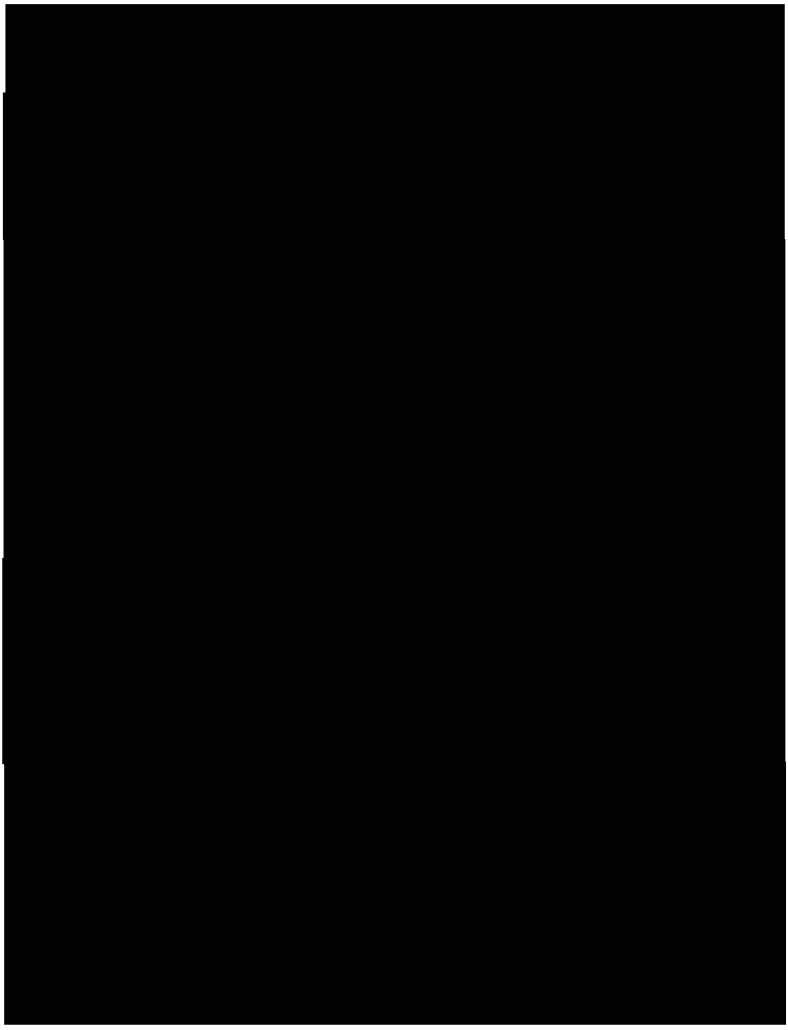
However, regardless of the clarity of the sentence, the opinion held that the will contest which was filed prior to the order of September 3, 1981, was not heard until many months later and was not decided until the trial court entered its judgment on September 30, 1985. Thus, there was no final order in the will contest until that date; the will contest was not decided by the September 3, 1981, order; and appellant's motion for summary judgment contending that the 1981 order was res judicata of the will contest was properly overruled by the trial court.

CRACRAFT and COOPER, JJ., agree.

Jack D. WALLNER and Billie Frank WALLNER, Husband and Wife *v.* Charles E. JOHNSON, et al.

CA 87-11 730 S.W.2d 253

Court of Appeals of Arkansas
Division I
Opinion delivered May 27, 1987



Mashburn & Taylor, by: *W. H. Taylor*, for appellants.

Vowell & Atchley, by: *Stevan E. Vowell*, for appellees.

DONALD L. CORBIN, Chief Judge. Appellants, Jack Wallner and Billie Frank Wallner, appeal a decision of the Carroll County Chancery Court which held that, because appellees, Charles Johnson, Joan Johnson, George Young, Florence Young, Harvey McBride and Janie McBride, are the assigns of Lura Derthick, their distant predecessor in title, who reserved the use of a certain roadway in a 1934 right-of-way deed to Azelia and Adah Lewis, appellees have the right to use the roadway. Appellees cross-appeal contending the chancellor erred in finding they had not acquired a prescriptive easement to the roadway and in holding that a gate across the roadway maintained by appellants was not a material interference with appellees' use of the roadway. We affirm the chancellor's decision as modified.

In 1934, Lura Derthick, appellees' predecessor in title, conveyed to the Lewises, their heirs and assigns, a right of way for the purpose of a road across Mrs. Derthick's land. The right-of-way deed provided "that Mrs. Derthick, her heirs and assigns shall be permitted to use said road herein conveyed. . . . It is agreed that the terms, covenants and agreements contained herein shall extend to and be firmly binding on the heirs, executors, administrators or assigns of the parties hereto." The Lewises owned the property adjacent to Mrs. Derthick, and the right-of-way deed for the road across the Derthick property gave the Lewises access from State Highway 23 directly to their property. Through the years, the Derthick property in its entirety was conveyed by warranty deed to various successors in interest. In 1963, Willis and Ruth Sutcliffe, who owned the Derthick property, conveyed a parcel of their land to appellees Young. The deed to the Youngs described the land conveyed in relation to "where Lewis Road intersects Highway No. 23." In 1972, the Sutcliffes conveyed the first of two parcels of property to appellees Johnson. This deed described the land conveyed as "lying Southeast of the Adah Lewis road." The next year, the Sutcliffes again sold a parcel of property to appellees Johnson, and the land conveyed was described as bounded by the Lewis road. In 1980, appellees Johnson sold a parcel of the land which they had purchased from the Sutcliffes to appellees McBride.

Through the years, the right of way granted by Lura Derthick to the Lewises was conveyed to various successors in interest and was purchased by appellants in 1979. In 1985, appellants obtained a quitclaim deed from Ruth Sutcliffe to her interest in the fee title to the road bed. Appellants have asserted that they now hold the unencumbered fee to the road bed on the ground that their right-of-way interest merged with their acquisition of the Sutcliffes' fee interest.

In 1985, appellants erected a gate across the road near its intersection with Highway 23. Appellees then sued for an injunction requiring appellants to remove the gate and refrain from obstructing the road in any manner in the future and for a declaration that the road is a public road and that the appellees are entitled to a prescriptive easement, as well as an easement by necessity. At trial, the appellees introduced eighteen exhibits to establish a chain of title to the properties owned by the parties;

these exhibits were admitted without objection. Much testimony was also taken as to the use of the roadway in question by the parties and the public.

In his order, the chancellor denied appellees' complaint for a permanent injunction and held that appellees failed to prove that the roadway had been held in adverse possession by the general public or that the appellees had established a prescriptive right in the roadway. The chancellor found that there was no proof of notice of hostile use of the roadway by appellees. The chancellor further found that Mrs. Derthick's reservation of the use of the road bed extended beyond her personal use for the use of the road by her heirs and assigns (appellees). The chancellor also held that the purchase by appellants of the legal title to the road bed did not deny the assigns of Lura Derthick the right to use the roadway and that the merger of appellants' title was subject to the easement rights of appellees. The chancellor held that appellants have the right to maintain the roadway as long as they do not materially interfere with appellees' enjoyment of the easement or place additional burdens on the adjoining landowners' property and that the erection and maintenance of a gate across the roadway is permissible as long as it is well-maintained and unlocked.

In their appeal, appellants assert two points: (1) the chancellor erred as a matter of law when he concluded that appellees are the assigns of Lura Derthick because the reservation retained by Lura Derthick does not run to the abutting property now owned by appellees; and, (2) no evidence was introduced to reflect that appellees are in fact the assigns of Lura Derthick. In their cross-appeal, appellees argue (1) that the chancellor erred in holding that appellees failed to establish an easement by prescription; and, (2) the chancellor erred in holding that the erection and maintenance of the gate by appellants is not a material interference with appellees' use and enjoyment of the roadway.

In deciding whether the chancellor erred in finding that appellees are the assigns of Lura Derthick and entitled to the benefit of the reservation created in her 1934 right-of-way deed to the Lewises, it is necessary to first review the type of reservation created and determine whether it was appurtenant to Mrs. Derthick's land or in gross. "Since a reservation is the creation in

behalf of the grantor of a new right issuing out of the thing granted, an easement appurtenant to the grantor's remaining land may be created by reservation." 25 Am.Jur.2d *Easements and Licenses* Section 21 (1966). A reservation is a clause in a deed whereby the grantor reserves some new thing to himself, issuing out of the thing granted which was not *in esse* before. *Parker* v. *Parker*, 99 Ark. 244, 138 S.W. 462 (1911). In *Fort Smith Gas Co.* v. *Gean*, 186 Ark. 573, 577, 55 S.W.2d 63 (1932), the Arkansas Supreme Court stated: "It is the general rule that those covenants which are held to run with the land and to inure to the benefit of those succeeding in title to the grantee are such as generally affect the land itself and confer a benefit on the grantor. . . ." Clearly, the easement created by the reservation in the right-of-way deed was appurtenant to Mrs. Derthick's land and was not for her personal use alone.

The next question must be whether the reservation inured to the benefit of Mrs. Derthick's grantees in the various parcels of land conveyed to appellees, even though the reservation was not specifically conveyed to appellees in their deeds. Our review of the relevant law and facts leads us to conclude that the answer to this question must be in the affirmative:

> Unless expressly excepted, a transfer of real property passes all easements appurtenant thereto although not referred to in the instrument of transfer, and whether the transfer is voluntary or involuntary. The term "appurtenances" is sometimes used for the conveyance of easements, but its use is not necessary to transfer an appurtenant easement.

25 Am.Jur.2d *supra*, at Section 95.

> As a general rule, if the dominant tenement is transferred in separate parcels to different persons, each grantee acquires a right to use easements appurtenant to the dominant estate, provided the easements can be enjoyed as to the separate parcels without any additional burden on the servient tenement. Thus, where there is an easement of way appurtenant to a dominant tenement, the subsequent grantee of a part of such tenement has the right to use the way as appurtenant to his particular part.

25 Am.Jur.2d *supra*, at Section 96.

> Where an easement is annexed as an appurtenance to land by an express or implied grant or reservation, or by prescription, it passes with a transfer of the land although not specifically mentioned in the instrument of transfer.

28 C.J.S. *Easements* Section 46 (1941).

> Furthermore, those who succeed to the possession of each of the parts into which the dominant tenement may be subdivided, may also succeed to the appurtenant easements, unless otherwise provided by the terms of the conveyance.

28 C.J.S. *Easements* Section 46 (Supp. 1986).

In *Warren* v. *Cudd*, 261 Ark. 690, 550 S.W.2d 773 (1977), the Arkansas Supreme Court quoted 28 C.J.S. *supra*, Section 46 (1941) and stated that, if not specifically excluded, an easement appurtenant to a dominant tenement accompanies the dominant tenement in a transaction or instrument of transfer even if no mention of the easement is made. We therefore reject appellants' assertion that the reservation did not pass by operation of law to appellees because their deeds did not specifically grant the reservation in the road. In *Brandenburg* v. *Brooks*, 264 Ark. 939, 576 S.W.2d 196 (1979), the Arkansas Supreme Court cited 25 Am.Jur.2d *supra*, Section 95 and stated that "a way of necessity over remaining lands of the grantor, created by implied grant upon the severance of land, being appurtenant to the granted land, passes by each conveyance to subsequent grantees thereof. . . ." 264 Ark. at 940. Accordingly, we conclude that the chancellor was entirely correct in holding that appellees are the assigns of Lura Derthick and entitled to the benefit of the reservation of the use of the roadway.

We do find that the chancellor erred in his finding that appellants own the fee title to the road bed where it is bounded by the property of appellees. Even if the purported merger had occurred, it could not foreclose appellees' rights created by the reservation in Mrs. Derthick's right-of-way deed. In their brief, appellants cite *Massee* v. *Schiller*, 243 Ark. 572, 420 S.W.2d 839 (1967) as support for their argument that they hold the fee to the road bed unencumbered. That case, however, does not stand for

the proposition that the assigns of a distant grantor who reserved a right to use the right of way appurtenant to her land may have their interests foreclosed by such an acquisition on the part of appellants.

Additionally, we believe the evidence demonstrates that appellees own the fee title to the road bed where it adjoins their land. The Arkansas Supreme Court has held that, when a right of way is still in use, a conveyance extends to the center of the right of way unless a contrary intention is clearly stated. This principle applies to private as well as public roads and is in keeping with the public policy of discouraging separate ownership of narrow strips of land. *Abbott* v. *Pearson*, 257 Ark. 694, 520 S.W.2d 204 (1975). In *McGee* v. *Swearengen*, 194 Ark. 735, 742, 109 S.W.2d 444 (1937), the Arkansas Supreme Court stated that, where a conveyance of land bounded by a street or highway uses the expressions "bounded by," "on," "upon," or "along," such street or highway, it is generally held to indicate an intention to convey to the center thereof. We therefore hold that the deeds to appellees' property, bounded by the Adah Lewis road, conveyed the fee simple to the center of such road bed. Accordingly, we modify the chancellor's order to reflect this holding.

We also disagree with appellants' assertion that appellees presented no evidence that they are the assigns of Lura Derthick and that, because appellees failed to plead in their complaint that they are the assigns of Lura Derthick, the chancellor erred in so finding. It must be remembered that appellees presented eighteen exhibits describing the relevant chains of title to the various pieces of property in question without objection on the part of appellants. The deeds reflected in these exhibits provide more than sufficient evidence of the appellees' status as the assigns of Lura Derthick.

The fact that appellees failed to plead that they are the assigns of Lura Derthick in their complaint is similarly not fatal to their cause. ARCP Rule 15(b) provides in part:

> 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. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to

> raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

See also Thompson v. *Brown*, 5 Ark. App. 111, 633 S.W.2d 382 (1982).

We also find no merit in appellees' first point in their cross-appeal, in which they assert that the chancellor erred in holding appellees failed to prove the establishment of an easement by prescription. Upon appeal, we review the evidence in the light most favorable to appellee, and the trial court's findings are sustained unless they are clearly against the preponderance of the evidence. *First State Bank of Crossett, Arkansas* v. *Phillips*, 13 Ark. App. 157, 681 S.W.2d 408 (1984). The individual asserting an easement by prescription has the burden of proof to show by a preponderance of the evidence that use of the roadway has been adverse to the owner and his predecessors in title under claim of right for the statutory period. The determination of whether use of the roadway is adverse or permissive presents a fact question. *Teague* v. *Raines*, 270 Ark. 412, 605 S.W.2d 485 (Ark. App. 1980).

Some circumstance or act, in addition to, or in connection with, the use of the way, tending to indicate that the use of the way was not merely permissive, is required to establish a right by prescription. *See Chapin* v. *Talbot*, 13 Ark. App. 53, 679 S.W.2d 219 (1984). Some overt activity on the part of the user is necessary to make it clear to the owner of the property that an adverse use and claim is being exerted. *Id.* The mere permissive use of an easement cannot ripen into an adverse claim without clear action which would have placed the defendant on notice. *See Fullenwider* v. *Kitchens*, 223 Ark. 442, 266 S.W.2d 281 (1954). We agree with the chancellor in his finding that appellees' use of the roadway in question had been permissive and affirm his finding in this regard as not clearly erroneous or clearly against the preponderance of the evidence.

The question of whether an easement is private or public is one of fact; such a finding will not be reversed if it is not clearly against a preponderance of the evidence. *Hall* v. *Clayton*, 270 Ark. 626, 606 S.W.2d 102 (Ark. App. 1980). Here, although there was testimony to the effect that Carroll County had graded

the roadway in question in the past, there was also ample evidence that the County did not and never had considered the road bed in question to be a public road. In fact, it appears that, when the County graded the roadway in the past, it was at the request of the owners of the adjacent property. We do not find the chancellor's finding that the roadway in question is not a public road to be clearly erroneous.

We also disagree with appellees in their assertion that the maintenance by appellants of an unlocked gate across the roadway materially interferes with appellees' use of the roadway. Where land is subject to a prescriptive right of another to travel a designated route across the land, overlapping rights and conflicts of the parties are measured by the reasonableness of interference with the owners' rights, a question which depends on the facts and circumstances of each case. *Massee, supra.* The owner of a servient estate may erect a gate across an easement if it is located, maintained and constructed so as not unreasonably to interfere with the right of passage. *Hall* v. *Clayton, supra; see also Jordan* v. *Guinn*, 253 Ark. 315, 485 S.W.2d 715 (1972). The chancellor's findings in this regard will not be reversed unless they are clearly erroneous. *Warren* v. *Robinson*, 288 Ark. 249, 704 S.W.2d 614 (1986). Here, appellants presented evidence that, for some time, the roadway in question had been frequented by people at night as a "lovers' lane" and that trash had been left along the roadway as a result. We do not find that the chancellor's holding in this regard is clearly erroneous and affirm on this point.

Affirmed as modified.

MAYFIELD and COULSON, JJ., agree.

James A. WROTEN *v.* Howard A. EVANS and Shirley Harris Evans

CA 86-419 729 S.W.2d 422

Court of Appeals of Arkansas
Division I
Opinion delivered May 27, 1987

Shackleford, Shackleford & Phillips, P.A., for appellant.

Guthrie, Burbank, Dodson & McDonald, for appellees.

DONALD L. CORBIN, Chief Judge. Appellees, Howard A. and Shirley Harris Evans, brought a foreclosure action against El Dorado Armature Works, Inc. They also sought judgment jointly and severally against four guarantors in accordance with a Guaranty Agreement to the extent the foreclosure sale failed to satisfy the judgment. Appellant, James A. Wroten, was one of the four guarantors. The other three guarantors are not parties to this appeal. Appellees subsequently obtained a judgment against El

Dorado Armature Works, Inc., in the amount of $207,490.48, attorney's fees and costs. The judgment was not paid and the property was sold by a commissioner appointed by the court for $35,000. Appellees then sought judgment jointly and severally against the guarantors for $150,000. Appellant appeals from the award of judgment against him and raises one point for reversal. We affirm.

Appellant and three others executed a Guaranty Agreement on April 1, 1980, which provided that they jointly and severally guaranteed the payment of all sums due under the terms of a promissory note made and executed by El Dorado Armature Works, Inc. It guaranteed payment to the extent the note remained unpaid after the sale of certain property described within a mortgage. The agreement further provided that in no event would the guarantors be liable either jointly or severally for a sum in excess of $150,000.

Appellant filed an amended answer and cross-claim wherein he contended that any judgment awarded appellees against the guarantors should be rendered separately and that it should not be in excess of each guarantor's pro rata share. Appellant sought exoneration by the other guarantors so that each guarantor should be required to pay a proportionate share of the judgment before appellees would be permitted to enforce payment by appellant of any amount in excess of his proportionate share. In his cross-claim, appellant asked for judgments against the other guarantors in the event appellant paid in excess of his proportionate share.

Following a hearing on appellant's amended answer and cross-claim, the trial court denied the relief sought by appellant in a letter opinion. Citing *Cooper* v. *Rush*, 138 Ark. 602, 212 S.W. 94 (1919), *Hazel* v. *Sharum*, 182 Ark. 557, 32 S.W.2d 315 (1930), and *Halford* v. *Southern Capital Corp.*, 279 Ark. 261, 650 S.W.2d 580 (1983), the trial court determined appellees were entitled to judgment, jointly and severally, against each of the four guarantors for $150,000. The court below further determined that in the event appellant satisfied more than his proportionate part, appellant would have an action for contribution against the other guarantors for any amount appellant paid above his proportionate share. The record reflects appellee Howard A.

Evans testified at the hearing that based upon his information and belief, appellant was the person most likely to be in a financial position to satisfy the guaranty obligation.

Appellant argues on appeal that the chancellor erred in denying his claim for exoneration. He contends the effect of the denial of his claim for exoneration is to cause unnecessary litigation on his part to enforce his claim for contribution. Appellant points out the four guarantors were parties to the action instituted by appellees, and asks why he should be required to institute separate actions for contribution against the other guarantors when the trial court had all the necessary parties before it. He asks this court to reverse and remand with directions to the trial court to decree specific performance requiring each guarantor to pay his proportionate share. This would be conditioned upon payment by appellant of his proportionate share. In the event a guarantor fails or refuses to pay his share, appellant suggests the chancellor should enter an order permitting appellees to proceed against appellant and the remaining guarantors for the proportionate share of the nonpaying guarantor. If appellant is required to make an additional payment, appellant contends the chancellor should enter judgment in his favor for contribution against the nonpaying guarantor.

Both parties to this appeal concede the equitable doctrine of exoneration has not been recognized by the appellate courts of Arkansas. This doctrine gives a surety in certain situations the right to call upon his co-sureties for exoneration before any payment is made. *See D'Ippolito* v. *Castoro*, 51 N.J. 584, 242 A.2d 617 (1968); Annot., 38 A.L.R. 3rd 680 (1971). The doctrine of exoneration appears to be an expansion of the equitable doctrine of contribution.

The trial court in the case at bar was correct in denying appellant's claim for exoneration. The right of contribution among co-sureties and co-guarantors is well settled in this State. In *Hazel* v. *Sharum*, 182 Ark. 557, 32 S.W.2d 315 (1930), the supreme court held that an obligation created by the obligors jointly liable on a promissory note, one of whom subsequently paid the entire obligation, entitled the payor to contribution by the others on an implied obligation. In reviewing the law on the subject of contribution, the court stated:

> Here the appellees, having paid the whole amount of the debt for which all were jointly liable, were entitled to maintain an action for contribution against the other joint makers of the note, not on the note, but on the contract which the law implies, an obligation worked out by courts of equity in order to do exact justice between the parties.

Id. at 559. In *Cooper* v. *Rush*, 138 Ark. 602, 212 S.W. 94 (1919), the Arkansas Supreme Court said:

> The right of action for contribution accrues when one surety pays more than his share of the common liability. In most of the cases it is said that the contract for contribution between sureties is one which the law implies for their mutual protection and indemnity. Nearly all the cases agree, however, that no cause of action arises until payment by one of their common debt . . . . [cites omitted].

Id. at 605.

In the instant case appellant and his three co-guarantors jointly and severally guaranteed the payment of the amount due appellees under the terms of a promissory note not to exceed $150,000. In order to grant the relief requested by appellant, we would have to ignore the clear language of the Guaranty Agreement which we cannot do. Appellant has a contractual obligation pursuant to that agreement, and contribution is appellant's remedy against his co-guarantors. This remedy is not available to appellant until he satisfies more than his pro rata share of the judgment, $37,500. Accordingly, we cannot say the trial court erred in denying appellant's claim for exoneration, and its decision is affirmed.

Affirmed.

CRACRAFT and COOPER, JJ., agree.

ARKANSAS WOOD PRODUCTS/INDEPENDENT WOOD SUPPLIERS AND ROCKWOOD INSURANCE COMPANY, Insurance Carrier *v.* E.J. ATCHLEY

CA 86-480 729 S.W.2d 428

Court of Appeals of Arkansas
Division I
Opinion delivered May 27, 1987

[redacted]

Hardin, Jesson & Dawson, by: *Robert M. Honea*, for appellant.

Wilson, Engstrom, Corum & Dudley, by: *William R. Wilson, Jr.*, and *Barber, McCaskill, Amsler, Jones & Hale, P.A.*, by: *Robert L. Henry, III*, for appellee.

JAMES R. COOPER, Judge. In this workers' compensation case, the only issue to be decided is whether there is substantial evidence to support the Commission's finding that the appellee was permanently and totally disabled. We find that there is sufficient evidence and affirm. The appellants also argue that the evidence was insufficient to support the Commission's finding that the appellee's injury was non-scheduled. We need not reach this issue in light of the fact that we affirm the Commission's finding that the appellee was totally and permanently disabled. An employee who suffers a scheduled injury, which proves to be permanently and totally disabling, is not restricted to compensation specified for the scheduled injury, but is entitled to the greater benefits provided for permanent and total disability. *Cooper Industrial Products, Inc.* v. *Worth*, 256 Ark. 394, 508 S.W.2d 59 (1974); *McNeely* v.*Clem Mill and Gin Co.*, 241 Ark. 498, 409 S.W.2d 502 (1966).

At the hearing before the administrative law judge, it was undisputed that the appellee's injury arose out of and in the course of his employment. The appellants paid medical expenses; temporary total disability from the date of injury, October 23, 1982 through February 25, 1985; and fifty weeks of permanent partial disability. The only issue before the administrative law judge was whether the injury was scheduled and the appellee was therefore not entitled to further permanent partial disability. The administrative law judge found that the appellee's injury was non-scheduled, and assessed a permanent partial disability rating of thirty-five percent to the body as a whole. Both sides appealed to the Commission, and the Commission affirmed the administrative law judge's opinion with the exception that the Commission

found the appellee to be permanently and totally disabled.

In a workers' compensation case, the appellate court must view and interpret the evidence, and all reasonable inferences deducible therefrom, in the light most favorable to the findings of the Workers' Compensation Commission and give the testimony its strongest probative force in favor of the action of the Commission. *Roberts* v. *Leo Levi Hospital*, 8 Ark. App. 184, 649 S.W.2d 402 (1983). Even if the evidence will support a finding contrary to that made by the Commission, the question before the appellate court is whether there is substantial evidence to support the finding made by the Commission. *Barksdale Lumber Co.* v. *McAnally*, 262 Ark. 379, 557 S.W.2d 868 (1977).

The appellee, while employed as a pulpwood worker, sustained an injury to his left shoulder. The biceps tendon, which attaches the biceps muscle to the bone, was torn. Surgery was performed on October 27, 1982, by Dr. Skagerberg. The shoulder joint was opened up to re-attach the muscle to the bone. After the surgery, the appellee was attended by Dr. Mumme. Dr. Mumme's progress notes, which were entered into evidence, show that the appellee suffered continual pain in the shoulder, in spite of therapy, medication, and a TENS unit. (A TENS unit is an electric stimulation device used to control and modify some types of pain.) Dr. Mumme felt, however, that the appellee's shoulder had improved, and on January 6, 1984, he noted that the appellee had recovered virtually full range of motion of the left shoulder. On February 28, 1984, Dr. Mumme rendered an opinion that the appellee had sustained a twenty-five percent permanent partial impairment to his left shoulder and fifteen percent to the body as a whole.

In the interim, an arthroscopy was performed on the appellee on August 17, 1983. In the operative report, Dr. Mumme noted that the procedure was difficult because of secondary adhesions in the left shoulder. He further noted that he was unable to satisfactorily examine the intra-articular aspect of the shoulder because of tightness and adhesions.

At the recommendation of the appellee's family physician, the appellee was seen by orthopedic specialist Dr. John Wilson. Dr. Wilson found mild restrictive motion in the shoulder, and gave the appellee a permanent impairment rating of fifteen

percent to the upper extremity and nine percent to the body as a whole.

In addition to Drs. Mumme and Wilson, the appellee was also being seen by Dr. Knight, who works with Dr. Mumme at the Holt-Krock Clinic in Fort Smith, Arkansas. Dr. Knight's findings and impairment ratings were essentially the same as Dr. Mumme's.

At the hearing, Dr. McBryde, the appellee's family physician, testified. He stated that he believed the appellee suffered impairment of fifty percent to the shoulder and twenty-five percent to the body as a whole. He testified that the appellee could not lift anything with his left arm, and could only lift fifty percent of normal with his right arm. Dr. McBryde also found an injury to the left elbow which restricted the appellee's ability to reach with his left arm. Although the doctor was unable to specify any particular incident in which the appellee injured his elbow, he did state that the appellee had not had any problems with the elbow prior to the shoulder injury. The doctor also stated that the appellee's problems with headaches were attributable to the shoulder. It was his opinion that instability of the neck and shoulder were causing a muscle contraction type headache. Dr. McBryde also found degenerative arthritic changes in the neck, and felt that the arthritis and shoulder injury tended to aggravate each other. The appellee had been suffering from high blood pressure prior to the shoulder injury. Seven days after the injury, the appellee's blood pressure rose even higher and he required increased medication to control it because his blood pressure has not returned to the pre-injury range. Dr. McBryde testified that part of the reason for the elevated blood pressure was the stress placed on the appellee because of the injury, the associated pain, and financial concerns. Dr. McBryde also discussed the appellee's prior back injury. At the time of that injury he had been treated by Dr. Wright, who had been the appellee's family physician prior to Dr. McBryde. As a result of all of the symptoms, Dr. McBryde testified that the appellee's physical abilities were limited.

The thrust of the appellants' argument is that the opinions of the orthopedic specialists, Drs. Mumme, Wilson and Knight, should be given greater consideration than that of the

family physician. However, that is a matter going to the weight and probative force of the evidence, rather than its substantiality. *Barksdale Lumber Co.* v. *McAnally*, 262 Ark. 379, 557 S.W.2d 868 (1977). Conflicts in medical testimony are for the Commission to resolve, and when the Commission chooses to accept the testimony of one physician over that of another, this Court is powerless to reverse the decision. *Barksdale, supra.*

■ Furthermore, many factors, not just the medical evidence, are to be considered in a determination of wage loss disability. Consideration should be given to the claimant's age, education, experience, and other matters affecting wage loss, including the degree of pain he endures as a result of the compensable injury. *Chism* v. *Jones*, 9 Ark. App. 268, 658 S.W.2d 417 (1983); *Hunter Wasson Pulpwood* v. *Banks*, 270 Ark. 404, 605 S.W.2d 753 (Ark. App. 1980).

The appellee testified that he was fifty years old and had not had any job training or education since his graduation from high school in 1954. His work history is limited to heavy manual labor and operating heavy equipment. He testified that he could not return to those jobs because of the pain, weakness, and limited motion in his arm and shoulder. He also stated that he could not sit or stand for long periods of time, could not drive for long periods of time, and that his wife had to assist him with dressing.

The appellee lived in Scott County all of his life with the exception of the six years he was in the Navy. The County Judge, Hon. Clyde Hawkins, testified that the appellee had worked for him before and he knew the appellee to be a hard worker. He also stated that he was familiar with the job market in Scott County and did not know of any job the appellee could perform.

■ We find that the medical evidence, along with the evidence of the appellee's job skills, education, and the fact that he still suffers severe pain, supports the Commission's finding that the appellee is permanently and totally disabled.

Affirmed.

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

The CITY OF EL DORADO, Employer, and MUNICIPAL LEAGUE WORKERS' COMPENSATION TRUST, Self-Insurer *v.* Byron SARTOR

CA 86-484 729 S.W.2d 430

Court of Appeals of Arkansas
Division I
Opinion delivered May 27, 1987

Winston Bryant and *J. Chris Bradley*, for appellant.

Shackleford, Shackleford & Phillips, P.A., for appellee.

JAMES R. COOPER, Judge. The appellee in this workers' compensation case, Byron Sartor, was employed as a patrolman by the City of El Dorado Police Department. On December 6, 1985, the appellee went off duty at 9:00 p.m. He and his wife then went to the Heritage Club, an El Dorado nightclub. While at the club, the appellee, who was not in uniform, drank two ten-ounce mugs of beer. As he was standing outside the club's entrance at approximately 12:00 p.m. on December 6, the appellee was struck, threatened, and cursed by Mark Davis, against whom the appellee had recently testified in El Dorado Municipal Court. One of Davis's friends pulled him away from the appellee. However, Davis continued to shout obscenities at the appellee from across the street, and the appellee asked the nightclub manager to call the police. The appellee then crossed the street and asked Davis to apologize to him. When Davis refused to do so, the appellee placed him under arrest. Davis resisted, and, in the resulting altercation, the appellee suffered a fractured and dislocated elbow.

The appellee filed a workers' compensation claim for benefits arising from his injuries. In an opinion dated May 5, 1986, the administrative law judge found that the appellee's injury had been an accidental one, arising out of and in the course of his employment as a police officer. The opinion of the administrative law judge was approved and adopted by the full Commission in an opinion dated September 16, 1986. From that decision, comes this appeal.

For reversal, the appellant contends that the Commission erred in finding that the appellee's injuries arose out of and in the course of his employment. We find no error, and we affirm.

The term "arising out of the employment" relates to the causal connection between the claimant's injury and his employment, while our cases define "course of employment" as relating to the time, place, and circumstances under which the injury occurred. *See American Red Cross* v. *Wilson*, 257 Ark. 647, 519 S.W.2d 60 (1975); *Owens* v. *National Health Laboratories, Inc.*, 8 Ark. App. 92, 648 S.W.2d 829 (1983). An injury arises out of one's employment when a causal connection between work conditions and the injury is apparent to the rational mind; moreover, the employment need not be the sole or proximate cause; all that is required is that "there be a substantially contributory causal connection between the injury and the business in which the employer employs the claimant." *American Red Cross* v. *Wilson*, 257 Ark. at 649. With respect to course of employment, the test advanced by Professor Larson requires that the injury occur within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose, or advancing the employer's interests directly or indirectly. 1 A. Larson, *Workmen's Compensation Law* §§ 14.00, 20.00 (1985).

In attacking the Commission's finding that the appellee's injury arose out of and in the course of his employment, the appellant argues that, when the appellee was injured, he was acting as a private citizen and had not been called into duty; that the appellee's actions were of no benefit to the City of El Dorado; and that the legality of the appellee's arrest of Davis is not dispositive of the issue of whether the appellee's injuries occurred in the course of his employment. All of these arguments constitute challenges to the sufficiency of the evidence to sustain the finding of the Workers' Compensation Commission. In determining the sufficiency of the evidence to sustain the Commission's factual findings, we review the evidence in the light most favorable to those findings, and we must affirm if there is any substantial evidence to support them. *DeBoard* v. *Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). We may reverse the Commission's findings only when we are convinced that fair-minded people, with the same facts before them, could not have arrived at the

conclusion reached by the Commission. *Snow* v. *Alcoa*, 15 Ark. App. 205, 691 S.W.2d 194 (1985).

In the case at bar, there was evidence that the appellee was not merely acting as a private citizen avenging a personal wrong. Indeed, the record reflects that the appellee showed restraint; rather than arresting Davis as soon as he was attacked, the appellee allowed Davis to be led away across the street. It was only when Davis continued to shout threats and profanities that the appellee determined to arrest him. Even then, the appellee told Davis that he would not arrest him if he would apologize. While the appellant sees this as evidence that the appellee's actions were of a purely personal nature, we think that the Commission was entitled to interpret the request for an apology as an attempt by the appellee to defuse a potentially dangerous situation by calming his assailant.

Moreover, El Dorado Police Regulations state that "[o]fficers off duty shall perform necessary police service in the City of El Dorado whenever they are aware of a serious criminal offense or a present threat to life." As we noted in *City of Sherwood* v. *Lowe*, 4 Ark. App. 161, 628 S.W.2d 610 (1982), it is the nature of police work that an officer might at any time be called into duty, either by his superiors or by what he observes. In addition, we noted in *Lowe* that the existence of a benefit to the employer was an important element in the analysis to determine whether an injury occurred in the course of the claimant's employment. *Id.*

Under the circumstances of the case at bar, we hold that the evidence was sufficient to support the Commission's finding that the appellee's injury arose out of and in the course of his employment as a police officer. Viewed in the light most favorable to that finding, the Commission could reasonably conclude that the appellee was motivated by the public interest, and that the attack upon his person, and the subsequent disturbance of the peace under the circumstances then present, constituted a serious criminal offense or threat to life requiring the appellee to act in his official capacity as a police officer. Moreover, we think that the City of El Dorado obtained a benefit from the appellee's actions in that a potentially serious breach of the peace was quelled without injury to nightclub patrons or other bystand-

ers. Finally, while we agree with the appellant that the legality of Davis's arrest is not entirely dispositive of the issue of whether the appellee's injury occurred within the course of his employment, we do not agree that this fact is irrelevant, for it tends to substantiate the appellee's assertion that a crime was committed in his presence, and that his injury occurred while he was exercising lawful authority.

Affirmed.

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

PULPWOOD SUPPLIERS, INC. *v.* FIRST NATIONAL BANK IN STUTTGART

CA 85-503 729 S.W.2d 425

Court of Appeals of Arkansas
Division II
Opinion delivered May 27, 1987

Armstrong & Binns, by: *Murray F. Armstrong*, for appellant.

Carl J. Madsen, P.A., for appellee.

JAMES R. COOPER, Judge. This appeal concerns two civil suits brought by First National Bank in Stuttgart against Grand Prairie Leasing, Inc., and the appellant, Pulpwood Suppliers, Inc. These causes of action were based upon two notes executed by Grand Prairie to First National Bank which were secured by assignments of various lease agreements in which Grand Prairie was the lessor, and the appellant, Pulpwood Suppliers, Inc., was the lessee. The two cases were consolidated for trial, and the trial

court entered judgment for the appellee, First National Bank. From that decision, comes this appeal.

For reversal, the appellant contends that the trial court erred in denying its motion to dismiss for improper venue; that there was no substantial evidence to support the trial court's finding that, when Pulpwood Suppliers was notified of the assignment of the lease on a loader, the balance due under the lease was $26,610.56; and that the trial court erred in awarding the appellee judgment for the amount of the proceeds of the sale of leased vehicles taken as collateral, because the appellee bank had no perfected security interest in the vehicles. We find no error, and we affirm.

As noted above, this appeal is from judgments entered in two cases which were consolidated for trial. The appellant's first and second points for reversal are based on Arkansas County Circuit Court case number CIV 81-239, involving the assignment of a lease for a Lucky Loader. The appellant's third point arises out of case number CIV 81-240, which involved an assignment taken on seven vehicle leases.

With respect to case number CIV 81-239, the evidence shows that the appellant leased a Lucky Loader from Grand Prairie on March 14, 1979. On March 15, 1979, Grand Prairie executed a note to First National Bank in the amount of $36,868.80. This note was secured by an assignment of the lease of the Lucky Loader to the appellant. By June 4, 1980, the appellant was notified of the assignment; however, on June 13, 1980, the appellant purchased the Lucky Loader from Grand Prairie Leasing for $2,188.24. The appellant contends that this amount was the balance owed to Grand Prairie under the lease agreement.

In the second case tried below, Arkansas County Circuit Court number CIV 81-240, the evidence shows that Grand Prairie executed a note to First National Bank in the amount of $42,338.98. This note was secured by an assignment of seven separate lease agreements, under which Grand Prairie leased seven different vehicles to the appellant. On May 6, 1980, the appellant purchased two of those vehicles from Grand Prairie. On June 4, 1980, Pulpwood purchased the remaining five vehicles from Grand Prairie for the sum of $8,362.54.

As its first point for reversal, the appellant contends that the trial court erred in denying its motion to dismiss for improper venue in case number CIV 81-239. The appellee, First National Bank, filed that case in Arkansas County Circuit Court, seeking judgment against Grand Prairie Leasing, Inc.; Lloyd M. Sivils, chief officer of Grand Prairie Leasing; and the appellant, Pulpwood Suppliers, Inc. Both Grand Prairie Leasing and the appellant were Arkansas corporations. As support for its contention that venue in Arkansas County was improper, the appellant relies upon Ark. Stat. Ann. § 27-605 (Repl. 1979), which provides, in part, that an action against a domestic corporation "may be brought in the county in which it is situated, or has its principal office or place of business, or in which its chief officer resides." The appellant's principal place of business was Cleveland County. Lloyd M. Sivils, chief officer of Grand Prairie Leasing, resided in Jefferson County. The crux of the appellant's argument is that, whereas Arkansas County had formerly been Grand Prairie Leasing's principal place of business, at the time that this action was filed Grand Prairie Leasing no longer had a place of business and was, in fact, a defunct corporation, since its corporate charter had been revoked on November 24, 1980, almost one year prior to the commencement of this action. Thus, argues the appellant, neither of the defendant corporations had a principal place of business in Arkansas County at the time the action was filed, nor did the chief officer of either corporation reside in Arkansas County at that time, and the prerequisites for venue in Arkansas County under Ark. Stat. Ann. § 27-605 were therefore not met.

However, we do not reach the merits of the appellant's argument, for we think that venue in Arkansas County was proper under Ark. Stat. Ann. § 27-621 (Repl. 1979), which provides that "[a]n action on a debt, account, note, or for goods or services may be brought in the county where the defendant resided at the time the cause of action arose." Because Grand Prairie Leasing had its principal place of business in Arkansas County when it defaulted on its note to the appellee and this cause of action arose, we hold that venue was properly in Arkansas County. *See Zolper* v. *AT&T Information Systems, Inc.*, 289 Ark. 27, 709 S.W.2d 74 (1986).

Next, the appellant contends that the trial court's finding

that the balance due under the Lucky Loader lease was $26,610.56 when the appellant was notified of the assignment is not supported by the evidence. At trial, I.E. Moore, president of Pulpwood Suppliers, and Lloyd M. Sivils, president of Grand Prairie Leasing, testified that on June 4, 1980, the day that Pulpwood was notified of the assignment of the Lucky Loader lease, the balance due under that lease was $2,188.24. However, Jack Barber, an officer of First National Bank, testified that the balance due under the lease was $26,610.56. Mr. Barber based his testimony upon calculations he made, based on a payment formula set out in the lease agreement, and upon the assumption that the lease payments were up to date.

The findings of fact of a circuit judge sitting as the finder of fact will not be disturbed on appeal unless, considering the evidence in the light most favorable to the appellee, the findings are clearly erroneous or clearly against the preponderance of the evidence, giving due regard to the opportunity of the trial court to assess the credibility of the witnesses. *Special Insurance Services, Inc.* v. *Adamson*, 20 Ark. App. 8, 722 S.W.2d 875 (1987); ARCP Rule 52. In the case at bar, the appellee produced evidence of the existence of the lease agreement, the assignment of that agreement to the appellee, and the balance due under the terms of that agreement at the time that the appellant was notified of the assignment. The appellant, in turn, offered evidence to show that the balance due under the agreement had been greatly reduced by payment to Grand Prairie Leasing. Payment is an affirmative defense, ARCP Rule 8(c), and the burden of proving payment lies on the party asserting it. *See Miles* v. *Teague*, 246 Ark. 1288, 441 S.W.2d 779 (1969); *Beeson* v. *Beeson*, 11 Ark. App. 79, 667 S.W.2d 368 (1984); 5A *Corbin on Contracts* § 1288 (1964). Under the circumstances presented by this case, and giving due regard to the opportunity of the trial judge to weigh the credibility of the appellant's witnesses, both of whom were interested parties, we cannot say that the trial court's finding was clearly erroneous.

The appellant's final contention regarding case number CIV 81-239 is that the trial court lacked authority to award the appellee a judgment greater than $2,188.24. The appellant states that its purchase of the loader from Grand Prairie Leasing for that sum on June 13, 1980, constituted a sale of the collateral,

and argues that, under Ark. Stat. Ann. § 85-9-306 (Supp. 1985), the appellee's recovery is limited to judgment against the debtor for the proceeds of the sale and a continuing lien on the collateral sold. We do not agree. In addition to having a security interest in the Lucky Loader itself, the appellee was the assignee of the appellant's lease agreement with Grand Prairie Leasing. Moreover, the appellant had notice of the assignment of the lease agreement before it purchased the loader. Where the debtor had notice of the assignment, payment to an assignor, or discharge or release by him, is no defense to the claim of the assignee. *Newton* v. *Merchants & Farmers Bank*, 11 Ark. App. 167, 668 S.W.2d 51 (1984). Here, the assignment of the lease agreement was itself collateral in addition to the appellee's security interest in the loader. Insofar as the lease agreement was concerned, there was no sale of the collateral in this case, because the assignor and the debtor were without power to interfere with the assignee's interests by terminating the lease without the assignee's authorization. *Block* v. *Walker*, 2 Ark. 4 (1839); *see also Newton* v. *Merchants & Farmers Bank, supra*; 6 Am. Jur. 2d *Assignments* § 112 (1963). Thus, Ark. Stat. Ann. § 85-9-306 did not limit the trial court's power to award the appellee judgment for the amount due under the lease agreement at the time the appellant received notice of the assignment, because no sale or other disposition of the lease agreement itself occurred.

The appellant's final point for reversal arises out of case number CIV 81-240, involving the assignment of seven vehicle leases between the appellant and Grand Prairie Leasing to the appellee. The argument advanced by the appellant, essentially the same as the foregoing contention treated above, is that the trial court erred in awarding the appellee judgment for the amount of the proceeds of the sale of the collateral, because the appellee had no perfected security interest in the vehicles. Again, we do not agree, because the vehicles were not the only collateral taken by the appellee: an assignment of the lease agreements was given as well. The appellant and Grand Prairie Leasing were unable to terminate the leases without the appellee's consent for the reasons noted above. The trial court did not award the appellee judgment for the proceeds of the sale of the leases, because no sale or termination occurred. This point also lacks merit. *See Block, supra*, and *Newton, supra*.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

MERCHANTS AND PLANTERS BANK AND TRUST COMPANY of Arkadelphia, Arkansas *v.* PHOENIX HOUSING SYSTEMS, INC., et al.

CA 86-250 729 S.W.2d 433

Court of Appeals of Arkansas
Division I
Opinion delivered May 27, 1987
[Rehearing denied July 1, 1987.]

McMillan, Turner & McCorkle, for appellant.

McKenzie, McRae & Vasser, and *Wright & Chaney, P.A.*, for appellee.

MELVIN MAYFIELD, Judge. Appellant, Merchants and Planters Bank, brings this appeal from the action of the Hempstead County Circuit Court holding that the Bank of Yellville had a security interest, superior to the security interest of appellant, in a modular building still under construction.

Phoenix Housing Systems was an Arkansas corporation which manufactured modular buildings. They were similar to mobile homes except they had no chassis or wheels. The completed buildings were transported by truck and trailer to sites where they were set on a permanent foundation and became a part of the realty. While under construction, each unit was

considered personal property. Appellee Jim Meador was vice-president and chief executive officer of Phoenix Housing from March 1985 until the business was closed in January 1986.

On August 28, 1985, Meador, in his capacity as an officer of Phoenix Housing, negotiated a loan of $90,390.41 with Merchants and Planters Bank. The loan was secured by a security interest in all inventory, accounts receivable, and a specific contract for the sale of Unit 1014. The note was due and payable on September 20, 1985, and was personally guaranteed by Meador. The inventory security agreement provided that as long as Phoenix was not in default on the note, it had the right to sell inventory in the ordinary course of business. However, the agreement also provided that the security interest of the bank would attach to all proceeds (whether represented by cash, checks, drafts, notes, chattel paper, open accounts or otherwise) of all sales or other dispositions of borrower's inventory. On December 18, 1985, appellant filed suit for replevin of the inventory, contending the note was in default.

Meanwhile, on September 16, 1985, the Bank of Yellville had made a loan to Jim Meador and Leigh Ann Meador for $45,000.00 and had taken a security interest in a 1985 fourplex modular home, Serial No. 1019, which was under construction. Meador paid Phoenix Housing $40,000.00 of this money as a down payment on Unit 1019. On September 12, 1985, Phoenix Housing executed a "Manufacturer's Statement or Certificate of Origin To a Modular Home" to the Meadors. However, no further work was done on Unit 1019 and it was tendered to the Meadors several months later in an incomplete condition. It was conceded at trial that in its stage of completion the unit was not equal in value to the Meadors' down payment.

The Bank of Yellville intervened in appellant's suit against Phoenix Housing and Meador individually, contending that its lien on Unit 1019 was superior to the appellant's inventory lien. Trial to the court proceeded as to Unit 1019 only. The court held that the Meadors' purchase of Unit 1019 was in the ordinary course of business and that the lien of the Bank of Yellville had priority over the lien of the appellant.

At trial, Jim Meador testified that he had executed the loan from the Yellville bank in order to purchase Unit 1019 from

Phoenix Housing for a contract price of $80,000.00. He admitted the $40,000.00 down payment was larger than a purchaser would normally make, but testified he did it to infuse funds into the failing company. Meador also said he knew none of the money would be paid to appellant. He testified further that he had been a party to the loan appellant made to Phoenix Housing and was familiar with the financing statement and security agreement. He said he knew that the security agreement covered the inventory of Phoenix, but testified he did not think the sale of that unit would violate the security agreement because of the language in the agreement which allowed the sale of inventory in the ordinary course of business as long as the note was not in default.

On September 12, 1985, when Meador claims to have purchased Unit 1019, the note to appellant was not yet due. Meador admitted that Unit 1019 was never delivered to him and testified that he also knew that under the accounting method utilized by Phoenix Housing a unit was not considered sold until it was completed, delivered, and final payment had been received. He said he also knew that work in progress was carried on the books as an asset of the company and that the books of Phoenix Housing never reflected a sale of Unit 1019 to him. On December 5, 1985, Meador testified, Unit 1019 was again sold, this time to Petromark, and the contract for that sale represented the seller as Phoenix Housing.

Charles White, Phoenix Housing's accountant, testified that according to the procedures used by him in keeping the books, a sale was not reflected on the books until the unit was delivered and, in most cases, the final payment was received. He said at no time was a sale actually recorded on the books until delivery of the unit. White also said that, according to the books of Phoenix Housing, no sale of Unit 1019 had been made. The reason for this was because the unit was unfinished and still located in the manufacturing plant.

As its first argument appellant contends the court erred in finding that there was a sale from Phoenix Housing to Jim Meador. Appellant relies on Ark. Stat. Ann. § 85-2-401(2)(Add. 1961) which provides:

> Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes

> his performance with reference to the physical delivery of the goods, ...

Since there was no delivery in the usual manner, appellant contends there was no sale. Appellees, on the other hand, argue that there was a sale because there was a definite agreement to sell Unit 1019, it was identified to the contract, title was transferred and money changed hands. Appellees insist it was not essential that delivery take place for a sale to have occurred under these circumstances. And they point to the Certificate of Origin which states that Unit 1019 "has been transferred" to the Meadors as evidence that delivery was not necessary to pass title in this case as "it was otherwise explicitly agreed." In discussing the sale of goods to be manufactured, 3 R. Anderson, *Uniform Commercial Code* § 2-501:22 (3d ed. 1983), states:

> Title does not pass with identification, as the seller who has not completed his manufacturing of the goods manifestly has not completed his performance "with reference to the physical delivery of the goods," and it is at that time that title passes "*unless otherwise explicitly agreed.*" (Emphasis added.)

Although the issue may be close, we cannot say the trial court's finding that title passed to the Meadors at the time the Certificate of Origin was issued is clearly against the preponderance of the evidence.

Appellant's second point is that the evidence does not support the court's finding that the sale to the Meadors was made in the ordinary course of business. According to Ark. Stat. Ann. § 85-9-307(1)(Supp. 1985), a buyer in the ordinary course of business takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence. Section 85-1-201(9) defines a buyer in the ordinary course of business as "a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind," and section 85-1-201(19) defines good faith as "honesty in fact in the conduct or transaction concerned."

White and Summers, *Uniform Commercial Code*, §

25-13 (2d ed. 1980), states that at least five conditions must be met in order for one to qualify as a buyer in the ordinary course of business under section 85-9-307(1): (1) he must be a buyer in the ordinary course; (2) he must not take the goods in total or partial satisfaction of a preexisting debt; (3) he must have bought the goods from one who was in the business of selling goods of that kind; (4) he must buy in good faith and without knowledge that the purchase was in violation of another's security interest; and (5) the competing security interest must be one created by his seller.

Two cases citing these conditions from the White and Summers Hornbook are informative. *Ex parte General Motors Acceptance Corp.*, 425 So. 2d 464 (Ala. 1983), held that a bank which had financed the purchase of a car from a used car dealer held a lien that was superior to the lien of the dealer's financing company. The court said that section 9-307(1) of the Commercial Code allows a "buyer in the ordinary course of business" to take goods held for sale free of a security interest created by his seller because it is felt that such a buyer has the right to expect that a merchant has the power to sell the goods free of such a security interest, and creditors who know that goods financed by them are inventory must expect the goods will be sold and that buyers in the ordinary course of business will take the goods free of liens. On the other hand, in *ITT Industrial Credit Co.* v. *H & K Machine Service Co., Inc.*, 525 F.Supp. 170 (E.D. Mo. 1981), ITT made a loan to a manufacturing company and took a security agreement on various items of equipment owned by the company. One of those items was later sold to H & K Machine Service Company for its original purchase price and H & K gave the company credit for that amount on its indebtedness to H & K. In holding that H & K did not take the piece of equipment free of the security interest of ITT, the court said H & K was not a buyer in the ordinary course of business because the equipment purchased was not inventory, it was not sold at a profit, and H & K took it as partial cancellation of a preexisting debt.

In the present case, we do not think the evidence previously set out, which is really not in dispute, will support a finding that Jim Meador was a buyer in the ordinary course of business when he purchased Unit 1019. Without restating the evidence, it is enough to say that the amount of Meador's down payment was

larger than usual; the Manufacturer's Certificate of Origin was given to Meador before the unit was completed and before the purchase price was fully paid, both of which were not according to the usual way the matters were handled; after the sale to Meador, Phoenix agreed to refund Meador's money and sell the unit to Petromark, and there is no evidence that such agreement was a usual way of operating; and there was a relationship between Phoenix and Meador which was not the usual customer relationship.

By this last statement we do not mean to suggest that Meador could not make a purchase from Phoenix in the ordinary course of business. The case of *Crystal State Bank* v. *Columbia Heights State Bank*, 203 N.W.2d 389 (Minn. 1973), cited by the appellees, found such a sale where the president and principal shareholder of an automobile dealership purchased a car from his own company. However, that opinion states the sale "resembled in every material way a sale out of inventory to any retail customer." The sale to Meador, simply put, was not such a sale. Meador handled the loan from the appellant bank to Phoenix and was familiar with its details. He was personally liable on the note. He admitted that his large down payment on Unit 1019 was an attempt to infuse capital into Phoenix, and that he knew none of it would be paid to appellant. Obviously, it was to his interest to keep Phoenix operating as long as feasible in order to pay the appellant's note for which Meador was liable. Actually, in this case, regardless of which bank wins, Meador gets his obligation to that bank reduced. We believe that Meador's purchase falls short of the Commercial Code's concept of a "buyer in the ordinary course of business." We think the trial court's finding that he was such a buyer is clearly contrary to the preponderance of the evidence.

Reversed and remanded for proceedings in keeping with this opinion.

CRACRAFT and COULSON, JJ., agree.

Gene BULLOCK and Verla Beth BULLOCK *v.* SHELTER MUTUAL INSURANCE COMPANY and James HOWELL

CA 87-112 729 S.W.2d 436

Court of Appeals of Arkansas
En Banc
Opinion delivered May 27, 1987

Walters Law Firm, P.A., by: *Bill Walters*, for appellants.

Jones, Galbreath, Jackson & Moll, by: *Robert L. Jones, Jr.*, for appellees.

PER CURIAM. The appellants brought this action against Shelter Mutual Insurance Company and its agent, James Howell, contending that both parties were liable to them for negligence in the issuance of an insurance policy ordered by the

appellants. The court entered an order granting summary judgment in favor of the appellee Shelter Mutual Insurance Company but did not direct the entry of final judgment upon an express determination that there was no just reason for delay. The claim against Howell was left pending. Appellants appeal contending that the court should not have granted Shelter Mutual Insurance Company's motion for summary judgment as there were material facts to be determined. Appellees filed this motion to dismiss the appeal. We grant that motion.

Rule 54(b) of the Arkansas Rules of Civil Procedure provides that when multiple parties are involved, or when more than one claim is presented, the trial court may direct the entry of a final judgment as to one or more but fewer than all of the parties or claims only upon an express determination that there is no just reason for delay and upon express direction for the entry of judgment. Here, the order appealed from neither dismissed all of the parties nor directed the entry of final judgment. We dismiss the appeal because the order appealed from is not a final one. *City of Marianna* v. *Arkansas Municipal League*, 289 Ark. 473, 712 S.W.2d 305 (1986); *3-W Lumber Company* v. *Housing Authority*, 287 Ark. 70, 696 S.W.2d 725 (1985); ARCP Rule 54(b).

The appellees' motion to dismiss the appeal was not filed in this court until after the appellant had obtained and lodged a transcript of the record consisting of 112 pages and filed a brief and abstract containing over 50 pages. This practice in many cases occasions delay in the trial court's disposition of remaining issues, needless expense and effort in transcribing records, and the writing of useless briefs on the merits. A better practice would be to file with this court a partial transcript, containing a copy of the order, and a motion to dismiss as soon as the jurisdictional defect becomes apparent. We, today, issue a caveat to counsel that in the future, where this practice is not followed, sanctions may be imposed, unless good cause for delay in presenting the motion can be shown.

Dalton L. SMITH *v.* CARRIER AIR CONDITIONING, et al.

CA 87-18 730 S.W.2d 509

Court of Appeals of Arkansas
Division I
Opinion delivered June 10, 1987

[redacted]

Gary Eubanks & Associates, by: *James Gerard Schulze*, for appellant.

Friday, Eldredge & Clark, by: *C. Tab Turner*, for appellees.

GEORGE K. CRACRAFT, Judge. Dalton L. Smith appeals from an order of the Arkansas Workers' Compensation Commission denying him benefits under the rule announced in *Shippers Transport of Georgia* v. *Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979). In order for the *Shippers* defense to apply three factors must be proved: (1) the employee must have knowingly and willfully made a false representation as to his physical condition on an employment application; (2) the employer must have relied on the false representation and that reliance must have been a substantial factor in the hiring; and (3) there must be a causal connection between the previous condition about which the representation was made and the injury for which the claimant seeks compensation.

The appellant concedes that the evidence supports both the finding that he had injured his lumbar spine on at least two occasions prior to his employment application and the finding that he willfully and knowingly misrepresented that fact in that application. He contends only that the evidence is insufficient to support the finding that there was a causal connection between the two injuries. Appellant argues that, as there was no expert medical testimony relative to a causal connection between the two injuries, the Commission could not find such a connection. We do not agree.

Our court has ruled that ordinarily a claimant can sustain his burden of proving a causal connection between his injury and his work by either medical or lay testimony and that awards in all cases need not be accompanied by a definite medical diagnosis. In appropriate circumstances, awards may be made when medical evidence is inconclusive, indecisive, fragmentary, or even nonexistent. *American Can Co.* v. *McConnell*, 266 Ark. 741, 587 S.W.2d 583 (1979); *Harris Cattle Co.* v. *Parker*, 256 Ark. 166, 506 S.W.2d 118 (1974); *Crain Burton Ford Co.* v. *Rogers*, 12 Ark. App. 246, 674 S.W.2d 944 (1984). It is apparent,

however, that the court has required more convincing evidence in those cases where the *Shippers* defense is in issue. The rule seems to be now well settled that the Commission's finding of causal connection must be based on expert medical testimony except in the most obvious cases. *DeFrancisco* v. *Arkansas Kraft Corp.*, 5 Ark. App. 195, 636 S.W.2d 291 (1982); *Baldwin* v. *Club Products Co.*, 270 Ark. 155, 604 S.W.2d 568 (Ark. App. 1980). Our standard of review of workers' compensation cases, however, is to determine if the finding of the Commission is supported by substantial evidence. *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979).

The appellant was employed by appellee in February of 1985. In July of 1985, he experienced back pain while in the course of ordinary and normal activity and which did not result from extraordinary trauma. The medical reports showed a bulging disc at the L4-5 level resulting in L4-5 nerve root compression. The evidence indicated that in October of 1983 he was diagnosed with disc impairment at the L4 and L5 levels, and that degenerative changes in the facet joints in that area were observed. Both the 1983 and 1985 injuries were in precisely the same area and were of the same type. At the time the injury occurred, the appellant was doing nothing unusual and was performing the usual and customary duties of his employment. These factors are supportive of the Commission's finding as to the obvious nature of the causal connection. We cannot conclude that the finding is not supported by substantial evidence.

The appellant next contends that the defense of misrepresentation should be abolished because there is no prohibition against misrepresentation contained in the Workers' Compensation Act. He argues that it was a duty of the court to interpret the act and, as the act is silent as to the effect of false representations, the court should not have entered that area.

This argument was advanced and rejected in *Shippers*. The court recognized that the statute was silent as to the effect of false misrepresentations except in case of occupational diseases. The court held that public policy requires an obligation on the part of an employee, upon inquiry, to be truthful to the employer about pre-employment health conditions. The court concluded that "public policy, in the absence of a clear legislative intent to

the contrary," required the application of the rule it adopted. The legislature has met on several occasions since that opinion was rendered and has not seen fit to declare a different legislative intent. The court of appeals has adhered to that rule on numerous occasions since *Shippers*. We conclude that the rule is a sound one and decline to now reconsider it.

Affirmed.

CORBIN, C.J., and COOPER, J., agree.

W.D. MOORE and Evelyn MOORE *v.* Hattie MOORE, Individually and as Executrix of the ESTATE of Doyle MOORE, Deceased, et al.

CA 86-311 731 S.W.2d 215

Court of Appeals of Arkansas
Division II
Opinion delivered June 10, 1987
[Rehearing denied July 8, 1987.*]

* Corbin, C.J., not participating.

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Friday, Eldredge & Clark, by: *Michael G. Thompson, James Edward Harris*, and *J. Lee Brown*; and *Roy Finch*, for appellant W.D. Moore.

Cliff Jackson, P.A., for appellant-intervenor Evelyn Moore.

Hilburn, Bethune, Calhoon, Harper & Pruniski, Ltd., by: *Sam Hilburn* and *Paula Jamell Storeygard.*

JAMES R. COOPER, Judge. The appellant, W.D. Moore, filed suit against the executrix of his deceased brother's estate, the appellee Hattie Moore, alleging that he was entitled to one-half of the stock of a corporation, Arkansas Parts Warehouse, Inc. W.D. Moore based his complaint on a 1952 contract executed by the brothers which provided that W.D. Moore was to be the beneficial owner of one-half of the outstanding stock of the corporation, and that Doyle Moore was to hold the title in his name. W.D. Moore alleged that his brother was the trustee for his one-half of the stock, and asked the court to find that there was an implied, resulting, or constructive trust.

The other appellant, intervenor Evelyn Moore, is the estranged wife of the appellant, W.D. Moore. In her complaint filed August 5, 1985, she alleged that she was a third party beneficiary to the 1952 contract, and that both brothers had committed fraud against her by lying during depositions taken during pending divorce proceedings and attempting to hide the true ownership of the corporation's stock and other property.

The appellee answered, denying the allegations and pleading the affirmative defenses of the statute of non-claim, statute of limitations, estoppel, and laches. A hearing was held on January 21, 1986, and by agreement of the parties, the chancellor first heard the arguments of counsel on the affirmative defenses. Ruling from the bench, the chancellor dismissed Evelyn Moore's claims. A decree, dated April 22, 1986, was entered *nunc pro tunc*

dismissing the claims of both appellants. However, before the entry of the written order, the appellants attempted to amend their complaint. In the amended complaint, W.D. Moore alleged that he was also entitled to one-half ownership of two parcels of real estate, and he added the other appellees as necessary parties, alleging that they had been wrongfully issued stock. The chancellor also dismissed the amended complaint on the grounds of res judicata, collateral estoppel, statute of non-claim, statute of limitations, unclean hands and equitable estoppel.

In this appeal, the appellants argue that the chancellor erred in dismissing their complaints on the grounds of non-claim and statute of limitations, and that the chancellor erred in dismissing their amended complaints. The appellant, Evelyn Moore, also argues that the trial court erred in dismissing her complaint in intervention based upon the fact that she was not a third party beneficiary to the contract, and that he erred in dismissing her fraud claim without taking any evidence. We find the trial court was correct in dismissing the claims of the intervenor, but erred in dismissing the claims of W.D. Moore.

For the sake of clarity, we will first address Evelyn Moore's arguments, then the arguments of W.D. Moore concerning the dismissal of the complaint, and then the amended complaint. Only facts necessary to an understanding of the issues involved will be recited.

THE TRIAL COURT DID NOT ERR IN DISMISSING THE COMPLAINTS OF THE APPELLANT/ INTERVENOR, EVELYN MOORE.

The chancellor first found that the intervenor, Evelyn Moore, had no interest in the stock in her own right, and we agree. Any rights she may have had in the stock, or in the real property, would vest through her relationship with her husband, W.D. Moore. At the time of the hearing they had been separated since 1974, and, even though a divorce was pending, they had not been divorced. Arkansas Statutes Annotated § 34-1214(a) (Supp. 1985) states that marital property shall be distributed at the time the divorce decree is entered. A chancellor has no authority to dispose of property rights in an award of separate maintenance. *Coleman* v. *Coleman*, 7 Ark. App. 280, 648 S.W.2d 75 (1983). Therefore, even if the chancellor had heard the merits of the case

and decided in favor of W.D. Moore, he would have had no authority to issue the intervenor her share.

The appellant's argument that she is a third party beneficiary to the contract between the two brothers is also without merit. There is a presumption that parties contract only for the benefit of themselves, and a contract will not be considered as having been made for the use and benefit of a third party unless it clearly appears that this was the intention of the parties. *Brown* v. *Summerlin Associates, Inc.*, 272 Ark. 298, 614 S.W.2d 227 (1981). Nowhere does the intervenor's name appear in the 1952, or later, contracts. At the time the contract was executed, the brothers believed that it was a violation of the Fair Trade Laws to operate their auto parts business at both the wholesale and retail levels. Therefore, they dissolved their partnership and issued all of the stock in the new corporation to the now-deceased brother. The contract stated that W.D. Moore had beneficial ownership in one-half of the stock of the corporation. The only other written contract executed by the brothers is one which provided for the continuity of the business in the case of death or disability of one of the brothers. However, that contract was later rescinded by a written agreement signed by both brothers and their wives.

The appellant's arguments regarding fraud are also meritless. It is true that, in some circumstances, the wife may be able to sue her husband for tortious fraud. *See Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986); *Leach* v. *Leach*, 227 Ark. 599, 300 S.W.2d 15 (1957). However, the intervenor admitted that she suspected in 1974 that her husband and his brother had lied and were attempting to defraud her. Therefore, the trial court was correct in dismissing any fraud claim the intervenor may have had on the grounds of the statute of limitations. Ark. Stat. Ann. § 37-206 (Repl. 1962).

THE TRIAL COURT ERRED IN DISMISSING W.D. MOORE'S CLAIM TO THE STOCK ON THE BASIS OF THE STATUTE OF NON-CLAIM.

The trial court found that W.D. Moore's claim to the stock was based on breach of trust and that it was barred by the statute of non-claim, which, at the time of Doyle Moore's death, provided that contract actions against a decedent's estate were to be filed or verified to the personal representative within six months after the

date of the first publication of notice to creditors or be forever barred. Ark. Stat. Ann. § 62-2601(a) (Repl. 1971). The brother, Doyle Moore, died on September 1, 1982, and notice to creditors was first published on September 17, 1982. W.D. Moore's complaint was not filed until 1985. However, we find that W.D. Moore's complaint was timely filed because his cause of action was based on breach of title.

The statute of non-claim does not refer to claims of title or for the recovery of property, as claims of such character are not claims against the estate of the deceased. *Morton* v. *Yell*, 239 Ark. 195, 388 S.W.2d 88 (1965); *Fred* v. *Asbury*, 105 Ark. 494, 152 S.W. 155 (1912). This rule clearly applies to the recovery of real estate. The appellees argue that the rule applies only to real estate. We disagree.

The purpose of the statute of non-claim is to facilitate payment of claims against an estate within a particular time period, and not to defeat a just claim on a technicality that might entrap the claimant. *Parham* v. *Pelegrin*, 468 F. 2d 719 (8th Cir. 1972). This purpose is not advanced by limiting the exception to claims for real estate, especially when, as in the case at bar, the claimant is not seeking recovery of a debt, but is asking the representative of the decedent's estate to return to him property that belongs to him. As stated in C.J.S.:

> [P]resentation is ordinarily required of all claims against [the] decedent, the term "claims" comprehending such debts or demands as might have been enforced against the decedent by personal actions for the recovery of money; but claims of title or for the possession or recovery of specific property need not be presented.

34 C.J.S. *Executors and Administrators* § 398 (1942). In the present case, W.D. Moore alleges that identifiable personal property in the hands of the administrator of Doyle Moore's estate belongs to him; he is not claiming that the stock is owed to him as a debt or claiming money for the value of the stock. Therefore, we hold that the chancellor erred in dismissing the complaint as it pertained to the stock.

THE TRIAL COURT ERRED IN DISMISSING W.D. MOORE'S CLAIM TO CERTAIN REAL ESTATE BASED ON THE STATUTE OF LIMITATIONS.

Although the issues concerning the real estate were not raised by W.D. Moore in his first complaint, the chancellor allowed the attorneys to argue the affirmative defenses pled by the appellees as they applied to the real estate. One tract in question, located in Little Rock, is a parcel of land on which the business is now situated, purchased by Doyle and Hattie Moore. The other parcel of land is located in Fayetteville, Arkansas.

W.D. Moore again bases his claim on the 1952 contract. That contract provided that both of the brothers would own one-half of any commercial enterprise either is engaged in, and the only exclusions were the respective homes and personal property of the parties, or any real estate purchased by them for speculation out of individual funds.

The trial court found that, if a trust relationship existed, the appellant, W.D. Moore, was put on constructive notice that the trust was being repudiated when Doyle Moore conveyed the Little Rock property to the Doyle Moore Investment Trust on December 31, 1976, and thus his claim was barred by the statute of limitations. We disagree.

In order to set the statute of limitations in motion in favor of the trustee, the trust must terminate as by its own limitation or by settlement of the parties, or there must be a repudiation of the trust by the trustee and an assertion of an adverse claim by him, and the fact made known to the beneficiary of the trust. *McPherson* v. *McPherson*, 258 Ark. 257, 523 S.W.2d 623 (1975). When the statute of limitations has been pled, the party relying on it has the burden of proving those facts giving rise to it. *Beeson* v. *Beeson*, 11 Ark. App. 79, 667 S.W.2d 368 (1984).

The appellees argue on appeal that the trust was repudiated in 1976 when Doyle Moore conveyed the land to the Doyle Moore Investment Trust. We cannot find any evidence in the record that W.D. Moore had knowledge of this conveyance. We do not agree that the mere recordation of the deeds put W.D. Moore on constructive notice. In *Beeson, supra*, the recordation of the deeds was held to be a repudiation because the deeds conveying the land

to the trustee were executed with the understanding that they were not to be recorded during the lifetime of the beneficiary. Also cited by the appellees is the case of *Waller* v. *Waller*, 15 Ark. App. 336, 693 S.W.2d 61 (1985). In that case the appellee, who was the ex-wife of the appellant, used her funds to purchase a home, but took title as husband and wife. Later, the appellant refused to convey the property to the appellee when she so requested, but he still recognized her as the sole owner. We held there that the appellee relied on the appellant's actions recognizing her as the lawful owner, and held that the statute of limitations did not run.

In the case at bar, W.D. Moore had no knowledge of any repudiation until Hattie Moore fired him and evicted him from the premises in December 1984. From the time the property was purchased in the names of Hattie and Doyle Moore, through the time the property was conveyed, and continuing up until the point in time that Hattie Moore dismissed him, W.D. Moore worked at the company in the same capacity he always had; he drove a company car, used company credit cards and was paid by the company in the same manner as in the years before his brother's death. We hold that the evidence will not support a finding that the trust was repudiated in 1976. The document giving rise to a possible trust relationship does not forbid conveying the land, there is no evidence that W.D. Moore had any knowledge that the land had been conveyed nor is there any evidence that the appellees made any changes in company management sufficient to put W.D. Moore on notice that a trust relationship had been repudiated.

We do not mean to suggest that a trust did in fact exist. That is a matter for the trial court to decide after hearing all the evidence. We only hold that if a trust relationship did exist, it was not repudiated until December 1984, and thus, the statute of limitations did not begin to run until then.

THE TRIAL COURT ERRED IN DISMISSING THE AMENDED AND SUBSTITUTED COMPLAINT OF W.D. MOORE.

W.D. Moore filed an amended complaint on April 14, 1986, adding the other appellees as co-defendants and alleging that a fiduciary relationship existed between Doyle and W.D. Moore.

The amended complaint also included the claims regarding the real property. The chancellor dismissed the complaint, stating that the appellants were attempting to add new causes of action and new parties. He also found that the amended complaint was barred by res judicata, statute of limitations, laches, equitable estoppel, and the doctrine of unclean hands.

It was error for the trial court to dismiss the amended complaint based on res judicata because the amended complaint was filed before the trial court issued its order. The appellees argue that res judicata does apply because the trial court entered its order *nunc pro tunc* and that the order relates back to the date of trial. We disagree.

A *nunc pro tunc* order may be entered to make the court's record speak the truth or to show that which actually occurred. *Southern Farm Bureau Casualty Insurance Co.* v. *Robinson*, 238 Ark. 159, 379 S.W.2d 8 (1964). However, it may not be used to accomplish something which ought to have been done but was not done. *Fitzjarrald* v. *Fitzjarrald*, 233 Ark. 328, 344 S.W.2d 584 (1961); *Dickey* v. *Clark*, 192 Ark. 67, 90 S.W.2d 236 (1936). Courts are not permitted to enter a *nunc pro tunc* order simply because such order should have been entered at that time; rather *nunc pro tunc* orders are only properly issued where such orders were properly made, but through clerical misprision were not entered. *Canal Insurance Co.* v. *Arney*, 258 Ark. 893, 539 S.W.2d 178 (1975). A judgment or decree is effective only when it is entered by filing with the clerk as provided by ARCP Rules 58 and 79. *Koelzer* v. *Bagley*, 13 Ark. App. 48, 680 S.W.2d 111 (1984). Thus, res judicata could not apply to the amended complaint because it was filed prior to the date the judgment was entered and became effective.

The discussion of the dismissal on the grounds of the statute of non-claim and statute of limitations also applies to the dismissal of the amended complaint on the grounds of the statute of limitations and statute of non-claim. Basing the dismissal on laches was also error. We have found that W.D. Moore's cause of action arose in December 1984, when Hattie Moore dismissed him. W.D. Moore filed his complaint a few months later on February 19, 1985. Laches refers to the inequity caused by unreasonable delay where the party claiming the

defense of laches has changed his position to his detriment. *Beeson* v. *Beeson, supra.* We can find no unreasonable delay on the part of W.D. Moore nor can we find any facts which would support a conclusion that the appellees relied to their detriment on an unreasonable delay.

The chancellor also stated in the order dismissing the amended complaint that the appellant was attempting to add new causes actions and new parties. However, we fail to see how the amended complaint addresses any new causes of action. While W.D. Moore made no claim regarding the real estate in his original complaint, the trial court did allow the appellant to present his cause of action at the pre-trial hearing and allowed the attorneys for all parties to argue the merits of the affirmative defenses as they applied to the real estate. Thus, the allegations regarding the real estate cannot be called new causes of action. The additional parties were beneficiaries of Doyle Moore's will and were necessary parties to the action. *See* ARCP Rule 19(a). Therefore, it was error for the chancellor to dismiss the amended complaint on the ground that W.D. Moore was attempting to add new parties and causes of action.

It was also error for the trial court to dismiss the amended complaint on the grounds of unclean hands. The chancellor apparently mentioned this doctrine because W.D. Moore, in an attempt to prevent his estranged wife from receiving her marital share of the company, stated in a deposition that he did not own any stock, and that his brother, Doyle Moore, owned it all. However, the appellees in this case were not the victims of the alleged attempted fraud and it is clear that Doyle Moore was an active participant in the scheme. One guilty of fraud may not invoke the unclean hands doctrine. *Anthony* v. *First National Bank of Magnolia*, 244 Ark. 1015, 431 S.W.2d 267 (1968). If the unclean hands doctrine is used to defeat a suit, it must have an immediate and necessary relation to the equity which the complainant seeks to enforce against the defendant, and the party complaining of the wrong must have been injured thereby to justify the application of the principle of unclean hands. *McCune* v. *Brown*, 8 Ark. App. 51, 648 S.W.2d 811 (1983). The purpose of the doctrine is to secure justice and equity and not to aid one in an effort to acquire property to which he has no right. *McCune, supra.* Since Doyle Moore was, according to the testimony, an

active participant in the conduct sought to be used to bar W.D. Moore's claim, equity should not use the doctrine to aid Doyle Moore's estate.

The final issue is whether the amended complaint is barred by equitable estoppel. We hold that the trial court erred in finding that it is. Again the trial court based its finding on the statements W.D. Moore made in the depositions taken in contemplation of his divorce.

To successfully assert the defense of equitable estoppel four elements must be shown:

1) the party to be estopped must know the facts; and,

2) he must intend that his conduct shall be acted on or must so act that the party asserting estoppel has a right to believe the other party so intended; and,

3) the party asserting estoppel must be ignorant of the facts; and,

4) the party asserting estoppel must rely on the other's conduct to his detriment.

Linda Elena Askew Trust v. *Hopkins*, 15 Ark. App. 19, 688 S.W.2d 316 (1985); *Wells* v. *Everett*, 5 Ark. App. 303, 635 S.W.2d 294 (1982).

The evidence in this case simply will not support affirmative findings on all of these elements. There is no evidence that W.D. Moore intended his brother and his family to believe that he had no interest in the stock and property, and W.D. Moore's conduct indicates the opposite. He continued to work for the company, had a company credit card, and drove a company car. We cannot find any evidence in the record that indicates that Hattie Moore and the other appellees were ignorant of the true facts. There has been no showing that any of the appellees relied to their detriment on W.D. Moore's conduct or statements.

In summary, we affirm the dismissal of the complaint of the

appellant/intervenor, but we reverse the trial court's dismissal of the complaint and amended and supplemental complaint of the appellant W.D. Moore, and we remand the case to the trial court for further proceedings consistent with this opinion.

Affirmed in part.

Reversed and remanded in part.

COULSON and MAYFIELD, JJ., agree.

Merle A. REVES *v.* Estalee P. REVES

CA 86-312 730 S.W.2d 904

Court of Appeals of Arkansas
Division II
Opinion delivered June 10, 1987

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Stripling & Morgan, by: *Dan Stripling*, for appellant.

John C. Aldsworth, for appellee.

JAMES R. COOPER, Judge. The parties in this divorce case were married for approximately 23 years when the appellee filed her complaint for divorce on February 13, 1984. Prior to a formal hearing on the complaint, the parties reached an agreement. At a hearing held on April 5, 1984, the terms of the agreement were read into the record. A consent decree based upon the agreement, and approved by both parties' attorneys, was filed on May 2, 1984. On November 4, 1985, the appellee filed a petition to execute the terms of the decree, alleging that the parties could not comply with the May 1984 consent decree. On January 10, 1986, the appellee filed a motion for temporary maintenance and child support. After a hearing on March 3, 1986, the chancellor entered a decree substantially different from the consent decree of May 2, 1984. The March 1986 decree required the appellant to pay child support in the amount of $200.00 per month. The appellant failed to pay child support as ordered, and, after a hearing on May 5, 1986, he was found to be in willful contempt of

court. From that order, and from the decree of March 3, 1986, comes this appeal.

For reversal, the appellant contends that the chancellor erred in requiring him to pay child support; in amending the 1984 consent decree to eliminate the appellee's obligation to pay the appellant $5,000.00 from the proceeds of the sale of a 230-acre tract of land; in failing to secure for the appellant a coin collection that was part of the property subject to the 1984 agreement; in ordering an automobile sold and the proceeds divided; in ordering that a brass bed and the proceeds from the sale of a bull be divided equally between the parties; and in holding the appellant in contempt of the March 1986 order to pay child support. We affirm in part, and reverse in part.

The May 1984 consent decree awarded custody of the parties' three minor children to the appellee, and provided that the appellant would have no right of visitation, and no duty to pay child support. The decree further provided that a 230-acre tract of real property held by the parties as tenants by the entirety would be sold to a third party pursuant to an existing contract of sale for a cash purchase price of $65,000.00. The appellant was to receive $5,000.00 out of the proceeds of the sale, and the appellee was to receive all of the remaining proceeds, minus costs of the sale, attorneys' fees, and satisfaction of an outstanding mortgage on the property. The decree provided that, in the event the contract for the sale of the property was not performed, the parties would take all necessary steps to preserve the full value of the property, and would sell the real property as expediently as possible. With respect to a house and 3/4 of an acre of real property acquired during the marriage, the decree required the appellant to quitclaim his interest therein to the appellee so that full legal title should be vested in her. The appellee was to retain all of the household furniture, appliances, etc., with the exception of certain power tools, books, and magazines that were to be retained by the appellant. A herd of approximately 44 head of cattle was to be sold by the appellee at the best market price obtainable at the earliest possible date; the appellant was to receive $2,500.00, and the appellee was to retain all the remaining cattle, or the proceeds thereof. The appellant was to retain the entire family coin collection and a 1972 GMC pickup truck, while the appellee was to retain a 1968 pickup truck. Finally, the decree

provided that "the court retains control of this cause for such further orders and proceeds [sic] as may be necessary to ascertain definitely, and enforce, the rights of the parties hereto in the property herein referred to."

The record reveals that the parties were unable to carry out the provisions of the May 1984 consent decree. The 230-acre tract did not sell pursuant to the contract of sale that had been in effect at the time the May 1984 decree was rendered. Moreover, a subsequent offer and acceptance agreement for the sale of that property failed as well, because the terms of that agreement were not acceptable to the appellant. The division of the proceeds of the sale of the cattle was frustrated when the parties could not agree upon who was responsible for satisfaction of a $2,150.00 lien against the cattle. The appellee contended she had not been aware of this debt at the time the May 1984 consent decree was entered. Finally, the record shows that the coin collection, which the appellant was to retain under the terms of the May 1984 decree, was never delivered to the appellant, but instead had been sold by the parties' grown children. The parties' daughter, Karen, sold some of the coins, and used the proceeds to buy a refrigerator for the appellee. Doug, the parties' son, sold the remaining coins, and purchased a 1972 automobile with the proceeds. Doug kept the 1972 automobile for himself, and gave his own 1981 pickup truck to the appellee.

On November 4, 1985, the appellee filed a petition to execute the terms of the May 1984 decree. Subsequently, she moved for maintenance and child support. A hearing was held on March 3, 1986. In a decree of March 20, 1986, the chancellor found that circumstances arising after the issuance of the May 1984 decree prevented that decree from being carried out completely, but he affirmed the terms of that decree and stated his intent to follow them in spirit. He also found that both parties had been guilty of contemptuous behavior regarding the disposition of marital property: the appellee, by virtue of her failure to prevent Karen and Doug from disposing of the coin collection; and the appellant, for failing to disclose the $2,150.00 lien on the cattle, and for refusing to sign the second offer and acceptance agreement for the sale of the 230-acre tract.

The most salient differences between the May 1984 decree

and the decree of March 1986 were that, under the terms of the latter decree, the appellant was no longer to receive $5,000.00 from the sale of the 230-acre tract; the appellant was ordered to pay child support in the amount of $200.00 per month; the appellant was to receive only $420.00 from the appellee as credit for the disposition of the coin collection, and was to pursue any further remedy for the loss of the collection against Karen and Doug, who had sold it; and the parties were to divide equally the proceeds of a bull, which the appellant had sold subsequent to the parties' separation, but prior to the issuance of the May 1984 decree. Finally, the chancellor ordered that a Lincoln automobile and a brass bed were to be sold at public auction, and the proceeds divided equally between the parties.

The appellant subsequently failed to pay child support as required by the March 1986 decree. In an order filed May 5, 1986, the chancellor found him in contempt, and ordered him to be taken into custody until he purged himself of the contempt by paying the child support arrearages, court costs, and attorney's fees.

The appellant initially contends that the chancellor erred in requiring him to pay child support. He argues that the chancellor lacked the authority to amend the decree to include a support order, and that, in any event, there was no showing of changed circumstances that would justify the award of child support. We do not agree.

With respect to the appellant's argument concerning the chancellor's authority to amend the decree to provide for child support, the general rule is that the court cannot alter or modify an independent contract, incorporated and made part of the divorce decree. *McInturff* v. *McInturff*, 7 Ark. App. 116, 644 S.W.2d 618 (1983). An exception to the general rule exists with respect to independent contracts dealing with child support and child custody: such provisions are generally not binding on the courts. *Id.*, 644 S.W.2d 618. Nevertheless, when the parties execute a property and support settlement agreement in which the provisions dealing with property, debt, alimony, and child support constitute reciprocal considerations the court cannot later alter or modify the decree based on such an independent contract unless the parties have provided for or agreed to the

modification. *Id.*, 644 S.W.2d 618. The question of the authority of the chancellor to modify the parties' agreement to provide for child support in the instant case thus involves a two-step analysis: first, was the agreement between the parties which was read into the record at the April 5, 1984, hearing an "independent contract," and, second, if an independent contract existed, was it an "integrated agreement" in which the property, debt, alimony, and child support provisions constituted reciprocal consideration?

The Arkansas cases dealing with the chancellor's authority to modify the alimony and child support provisions of a decree based upon an agreement between the parties distinguish between two types of agreements: an "independent contract," and a "less formal" agreement. The significance of the distinction was pointed out in *Seaton* v. *Seaton*, 221 Ark. 778, 255 S.W.2d 954 (1953):

> 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 husband, in contemplation of the divorce, binds himself to pay a fixed amount or fixed installments for his wife's support. Even though such a contract is approved by the chancellor and incorporated in the decree . . . it does not merge into the court's award of alimony, and consequently . . . 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'. [Citations omitted.] A contract of the latter character is usually less formal than an independent property settlement; it may be intended merely as a means of dispensing with proof upon an issue not in dispute, and by its nature it merges in the divorce decree.

221 Ark. at 780, 255 S.W.2d at 955-56 (emphasis supplied). Our review of the cases leads us to the conclusion that the question of the existence of an independent contract, as opposed to a mere

informal agreement, turns upon the intent of the parties; if they intend that there should be an independent remedy at law upon the agreement in the event that equity declines to enforce its provisions, then the agreement is an independent contract. If, however, the parties merely agree upon the amount to be paid without intending to create an independent cause of action based on the agreement, the agreement is an informal one which the chancellor may modify without doing violence to contractual rights.

Our conclusion that the intent of the parties is the controlling factor in distinguishing between independent contracts and informal agreements is borne out by *Law* v. *Law*, 248 Ark. 894, 455 S.W.2d 854 (1970). In *Law*, the Supreme Court held that the burden of proving that the agreement was an independent contract was on the party so asserting, and, noting that the agreement in that case was not reduced to writing, and was evidenced only by the recitals in the decree, stated that there was nothing in the decree to indicate that the agreement was intended to be anything other than a stipulation as to the amount that the court should fix for alimony; i.e., there was no evidence that the agreement was intended to create an independent cause of action. That the intent of the parties is the determinative factor in distinguishing independent contracts from mere informal agreements is also demonstrated in *Songer* v. *Songer*, 267 Ark. 1075, 594 S.W.2d 33 (Ark. App. 1980). The decree in *Songer* made detailed provisions for alimony, child support, and the division of property. However, when a petition to modify the decree was subsequently presented, the chancellor held that the alimony portion of the decree was not subject to modification because he "had nothing to do with" the division of property. *Id.* at 1076, 594 S.W.2d at 34. We reversed and remanded that case for a determination of whether the decree should be modified, noting that "there is nothing, written or otherwise, showing *intent that any agreement be enforceable separately from the decree.*" *Id.* at 1077, 594 S.W.2d at 35 (emphasis supplied). A final case indicating that the test for distinguishing between an independent contract and an informal agreement is the intent of the parties to create an independently enforceable contract is *Armstrong* v. *Armstrong*, 248 Ark. 835, 454 S.W.2d 660 (1970), in which the Supreme Court upheld the chancellor's finding of an

independent contract. In so doing, the Court examined the provisions of the agreement to determine whether they indicated that the parties would have expected the provisions to be subject to subsequent modification; e.g., the Court found the provision of alimony for life or until remarriage to indicate an independent contract, because, under an alimony order entered by the chancellor in the absence of an independent agreement, the amount of alimony payable could be modified or reduced to zero should the wife later become independently wealthy. Likewise, a provision requiring the husband to repay a loan made to him by his wife was seen as indicative of an independent contract, because "it could not have been contemplated that the court would have the right to relieve the appellant of this obligation." *Id.* at 840, 454 S.W.2d at 663. The *Armstrong* Court concluded its inquiry into the particulars of the agreement with the statement that "[t]hese provisions are referred to as a matter of showing that the parties, when entering into their agreement, desired an independent contract that could be enforced in a court of law as well as in chancery." *Id.*, 454 S.W.2d at 663.

The agreement between the parties in the case at bar is not evidenced in writing, but rather was read into the record at the hearing of April 5, 1984. The agreement made no provision for alimony, and, although there were detailed provisions for the division of marital property, many of these provisions were never carried out. The appellant bears the burden of proving that the agreement constituted an independent contract. *Law* v. *Law, supra.* To prevail under the authorities discussed above, he must show that it was the intent of the parties to create an independent cause of action at law in the event that equity declined to enforce the decree. The intent of the parties to create a contract is a question for the finder of fact. *R.G. Varner Steel Products, Inc.* v. *Puterbaugh*, 233 Ark. 953, 349 S.W.2d 805 (1961).

Although chancery cases are tried *de novo* on appeal, the chancellor's findings of fact will not be reversed unless they are clearly against the preponderance of the evidence. *Pennybaker* v. *Pennybaker*, 14 Ark. App. 251, 687 S.W.2d 524 (1985). We review the testimony in the light most favorable to the appellee, and indulge all reasonable inferences in favor of the decree. *Gooch* v. *Gooch*, 10 Ark. App. 432, 664 S.W.2d 900 (1984). In the case at bar the record contains testimony by the

appellant which, if believed, would tend to show that he consented to give the appellee a larger share of the marital property in exchange for her agreement that he would not be required to pay child support. However, the decree in which the agreement was embodied provided that the chancery court would retain control of this action for further orders and proceedings as might be necessary to further ascertain and enforce the parties' rights in the property disposed of, which indicates that the parties were willing to look to the chancery court for the enforcement of their rights, rather than pursue an action at law in circuit court. Nowhere in the record is there any clear-cut indication that the parties intended to create a separately enforceable cause of action at law to enforce their agreement. Under these circumstances, and giving due regard to the superior position of the chancellor to assess the credibility of the parties, we hold that the chancellor could properly find that the parties entered into an informal agreement, as opposed to an independent contract. As no independent contract was involved, the chancellor had the authority to modify the decree to provide for child support. *Law* v. *Law, supra; McInturff* v. *McInturff, supra.* Our resolution of this issue makes it unnecessary to decide whether an integrated agreement of the type described in *McInturff* existed.

The appellant next contends that the award of child support was improper because the appellee failed to show a sufficient change in circumstances to justify such an award. We disagree. Although the appellant correctly states that increased child support may be awarded only upon a showing of a sufficient change in circumstances, *Glover* v. *Glover*, 268 Ark. 506, 598 S.W.2d 736 (1980), we think that such changed circumstances were present in the case at bar. There was evidence that the failure of the 230-acre farm to sell and the resulting deadlock between the parties created an unanticipated lack of support for the parties' children. Viewing the evidence in the light most favorable to the appellee, we find that the chancellor's finding of changed circumstances was not clearly erroneous. In light of our findings that the chancellor had the authority to modify the decree, and that the finding of changed circumstances is supported by the evidence, we hold that the chancellor did not err in ordering the appellant to pay child support.

The appellant next contends that the chancellor erred

in amending the May 1984 decree to eliminate the appellee's obligation to pay the appellant $5,000.00 out of the proceeds of the 230-acre tract. He cites *Harrison* v. *Bradford*, 9 Ark. App. 156, 655 S.W.2d 466 (1983), for the proposition that the chancellor lacked authority to set aside or modify the May 1984 decree. The decree at issue in *Harrison* recited that the property rights of the parties had been settled, and specifically provided for the disposition of various property. The property rights mentioned in the decree, however, were not at issue in *Harrison.* Instead, the controversy in that case revolved around the parties' rights to a sixteen-acre tract not mentioned in the decree. We held that, under those circumstances, the chancellor erred in modifying the decree to determine the parties' respective interests in the sixteen-acre tract, because the chancellor lacked authority to modify the decree after the lapse of the term of court in which the decree had been entered. Although terms of court have been abolished, this limitation on the power of a court over its final decrees was carried over in ARCP Rule 60(b), which permits the trial court to modify an order or decree within 90 days of its having been filed with the clerk. *Id.*, 655 S.W.2d 466.

The record in the case at bar indicates that the chancellor's intent in modifying that portion of the decree relating to the division of the proceeds of the sale of the 230-acre tract was not to deprive the appellant of his entire $5,000.00 share awarded in the earlier decree, but instead was to reduce that award by the amount of the lien on the cattle which the appellant failed to disclose at the time of the original agreement. We think that the situation presented in the case at bar is to be distinguished from the circumstances of *Harrison.* While the sixteen-acre tract in *Harrison* had never been mentioned in the chancellor's decree, the May 1984 decree in the case at bar specifically provided for the sale of both the 230-acre tract and the cattle. We find it significant that the May 1984 decree did not simply divide the tract and the cattle in kind between the parties, but instead ordered that this property be sold, with the proceeds of the sale to be divided between the parties at some future date. The situation thus resembles that presented in *Carter* v. *Olsin*, 228 Ark. 629, 309 S.W.2d 328 (1958), in which the trial court had ordered a party to replace a fence, and fixed the date for compliance beyond the expiration date of the term of court in which the order was

issued. The *Carter* Court held that the order to replace the fence was, in effect if not in fact, in the nature of a mandatory injunction, and that, under such circumstances, the trial court did not lose control or jurisdiction with the lapse of the term of court. 228 Ark. at 632-32; *see also Hardy* v. *Hardy*, 217 Ark. 296, 230 S.W.2d 6 (1950). We hold that the portion of the decree in the case at bar ordering the sale of the 230-acre tract and the cattle was an interlocutory order in the nature of a mandatory injunction, and that the chancery court thus retained jurisdiction with respect to those matters. However, our review of the record leads us to the conclusion that the chancellor's intent in modifying this portion of the decree was not to deprive the appellant of the entire $5,000.00 proceeds of the sale, but rather was to reduce that award by $2,150.00, the amount of the lien on the cattle. We therefore modify the decree to provide that the appellant is to receive $2,850.00 out of the proceeds of the sale of the 230-acre tract.

As his third point, the appellant contends that the chancellor erred in not fully compensating him for the loss of the coin collection which he was to retain under the terms of the May 1984 decree. The evidence reflects that the appellee did not deliver the coin collection to the appellant after the 230-acre tract failed to sell. She stated that she retained the collection after the sale fell through because she "knew that he wouldn't give [her] anything." Subsequently, the parties' daughter, Karen, sold some of the coins for $420.00, and used the proceeds to buy a refrigerator for the appellee. Doug, the parties' son, subsequently sold the remaining coins for $1,073.35. He bought an automobile for himself with the proceeds, and gave his own pickup truck to the appellee. Doug testified that he picked up the coins from the appellee's house. The appellee admitted that she knew what Doug intended to do with the coins when he took them from her house, but that she did not try to prevent him from taking them. In the March 1986 order, the chancellor ordered that the appellee was to credit the appellant $420.00 for the disposition of the coin collection. We note that in his March 1986 decree, the chancellor found the appellee to be guilty of contemptuous conduct for failing to prevent Karen and Doug from disposing of the coin collection.

The chancellor's award of $420.00 to the appellant

was based upon his finding that the appellee benefitted from the sale of the collection to that extent. While we agree that the extent to which the appellee benefitted from the sale is a significant consideration in the resolution of this issue, our *de novo* review of the record leaves us with the firm conviction that the award of only $420.00 to the appellant is an inequitable result. We think that the appellee also benefitted from the proceeds of Doug's sale of a portion of the collection, and that benefit is evidenced by the fact that he gave his own pickup truck to the appellee after buying another vehicle with the proceeds of the sale of the coins. Moreover, the record shows that the coins were kept as security after the 230-acre tract did not sell, and that the appellee knew of Doug's plans to remove the coins from her residence and sell them, yet failed to deter him from doing so. That the appellee could have prevented Doug's sale of the coins is reflected in the chancellor's finding that she was guilty of contemptuous conduct for failing to prevent Doug from taking the coins from her residence. While we find that the chancellor properly adopted the appraisal value of the coins as the correct measure of valuation, we hold that he erred in failing to require the appellee to fully reimburse the appellant for the collection's loss. We therefore modify the decree to require the appellee to credit or reimburse the appellant in the amount of $1,493.35 for the loss of the collection, instead of the $420.00 set out in the March 1986 decree.

Next, the appellant asserts that the chancery court did not have the power to order a Lincoln automobile sold which was owned by the parties prior to the May 1984 decree. We agree. The May 1984 decree does not mention this automobile, although it specifically provided for the disposition of two other vehicles owned by the parties, and there is nothing in the record to indicate that the need to dispose of the Lincoln was called to the chancellor's attention at the time of the original hearing. To the contrary, the chancellor plainly stated in his March 1986 order that the disposition of the Lincoln was not taken into account in the original decree. Under these circumstances, we think that the chancellor's modification of the May 1984 order to provide for the disposition of this automobile was erroneous.

Rule 60(b) of the Arkansas Rules of Civil Procedure limits a trial court's authority to modify a decree to a period

of 90 days after it has been filed with the clerk. Although ARCP Rule 60(a) permits trial courts to correct their judgments, this power is confined to correction of the record to make it conform to the action which was actually taken at the time, and does not permit a decree or order to be modified to provide for action that the court, in retrospect, should have taken, but which in fact it did not take. *Harrison* v. *Bradford, supra*; ARCP Rule 60(a). Rule 60(c) of the Arkansas Rules of Civil Procedure permits a judgment to be vacated or modified after the expiration of the 90-day period, but the record does not reflect the establishment of any of the grounds set out in Rule 60(c) for modifying the prior order of the court with respect to this issue, and there was no compliance with subsection (1) of that rule, which permits the vacation of judgment and the granting of a new trial on the ground of newly discovered evidence upon a motion for a new trial filed not later than one year after discovery of the grounds, or one year after the judgment was filed, whichever is earlier. No such motion for a new trial was filed by the appellee in the case at bar; instead, she petitioned the trial court to execute the terms of the May 1984 decree, and requested reexamination and modification of it. This petition was filed in November 1985, over one year from the filing of the May 1984 decree. In the absence of a timely motion, the chancellor lacked the authority to adjudicate the parties' rights in the Lincoln automobile under the authorities cited above. That portion of the March 1986 decree providing for the sale of the Lincoln and the division of the proceeds between the parties is therefore reversed.

The appellant's contention that the chancellor erred in ordering the division of the proceeds from a bull sold by the appellant after the parties' separation, but prior to the May 1984 decree, requires similar treatment. Because the bull was sold prior to the issuance of the decree, it was not part of the herd given to the appellee under the terms thereof. As in the case with the Lincoln automobile, the parties' rights to the proceeds from the bull's sale simply were not before the chancellor for adjudication when the original decree was issued. Moreover, the appellee does not allege that the appellant fraudulently concealed the fact of the sale, but merely contends on appeal that he failed to notify her after selling the bull. Under these circumstances, grounds for modifying the decree after the expiration of the 90-day period are

absent, and the appellee failed to timely move for a new trial on the grounds of newly discovered evidence. ARCP Rule 60; *see also Harrison* v. *Bradford, supra.* We therefore hold that the chancellor lacked the authority to order the division of the proceeds of the sale of the bull, and we remand this cause to the chancellor with instructions that he enter an order restoring the proceeds of the sale of the bull, and the Lincoln automobile, or the proceeds of the sale thereof, to the appellant.

The appellant also argues that the chancellor lacked the authority to order the sale of a brass bed. Because the appellee has stipulated on appeal that this bed is the appellant's property under the terms of the agreement upon which the original decree was based, we hold that the brass bed is the appellant's property, and order that he be allowed to take possession of it, if he has not yet done so.

Finally, we reach the appellant's contention that the chancellor erred in finding him in contempt of that portion of the March 1986 decree requiring him to pay child support in the amount of $200.00 per month. The appellant does not deny that he failed to make the support payment as ordered, but contends that the evidence was insufficient to support a finding that he willfully disobeyed the court's order.

Imprisonment of a divorced husband for failure to pay child support is permitted only in cases where the defendant has the ability to pay, but has willfully disobeyed the order to pay child support. *Nooner* v. *Nooner*, 278 Ark. 360, 645 S.W.2d 671 (1983). In the case at bar the appellant testified that he lacked the funds with which to make the required payments, and that he had last had income in June 1985. He also stated that, although he had formerly done sheetrock work, he was no longer able to do so because he was disabled. However, there was also evidence presented to show that the appellant received no disability benefits; that he was an experienced real estate salesman; and that he made no attempt to make even a partial payment of child support subsequent to the March 1986 order. On these facts, and giving due regard to the chancellor's superior position to assess the credibility of the witnesses, we cannot say that the chancellor's finding that the appellant willfully failed to comply with the order requiring him to pay child support was clearly erroneous.

Affirmed in part.

Reversed and remanded in part.

CRACRAFT and JENNINGS, JJ., agree.

Anice E. THIGPEN *v.* Kendrick R. CARPENTER

CA 86-475 730 S.W.2d 510

Court of Appeals of Arkansas
Division II
Opinion delivered June 10, 1987

Mays & Crutcher, P.A., by: *Arkie Byrd*, for appellant.

Lovell, Arnold & Nalley, for appellee.

JAMES R. COOPER, Judge. In contemplation of their divorce, the appellee and the appellant, Anice E. Thigpen, entered into an agreement which provided for joint custody of their two minor daughters. Four months later, the appellee filed a motion seeking sole custody of the children, which was granted by the chancellor. For her appeal the appellant argues four points: that the evidence

was insufficient to support the chancellor's finding that the appellant lacked the emotional stability to care for the children; that there was insufficient evidence that the appellant's sexual orientation would adversely affect the children; that there was insufficient evidence of a change of circumstance to warrant a change in custody; and that the court's orders denying the appellant custody and restricting visitation because of her homosexuality violated her constitutional rights. We find that there was sufficient evidence presented to the trial court to warrant a change in custody, and therefore, we affirm.

Our standard of review is well settled. On appeal from a chancery court case, this Court considers the evidence *de novo,* and we will not reverse the chancellor unless it is shown that the lower court's decision is clearly contrary to a preponderance of the evidence. *Digby* v. *Digby,* 263 Ark. 813, 567 S.W.2d 290 (1978). The primary consideration in awarding the custody of children is the welfare and best interest of the children involved, and other considerations are secondary. *Scherm* v. *Scherm,* 12 Ark. App. 207, 671 S.W.2d 224 (1984). Custody is not awarded as a reward to, or punishment of, either parent. *Ketron* v. *Ketron,* 15 Ark. App. 325, 692 S.W.2d 261 (1985). Since the question of the preponderance of the evidence turns largely on the credibility of the witnesses, the appellate court defers to the superior position of the chancellor, especially in those cases involving child custody. *Anderson* v. *Anderson,* 18 Ark. App. 284, 715 S.W. 2d 218 (1986).

The appellant first argues that the appellee failed to establish by the preponderance of the evidence that the appellant lacked the emotional stability to properly care for their minor children. The appellant contends that any emotional problems she suffered were in the past, and that, because she was able to be a good mother during the marriage, she is capable of continuing to parent the children now. At trial the appellant presented an expert witness, Dr. Winston Wilson, who testified that he had tested and talked with the appellant for five hours, and that he had found her to be emotionally stable.

The appellee testified that the appellant had attempted suicide before they were married, and that at the time he separated from her she was despondent and suicidal. Both of the

appellant's parents testified that they loved their daughter, but that they were primarily concerned that their grandchildren receive the best care possible. The appellant's father stated that the appellant had recently had emotional outbursts. Her mother testified that the appellant had shown a great deal of instability in the past and that, although the appellant had been a perfect mother in the past, "she has had a sudden turnaround to everything she had always believed in." The mother admitted that she did not like her daughter's homosexuality, but that the appellant's prior history of instability frightened her the most.

We simply cannot second-guess the chancellor in this matter. The chancellor had the opportunity, which we do not have, to view the appellant, the appellee, and the other witnesses who testified to the appellant's emotional state. Where the testimony is conflicting the issue of credibility is a matter which we must defer to the trial court's judgment. *Durham* v. *Durham,* 289 Ark. 3, 708 S.W.2d 618 (1986).

The appellant next argues that the appellee failed to establish by a preponderance of the evidence that the appellant's sexual orientation will adversely affect the best interest of the children. However, as the chancellor pointed out, Arkansas courts have never condoned a parent's promiscuous conduct or lifestyle when such conduct has been in the presence of the children. *Ketron* v. *Ketron,* 15 Ark. App. 325, 692 S.W.2d 261 (1985). In *Ketron,* the mother was living with a man who was married but separated from his wife. Although the court allowed the mother to retain custody, it ordered her to terminate her living arrangement. In other cases we have approved changes in custody where the custodial parent has been involved in illicit sexual relationships. *See Scherm* v. *Scherm,* 12 Ark. App. 207, 671 S.W.2d 224 (1984); *Bone* v. *Bone,* 12 Ark. App. 163, 671 S.W.2d 217 (1984).

At trial the appellant testified that she began a relationship with her lesbian lover before the divorce, and she admitted that she currently resided with her lover. She stated that she felt married to her lover and intended to live with her forever. She further stated that she occupied the same bedroom as her lover and would do so while the children were staying with them. Barrett Markland, the appellant's lover, testified that she loved

the appellant and was fond of the children. She testified that she and the appellant had never engaged in any physical sexual contact in the children's presence, but that she and the appellant would be sharing the same bedroom while the children were with them. They both stated that, on the occasions they had the children, they slept together in their bedroom, and, in one case, on the couch of the friend with whom they were staying. It is clear from their testimony that neither the appellant nor Ms. Markland intended to purposely engage in sexual conduct in the presence of the children; it is equally clear that neither expressed a desire to take precautions to shield the children from exposure to their sexual activities.

In light of this testimony, we cannot say that the chancellor erred. Contrary to the appellant's argument, it has never been necessary to prove that illicit sexual conduct on the part of the custodial parent is detrimental to the children. Arkansas courts have presumed that it is. *See Digby* v. *Digby,* 263 Ark. 813, 567 S.W.2d 290 (1978); *Walker* v. *Walker,* 262 Ark. 648, 559 S.W.2d 716 (1978); *Harmon* v. *Harmon,* 253 Ark. 428, 486 S.W.2d 522 (1972); *Northcutt* v. *Northcutt,* 249 Ark. 228, 458 S.W.2d 746 (1970); *Scherm, supra; Bone, supra.*

For her third point, the appellant contends that the appellee failed to establish by a preponderance of the evidence that a change of circumstances existed to warrant a change of custody. The appellant stated that she had told her husband of a homosexual relationship she had been involved in prior to their marriage. She further stated that her husband knew she planned to live with Ms. Markland, and in fact helped her to move into Ms. Markland's house in Austin, Texas. The appellant argues that since her husband knew of her lesbianism at the time they entered the agreement regarding joint custody of the children, no change of circumstance has taken place. We disagree.

At the time of the divorce hearing, the agreement was read and made a part of the decree. However, the parties did not apprise the chancellor of the appellant's homosexuality, her plans regarding her living conditions, or her past emotional problems. An original decree is a final adjudication; however, custody can be changed if there is proof of material facts which were unknown to the court at the time. *Henkell* v. *Henkell,* 224

Ark. 366, 273 S.W.2d 402 (1955); *Phelps* v. *Phelps,* 209 Ark. 44, 189 S.W.2d 617 (1945); *Carter* v. *Carter,* 19 Ark. App. 242, 719 S.W.2d 704 (1986); *Watts* v. *Watts,* 17 Ark. App. 253, 707 S.W.2d 777 (1986). Clearly, the facts mentioned above, unknown to the chancellor, were sufficient to warrant a change in custody.

For her final point, the appellant argues that the trial court's order denying custody and restricting visitation on the ground that the appellant is a homosexual violates the appellant's rights under the federal constitution. We agree with the appellant's assertions that the rights attached to parenthood are among the "basic civil rights," *Stanley* v. *Illinois,* 405 U.S. 645 (1972), and that before the State can interfere with such rights the State must comply with the requisites of due process. *Stanley, supra; Goldberg* v. *Kelly,* 397 U.S. 254 (1970). However, we disagree that the appellant's rights were violated, or that due process requires a showing that there be a nexus between the parent's activity and harm to the child. Furthermore, we do not find that the chancellor denied the appellant custody solely because she is a homosexual. The chancellor pointed out four factors he considered; 1) that with the appellee, the children would be residing in the same neighborhood in which they had always resided (the appellant's home was in Austin, Texas); 2) that the appellant's educational goals would substantially interfere with the time she has for parenting (the appellant is a graduate student at the University of Texas and is pursuing a Ph.D. in biochemistry); 3) that homosexuality is generally socially unacceptable, and the children could be exposed to ridicule and teasing by other children; and, 4) that is was contrary to the court's sense of morality to expose the children to a homosexual lifestyle, and that it was no more appropriate for a custodial parent to cohabit with a lover of the same sex than with a nonspousal lover of the opposite sex. The chancellor also indicated that he was concerned about the appellant's emotional stability. Contrary to the appellant's argument, it is clear to us that while the appellant's homosexuality was a factor the chancellor considered, it was not the only consideration. When all of the above factors are considered together, we cannot say that the chancellor's finding that the appellee is the proper person to have sole custody of the children is clearly erroneous or against the

preponderance of the evidence.

Affirmed.

JENNINGS, J., agrees.

CRACRAFT, J., concurs.

GEORGE K. CRACRAFT, Judge, concurring. I fully concur with the result reached by my colleagues and agree that the chancellor's findings with regard to the best interest of these children are fully supported by the evidence and that his decree should in all things be affirmed. I do, however, desire to more fully express my views respecting the argument that appellant's preference for homosexual sodomy is constitutionally protected under the due process clause.

In her testimony, the appellant graphically described the sexual activities she engaged in with another female with whom she shared a bedroom in an Austin, Texas, house in which the children would also reside. The people of both Texas and Arkansas have declared the conduct she described to be so adverse to public morals and policy as to warrant criminal sanctions. Arkansas Statutes Annotated § 41-1813 (Repl. 1977) defines her conduct as "sodomy," and Tex. Penal Code Ann. § 21.06 (Vernon 1974) labels that activity "homosexual conduct." The statutes of both states authorize the imposition of criminal penalties against those who engage in that conduct.

In *Bowers* v. *Hardwick*, ___ U.S. ___, 106 S. Ct. 2841 (1986), the Supreme Court of the United States held that Georgia's law imposing felony penalties for homosexual sodomy violated no constitutional guarantees. The Court declared that neither the Constitution nor the due process clauses of the Fifth and Fourteenth Amendments confer a fundamental right on homosexual persons to engage in sodomy, even in private places. The Court found a reasonable basis for the prohibition of such conduct in the declared belief of a majority of the people of Georgia that such conduct was immoral and wholly unacceptable. Noting in its opinion the deep-rooted abhorrence with which homosexual sodomy has been historically viewed by the people of this country since before the adoption of the Constitution, the Court rejected due process arguments by simply stating that, if all laws based on moral choices were to be invalidated under the

due process clause, the courts would indeed be very busy.

The people of this state have declared, through legislative action, that sodomy is immoral, unacceptable, and criminal conduct. This clear declaration of public policy is certainly one that a chancellor may note and consider in child custody cases where, as here, the custodial contestant has declared her fixed determination to continue that course of illegal conduct for the rest of her life, in a home in which the children also reside, and to justify her conduct to the children if and when they find her out.

ECHO, INC. *v.* Demetria STAFFORD

CA 86-498 730 S.W.2d 913

Court of Appeals of Arkansas
Division II
Opinion delivered June 10, 1987

Meeks, Fox & Carter, P.A., by: *Tim Fox*, for appellant.

G. Christopher Walthall, for appellee.

JOHN E. JENNINGS, Judge. Gaston Lanata and his wife owned a home in Malvern, Arkansas. On March 29, 1982, the Lanatas signed an offer and acceptance agreeing to sell the property to Tommy Stafford and his wife, Demetria. The contract provided that the Lanatas would receive the Staffords' home in trade, valued at $70,000.00, and the Staffords would assume Lanata's existing mortgage at First Federal of Malvern in the amount of $40,000.00. On April 16, 1982, the Lanatas and the Staffords entered into a printed form "Purchaser's Agreement." This agreement was in the form of a contract for deed. It provided for a total purchase price of $110,000.00, and Lanata acknowledged the receipt of $70,000.00 cash. On the back of the "Purchaser's Agreement" there was a promissory note from the Staffords to the Lanatas for $40,000.00, payable at $368.30 per month. This was precisely the amount of the monthly payment on Lanata's mortgage. Although the contract did not so provide, the deed was executed and placed in escrow.

The Staffords never paid the Lanatas on the note; instead, they made the payments on Lanata's mortgage at First Federal.

It appears that the reason the mortgage was not assumed was that it contained a due on sale clause. It is clear that First Federal subsequently learned of the sale by Lanata and declined to enforce the due on sale clause.

On April 22, 1983, appellant, Echo, Inc., obtained a judgment of $530,000.00 against Gaston Lanata. The judgment was registered in Hot Spring County, Arkansas on September 1, 1983.

Demetria Stafford and her husband divorced and she received a quitclaim deed to the property. On January 19, 1985, Echo sued Demetria Stafford, seeking to foreclose its judgment lien. The house on the property burned to the ground on March 22, 1985.

The "Purchaser's Agreement" contained a printed provision requiring the buyer to maintain $80,000.00 in fire insurance with the proceeds payable to the seller, Lanata. The Staffords had insured the property for $81,000.00, but the policy named the mortgagee, First Federal, as the loss payee. After the house burned, First Federal's mortgage, then $38,000.00, was satisfied from the insurance proceeds and the balance of $43,000.00 was tendered by the insurance company into the registry of the court. On January 14, 1986, Echo amended its complaint seeking the entire $80,000.00 in insurance proceeds, or in the alternative, to require Demetria Stafford to pay the $40,000.00 note executed to the Lanatas, to it.

The chancellor held that Echo had no interest in the land and no interest in the insurance proceeds, and that Demetria Stafford owed nothing to Lanata. On appeal, Echo raises a number of issues. We affirm the chancellor's decision.

■ At trial the court permitted the title insurance agent who closed the transaction between the Lanatas and the Staffords to testify that after closing the Lanatas had no other monies coming to them; permitted Mrs. Stafford to testify that after closing she owed the Lanatas nothing; and admitted the offer and acceptance into evidence. Appellant claims that the parol evidence rule was thereby violated. However, the parol evidence rule does not apply in a dispute between a party to the contract and a stranger. *Worcester Felt Pad Corporation* v. *Tucson Airport*

Authority, 233 F.2d 44 (9th Cir. 1956); *Kassianov* v. *Raissis*, 200 Cal. App. 2d 573, 19 Cal. Rptr. 614 (1962).

Echo argues that Demetria Stafford's statement was a "legal conclusion." We believe that the testimony was admissible under A.R.E. Rule 701, as it was rationally based on the perception of the witness and was helpful to the determination of a fact in issue.

Appellant argues that, because the purchaser's agreement required the Staffords to maintain $80,000.00 in insurance payable to the Lanatas, it is entitled to judgment against Mrs. Stafford of $80,000.00. We disagree. A judgment lien is subject to all other existing liens which are valid as to the landowner, because the judgment lien does not attach to the land but only to the judgment debtor's interest therein. *Alston* v. *Bitely*, 252 Ark. 79, 477 S.W.2d 446 (1972). Judgment creditors are not innocent purchasers and the judgment lien is subject to every equity which exists against the land at the time it comes into existence. *First National Bank* v. *Meriwether Sand & Gravel Co., Inc.*, 188 Ark. 642, 67 S.W.2d 599 (1934). The existing equities need not be of record and lack of notice to the judgment creditor is immaterial. *See Snow Brothers Hardware Co.* v. *Ellis*, 180 Ark. 238, 21 S.W.2d 162 (1929). Before Echo obtained its judgment against Lanata, Lanata had sold the property in question to the Staffords. The fact that the contract was unrecorded is immaterial. As Lanata retained no interest in the land, there was nothing to which Echo's judgment lien might attach.

Even if Echo were correct that it had some sort of lien against the property, it would not follow that it had a lien against the insurance proceeds. The amount collected on a fire insurance policy by an insured does not, in any sense, constitute proceeds of the property, and the coverage is personal to the insured and is for his benefit only. *Page* v. *Scott*, 263 Ark. 684, 567 S.W.2d 101 (1978). The result here is not changed by the clause in the purchaser's agreement by which the Staffords agreed to take out $80,000.00 in fire insurance payable to Lanata. The true agreement was shown to be that Lanata had no further interest in the property and that the insurance policy was to name First Federal as a loss payee. This is what was done. In effect, Echo seeks to enforce a contractual provision which its own judgment debtor

could not have enforced. This it may not do.

Appellant next argues that it is entitled to an $80,000.00 judgment against Mrs. Stafford because of the "doctrine of appropriation in advance," citing *Fireman's Fund Insurance Company* v. *Rogers,* 18 Ark. App. 142, 712 S.W.2d 311 (1986). This "doctrine" simply means that when a mortgagee is named as loss payee in its mortgagor's insurance policy, and a loss occurs, the mortgagee is entitled to enough of the proceeds to satisfy the mortgage indebtedness. The concept is inapplicable to the facts of this case.

Appellant also argues, in the alternative, that the court should have awarded it judgment against Mrs. Stafford on the $40,000.00 note to Lanata. It was clearly shown at trial, however, that the parties never intended that the note be paid; the note was merely to evidence the Staffords' assumption of Lanata's mortgage to First Federal. It is a familiar equitable principle that the form of a transaction will never preclude inquiry into its real nature and that the intention of the parties must govern, irrespective of the form. *Schnitt* v. *McKellar,* 244 Ark. 377, 427 S.W.2d 202 (1968). If Lanata cannot enforce the note, certainly his judgment creditor cannot.

Finally, appellant argues that Demetria Stafford has "unclean hands" because she attempted to avoid the due on sale clause in Lanata's mortgage to First Federal, and that therefore it is entitled to an $80,000.00 judgment against her. The doctrine of unclean hands is an equitable defense. It may constitute a basis, in equity, for a denial of relief. It is not a tort; it will not form the basis of a cause of action.

The trial court was correct in dismissing the appellant's complaint.

Affirmed.

MAYFIELD and COULSON, JJ., agree.

WASHINGTON COUNTY, et al. *v.* Gerald W. FORD

CA 87-7 730 S.W.2d 515

Court of Appeals of Arkansas
Division II
Opinion delivered June 10, 1987

Michael E. Surguine, Public Employee Claims Division, for appellants.

Everett & Gladwin, by: *Robert J. Gladwin*, for appellee.

Matthews, Campbell & Rhoads, P.A., by *George R. Rhoads*, for intervenor Blue Cross & Blue Shield.

JOHN E. JENNINGS, Judge. The issue in this workers' compensation case is to what extent is the compensation carrier entitled to subrogation as to the proceeds of a settlement between the claimant and a third party tortfeasor.

In 1982, Gerald Ford, an employee of Washington County, was injured in an automobile accident. The driver of the other vehicle was apparently at fault and was insured by Allstate Insurance Company. Public Employee Claims Division (PECD), the compensation carrier for Washington County at the time of the accident, accepted the claim as compensable and paid more than $50,000.00 in benefits.

Ford settled his personal injury cause of action with Allstate for $50,000.00, the policy limit. This $50,000.00 settlement included $4,042.26 in medical expenses previously paid by Allstate for medical bills which would have been compensable under workers' compensation law and for which PECD would have had responsibility otherwise. Furthermore, Arkansas Blue Cross Blue Shield, Ford's group health insurance carrier, also paid $5,323.05 in medical bills which would have been the responsibility of PECD.

Ark. Stat. Ann. § 81-1340 (Repl. 1976) provides in part:

> Third party liability. (a) Liability unaffected. (1) The making of a claim for compensation against any employer or carrier for the injury or death of an employee shall not affect the right of the employee, or his dependents, to make claim or maintain an action in court against any third party for such injury, but the employer or his carrier shall be entitled to reasonable notice and opportunity to join in such action. If they, or either of them, join in such action they shall be entitled to a first lien upon two thirds (⅔) of the net proceeds recovered in such action that remain after the payment of the reasonable costs collection, for the payment to them of the amount paid and to be paid by them as compensation to the injured employee or his dependents.
>
> (2) The commencement of an action by an employee or his dependents against a third party for damages by reason of an injury, to which this act [§§ 81-1301—81-1349] is applicable, or the adjustment of any such claim shall not

> affect the rights of the injured employee or his dependents to recover compensation, but any amount recovered by the injured employee or his dependents from a third party shall be applied as follows: Reasonable costs of collection shall be deducted; then one third [⅓] of the remainder shall, in every case, belong to the injured employee or his dependents, as the case may be; the remainder, or so much thereof as is necessary to discharge the actual amount of the liability of the employer and the carrier; and any excess shall belong to the injured employee or his dependents.
>
> (b) Subrogation. An employer or carrier liable for compensation under this act for the injury or death of an employee shall have the right to maintain an action in tort against any third party responsible for such injury or death. After reasonable notice and opportunity to be represented in such action has been given to the compensation beneficiary, the liability of the third party to the compensation beneficiary shall be determined in such action as well as the third party's liability to the employer and carrier. After recovery shall be had against such third party, by suit or otherwise, the compensation beneficiary shall be entitled to any amount recovered over and above the amount that the employer and carrier have paid or are liable for in compensation, after deducting reasonable costs of collection, and in no event shall the compensation beneficiary be entitled to less than one third [⅓] of the amount recovered from the third party, after deducting the reasonable cost of collection.

The problem for the administrative law judge, and subsequently for the full Commission, was how to apply this statute in calculating the amount of subrogation to which PECD would be entitled. The costs of collection were shown to be $9,000.00.

The ALJ multiplied two-thirds times $41,000.00 (the net proceeds after costs of collection) to arrive at a gross amount available for subrogation of $27,332.00. He then deducted the amount paid by Allstate for medical bills, $4,042.26, and held the net amount available for subrogation was $23,289.74. He also required PECD to reimburse Blue Cross for the $5,323.05 which Blue Cross had paid. On appeal, the Commission purportedly

affirmed the opinion of the ALJ, but in its calculations the Commission also deducted the amount of medical expenses paid by Blue Cross from the gross amount available for subrogation, leaving a net balance available to PECD of $17,966.69.

On appeal PECD argues that the Commission erred in deducting either the amount paid by Allstate or the amount paid by Blue Cross, although PECD concedes that it should reimburse Blue Cross for the medical expenses. The claimant argues that it was appropriate to deduct the amount paid by Allstate. We hold that the amount paid by Allstate for medical expenses should have been deducted, although not in the manner done by the Commission, and that the Commission erred in deducting the amount PECD was required to reimburse Blue Cross.

At the outset we must note a problem with the statute. Section 81-1340 was originally enacted as Act 319 of 1939. Section 81-1340(a)(2) originally read:

> The commencement of an action by an employee or his dependents against a third party for damages by reason of an injury, to which this Act is applicable, or the adjustment of any such claim shall not affect the rights of the injured employee or his dependents to recover compensation, but any amount recovered by the injured employee or his dependents from a third party shall be applied as follows: Reasonable costs of collection shall be deducted; then one-third of the remainder shall, in every case, belong to the injured employee or his dependents as the case may be; the remainder, or so much thereof as is necessary to discharge in actual amount the liability of the employer and the insurance carrier *for compensation, shall be paid to such employer or insurance carrier;* and any excess shall belong to the injured employee or his dependents. [Emphasis added.]

It appears likely that in compilation the underlined language was inadvertently omitted. Although the meaning of the statute as it is presently worded is clear enough to be applied, the inadvertent omission could cause confusion.

PECD contends on appeal that there is no logical reason for deducting the amount paid by Allstate for otherwise compensable

medical expenses. We disagree.

When Allstate paid Ford's compensable medical expenses, PECD benefited by not having to pay them itself. While it seems immaterial to the tortfeasor's insurance company, it is fair both to the compensation carrier and the claimant to deduct amounts paid by the tortfeasor's insuror for otherwise compensable medical expenses before calculating the compensation carrier's two-thirds entitlement for subrogation.

An admittedly extreme example will illustrate the inequities which would result from an adoption of PECD's position. Suppose, in this case, Allstate had settled with the claimant for $50,000.00, its policy limits, by paying directly $41,000.00 in otherwise compensable medical expenses and $9,000.00 to the claimant's attorney as the costs of collection. An adoption of PECD's position would result in its being entitled to an award against the claimant for some $27,000.00, although the claimant received nothing in hand and PECD would have already benefited by not having to pay $41,000.00 in medical expenses for which it would have otherwise had liability. This cannot be the law.

■ We hold that the appropriate method of calculating the compensation carrier's subrogation award, under the circumstances of this case and under the statute, is to deduct from the gross settlement proceeds the cost of collection, and then to deduct from the remainder any payment by the tortfeasor's insuror of otherwise compensable medical expenses paid as part of the settlement. The figure thus obtained constitutes the net proceeds of settlement and the subrogation award should be two-thirds of this amount. In the case at bar, the gross settlement proceeds minus the costs of collection is $41,000.00. From that amount the Commission should have deducted $4,042.26, the amount paid by Allstate for otherwise compensable medical expenses, to arrive at a figure of $36,957.74. Two-thirds of this amount is $24,638.49, which is the amount of subrogation to which PECD is entitled.

■ We fully agree with PECD that the amount it was directed to repay to Blue Cross, $5,323.05, should not have been deducted from the subrogation award. Even the claimant does not argue otherwise. The reason this amount should not have been

deducted is that it had nothing to do with the settlement between Allstate and Ford and simply has no bearing on PECD's subrogation rights.

Affirmed as modified.

COULSON and MAYFIELD, JJ., agree.

Donnell JOHNSON *v.* STATE of Arkansas

CA CR 86-221 730 S.W.2d 517

Court of Appeals of Arkansas
Division I
Opinion delivered June 10, 1987
[Rehearing denied July 8, 1987.]

James P. Massie, for appellant.

Steve Clark, Att'y Gen., by: *J. Blake Hendrix*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. Appellant, Donnell Johnson, was convicted in a jury trial of possession of cocaine with intent to deliver, and possession of marijuana with intent to deliver. He was sentenced to five years and four years respectively in the Arkansas Department of Correction, with the sentences to be served consecutively. On appeal, the appellant argues that the trial court erred in not suppressing the evidence which he contends was obtained by an illegal search.

At a hearing on appellant's motion to suppress, Scott Timmons, a detective with the Little Rock Police Department, testified that he arrested the appellant on August 1, 1985, after receiving a telephone call from a confidential informant whom he had known for over one year and who had given him reliable information on five prior occasions. The informant told him that a black male name Donnell Johnson was at the intersection of Gilliam Park Road and Venice Court. The informant said Johnson was sitting in a metal folding chair by a gambling game and was wearing a black baseball cap, a black pullover shirt, Lee jeans, and white tennis shoes. The informant said Johnson had several papers of cocaine and several bags of marijuana concealed in a plastic bag which he had stuffed down his pants; that he was

selling the cocaine and marijuana; and that he had a dark-colored revolver.

On the basis of that information, Timmons and several other members of the narcotics detail went to the location given by the informant. When they arrived, they found a gambling game in progress, as the informant had said, and a black male sitting in a folding chair, wearing the clothing described by the informant. The man said his name was Donnell, and Timmons testified this led him to believe that this was the man the informant had described. Timmons testified he made a frisk of the appellant to check for a weapon and to see if he had drugs on him. During the search, Timmons felt an object but could not determine what it was. He then unzipped the appellant's blue jeans and could see a plastic bag stuffed in his underwear. Inside that bag were other clear plastic bags containing green vegetable matter. Timmons pulled the bag out and found it contained seven clear bags each containing what appeared to be marijuana, and a Kool cigarette package with six white folded papers containing what appeared to be cocaine. Timmons then arrested the appellant.

Appellant argues that Officer Timmons performed the search with the dual purpose of securing a weapon and drugs, thus exceeding the permissible scope of a "stop and frisk" and contrary to the holding of *Terry* v. *Ohio,* 392 U.S. 1 (1968). We do not address this particular argument because we uphold the search as a search incident to a lawful arrest.

On appeal, the legality of an arrest is presumed and the burden is on the appellant to establish its illegality. *Freeman* v. *State,* 6 Ark. App. 240, 640 S.W.2d 456 (1982). An officer may arrest a person without a warrant if he has reasonable cause to believe the person has committed a felony. *Gaylor* v. *State,* 284 Ark. 215, 681 S.W.2d 348 (1984); A.R.Cr.P. Rule 4.1(a)(i). Reasonable cause exists where facts and circumstances, within the arresting officer's knowledge and of which he has reasonably trustworthy information, are sufficient within themselves to warrant a man of reasonable caution to believe that an offense has been committed by the person to be arrested. *Gass* v. *State,* 17 Ark. App. 176, 706 S.W.2d 397 (1986); *Gaylor* v. *State, supra.* Most courts agree there is no substantive distinction between the terms "reasonable cause" and "probable cause." *McGuire* v.

State, 265 Ark. 621, 580 S.W.2d 198 (1979); *see also* Commentary to Article IV following A.R.Cr.P. Rule 10.1.

In this case, the information giving rise to reasonable cause was obtained as a result of a confidential informant's telephone call. In *Mock* v. *State,* 20 Ark. App. 72, 723 S.W.2d 844 (1987), we noted that the test for probable cause sufficient to issue a search warrant based upon information supplied by an informant is based on the "totality of the circumstances." *See also Illinois* v. *Gates,* 462 U.S. 213 (1983). In *Mock,* we said:

> While the case at bar involves the existence of probable cause to support a warrantless arrest as opposed to the issuance of a search warrant, we think that the "totality of the circumstances" test provides a useful framework for analysis. . . . The veracity, reliability, and basis of knowledge of the informant are relevant considerations in the "totality of the circumstances" analysis. . . .

20 Ark. App. at 77-78.

Here, Officer Timmons testified he had known the confidential informant for over one year and had been given reliable information by him on five prior occasions. The informant told the officer that appellant was selling marijuana and cocaine, a felony under Ark. Stat. Ann. § 82-2617 (Supp. 1985); and when the officers went to the location provided by the informant, the information checked out. Under these circumstances, we think the officers had reasonable cause to arrest appellant without a warrant. *See Draper* v. *United States,* 358 U.S. 307, 313 (1959).

An officer making a lawful arrest may conduct a search of the person or property of the accused without a warrant, to protect the officer, the accused, or others; to obtain evidence of the commission of the offense for which the accused has been arrested; and to seize contraband or other things criminally possessed or used in conjunction with the offense. A.R.Cr.P. Rule 12.1. The search in this case clearly falls within the guidelines of Rule 12.1.

A search is valid as incident to a lawful arrest even if conducted before the actual arrest provided the arrest and search are substantially contemporaneous and there was probable cause

to arrest prior to the search. *Rawlings* v. *Kentucky,* 448 U.S. 98 (1980); *Horton* v. *State,* 262 Ark. 211, 555 S.W.2d 226 (1977). Here, the "arrest followed quickly on the heels of the challenged search" of appellant's person, *see Rawlings,* 448 U.S. at 111, and as soon as Timmons found the contraband.

Judged by these standards and based on the evidence of record, we conclude that reasonable cause to arrest the appellant existed prior to the challenged search, that the search and subsequent arrest were "substantially contemporaneous," and that the trial court did not err in refusing to suppress the evidence.

Affirmed.

CORBIN, C.J., and COULSON, J., agree.

Nathan Randy BALLEW *v.* STATE of Arkansas

CA CR 86-220 731 S.W.2d 222

Court of Appeals of Arkansas
En Banc
Opinion delivered June 17, 1987

Henry & Mooney, by: *John R. Henry*, for appellant.

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

GEORGE K. CRACRAFT, Judge. Nathan Randy Ballew appeals from his conviction of murder in the second degree contending only that the evidence is insufficient to sustain a finding of guilt. Although the appellant did not move for a directed verdict or otherwise preserve the issue of the sufficiency of the evidence in the trial court, the attorney general, relying upon *Ply* v. *State*, 270 Ark. 554, 606 S.W.2d 556 (1980), has agreed in his brief that the issue is properly before this court because it is a matter that may be raised for the first time on appeal. We do not agree that *Ply* is controlling, and, in the absence of a proper objection or motion in the trial court, we do not reach the sufficiency issue on the merits. *Johnson* v. *State*, 290 Ark. 46, 716 S.W.2d 202 (1986); *Janes* v. *State*, 285 Ark. 279, 686 S.W.2d 783 (1985); *Eskew* v. *State*, 273 Ark. 490, 621 S.W.2d 220 (1981); *Wicks* v. *State*, 270 Ark. 871, 606 S.W.2d 366 (1980).

Our court has long adhered to the general rule that it will not consider issues raised for the first time on appeal. That rule has now been codified as to civil actions in ARCP Rule 52(e), which provides that the failure in civil actions to move for a directed verdict or for a judgment notwithstanding the verdict

constitutes a waiver of any question pertaining to the sufficiency of the evidence. This general rule was also applied to the issue of sufficiency of the evidence in criminal cases by our state and federal courts prior to the decision in *Ply*. *See, e.g., Craig* v. *United States*, 337 F.2d 28 (8th Cir. 1964), *cert. denied* 380 U.S. 909 (1965); *Harris* v. *State*, 262 Ark. 506, 558 S.W.2d 143 (1977); *Gathright* v. *State*, 245 Ark. 840, 435 S.W.2d 433 (1968).

There is language in *Ply* indicating that the supreme court was departing from its earlier rule and would consider the issue of sufficiency of the evidence for the first time on appeal. From our consideration of cases decided subsequent to *Ply*, however, we conclude that the court did not so intend. We are bound to follow these latest expressions of that court.

Shortly after *Ply* was decided, the court announced its decision in *Wicks* v. *State, supra*. In *Wicks*, the appellant argued for the first time on appeal that the court erred in failing to excuse a juror for cause and in failing to submit certain issues to the jury. In its opinion, the court noted the frequency with which it was being argued that cases should be reversed on points not raised in the trial court and stated that this practice was becoming burdensome. For that reason, the court stressed the absence of any objection to those issues in order to make its position clear. The court rejected the so-called "plain error rule" and restated its position in the following language:

> To the contrary, in hundreds of cases we have reiterated our fundamental rule that an argument for reversal will not be considered in the absence of an appropriate objection in the trial court. Citations to that familiar principle are unnecessary.
>
> Exceptions to the basic requirement of an objection in the trial court *are so rare* that they may be reviewed quickly.

Wicks, 270 Ark. at 785, 606 S.W.2d at 369 (Emphasis added).

The court then recognized exceptions to the general rule in certain phases of death penalty cases, errors made by the trial judge himself at a time when there was no opportunity to object, errors so flagrant and highly prejudicial as to require the

court to intervene *sua sponte* (such as failure to control a prosecutor's closing argument), and errors relating to the admission or exclusion of evidence which affect substantial rights. The court concluded that, if there were any other exceptions to the general rule that an objection must be made in the trial court, it had not found them in its review of the case law. It is argued that *Wicks* is not authority for this rule because it did not involve the issue of sufficiency of the evidence. To us, the significance of *Wicks* lies in its *failure* to mention sufficiency of the evidence as a recognized exception.

In *Eskew* v. *State, supra*, the appellants were convicted of rape and kidnapping and argued on appeal that the evidence was insufficient to support their convictions of a class A felony. The court rejected that argument stating:

> The second argument by appellants is that the evidence was insufficient to support the appellants' conviction for class A felony kidnapping. This may well be true, but the fact remains that the appellants never requested an instruction on class C kidnapping, and the matter is raised for the first time on appeal. We need not cite authority for the proposition that we do not consider matters raised for the first time on appeal.

Eskew, 273 Ark. at 492, 621 S.W.2d at 221. It is argued that *Eskew* does not stand for the proposition that one cannot raise the issue of sufficiency for the first time on appeal because the court referred to the issue there as one of having failed to request an instruction. Although the court did use those words, it is clear that the issue before it was the sufficiency of the evidence to sustain the conviction.

If any doubt remained, it was resolved in *Janes* v. *State, supra*. In *Janes*, the appellant was convicted of driving while intoxicated, second offense. One essential element of the charge was a prior offense of DWI within the specified period. The record did not include documented evidence of a previous conviction or other evidence about a prior offense. At least one member of the court argued that the the issue could be raised for the first time on appeal and that the case should be reversed because the evidence of a prior offense was insufficient. However, the majority declared:

> We have consistently held that where there is a particular defect in the State's proof that might readily have been corrected had an objection been made, the absence of any objection prevents the point's being raised for the first time on appeal.

Janes, 285 Ark. at 281, 686 S.W.2d at 784. It has been argued that *Janes* is not authority for this proposition because the issue was raised in conference rather than in the briefs and is therefore dicta. Dicta is generally defined as expressions which go beyond the facts before the court, express individual views, and are not necessary to a determination of the issue. We cannot conclude that the fact that the question was raised by the court *sua sponte* makes its declaration in disposition of the case dicta.

In *Johnson* v. *State, supra*, the appellant was found guilty of rape and kidnapping. On appeal, the appellant argued that the evidence was insufficient to establish the offense of kidnapping, but he had not raised that issue in the trial court. The court, in a two-paragraph opinion, declared that the matter was not before it as it did not consider matters which were not raised in the trial court. It has been argued that the court in *Johnson* did not rely upon proper precedent and did not overrule prior cases, including *Ply* v. *State, supra.* Whether the supreme court was right or wrong in its decisions or declarations in *Johnson, Janes*, and *Eskew*, is not an issue before this court. Whether we agree with the soundness of those decisions is one thing, but for us to refuse to follow them is another. They are the latest expressions of the highest court of this state, which this court is bound to follow.

A persuasive argument might be made that cases involving the requirement that the State prove each and every element of the crime charged should be distinguished from those in which Fourth and Fifth Amendment rights are waived by failure to properly assert them, in which guilt is established by other inadmissible evidence, or in which improper instructions are given without objection. Although it may be that the right to have every element of the offense proved is a positive one and that those dealing with the admissibility of evidence of guilt stand on a different footing, we are persuaded that those arguments would be better addressed to the supreme court in a plea that it reconsider its declarations in *Eskew, Janes*, and *Johnson.* We do

not consider it within our province to do so even if we were so inclined.

Affirmed.

CORBIN, C.J., COULSON and COOPER, JJ., concur.

JAMES R. COOPER, Judge, concurring. I concur with the result reached by the majority because I believe that the appellant's conviction was supported by substantial evidence. However, I disagree with the majority's conclusion that we will not consider the sufficiency of the evidence to support a criminal conviction on appeal unless the issue was raised in the trial court.

I strongly disagree that we should affirm this case on the basis that counsel failed to lodge a proper objection or move for a directed verdict in the trial court. The majority cites one case directly on point, *Johnson* v. *State*, 290 Ark. 77, 716 S.W.2d 203 (1986). However, the case cited in *Johnson* as support for the rule that sufficiency of the evidence will not be considered on direct appeal without having been raised in the trial court is a Rule 37 appeal, *Rowe* v. *State*, 275 Ark. 37, 627 S.W.2d 16 (1982). In the direct appeal of his case, *Rowe* v. *State*, 271 Ark. 20, 607 S.W.2d 657 (1980), the appellant presented one argument concerning the legality of the sentences imposed upon him, but attempted to raise a different ground in his Rule 37 petition. The Supreme Court simply held that he could not challenge the sentences on a different basis in his Rule 37 petition. Parenthetically the Court noted that no challenge to Rowe's sentences was raised in the trial court, thus precluding consideration of that argument in his direct appeal. Thus, although *Johnson* does say what the majority says, the Supreme Court did not overrule prior cases, including *Ply* v. *State*, 270 Ark. 554, 606 S.W.2d 556 (1980).

The majority reaches its conclusion by distinguishing *Ply*, and concluding that *Ply* is no longer valid. While I disagree with the conclusion that *Ply* now lacks validity, I do believe that *Ply* is distinguishable from the other substantial evidence cases cited by the majority. I submit that the crucial distinction is between cases such as *Ply* and the case at bar, where the appellant contends that proof of an essential element of an offense is lacking because the State failed to present it, and cases in which evidence was offered, but may not be considered due to various trial errors.

In *Ply*, the Supreme Court considered the issue of whether the State had presented adequate evidence to show that Ply had previously been convicted of certain felonies, relevant for the purpose of sentence enhancement. 270 Ark. at 562-63. Ply alleged that nowhere in the body of the judgment introduced by the State as evidence of the prior convictions did it appear that Ply was "the defendant" named therein. The real issue in *Ply* was whether the State had failed to present proof of an element required by statute for sentence enhancement. The Supreme Court reached this issue despite the absence of an objection below. *Id.* at 560. The appellant's contention in the case at bar is identical to the argument advanced by Ply in that he argues that proof of an essential element of the offense, here the appellant's knowing causation of the decedent's death under circumstances manifesting extreme indifference to the value of human life, was lacking. Under the circumstances presented here, I believe that *Ply* mandates that we review the sufficiency of the evidence to support the appellant's conviction.

Moreover, the cases cited by the majority as indicative of *Ply's* demise are distinguishable from the situation presented in the case at bar. *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980), is simply not on point. The first two *Wicks* exceptions, death penalty cases and instances of judicial error, bear no logical relation to the situation in *Ply*, where it was alleged that evidence of an element of the offense was lacking. *See Wicks*, 270 Ark. at 786. Neither would such an omission of proof necessarily be the sort of error which would require the trial court to intervene on its own motion, as suggested in the third *Wicks* exception. *See id.* The fourth exception mentioned in *Wicks* clearly relates only to a ruling admitting or excluding evidence. *Wicks* simply has nothing to do with the issue of raising questions at trial concerning the sufficiency of the evidence as a prerequisite to appellate consideration of the issue.

The majority relies on mere dicta in *Janes* v. *State*, 285 Ark. 279, 686 S.W.2d 783 (1985), concerning appellate review of criminal convictions in the absence of an objection in cases where the sufficiency of the evidence is challenged. In *Janes*, the appellant's brief never raised the issue of the sufficiency of the evidence to support the conviction; rather, the issue of sufficiency was suggested by the Supreme Court, *sua sponte*, at conference.

285 Ark. at 280-81. In the absence of an argument by the appellant that the evidence was insufficient, the *Janes* Court's statement that it would not review the issue of sufficiency in the absence of an objection below is clearly dicta.

Eskew v. *State*, 273 Ark. 490, 621 S.W.2d 220 (1981), is a case in which the issue of evidentiary sufficiency is complicated by trial error in the form of failure to request an instruction on a lesser offense. In the absence of a request that the jury be given an instruction for class C kidnapping, the Court refused to reverse on the ground of the trial court's failure to give a lesser included offense instruction. This result is consistent with *Ply*, where the Court refused to consider an argument that an improper instruction had been given at trial, in the absence of a timely objection. 270 Ark. at 560.

Finally, I submit that it is fundamentally unfair for a court, on an appeal of right, to refuse to review the sufficiency of the evidence where the issue on appeal is whether the State proved every element of its case. The appellant in the case at bar had a due process right to have the State present evidence from which a rational trier of fact could find, beyond a reasonable doubt, the essential elements of the crime with which he was charged. *Jackson* v. *Virginia*, 443 U.S. 307 (1979); *see also State* v. *Kimball*, 613 S.W.2d 932 (Mo. App. 1981). Although I agree with the majority's statement that we are required to follow the decisions of the Arkansas Supreme Court without regard to our own belief in their soundness, I submit that our obligation is to follow the clear holdings of the Arkansas Supreme Court's decisions before we resort to dicta for guidance. The decisions with respect to appellate review of the sufficiency of the evidence where the question was not raised below are less than clear. However, in the absence of a clear holding by the Supreme Court that its holding in *Ply* is no longer valid, I believe that we must attempt to follow the rule set out therein to the best of our ability.

I would also suggest that, if the majority will is to refuse to consider the sufficiency of the evidence where that question was not raised below, such a ruling should be prospective. To do otherwise creates a trap for defense counsel and will further burden an already overloaded appellate and trial court system with doubtlessly valid Rule 37 petitions.

I would affirm, but because I find the evidence sufficient to support the appellant's conviction.

CORBIN, C.J., and COULSON, J., join in this concurring opinion.

Tommy BASFORD *v.* WEYERHAEUSER COMPANY

CA 86-172 730 S.W.2d 916

Court of Appeals of Arkansas
En Banc
Opinion delivered June 17, 1987

Randall G. Wright, for appellant.

Wood, Smith, Schnipper & Clay, by: *Phillip M. Clay*, for appellee.

GEORGE K. CRACRAFT, Judge. Tommy Basford appeals from an order of the Arkansas Workers' Compensation Commission holding that his previously adjudged current-total disability had ceased, awarding him benefits for permanent-partial disability, and allowing the appellee, Weyerhaeuser Company, to credit all payments made for current-total disability against the present award of permanent-partial disability. We find error only in allowing the appellee to credit previous payments against the present award.

In July of 1979, the appellant sustained a compensable injury while in the employ of the appellee. On February 25, 1983, the Arkansas Workers' Compensation Commission entered an award upon finding that appellant had sustained an anatomical disability rating of fifteen percent to the body as a whole and that he was currently totally disabled, but reserved the determination of permanent disability until after the attempts at rehabilitation had been concluded. No appeal was taken from that order and it became final.

In May of 1985, the Commission found that appellant's current-total disability had ended and, after considering his anatomical disability along with other permissible work-loss factors, determined that he had sustained a permanent-partial disability of twenty-five percent to the body as a whole.

The appellant contends that the Commission erred in denying him further current-total disability benefits and that its findings in that regard are not supported by substantial evidence. Although appellant offered evidence to the contrary, the Commission found that further attempts at rehabilitation would be fruitless because he appeared to have no inclination to do anything other than work as an automobile mechanic, and, by his own admission, he was already an automobile mechanic. It further found that he knew how to repair small engines and there was work available for him in that field. The Commission

specifically found that his testimony that he was unable to perform any work lacked credibility.

On appellate review of workers' compensation cases, we view the evidence in the light most favorable to the Commission and affirm if those findings are supported by substantial evidence. *Bankston* v. *Prime West Corp.*, 271 Ark. 727, 610 S.W.2d 586 (Ark. App. 1981). Questions concerning the credibility of and weight to be given the evidence are exclusively within the province of the Commission. *Central Maloney, Inc.* v. *York*, 10 Ark. App. 254, 633 S.W.2d 196 (1984). From our review of the record, we conclude that there was substantial evidence to support the Commission's findings that the appellant's current total disability had ended and his disability, although permanent, was not total.

The Commission granted the appellee's motion that it be allowed to credit all current-total disability benefits paid from 1983 to the date of the 1985 hearing against any permanent-partial disability benefits awarded him. The Commission allowed that petition in the following language:

> [W]e find the respondent is entitled to such credit because since payment of current total disability benefits is certainly not payment of temporary (total) disability benefits, we think such payments must be construed as payment of permanent disability benefits.

We agree that the Commission erred in this ruling. At least since 1980, the Arkansas Workers' Compensation Commission and this court have recognized the Commission's authority to make awards for current-total disability to be followed by periods of permanent-partial disability. *See Sunbeam Corp.* v. *Bates*, 271 Ark. 385, 609 S.W.2d 101 (Ark. App. 1980). The Court of Appeals reaffirmed this concept in *Guffey* v. *Arkansas Secretary of State*, 18 Ark. App. 54, 710 S.W.2d 836 (1986). However, on April 13, 1987, the supreme court reversed our decision in *Guffey* and all prior decisions on that issue, declaring that our law does not authorize or recognize current-total disability benefits after the end of the healing period. *Arkansas Secretary of State* v. *Guffey*, 291 Ark. 624, 727 S.W.2d 826 (1987).

In 1983, when the Commission ordered current-total

disability benefits in this case, both the Commission and this court recognized the validity of such orders. The order was not appealed from and it became final and its terms binding on all parties. In 1985, when that period of current-total disability was terminated, the Commission should have applied the rules then in effect and judicially sanctioned. We conclude that the Commission under its own order was without authority to retroactively remit payments made for current-total disability or direct that they be treated as payments toward a future award of permanent-total disability. This cause is remanded for the entry of an order not inconsistent with this opinion.

Affirmed in part and reversed and remanded in part.

Kenneth RUSIN *v.* MIDWEST ENAMELERS, INC.

CA 87-17 731 S.W.2d 226

Court of Appeals of Arkansas
Division I
Opinion delivered June 17, 1987

Daily, West, Core, Coffman & Canfield, by: *Eldon F. Coleman* and *Stanley A. Leasure*, for appellant.

Warner & Smith, by: *G. Alan Wooten*, for appellee.

GEORGE K. CRACRAFT, Judge. Kenneth Rusin appeals from an order of the Sebastian County Circuit Court on which his complaint for liquidation and distribution of the assets of Midwest Enamelers, Inc., was denied. Because the order is not appealable, we do not reach the merits of the case.

The appellant filed a complaint against Midwest Enamelers, Inc., seeking liquidation and distribution of the corporate assets; $50,000.00 for unpaid director's fees; and $500,000.00 in bonuses allegedly owed to the appellant. In response, appellee answered and filed a third-party complaint against Lucinda Rusin, contending that she and her husband, the appellant, were indebted to the appellee for $30,000.00 on a promissory note; had converted over $250,000.00 belonging to the appellee to their personal use; and, that, while appellant was an officer of the appellee company and his wife an employee, they had formed a competing company which caused appellee to lose $500,000.00 and for which they should be liable. The court conducted a hearing limited to the issue of liquidation of the corporate assets, after which it found that the appellant had failed to establish grounds for dissolution of the corporation and further that appellant had an adequate remedy for money damages, and denied the petition for liquidation. The court expressly reserved all of the remaining matters for trial by a jury and entered an order accordingly. The appellant appeals, contending that the trial court's ruling that the corporation should not be dissolved was erroneous.

Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure provides that only final judgments and decrees are appealable. Rule 54(b) of the Arkansas Rules of Civil Procedure provides that, when multiple parties are involved or more than one claim is presented, the trial court may direct the entry of a final judgment as to one or more but fewer than all of the parties or claims only upon an express determination that there is no just reason for delay and with the express direction for the entry of final judgment. Here, the order appealed from did not dismiss all the parties or direct the entry of a final judgment as there were issues remaining before it for a trial by jury. No final order as defined in Rule 54(b) was entered and no appeal may be taken at this stage of the proceedings. *City of Marianna* v. *Arkansas Municipal League*, 289 Ark. 473, 712 S.W.2d 305 (1986); ARCP 54(b).

Appellant contends that, as his motion for a new trial was denied, the appeal is properly before the court. Although Rule 2(a)(3) provides that appeals may be taken from orders refusing a new trial, that rule contemplates an appeal from an order granting or refusing a new trial in cases in which all issues have been presented and decided. It can have no application to cases involving multiple issues or claims in which some, but not all, are decided.

Appeal dismissed.

CORBIN, C.J., and COOPER, J., agree.

Jane MORRIS *v.* STATE of Arkansas

CA CR 87-17 731 S.W.2d 230

Court of Appeals of Arkansas
Division I
Opinion delivered June 17, 1987
[Rehearing denied July 8, 1987.]

Achor & Rosenzweig, by: *Jeff Rosenzweig*, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with arson after the fire which destroyed her home was investigated by insurance representatives, the Pulaski County Sheriff's Department, and the Arkansas State Police. After a jury trial, she was convicted of that charge and sentenced to seven years in the Arkansas Department of Correction. From that conviction, comes this appeal.

For reversal, the appellant contends that the trial court erred in admitting testimony to show that, during a recess at trial, the

appellant asked a witness to change his testimony. She also asserts that the trial court erred in allowing testimony concerning scientific tests by a witness who was not present when the tests were performed. We find no error, and we affirm.

With respect to the appellant's contention concerning the admission of testimony that she attempted to influence a witness to change his testimony, the appellant first argues that, under A.R.E. Rule 403, the trial court abused his discretion in admitting the testimony. We disagree. Evidence of other crimes is admissible under A.R.E. Rule 404(b) if the evidence is independently relevant, and the probative value of the evidence outweighs the danger of unfair prejudice under A.R.E. Rule 403. *Smith* v. *State*, 19 Ark. App. 188, 718 S.W.2d 475 (1986). We think that these criteria were met in the case at bar.

The record indicates that the State called John Paul Proffitt as a witness. Proffitt testified that, about one month before the fire, the appellant offered to pay him to set fire to her house, but he refused. He further stated that he visited the appellant at her house on the day of the fire, and that he subsequently accompanied the appellant to her father's house, which was next door to that of the appellant; the appellant then went outside for a few minutes, leaving Proffitt in her father's house. The appellant's father then drove up to his house, and the appellant told Proffitt to go into the back bedroom so that her father would not see him. Proffitt then related that, within minutes of his entering the back bedroom, he heard the appellant exclaim that her house was on fire. He also testified that the appellant later told him that she set fire to her house herself, but that she subsequently accused him of setting the fire. Finally, Proffitt stated that he and the appellant had been in an elevator together during a recess at trial, and that she attempted to influence him to change his testimony, as reflected by the following excerpt from the record:

> Q And what was the — What do you say Jane Morris said to you?
>
> A She asked me what I was going to say. And I said, "the truth." And she said, "Like what"? And I said, "Like, for instance, that I'm going to tell them that me and James was [sic] in the back bedroom when your Daddy pulled up." And she said, "No. No. Tell them

you was [sic] walking down the road."

Proffitt's location during the minutes immediately prior to the outbreak of the fire was a relevant consideration, because the jury could infer from Proffitt's testimony that the appellant had placed Proffitt in the bedroom so that she could return to her house and set the fire. Moreover, if Proffitt had testified that he was walking down the road when the fire started, the appellant's accusation of Proffitt as the person who started the fire would have been more plausible. Under these circumstances, we think that his testimony concerning the conversation in the elevator possesses independent relevance, for it tends to show the appellant's knowledge of her own guilt, from which it may be inferred that she was the person who committed the crime. *See Poole* v. *State*, 262 Ark. 4, 552 S.W.2d 647 (1977); *see also* E. Inwinkelried, *Uncharged Misconduct Evidence* § 3:04 (1984). Nor do we think that the trial court erred in failing to exclude Proffitt's testimony regarding the conversation under A.R.E. Rule 403. The State was required to prove that the appellant set the fire intentionally, and the disputed testimony has a direct bearing on her knowledge and intent. Moreover, the disputed testimony was not of such character as to arouse undue hostility in the jury. *See McCormick on Evidence* § 490 at 565 (3d ed. 1984). Under these circumstances, we hold that the trial court did not abuse his discretion in admitting Proffitt's testimony.

The appellant also argues that the trial court's admission of Proffitt's testimony concerning witness tampering was erroneous because her attorney could have rebutted that testimony had he been permitted to testify; thus, she argues, she was deprived of her right to defend herself. We find no merit in this contention. The record indicates that the attorney's rebuttal testimony would have been that he had been with the appellant at various times during the day that the alleged tampering was said to have occurred. He did not claim that he had been with the appellant at all times while she was in the courthouse; nor did he claim to have been in an elevator with the appellant and Proffitt on the day in question. Moreover, the appellant's attorney did not request permission to testify, nor did he move to withdraw as the appellant's attorney, for a mistrial, or request a continuance. Instead, his position before the trial court, which he urges on appeal, was that he was absolutely barred from testifying under

the rules pronounced in *Aetna Casualty and Surety Co.* v. *Broadway Arms Corp.*, 281 Ark. 128, 664 S.W.2d 463 (1984), and *Bishop* v. *Linkway Stores, Inc.*, 280 Ark. 106, 655 S.W.2d 426 (1983), and that Proffitt's testimony concerning the appellant's statements on the elevator should thus be excluded. The cases cited by the appellant, however, do not set up an absolute bar to an attorney's testimony. In *Broadway Arms*, an attorney who had a financial interest in a case in the form of a contingent fee arrangement was permitted to testify on retrial, provided that he first withdrew from the case and completely severed the attorney/client relationship. *Broadway Arms, supra.* Moreover, the *Bishop* Court stated that "[a]n attorney who is to testify in an action should withdraw from the litigation." *Bishop*, 280 Ark. at 127, *citing Eznor* v. *State*, 262 Ark. 545, 559 S.W.2d 148 (1977). Thus, in order for an attorney to testify in a case in which he has participated, he must first withdraw and sever the attorney-client relationship. If the appellant's attorney in the case at bar had thought his testimony to be important in his client's defense, the proper course for him to take would be to have sought to withdraw as counsel. Without deciding whether the appellant's attorney could properly have testified without withdrawing from this case had he attempted to testify, *see Boling* v. *Gibson*, 266 Ark. 310, 584 S.W.2d 14 (1979), we hold that, in the absence of a motion to withdraw on the part of her attorney, the appellant was not deprived of her right to defend herself.

Finally, the appellant contends that the trial court erred in permitting testimony concerning scientific tests by a person who neither performed them nor was actually present when they were performed. She argues that this testimony was inadmissible hearsay which should have been excluded under A.R.E. Rule 803. We do not agree. The testimony that is the subject of this point for reversal was that of Andrew T. Armstrong, a chemist employed by Armstrong Forensic Laboratories, Inc., a firm specializing in the recovery and identification of flammable liquids from fire debris. Mr. Armstrong's testimony consisted of a statement of the results of various scientific tests, and his opinion that flammable liquids were present in samples of the debris taken from the appellant's house after the fire. Armstrong stated that, although the scientific tests upon which his opinion was based were performed by others, his conclusions were based upon

his own analysis of the data derived from those tests. Under these circumstances, we hold that the trial court did not err in admitting Armstrong's testimony concerning the test results. It is well-settled that an expert may base his opinion upon facts learned from others, even though those facts are themselves hearsay. *Dixon* v. *Ledbetter*, 262 Ark. 758, 561 S.W.2d 294 (1978); A.R.E. Rule 703. Moreover, we have held that, under Rule 703, an expert must be allowed to disclose the facts upon which his opinion is based to the trier of fact; otherwise, the opinion is deprived of its factual underpinning, and the trier of fact is left with little means for evaluating its correctness. *Carter* v. *St. Vincent Infirmary*, 15 Ark. App. 169, 690 S.W.2d 741 (1985).

Affirmed.

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

Lena Tamburo PURSER *v.* Kelsey J. KERR, Administrator of the Estate of Grover C. KERR, Deceased

CA 87-80 730 S.W.2d 917

Court of Appeals of Arkansas
Division I
Opinion delivered June 17, 1987

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

David [illegible]*omon*, for appellee.

JAMES R. COOPER, Judge. The appellant, Lena Tamburo Purser, filed suit in chancery court against the estate of Grover C. Kerr alleging that she was entitled to one half of the estate, because of her services rendered and because of an alleged contract to make a will. She also filed a claim in probate court alleging entitlement to one half of the estate because she and Mr. Kerr allegedly were partners. The probate and chancery cases were consolidated for trial.

The trial judge found that she was not entitled to any of the estate of Mr. Kerr on any of the theories advanced. On appeal, the appellant argues that the trial court erred in finding that the evidence was insufficient to establish a contract to make a will; in finding that the evidence was insufficient to establish a partnership; and in finding that the evidence was insufficient to support an award based on unjust enrichment, implied contract, or quantum meruit. We hold that the trial court was correct in his findings and we affirm.

The appellant was widowed in 1950. In 1952 she met Mr. Kerr, and he resided with the appellant and her mother until her mother's death. In 1973, Mr. Kerr built a home in which they resided together. They continued to live together until 1983. At that time, they had a misunderstanding about who was to pay certain income taxes. Although the appellant had moved into a separate house, the parties remained friendly until Mr. Kerr died on March 8, 1986.

During the entire time the parties lived together, and after their separation, they worked together in a business owned by Mr. Kerr. The appellant testified that they lived as man and wife, that

she cooked and cleaned for Mr. Kerr even after the separation, that he paid most of the expenses, and that they worked together to build the business. The appellant stated that Mr. Kerr had promised that she would be taken care of if anything happened to him, and that Mr. Kerr promised her half of his estate. Mr. Kerr died intestate.

The appellant first argues that there was sufficient evidence from which the chancellor could find that Mr. Kerr had made an oral contract to make a will naming her as a beneficiary. The appellant argues that she performed her part of the contract by acting as a wife to Mr. Kerr and working in his business without pay, and that Mr. Kerr breached the contract when he died intestate.

In chancery cases we review the record *de novo*, but will not disturb the findings of the court unless clearly erroneous or against the preponderance of the evidence. *Fletcher* v. *Long*, 271 Ark. 942, 611 S.W.2d 779 (1981). In order to prove an oral contract to make a will, the evidence must be clear, cogent and convincing. *Apple* v. *Cooper*, 263 Ark. 467, 565 S.W.2d 436 (1978). The decision of the chancellor is necessarily based on the credibility of the witnesses, and we have said many times that the chancellor is in a better position to judge credibility than we are. *Apple, supra.*

The appellant testified extensively as to what her living arrangement had been with Mr. Kerr, and that Mr. Kerr had told her that he would provide for her. However, the only indication that Mr. Kerr had any intent to provide for the appellant after his death is found in receipts for certificates of deposit which were payable on death to the appellant, but which had been changed to remove the appellant's name. According to the appellant, her name was removed from the certificates after their argument. The appellant further testified that the certificates had been purchased with both of their funds and that they had "split" them in 1983.

Several friends testified as to the living arrangement between Mr. Kerr and the appellant. Again, however, none of them was able to say that Mr. Kerr had expressly promised to make a will. One friend did testify that Mr. Kerr had told him he did not want his children to inherit, but that statement does not give rise

to a presumption that Mr. Kerr intended the appellant to inherit.

The evidence will not support a finding that Mr. Kerr entered into an agreement with the appellant to make a will, what the terms of the agreement were, or that the appellant had performed her part of the bargain. We agree with the trial judge that no express contract was negotiated between the parties.

The appellant next argues that the trial court erred in finding that the evidence was insufficient to establish a partnership. We disagree.

When Mr. Kerr first met the appellant he was working in an auto parts business in Memphis, Tennessee. After Mr. Kerr moved to Helena, Arkansas, the appellant loaned him one hundred and fifty dollars to open his own business. The appellant worked in the Helena auto parts business and in a second auto parts store later. Eventually, an antique store was opened. It is undisputed that the appellant worked in all of the businesses, and she testified that she worked in the businesses for thirty-four years without any pay. At one point she testified that when items were bought for the business she bought "half and he bought half"; however, she later testified that Mr. Kerr handled all of the money and that he paid for the items. Various friends also testified that they frequently saw the appellant working in the business, that she helped to make decisions as to what was purchased, and that when referring to the business Mr. Kerr would use the words "we" or "Lena and I."

The primary test of a partnership between parties is their actual intent to form a partnership. *Gammill* v. *Gammill*, 256 Ark. 671, 510 S.W.2d 66 (1974); *Brandenburg* v. *Brandenburg*, 234 Ark. 1117, 356 S.W.2d 625 (1962). On the evidence presented in the case at bar, we simply cannot say that the trial judge erred in failing to find a partnership. Although they had a joint checking account, that was changed in 1983. None of the other property was owned jointly, and it is clear that after the appellant's initial one hundred and fifty dollar investment, all of her funds were kept separate and apart from Mr. Kerr's. Furthermore, even if a partnership had existed, it is clear that it was ended in 1983. After their argument regarding income taxes, all of their funds were divided. At one point, the appellant referred to this period of time as when "we dissolved the

partnership."

Finally, the appellant argues that she should have recovered from the estate for the thirty-four years she worked without pay, based on the equitable principles of unjust enrichment, implied contract or quantum meruit. However, all of these remedies are founded on an implied agreement to give reasonable value for services performed and the principle that it would be unjust to allow the party receiving the services to accept them without paying for them. *See Frigillana* v. *Frigillana*, 266 Ark. 296, 584 S.W.2d 30 (1979); *Davis* v. *Hare*, 262 Ark. 818, 561 S.W.2d 321 (1978); *Whitley* v. *Irwin*, 250 Ark. 543, 465 S.W.2d 906 (1971).

In the case at bar it is clear that the appellant received consideration for her services. The appellant stated that Mr. Kerr would not allow her to spend her money, and that he invested and managed it for her. She lived in homes provided by Mr. Kerr and, as a result, was able to save and invest the monthly widow's pension she received after her first husband's death. While the appellant was working in the business for the past thirty-four years, Mr. Kerr, in return, provided for her and saw that she was taken care of. Furthermore, by the appellant's own admission, when they separated in 1983 she received a share of the certificates of deposit they had purchased with monies generated by the businesses.

Affirmed.

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

Larry Dewey TATUM *v.* STATE of Arkansas

CA CR 86-178 731 S.W.2d 227

Court of Appeals of Arkansas
Division I
Opinion delivered June 17, 1987

Jerry Cavaneau, for appellant.

Steve Clark, Att'y Gen., by: *J. Blake Hendrix*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was convicted by a jury of theft of property, theft by receiving, and of being a felon in possession of a firearm. He was sentenced as a habitual offender and received ten years on each charge to run consecutively. He was also found guilty of possessing a defaced firearm and was sentenced to one year in the county jail, to be served concurrently with the felony convictions. For his appeal, the appellant argues that the trial court erred in allowing the jury to hear evidence of all of his prior convictions during the guilt stage of the bifurcated trial. He also argues that the trial court erred in refusing to suppress evidence of the firearms found in the trunk of his car because the search warrant was defective. We agree with both of appellant's arguments and therefore we reverse and remand for a new trial.

On November 29, 1984, John Smith reported to the El Dorado Police Department that two royalty checks issued to his aunts had been stolen. He explained that he had left the checks in a car he rented from Marks Company and when he returned shortly after turning the car in, he found they were gone.

On December 4, 1984, Deborah Torrence called the El Dorado police and talked with Detective Carolyn Dykes. Torrence told Dykes that the man she had been living with, the appellant, had stolen two royalty checks from a rented car that had been returned to the Marks Company. Torrence also stated that the appellant had a .38 caliber revolver that he had stolen from a car at a gas station, and that he also had a stolen .38 revolver he told her he had bought. After an argument with the appellant, Torrence stated she threatened to turn him in to the police. Torrence last saw the guns when they were placed in a brown cassette tape case. Torrence advised Detective Dykes that she had hidden the checks on a shelf in the bedroom of the appellant's house.

After talking further with Torrence, Dykes discovered that the checks the appellant had were the same checks that John Smith had reported as stolen several days earlier. Dykes then filled out an affidavit and got a search warrant to search the appellant's car and his home. Dykes contacted the appellant at Marks Company, and, after showing him the search warrant, she searched the appellant's car and found two .38 revolvers inside a tape case and some letters addressed to Shirley Ann Tatum, the appellant's ex-wife. Dykes then arrested the appellant and they proceeded to his home, where she found the checks on a shelf in the bedroom closet.

The trial court denied the appellant's motion to suppress and allowed the guns and letters to be introduced into evidence. On appeal, the appellant argues that the trial court erred in not suppressing the evidence seized from his car pursuant to the search warrant because the affidavit does not state facts to support the officer's assertion that the items would be found in his car. We agree with the appellant's argument.

In judging the sufficiency of the affidavit based on information received from an informant, the magistrate issuing the warrant must make a practical, common sense decision based on all the circumstances set forth in the affidavit. *Rubio* v. *State*, 18 Ark. App. 277, 715 S.W.2d 214 (1986). The duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed to issue the warrant. *Harper* v. *State*, 17 Ark. App. 237, 707 S.W.2d 332 (1986). While inferences the magistrate may draw are those which a reasonable person could draw, certain basic information must exist to support an inference. *Collins* v. *State*, 280 Ark. 453, 658 S.W.2d 877 (1983). The practical common sense approach used to examine search warrants cannot cure omissions of fact that are undisputedly necessary. *Ulrich* v. *State*, 19 Ark. App. 62, 716 S.W.2d 777 (1986). The affidavit shall set forth facts and circumstances that tend to show that the things are in the places, or the things are in the possession of the person, to be searched, A.R.Cr.P. Rule 13.1(b).

The affidavit in this case states in part:

> On November 29, 1984, John Smith of 602 North Jackson Street reported to the El Dorado Police Department that

> two (2) Tosco royalty checks issued to Annie Smith and Rosie Smith in the amounts of $322.21 and $322.22, respectively, were stolen from a rental car after he returned the rental car to its owner, Marks Company, located at 2880 North West Avenue. Mr. Smith told police that he left the described checks over the sun visor of the car and when he returned to Marks Company a short time after discovering he left the checks in the car he found they had been stolen. On December 4, 1984, Deborah Torrence called the police department and told this officer that she lived at 1316 D Avenue with Larry Dewey Tatum, her boyfriend, until last night, 12/3/84. Ms. Torrence said that on or about Sunday, December 2, 1984, Tatum brought a .38 caliber revolver to the residence and told her that he had stolen the revolver from a car at a gas station in El Dorado. Torrence said that Tatum has another .38 caliber revolver in the residence and told her that he bought the gun "hot" from a man by the name of "Fish". Torrence said she saw Tatum place the two (2) .38 revolvers in a cassette tape case, after she threatened to turn him in to authorities. Torrence told this investigator that Tatum brought other stolen property to the residence including a "Tosco" check issued to Annie Smith and a "Tosco" check issued to Rosie Smith and that Tatum told her that he took the checks from a car at Marks Company, where he is employed.

It is clear from the face of the affidavit that there are sufficient facts stated to support the search of the home. However, there is no information or facts whatsoever that indicate either the guns or the checks would be found in the appellant's car. Therefore, the trial court erred when it refused to suppress the evidence that had been seized from the car.

The appellant's second argument concerns the propriety of introducing prior convictions into evidence during the "guilt" stage of a bifurcated trial. Under the facts and circumstances of this case, we find that it was error for the trial court to deny the appellant's motion in limine to exclude evidence of more than one felony conviction.

The appellant had four prior felony convictions. The trial

court, after denying the appellant's motion, also refused to allow the appellant to stipulate to one prior felony conviction. The trial court, explaining its ruling, found that the number and nature of prior convictions were relevant to the sentencing portion of the trial.

Arkansas Statutes Annotated § 41-1005 (Supp. 1985) sets out the procedure to be followed when enhancement of penalty is sought according to the Habitual Offender Act. First, the jury hears all of the evidence relative to the current charge, and then retires to deliberate. If the defendant is found guilty, the State may then present evidence of prior convictions to the trial judge out of hearing of the jury. The trial court then instructs the jury as to the number of prior convictions and the statutory sentencing range. Whether the jury is informed as to the nature of the prior convictions is within the discretion of the trial court. The jury then retires again to deliberate on the sentence.

The purpose of this bifurcated process is to protect the defendant by withholding proof of his prior convictions until the jury has found him guilty. *Heard* v. *State*, 272 Ark. 140, 612 S.W.2d 312 (1981). In this case, the defendant was not given that protection because evidence of all four of his prior convictions was introduced before the jury could deliberate on the issue of guilt.

This protection afforded a criminal defendant is so important that the Arkansas Supreme Court has mandated that, even though § 41-1005 does not apply to DWI proceedings, the evidence of prior DWI convictions should be presented in the second half of a bifurcated proceeding, after the jury has determined guilt of the offense charged. *Peters* v. *State*, 286 Ark. 421, 692 S.W.2d 243 (1985). This is true even though prior DWI convictions are an element of the offense in subsequent DWI charges. Thus, this procedure should certainly be followed in cases where § 41-1005 does apply, even where the prior convictions are an element of the offense charged.

This protection, however, must be balanced with the State's entitlement to prove all the elements of an offense. In the case at bar, where the appellant was charged with being a felon in possession of a firearm, proof of one prior felony conviction would have been sufficient. *See* Ark. Stat. Ann. § 41-3103 (Repl. 1977). Thus, introduction of all the appellant's prior convictions was

unnecessary, and denied the appellant the protection of § 41-1005.

We also disagree with the State's contention that the introduction of the prior felonies was not prejudicial. Prior convictions cannot be introduced for the purpose of showing that the accused is a bad person. *Ford* v. *State*, 276 Ark. 98, 633 S.W.2d 3 (1982); A.R.E. Rule 404(b). We can think of no other reason for the State to introduce more than one felony. That the State intended for the jury to believe that the appellant is a bad person is evident from the prosecutor's closing remark that the appellant was "a five time loser caught with his hand in the cookie jar again."

We are mindful of the fact that prior convictions may be used to impeach credibility under A.R.E. Rule 609 and are admissible for the purposes outlined in A.R.E. Rule 404; these uses are not affected.

Our holding today only limits the prosecution to proof of one prior felony conviction in its case in chief where a felony conviction is an element of the offense where the proceedings are bifurcated, and the validity of the conviction is not in dispute.

Reversed and remanded for new trial.

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

Bruce PAYNE *v.* STATE of Arkansas

CA CR 87-20 731 S.W.2d 235

Court of Appeals of Arkansas
Division II
Opinion delivered June 17, 1987

Wayland A. Parker, II, for appellant.

Steve Clark, Att'y Gen., by: *Robert A. Ginnaven, III*, Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. Bruce Payne was convicted of the first degree battery of Tiffany Bailey and of failure to appear. He was sentenced to 20 years imprisonment on the battery charge and 10 years on the failure to appear charge. The trial court ran the sentences concurrently.

On appeal, Payne argues that the evidence at trial was insufficient to support the jury's verdict. We disagree and affirm.

Bruce Payne was the live-in boyfriend of Shelly Bailey. They lived in Waldron with Ms. Bailey's 11-month-old daughter, Tiffany.

On August 18, 1984, Payne and Bailey brought Tiffany to the office of Dr. Young in Waldron. The child had a broken neck. Payne told Dr. Young that she had hurt herself falling off a porch step several days before. Payne also told Dr. Young that the night before the child had fallen off a couch. Janis Mays, a social worker who investigated the case later that day, testified that Shelly Bailey, the child's mother, gave her virtually no explanation for the situation.

Apart from the neck injury, bruises were found on the child's head, face, tongue, forearm, chest, abdomen, shoulders, hip, and genitals. The child also had multiple rib fractures.

The broken neck was by far the most serious injury to the

child. The fracture had dislocated and the spinal cord had been sheared. The medical evidence was that, while the child may have some use of her arms, she will never walk or regain control of her bodily functions.

After examining the child Dr. Young formed a diagnosis of battered child syndrome. He testified that the injuries he observed were not consistent with the history that Payne gave. Payne gave the following written statement to the local sheriff:

> On Thursday, August 16, 1984, I, Bruce Payne, was taking Tiffany Bailey in my home and I went out the back door to check on my grapes and two or three minutes later she (Tiffany) came to the back door and fell down the rock steps. I picked her up and brought her in and she cried for just a minute so I put her to bed. Shelly was in another part of the house and could see what happened and met me. On Friday, the 17th of August I gave her her bottle on the couch and I was watching T.V. when she fell off the couch on her head. She cried for just a little bit and stopped. Shelley was in the kitchen and heard it happen. She or I put Tiffany to bed. This morning Tiffany did not want to eat or move. That's the reason we brought her to the doctor.

Sheriff Daggs testified that Payne told him the steps were eight feet tall, but that when he went to the house and located the steps they were only slightly over three feet tall.

Dr. Fulbright, a neurosurgeon, gave his opinion that the child's injuries were not consistent with the history given by Payne. Dr. Woody, a pediatric neurologist, testified that the injury was not the result of an accident and that the type of force required to produce the neck injury was a direct blow to the neck with a baseball bat.

On appeal, Payne argues that there is no substantial evidence that he was the one to harm the child. While the evidence is admittedly circumstantial we believe it is sufficient to support the jury's verdict.

Deviney v. *State*, 14 Ark. App. 70, 685 S.W.2d 179 (1985), was similar to the case at bar. In *Deviney*, Michael and Nancy Deviney were convicted of the second degree murder of her 16-

month-old son, who died of a fractured skull. There were no witnesses. In addition to the fractured skull, the medical examiner found broken bones in the child's arm and bruises on the body. He testified that the injuries could not have occurred from falling down steps, as the Devineys contended.

In affirming the convictions we said:

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

In addition, a jury may consider and give weight to any false and improbable statements made by an accused in explaining suspicious circumstances. *Watson* v. *State*, 290 Ark. 484, 720 S.W.2d 310 (1986).

Substantial evidence is that which is more than a scintilla and must do more than create a suspicion of the existence of the fact to be established; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Surridge* v. *State*, 279 Ark. 183, 650 S.W.2d 561 (1983);

Phillips v. *State*, 271 Ark. 96, 607 S.W.2d 664 (1980). When we consider the defendant's improbable statement in this case together with the nature of the injuries to the child, the medical opinion evidence, and the defendant's opportunity, we are persuaded that, taken together, they are sufficient to constitute substantial evidence of guilt. *See Dix* v. *State*, 290 Ark. 28, 715 S.W.2d 879 (1986).

Appellant also argues that the evidence was insufficient to sustain a conviction for failure to appear. Ark. Stat. Ann. § 41-2820 (Repl. 1977) provides that a person commits the offense of failure to appear if subsequent to having been lawfully set at liberty upon condition that he appear at a specified time, place, and court, he fails to appear without reasonable excuse. The commentary to this statute indicates that "reasonable excuse" is a defense.

It was stipulated that appellant did not appear on the date he was originally set for trial. Bob Sharnas, the appellant's bondsman, testified that on the Thursday before the Monday he was to appear for trial Sharnas attempted to contact Payne and was not able to get Payne to return his calls. He learned that Payne was in the hospital because he had "just flipped out," and Sharnas went to the hospital in Konawa, Oklahoma. Sharnas was unable to learn anything about Payne's condition. It does not appear from the record that Payne ever notified the court or his attorney of any problem. The result was that the court convened on the date of trial, with the subpoenaed witnesses present but without the defendant. Payne's mother testified that when he started to go see his lawyer, right before the trial, he broke down and got sick. Payne offered no medical evidence as to what condition he might have been suffering from.

It was Payne's obligation to establish to the satisfaction of the jury that he had a reasonable excuse for his failure to appear. On the particular facts of this case we hold that the jury was entitled to find that Payne did not meet his burden in this regard.

Affirmed.

MAYFIELD and COULSON, JJ., agree.

David Samuel CARSON *v.* STATE of Arkansas

CA CR 87-2 731 S.W.2d 237

Court of Appeals of Arkansas
Division II
Opinion delivered June 17, 1987

Joel W. Price, for appellant.

Steve Clark, Att'y Gen., by: *J. Blake Hendrix*, Asst. Att'y Gen., for appellee.

BETH GLADDEN COULSON, Judge. On July 17, 1985, the appellant, David Samuel Carson, entered a plea of nolo contendere to the charge of battery in the second degree. The trial court suspended the imposition of sentence for a period of five

years subject to certain conditions, including the requirement that the appellant not violate any federal, state, or municipal law. The State filed a petition to revoke on July 8, 1986, alleging that the appellant had committed the offenses of manufacturing a controlled substance, possession of marijuana with intent to deliver, and possession of drug paraphernalia. The appellant filed a motion to suppress certain evidence on the grounds that the search warrant and underlying affidavit were defective because they contained no facts bearing upon the reliability of the State's confidential informant.

The trial court ruled that the exclusionary rule did not apply to revocation proceedings and that, even if the warrant was deficient, those executing the search in question had acted in "good faith" reliance upon the facial validity of the warrant. The appellant was found to be in violation of the terms and conditions of his suspended imposition of sentence and was sentenced to five years imprisonment with two years suspended. We find that the trial court's ruling was in accord with the prevailing law and affirm.

■ It is now settled in this jurisdiction that the exclusionary rule does not apply in revocation proceedings, at least where there has been a good faith effort to comply with the law. In *Harris* v. *State*, 270 Ark. 634, 606 S.W.2d 93 (Ark. App. 1980), we stated:

> [W]e adopt the rule which we consider to be consistent with Ark. Stat. Ann. § 41-1209(3)(b) (Repl. 1977) and with the holding in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), that the trial court may permit the introduction of any relevant evidence of an alleged violation of the conditions of probation, including evidence that might be subject to a motion to suppress under the doctrine of *Mapp* v. *Ohio*, at least where there has been a good-faith effort to comply with the law. This is the rule of the great majority of jurisdictions.

270 Ark. at 638.

■ The refusal to apply the exclusionary rule in cases where the search was conducted in good faith reliance upon a warrant later proven defective serves as an accommodation of the

societal interests in requiring strict compliance with conditions of probation and in deterring illegal police action. *Schneider* v. *State*, 269 Ark. 245, 599 S.W.2d 730 (1980), *cert. denied*, 449 U.S. 1124 (1981). *See Queen* v. *State*, 271 Ark. 929, 612 S.W.2d 95, *cert. denied*, 454 U.S. 963 (1981); *Lockett* v. *State*, 271 Ark. 860, 611 S.W.2d 500 (1981). The good faith exception, as adopted in *McFarland* v. *State*, 284 Ark. 533, 684 S.W.2d 233 (1985), applies to those situations where the warrant and underlying affidavit fail to set forth those facts which would establish the reliability of the informant who provided the hearsay information which prompted the State's decision to obtain the warrant. *Jackson* v. *State*, 291 Ark. 98, 722 S.W.2d 831 (1987).

In a hearing on a petition to revoke, the burden is upon the State to prove the violation of a condition of the suspended sentence, and, on appellate review, the trial court's findings are upheld unless they are clearly against a preponderance of the evidence. *Felix* v. *State*, 20 Ark. App. 44, 723 S.W.2d 839 (1987). The trial court's findings as to the application of the good faith exception in this case are not clearly against a preponderance of the evidence. For the foregoing reasons, we find no merit in the appellant's contention that the court erred in denying the motion to suppress, and we affirm.

Affirmed.

MAYFIELD and JENNINGS, JJ., agree.

FARMERS UNION MUTUAL INSURANCE COMPANY *v.* James M. MOCKBEE and Charlotte M. MOCKBEE

CA 86-431 731 S.W.2d 239

Court of Appeals of Arkansas
En Banc
Opinion delivered June 24, 1987

Randell Templeton and *Hugh L. Brown*, for appellant.

Lohnes T. Tiner, for appellees.

DONALD L. CORBIN, Chief Judge. A judgment in the amount of $4,425 plus a twelve percent penalty and attorney's fee in the sum of $500 was entered against appellant, Farmers Union Mutual Insurance Company. Appellant argues for reversal that the trial court abused its discretion in refusing to set aside the default judgment and in overruling appellant's motions to set aside the judgment. In its second assignment of error appellant asserts the trial court erred in entering judgment without requiring appellees to comply with ARCP Rule 55(b). We affirm.

The record reflects that appellees, James M. Mockbee and Charlotte M. Mockbee, his wife, filed a complaint in the Cross County Circuit Court against appellant which alleged that appellant had failed and refused to pay for windstorm damages to appellees' home and carport pursuant to a policy of insurance. Appellant filed a timely answer denying the allegations of appellees' complaint. A pre-trial hearing was conducted in this matter which appellant did not attend. The trial court set the case for non-jury trial at the pre-trial hearing. Appellant did not appear for trial and judgment was entered against it. A "Motion To Reconsider Refusal To Set Aside Default Judgment" was filed ten days after entry of judgment by appellant. The motion was denied by the trial court on the same day it was filed.

The basis of appellant's "Motion To Reconsider Refusal To Set Aside Default Judgment" was the trial court's failure to take under consideration Rules 4 and 12 of the Uniform Rules for Circuit and Chancery Courts in its determination that appellant received adequate notice of the trial setting. The order of the court denying appellant's motion provided that appellant had actual notice of the trial setting but chose to ignore it.

In this case appellant filed its post-trial motion within ninety days of the entry of the judgment it seeks to have set aside. The order of the trial court refusing to set aside the judgment was also filed within ninety days of the entry of the judgment. ARCP Rule 60(b) provides as follows:

> Ninety-Day Limitation. To correct any error or mistake or to prevent the miscarriage of justice, a decree or

> order of a circuit, chancery or probate court may be modified or set aside on motion of the court or any party, with or without notice to any party, within ninety days of its having been filed with the clerk.

The only limitation on the exercise of this power is addressed to the sound discretion of the court. *Massengale* v. *Johnson*, 269 Ark. 269, 599 S.W.2d 743 (1980). ARCP Rule 60(d) provides that no judgment against a defendant shall be set aside unless the defendant in his motion asserts a valid defense to the action and, upon hearing, makes a prima facie showing of such defense. *See Meisch* v. *Brady*, 270 Ark. 652, 606 S.W.2d 112 (Ark. App. 1980). This court in *Bunker* v. *Bunker*, 17 Ark. App. 7, 701 S.W.2d 709 (1986) said that in order to prevail under either Rule 60(b) or 60(c), a party is required to show that it has a meritorious defense. The motion itself must assert this defense. *Taggart* v. *Moore*, 8 Ark. App. 160, 650 S.W.2d 590 (1983). A meritorious defense has been defined as:

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

Tucker v. *Johnson*, 275 Ark. 61, 66, 628 S.W.2d 281, 283-4 (1982).

Appellant in the case at bar only alleged it had not received proper notice of the trial setting in its motion and relied upon the authority of Rules 4 and 12 of the Uniform Rules for Circuit and Chancery Courts for its proposition. Appellant failed to raise a valid defense to the judgment in its motion pursuant to Rule 60(d), and we cannot say that the trial court abused its discretion by refusing to set aside the judgment entered against appellant.

Appellant also asserts as error the trial court's entry of judgment against appellant because it did not receive the three-day notice required when an application for a default judgment is made under ARCP Rule 55(b). In *Dawson* v. *Picken*, 1 Ark. App. 168, 613 S.W.2d 846 (1981), we found no merit to the appellant's contention that the judgment entered was a default judgment and

that the appellant was entitled to three days' notice prior to a hearing under the provisions of ARCP Rule 55(b). We held that Rule 55(b) was inapplicable inasmuch as no motion for default judgment was filed, and the judgment was not based upon the failure of the appellant to answer or appear but was based on the complaint, answers, and evidence adduced. The result reached by this court in *Dawson, supra*, was specifically approved by the Arkansas Supreme Court in its recent decision of *Diebold* v. *Myers General Agency, Inc.*, 292 Ark. 456, 731 S.W.2d 183 (1987). In the instant case, appellant filed an answer to appellees' complaint but failed to appear at trial. The judgment entered against appellant was based upon the complaint, answer, oral testimony, exhibits and representation of counsel. Accordingly, we find no merit to this argument.

Affirmed.

Darla M. HARPER *v.* Barry W. HARPER

CA 86-390 731 S.W.2d 241

Court of Appeals of Arkansas
Division I
Opinion delivered June 24, 1987
[Rehearing denied July 22, 1987.]

Brockman & Norton, for appellant.

No brief filed for appellee.

GEORGE K. CRACRAFT, Judge. Darla M. Harper brings this appeal from an order of the chancery court of Pulaski County granting temporary relief only. She contends that the chancellor erred in not granting a decree of divorce in the form "submitted to him on April 24, 1986." We do not address the issue on its merits because we find the order appealed from to be unappealable.

Appellant brought this action for divorce, child custody, and settlement of all marital rights. On November 6, 1985, the parties appeared for a hearing on the merits. At the conclusion of the hearing, the chancellor orally announced that he would grant a divorce to the appellant and generally stated the disposition he would make of the marital property. He also stated that the custody of the minor child would remain with the appellant, and he fixed a definite amount of child support. Nothing further appears of record until April 24, 1986, when the court entered its order reciting that the appellant's attorney had presented a precedent for a decree of divorce which the chancellor declined to sign. In that order, the court recited the announcements made at the November hearing, but no order was entered on those announcements and no divorce was granted. The court further found that subsequent to the November hearing the appellant had disappeared, and ordered that the appellee be temporarily awarded custody of the minor child until it could be determined whether the appellant was dead or alive. The order specifically reserved the issue of divorce and property rights pending determination of the defendant's status and further orders of the court.

Appellant appeals contending that the court erred in not entering the precedent her counsel submitted at the hearing. No record was made of the proceedings on which the order appealed from was based, and the circumstances surrounding appellant's disappearance and form of the proffered decree are not made known to us. The announcements made by the court at

the conclusion of the trial were not orders of the court but merely directions to counsel of what the precedent should contain. The chancellor retained control of the cause and was free to change those directives. *O'Dell* v. *O'Dell*, 247 Ark. 635, 447 S.W.2d 330 (1969).

The only decree before us is the one entered by the court on April 24, 1986. It is not an appealable one because it was not a final decree within the meaning of Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure. In order to be final for the purposes of appeal, a decree must in some way determine or discontinue the action and put the chancellor's directive into immediate execution, ending the litigation or at least a separable portion of it. *Morgan* v. *Morgan*, 8 Ark. App. 346, 652 S.W.2d 57 (1983). The order entered here made no more than a temporary award of custody and expressly reserved all other issues for further action by the chancellor. Because we find the order unappealable, we do not address the issue on its merits.

Appeal dismissed.

CORBIN, C.J., and COOPER, J., agree.

SPRINGWIND FARMS, INC. *v.* McLANE CO.

CA 86-372 731 S.W.2d 784

Court of Appeals of Arkansas
Division I
Opinion delivered June 24, 1987

Ball, Mourton & Adams, by: *Phillip A. Moon*, for appellant.

Wright, Lindsey & Jennings, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from the registration of a default judgment rendered in Texas. The appellant is an Arkansas corporation with its principal place of business in Springdale, Arkansas. The appellee is a Texas corporation. Suit was filed in Texas and service was obtained on the appellant under the Texas "long-arm" statute. Appellant's first contention is that it did not have sufficient contacts with Texas to give that state in personam jurisdiction over it. Its second contention is that there was a failure to comply with the Texas procedural requirements for service and, therefore, the Texas court did not have personal jurisdiction to enter judgment against appellant.

We need not discuss either of these contentions because we agree with the appellee's contention on cross-appeal. The appellee claims the Texas judgment became a final Arkansas judgment since the appellant did not file an answer within the time allowed by the statutes providing for the registration of foreign judgments

in Arkansas. We agree and affirm the judgment entered by the trial court, although for a different reason than that used by the trial judge.

Ark. Stat. Ann. §§ 29-801 through 29-818 (Repl. 1979) are concerned with the enforcement of foreign judgments. These sections constitute the Uniform Enforcement of Foreign Judgments Act, and section 29-807 provides:

> If the judgment debtor fails to plead within twenty [20] days after jurisdiction over his person has been obtained, or if the court after hearing has refused to set the registration aside, the registered judgment shall become a final personal judgment of the court in which it is registered.

As the appellee points out, these statutes were discussed by Dr. Robert A. Leflar in a law review article in which it was said:

> If after registration personal service is secured on the judgment debtor in accordance with the law of the state of registration. . . . If he does not answer within this time, or if on hearing based on the issues raised by his answer the decision goes against him, the registered judgment becomes a final personal judgment of the court in which it is registered.

Leflar, *The New Uniform Foreign Judgments Act*, 3 Ark. L. Rev. 402, 415 (1949).

Since the appellant's answer to the petition for registration of the Texas judgment was filed five days late, we hold that the judgment sought to be registered became a final judgment under the plain language of Ark. Stat. Ann. § 29-807. The trial court considered the issues raised in the appellant's answer, even though it was filed late, because the judge thought he should determine whether Texas had jurisdiction to render the judgment. The appellee told the judge that it took the position that the judgment had become final when the time to file an answer to the petition for registration had expired and that it did not, by participating in the hearing on the jurisdiction issue, want to waive any right to assert that position. The trial judge stated he understood that position.

The appellant argues that the trial court's action allowed the

answer to be filed late, that this was discretionary, and that no abuse of discretion was shown. We do not agree. Not only did the appellant fail to show any excuse for filing its answer late, the judge did not indicate there was any excuse for the late filing. The judge simply thought he had to consider the basis of the granting of the foreign judgment since it was alleged that Texas did not have jurisdiction to grant it.

We think the trial court was in error in reaching this conclusion. It is true that a judgment in a foreign court which lacks jurisdiction will not be recognized in this state any more than a judgment in our own courts which lack jurisdiction will be recognized. *See Pulliam* v. *McGarity*, 268 Ark. 1138, 599 S.W.2d 419 (1980). However, this does not mean one can ignore the summons issued on a petition to register a foreign judgment and then, at any time he desires, raise the issue that the foreign court lacked jurisdiction to render the judgment. In *Purser* v. *Corpus Christi State National Bank*, 256 Ark. 452, 508 S.W.2d 549 (1974), the court said:

> The salient purpose of the Uniform Act is to provide for a summary judgment procedure in which a party in whose favor a judgment has been rendered may enforce that judgment promptly in any jurisdiction where the judgment debtor can be found, thereby enabling the judgment creditor to obtain relief in an expeditious manner.

256 Ark. at 456.

It would work against this "salient purpose" to allow without good cause the late filing of answers to petitions to register foreign judgments. In *Dolin* v. *Dolin*, 9 Ark. App. 329, 659 S.W.2d 954 (1983), we said the court is not required to conduct a hearing at which the burden is upon the party filing the petition for registration to establish entitlement to registration where there is no evidence or testimony to refute the prima facie case made by the authenticated documents filed with the verified petition to register the judgment. We said the appellant was afforded the opportunity to offer evidence to support his allegation of lack of jurisdiction and, having offered none, the judgment which was regular on its face and duly authenticated was entitled to registration.

In *Meisch* v. *Brady*, 270 Ark. 652, 606 S.W.2d 112 (1980), the court said a default judgment was "just as binding and forceful as a judgment entered after a trial on the merits of the case." 270 Ark. at 658. The court reversed the trial court's setting aside a default judgment, and said the record did not establish that the requirements of ARCP Rule 55, which allows a default judgment to be set aside "upon a showing of excusable neglect, unavoidable casualty, or other just cause," had been met. These requirements were not met in the instant case, either.

For the reasons indicated above, we affirm the trial court's judgment granting the appellee's petition to register the Texas judgment.

CORBIN, C.J., and COULSON, J., agree.

Ora Lee HUNT *v.* The PYRAMID LIFE INSURANCE COMPANY

CA 86-413 732 S.W.2d 167

Court of Appeals of Arkansas
En Banc
Opinion delivered June 24, 1987
[Rehearing denied July 22, 1987.]

[redacted]

[redacted]

[redacted]

Simmon S. Smith, for appellant.

Cabe & Lester, A Professional Association, for appellee.

BETH GLADDEN COULSON, Judge. Appellant raises four points for reversal of the trial judge's ruling granting appellee's motion for a directed verdict. We find none of her arguments persuasive, and we accordingly affirm the decision of the trial court.

The nature of the present case makes it necessary to examine the factual background at some length. On October 3, 1983, Bruce Jarsma, a soliciting agent for appellee, Pyramid Life Insurance Company, called upon appellant, Ora Lee Hunt, and

her husband, William Hunt, at their home in Little Rock, and persuaded them to purchase term life insurance for members of their immediate family, which included nine children.

Appellant also wanted a policy insuring the life of her sister, Dorothy Mae Jones, of Biscoe, Arkansas. It appears that while Jarsma was present appellant phoned her sister for some information which the agent used in preparing the policy. Because appellant is illiterate (although she can sign her own name) she asked her husband to sign her sister's name on the insurance application form.

The application, dated October 3, 1983, named appellant as the sole beneficiary. According to the testimony of appellant's husband, the purpose of the $50,000 policy was to provide funeral expenses in the event of Dorothy Mae Jones's death. The application form contained various questions relating to the past and present health of the proposed insured, and all were answered in the negative.

A policy was issued on October 11, 1983, with "Dorothy M. Jones" named as the insured and owner. On February 6, 1984, Dorothy Mae Jones died as a result of cancer of the pancreas. Appellee denied payment of appellant's claim based on the health of Dorothy Mae Jones. Appellant filed suit against appellee, alleging breach of contract, bad faith, fraudulent misrepresentation, and violation of the Arkansas Unfair Claims Settlement Act, Ark. Stat. Ann. § 66-3005 et seq. (Repl. 1980, Supp. 1985). Appellant also requested compensatory and punitive damages.

At trial, a hearing was conducted in chambers after appellant had rested her case. The trial judge then granted appellee's motion for a directed verdict on the first count of appellant's complaint, concerning the alleged breach of contract, but made no ruling on the remaining counts. From that decision, this appeal arises.

In her first point for reversal, appellant contends that the trial judge erred when he granted appellee's motion for a directed verdict. As a procedural matter, a directed verdict is proper only when the evidence is so insubstantial as to require that a jury verdict for the non-moving party be set aside. *Prudential Insurance Co.* v. *Williams*, 15 Ark. App. 94, 689 S.W.2d 590

(1985). To determine, on appeal, the correctness of the trial court's action regarding a motion for a directed verdict, we view the evidence that is most favorable to the non-moving party and give it the highest probative value, taking into account all reasonable inferences deducible from it. *National Security Fire & Casualty Co.* v. *Williams*, 16 Ark. App. 182, 698 S.W.2d 811 (1985).

According the highest probative value to the evidence presented by appellant, we cannot find any substantial evidence tending to establish an issue of fact in appellant's favor. The controlling law is found at Ark. Stat. Ann. § 66-3206 (Repl. 1980):

> No life or disability insurance contract upon an individual, except a contract of group life insurance or of group or blanket disability insurance, shall be made or effectuated unless at the time of the making of the contract the individual insured, being of competent legal capacity to contract, *applies therefor or has consented thereto in writing*. . . [Emphasis added.]

This court applied the statutory language to a situation in which an agent had never obtained an insured's consent or signature in *Cableton* v. *Gulf Life Insurance Co.*, 12 Ark. App. 257, 674 S.W.2d 951 (1984). We noted the public policy considerations which led to the enactment of the law codified at § 66-3206, quoting from *Callicott* v. *Dixie Life & Accident Insurance Co.*, 198 Ark. 69, 127 S.W.2d 620 (1939):

> One who takes out a policy of insurance on the life of his brother without the knowledge or consent of the latter, cannot maintain an action against the company on the policy. 14 R.C.L. 889.
>
> It is against public policy to allow one person to have insurance on the life of another without the knowledge of the latter. It is not only the general rule that the consent of the insured must be had, but that is the rule in this jurisdiction, and this case is ruled by the case of *Amer. Benefit Life Ins. Ass'n* v. *Armstrong*, 183 Ark. 47, 34 S.W.2d 1082.

In commenting on *Callicott*, we stated: "The passage of Ark.

Stat. Ann. § 66-3206 codifies this policy and cannot be circumvented." 12 Ark. App. at 259.

Appellant asserts that § 66-3206 and *Cableton* are inapplicable because appellee "ratified the parol agreement." However, even when the evidence is viewed most favorably to appellant, there is nothing to indicate that appellee was ever informed, by its agent or any other person, that the application had not been signed by the insured. Without such knowledge on appellee's part, it cannot be said that ratification occurred. Appellant's contention amounts to an argument that there had been a waiver of requirements by appellee, but, as *Cableton* emphatically states, the requirements of § 66-3206 "cannot be circumvented." We pointed in *Cableton* to *Southern Burial Insurance Co.* v. *Baker*, 199 Ark. 468, 134 S.W.2d 1 (1939), where the Arkansas Supreme Court stated its adherence to the policy of non-waiver of statutory law in the following terms:

> There is no room for construction, nor question of validity raised on this appeal. Truly, if we might say that the parties by their conduct could waive these provisions and their effect in this class of insurance, then there is no reason why the Legislature should have troubled about the enactment of this bit of legislation.

199 Ark. at 473, 134 S.W.2d at 3 quoted at 12 Ark. App. at 259, 674 S.W.2d at 952.

Because of the well established public policy, codified in the statutes and explained in the case law, neither the alleged oral consent of Dorothy Mae Jones nor the purported waiver of requirements of ratification by appellee is effective to negate the mandatory invalidation of life insurance policies issued without an application or consent in writing by the insured.

Appellant argues in her second point for reversal that the agent, Bruce Jarsma, had apparent authority to bind appellee to a term life insurance policy on Dorothy Mae Jones. At trial, however, appellee admitted only that Jarsma was a soliciting agent and, as such, had no authority to bind appellee to the issuance of this or any other policy.

It is well settled that the insured or the beneficiary of an insurance policy has the burden of proving coverage. *Snow* v.

Travelers Insurance Co., 12 Ark. App. 240, 674 S.W.2d 943 (1984). Arkansas is one of the states that makes a distinction between the authority of general and special agents of insurance companies. *Security Insurance Corp.* v. *Henley*, 19 Ark. App. 299, 720 S.W.2d 328 (1986). A general agent is ordinarily authorized to accept risks, to agree upon the terms of insurance contracts, to issue and renew policies, and to change or modify the terms of existing contracts. A soliciting agent, on the other hand, is ordinarily authorized to sell insurance, to receive applications and to forward them to the company or its general agent, to deliver the policies when issued, and to collect premiums. *Holland* v. *Interstate Fire Insurance Co.*, 229 Ark. 491, 316 S.W.2d 707 (1958).

Our courts have repeatedly held that a soliciting agent is not invested with the authority to make contracts on behalf of the insurer. *American National Insurance Co.* v. *Laird*, 228 Ark. 812, 311 S.W.2d 313 (1958). Notice to a soliciting agent is not notice to the company. A soliciting agent has no authority to waive any of the policy requirements, nor can his knowledge be imputed to the company he represents. *Continental Insurance Companies* v. *Stanley*, 263 Ark. 638, 569 S.W.2d 653 (1978). *See also Jackson* v. *Prudential Insurance Co. of America*, 736 F.2d 450 (8th Cir. 1984); *Ford Life Insurance Co.* v. *Jones*, 262 Ark. 881, 563 S.W.2d 399 (1978); *Holland* v. *Interstate Fire Insurance Co., supra*; *Security Insurance Corp.* v. *Henley, supra.* The burden is on the plaintiff to show that a soliciting agent has real or apparent authority to bind his principal by contract. *Security Insurance Corp.* v. *Henley, supra.*

The following language, from *Latham* v. *First National Bank of Fort Smith*, 92 Ark. 315, 320, 122 S.W. 992, 993 (1909), has often been quoted by our courts in addressing the question of the authority of agents:

> A principal is not bound by the acts and declarations of an agent beyond the scope of his authority. A person dealing with an agent is bound to ascertain the nature and extent of his authority. No one has the right to trust to the mere presumption of authority, nor to the mere assumption of authority by the agent.

See also Jackson v. *M.F.A. Mutual Insurance Co.*, 169 F. Supp.

633 (W.D. Ark. 1958); *Dixie Life & Accident Insurance Co.* v. *Hamm*, 233 Ark. 320, 344 S.W.2d 601 (1961).

Appellant asserts that Jarsma had apparent authority to commit "certain acts" on behalf of appellee. The nature of apparent authority was discussed in *Mack* v. *Scott*, 230 Ark. 510, 323 S.W.2d 929 (1959):

> The rule of law appears to be well settled that "The authority of an agent must be shown by positive proof or by circumstances that justify the inference that the principal has assented to the acts of his agent. . . .Apparent authority in an agent is such authority as the principal knowingly permits the agent to assume or which he holds the agent out as possessing; such authority as he appears to have by reason of the actual authority which he has; such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess." *Pierce* v. *Fioretti*, 140 Ark. 306, 215 S.W. 646. See also, *Ozark Mutual Life Association* v. *Dillard*, 169 Ark. 136, 273 S.W. 378.

230 Ark. at 514, 323 S.W.2d at 931-932.

Nothing in the record suggests any holding out of authority by appellee with respect to any form of authority of Jarsma to issue the policy in question or to bind appellee to issue the policy. Jarsma's actions and words in receiving the application and premium presented as evidence by appellant of his apparent authority, simply show him to have been a soliciting agent acting outside the scope of his authority. He therefore had no authority, apparent or otherwise, to bind appellee to the insurance contract on Dorothy Mae Jones.

Appellant's last two points are related and will be considered together. She argues that evidence of an oral agreement is admissible under conditions when fraud, deceit, or fraudulent misrepresentations are used to secure a written contract and that she presented sufficient evidence for the jury to find fraud, deceit, misrepresentation, bad faith, and breach of contract on counts II and III of her complaint. Appellant cites no authority for her argument concerning the admissibility of evidence of an oral agreement other than the inapposite comment

that knowledge on the part of the agent is imputed to the insurer, taken from an incorrect case. An argument unsupported by convincing authority will not be considered on appeal unless it is apparent without further research that it is well taken. *McIllwain* v. *Bank of Harrisburg*, 18 Ark. App. 213, 713 S.W.2d 469 (1986).

Appellant contends that there was fraud or misrepresentation on the part of the agent because of his "knowing" acceptance of an application not signed by the insured. No evidence was presented, however, to show that Jarsma, any more than appellant or her husband, knew of the statutory requirement that the insured must sign the application. In any event, the non-waivable nature of the requirement rendered the issue moot for submission to a jury. It does not appear, from our review of the record, that appellant carried her burden of proof with respect to the allegations of fraud, misrepresentation, and bad faith.

Since the requirements of Ark. Stat. Ann. § 66-3206 are non-waivable, appellee's acceptance of premiums does not, contrary to appellant's assertion, provide a basis for a finding of liability on appellee's part.

Finally, regarding appellant's argument that appellee engaged in unfair claim settlement practices, under Ark. Stat. Ann. § 66-3005 et seq. (Repl. 1980), it must be noted that, under § 66-3005(a), an insurer must be shown to have committed or performed the prohibited practices "with such frequency as to indicate a general business practice." Evidence of more than the acts alleged in this one case is required. *Aetna Casualty and Surety Co.* v. *Broadway Arms Corp.*, 281 Ark. 128, 664 S.W.2d 463 (1984).

Affirmed.

COOPER, JENNINGS, and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I respectfully suggest that the majority opinion has interpreted a legislative act contrary to its intent and contrary to the interpretation of the Arkansas Supreme Court.

At the close of appellant's evidence, the trial judge granted the insurance company's motion for directed verdict on the

specific finding that the policy was issued without the written application or consent of the insured and that the policy was therefore invalid for failure to comply with the requirement of Ark. Stat. Ann. § 66-3206 (Repl. 1980). That statute reads as follows:

> Application required — Life and disability insurance. — No life or disability insurance contract upon an individual, except a contract of group life insurance or of group or blanket disability insurance, shall be made or effectuated unless at the time of the making of the contract the individual insured, being of competent legal capacity to contract, *applies therefor or has consented thereto in writing*, except in the following cases:
>
> (1) A spouse may effectuate such insurance upon the other spouse.
>
> (2) Any person having an insurable interest in the life of a minor, or any person upon whom a minor is dependent for support and maintenance, may effectuate insurance upon the life of or pertaining to such minor.
>
> (3) The application for accident insurance procured through a vending machine licensed under section 171 [§ 66-2828] must be signed by the individual to be so insured; or if the individual to be so insured does not have legal capacity to contract the application must be signed by such individual's parent, guardian, or other legally constituted representative.
>
> (4) Family policies may be issued insuring any two (2) or more members of a family on an application signed by either parent, a stepparent, or by a husband or wife. [Acts 1959, No. 148, § 273, p. 418.] (Emphasis added.)

Focusing upon the phrase "applies therefor or has consented thereto in writing," the majority has relied upon *Cableton* v. *Gulf Life Insurance Co.*, 12 Ark. App. 257, 674 S.W.2d 951 (1984), to sustain the trial court's action.

First, I think we should give careful consideration to the evidence applicable to the issue involved. The record discloses that appellant, Ora Lee Hunt, was sitting in the living room of her

house when the insurance company's agent came to her door, stated he had just paid an insurance claim in the neighborhood, and asked if appellant had insurance. She testified the agent told her that he "would find something to fit her budget" and that he eventually "wrote me and the kids up and my husband." She then told the agent that her sister, Dorothy Mae Jones, wanted appellant to "take out a policy on her." The agent said he could take care of that too, and while he was sitting in appellant's living room, she called her sister who said it was "okay." The agent then asked appellant "a lot of questions" about the sister and, after he had filled out an application for insurance, he asked appellant to sign the sister's name on it. Appellant asked if her husband could sign it and, upon the agent's assurance it would be "okay," the husband signed the sister's name on the application.

Second, we need to carefully apply the above evidence to the legislative act and to the *Cableton* decision relied upon by the majority. *Cableton* states that the act sets forth the policy of this state as demonstrated by the case of *Callicott* v. *Dixie Life & Accident Insurance Company*, 198 Ark. 69, 127 S.W.2d 620 (1939), which held that "it is against public policy to allow one person to have insurance on the life of another without the knowledge of the latter." *Cableton*, 12 Ark. App. at 259. Looking at the act, we see it really does a little more than require the person insured to have "knowledge" of the insurance. Actually, the act provides that the insurance shall not be made or effectuated unless the individual insured "applies therefor or has consented thereto in writing."

Perhaps this case should have been certified to our Supreme Court under Rule 29(1)(c), as involving the interpretation of an act of the General Assembly. However, I think it is reasonably clear that the act contemplates two situations: (1) where the individual insured "applies" for the insurance and (2) where the individual insured "has consented thereto in writing." Under the first situation, the person insured is obtaining insurance on his own life. In *Constitution Life Insurance Co.* v. *M.D. Thompson & Son, Inc.*, 251 Ark. 784, 475 S.W.2d 165 (1972), it was argued that the insured did not consent to the issuance of the policy in writing as required by Ark. Stat. Ann. § 66-3206, *supra*. The court said the insured's writing of a personal check to get a cashier's check to pay the insurance premium was a sufficient

"consent in writing" to comply with the act, but the court said the insured had also accepted the company's oral counteroffer for $10,000.00 coverage on his life, instead of the $50,000.00 applied for, and that this made an oral contract which was valid. The court reasoned "had the General Assembly intended to invalidate oral contracts for life insurance it could have done so in simple language."

It therefore seems clear that the Arkansas Supreme Court does not believe the legislature has prohibited one from making an oral contract for insurance on his own life. And, if Ark. Stat. Ann. § 66-3206 "codifies" the public policy against insuring the life of another, as *Cableton* states it does, it is clear that what the legislature intended to prevent was the insuring of the life of another *unless* the person insured "consented thereto in writing." Thus, we should hold that the evidence presented by the appellant in this case, when considered in the light most favorable to her, was sufficient to present a question of fact on the issue of whether the insured, Dorothy Mae Jones, orally applied for the insurance on her life, as distinguished from only consenting to the issuance of the policy.

However, even if it is held that Ark. Stat. Ann. § 66-3206 requires a writing by the insured (whether considered an application or consent), the evidence presented by the appellant made an issue of fact in that regard. The *Constitution Life Insurance Co.* v. *M.D. Thompson & Son, Inc.*, case, *supra*, makes it clear that there only has to be a substantial compliance with the writing requirement. Here, we have a written application to which the insured's name was signed by her brother-in-law. If this was authorized by the insured, I think she has made a written application.

In the Missouri case of *Sells* v. *Fireside Life Ass'n*, 66 S.W.2d 955 (Mo. App. 1934), it was contended that the policy would not have been issued if the company had known that the wife had signed her husband's name to the application without his authority or knowledge. There was evidence that he was "willing to take out the insurance," and that he knew his wife "was going to fill out the application." The court held that this evidence made an issue of fact for the jury "insofar as the signing of the application" was concerned. That holding was later referred to

with approval by the Missouri Supreme Court, *see Bryne* v. *Prudential Insurance Company of America*, 88 S.W.2d 344 (Mo. 1935). While the case was not involved with a *statutory* requirement for an application in writing, it certainly supports the proposition that one can make a written application for insurance by authorizing another to sign the insured's name for him.

I believe the trial court erred in granting the insurance company's motion for directed verdict; therefore, I dissent from the majority opinion in this case.

COOPER and JENNINGS, JJ., join in this dissent.

TIME INSURANCE COMPANY *v.* William B. GRAVES, Individually and as Special Administrator of the ESTATE OF Linda GRAVES, Deceased

CA 86-73 734 S.W.2d 213

Court of Appeals of Arkansas
En Banc
Substituted Opinion on Rehearing June 24, 1987.*

* This case was originally decided February 4, 1987, in an opinion not designated for publication.

Barrett, Wheatley, Smith & Deacon, for appellant.

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

MELVIN MAYFIELD, Judge. In an unpublished opinion, handed down by a division of this court on February 4, 1987, the judgment of the circuit court was reversed and this case was dismissed. Petition for rehearing was filed, and pursuant to Ark. Stat. Ann. § 22-1211 (Supp. 1985), the court en banc has decided the petition should be granted to the extent that the judgment should be reversed and remanded rather than reversed and dismissed.

FACTUAL BACKGROUND

This is a suit on an insurance policy. The jury found for the appellee William B. Graves, individually and as Special Administrator of the Estate of Linda Graves, deceased. In appeals from cases tried by a jury, we view the evidence in the

light most favorable to the appellee and, where there is substantial evidence to support the verdict, we do not disturb it. *Duggar* v. *Arrow Coach Lines, Inc.*, 288 Ark. 522, 707 S.W.2d 316 (1986). In this case, there is evidence in the record from which the jury could find the following facts.

William and Linda Graves operated a retail grocery store in West Memphis, Arkansas. Eddie Lucas was a potato chip salesman who operated a route and serviced the Graves store. Mr. Lucas decided to quit the potato chip business and start selling insurance. He studied "a book on the rules and regulations of the Arkansas laws" and passed a test and obtained a license of some kind. He then became associated with Aubrey Holt who was an agent for the appellant Time Insurance Company. Holt testified that he was a general agent for Time, but his contract provided he was authorized to write and submit applications for insurance to Time and that he was responsible for "asking all questions and correctly recording all answers on applications for insurance and for immediately sending such applications to the Home Office of the Company. . . ."

There was testimony that Mr. Lucas, after he left the potato chip business, tried to sell Time insurance to the Graveses, as well as to other people. Because of his prior business relationship with the Graveses, Mr. Lucas knew that Linda Graves had been operated on for cancer. However, he told her that he could insure her with Time and that this insurance would provide her coverage for her preexisting condition. The Graveses expressed concern about this since they already had insurance, written by Pacific Mutual, which had been paying for Linda's visits to the doctor's office. So, Mr. Lucas took that policy and, after a couple of days, came back and told the Graveses that it would only be a change from one company to another. In response to specific questions, Lucas assured the Graveses that the Time policy would "fully" cover them and would pick up from where the other one left off.

Before either William or Linda Graves would agree to buy the insurance, Linda called her doctor's office, while Lucas was in the Graveses' store, and got a medical assistant to talk to Lucas over the telephone. The assistant testified that she told Lucas that Linda had an operation for removal of a cancer in 1977, and had received favorable reports from regular checkups since then, and

she did not want to see Linda change insurance policies because of her condition. She testified that Lucas said there would be no problem, that Linda could be covered with Time insurance, and that there would be no rider providing that cancer would not be covered.

Both William and Linda Graves testified that Lucas took their application and that Aubrey Holt was not present and that he never talked to either of them about the application. They also testified that they correctly and truthfully answered each question asked by Mr. Lucas, that they signed the application but did not read it, and that they did not read the policy when it was delivered to them. The application, however, is not signed by Eddie Lucas, but by Aubrey Holt, and Holt admitted that Lucas brought the application to him with a portion of it filled out by Lucas. The application is dated March 21, 1981, and contains the following statement immediately over the signature of Holt:

> Each application question was asked by me personally of the applicant(s) and all answers have been accurately recorded. I have witnessed the signing of this application by the applicant(s).

At the trial, Mike Steinhart, Vice-President of Time Insurance Company, and responsible for underwriting and claims of individual insurance policies, testified that Mr. Holt was an agent for the company and that it was the agent's obligation to ask the questions and record the answers on the application in a correct manner.

The application contains two questions which are incorrectly answered in the negative so as to reflect that no person proposed to be insured had suffered from a disorder of the generative organs or undergone surgery within the last ten years. Another question which asked if any person proposed to be insured had been diagnosed or treated for cancer, tumor, cyst, or growth, within the last ten years, was not answered. Holt testified that he received an amendment to the application from the company that contained the question about cancer which had not been answered on the application. The amendment already had the word "no" typed on it and Holt said he got Mr. Graves to sign the amendment when he delivered the policy to Graves. The policy shows that William B. Graves is the insured and the

application shows that Linda is his spouse and is to be insured also. The amendment to the application states that William B. Graves hereby amends "my application" as follows:

> Question 17H: Ever had any indication, diagnosis, or treatment of: Cancer, Tumor, Cyst or Growth of any kind? No.

Graves testified that the amendment to the application contained his signature, but he did not remember signing it. He said he recalled signing some statements for Lucas; that he never signed anything for anyone else; that if Lucas asked him to sign some papers about the insurance, he signed them; and that he considered Lucas to be an honorable man. The amendment is addressed to Mr. Graves and contains no reference to Mrs. Graves. We think the jury could find that Mr. Graves' signature on the application did not constitute an untruthful statement as to the preexisting condition of Mrs. Graves.

Graves also testified that he dropped his other insurance when he received the Time policy. The evidence also shows that Time tried to cancel its policy, more than a year after it was issued, because a claim had been filed for Mrs. Graves and the home office of Time learned of her past medical history from her doctor. This suit was then brought to recover for her medical expense. Mrs. Graves died shortly before this case was tried, and her husband was appointed Special Administrator of her estate and made a party to this suit in that capacity. Linda's deposition was taken shortly before her death and a portion of that deposition was read into evidence at trial. The jury returned a verdict in the amount asked for, and the judgment included statutory penalty and attorney's fees.

ESTOPPEL

The appellant's first point on appeal was that the court should have granted its motion for directed verdict. This contention was based on the proposition that the policy provided that it would pay for medical expenses resulting from sickness "which first manifests itself more than 15 days after this policy is in force." The appellee argued that the appellant was estopped to raise this question of coverage because of the complete disclosure made to Eddie Lucas who failed to correctly record the disclosed

information on the application but specifically assured the Graveses that Time's policy would cover Linda's preexisting condition. In the unpublished opinion of this court, it was held that estoppel did not apply because that doctrine cannot be invoked to extend coverage and thereby bring within coverage of the policy risks not covered by its terms. We are now convinced that opinion was not correct.

Although the rule set out in that opinion is generally applicable, it is not always applicable. 16B Appleman, *Insurance Law and Practice* § 9090, at 590-98 (rev. vol. 1981) states some restrictions upon the general rule as follows:

> An insurer also may, by its actions, waive, or be estopped from claiming, a defense of noncoverage. . . . The insurer clearly may be estopped to take advantage of a policy provision or limitation inserted in the contract for its own benefit which would frustrate the insured's purposes in applying for the insurance. And an insurer which has misled the insured into believing that a particular risk is within the coverage of the insurance contract will not be permitted to use the contract itself to prove the contrary.

The opinion in *National Discount Shoes, Inc.* v. *Royal Globe Insurance Co.*, 424 N.E.2d 1166 (Ill. App. 1981), cites the above section of Appleman's treatise as authority for this statement: "While it has frequently been stated, as an axiom, that coverage can never be extended by waiver and estoppel, in fact such statements are too broad." And in *Harr* v. *Allstate Insurance Company*, 255 A.2d 208 (N.J. 1969), the court discussed this matter extensively and decided to follow the decisions that utilize estoppel to broaden coverage and to bar the defense of noncoverage. The court explained its position as follows:

> These decisions all proceed on the thesis that where an insurer or its agent misrepresents, even though innocently, the coverage of an insurance contract, or the exclusions therefrom, to an insured before or at the inception of the contract, and the insured reasonably relies thereupon to his ultimate detriment, the insurer is estopped to deny coverage after a loss on a risk or from a peril actually not covered by the terms of the policy. The proposition is one of elementary and simple justice. By justifiably relying on the

> insurer's superior knowledge, the insured has been prevented from procuring the desired coverage elsewhere. To reject this approach because a new contract is thereby made for the parties would be an unfortunate triumph of form over substance.

255 A.2d at 219. This opinion also quoted the following excerpt from a law review article, written by Professor Clarence Morris, *Waiver and Estoppel in Insurance Policy Litigation*, 105 U. Pa. L. Rev. 925 (1957):

> Indexes to the great nineteenth century insurance texts do not list waiver and estoppel. But times have changed. The 1951 third edition of Vance on Insurance enfolds an excellent and important seventy-six page "Waiver & Estoppel" chapter—about a fourteenth of the book's bulk. What has fostered this growth in the last hundred years? My thesis is that waiver and estoppel are two of several guises that cloak the courts' part in changing insurance from a service safely bought only by sophisticated businessmen to a commodity bought with confidence by untrained consumers. Judges, at the urging of policyholders' advocates, have used waiver and estoppel to convert insurance from a custom-made document designed in part by knowing buyers to a brand-name staple sold over the counter by mine-run salesmen to the trusting public.

In *Hully* v. *Aluminum Company of America*, 143 F. Supp. 508 (S.D. Iowa 1956), *aff'd sub nom. Columbia Casualty Co.* v. *Eichleay Corporation*, 245 F.2d 1 (8th Cir. 1957), the court said estoppel "does not operate to create a new insurance contract, but simply to deny legal effect to a provision of the policy contract inserted for the benefit of the insurer." 143 F. Supp. at 513. And in *Crescent Co., Inc.* v. *Insurance Company of North America*, 225 S.E.2d 656 (S.C. 1976), the court said, "The scope of risk under an insurance policy can be extended by estoppel if the insurer has misled the insured into believing the particular risk is within the coverage." *Id.* at 659. The court also said the essential elements of estoppel are: (1) ignorance of the party invoking it of the truth as to the facts in question; (2) representations or conduct of the party estopped which mislead; (3) reliance upon such

representations or conduct; and (4) prejudicial change of position as a result of such reliance." The case of *Pitts* v. *New York Life Insurance Company*, 148 S.E.2d 369 (S.C. 1966), is cited in support of these elements.

The cases cited above clearly support the view that estoppel can be used to broaden coverage and to bar the defense of noncoverage. This matter is also the subject of an extensive annotation in 1 A.L.R. 3rd 1139 (1965). That annotation and its 1985 supplement cite cases from at least 12 states supporting the rule that estoppel or waiver is available to bring within the coverage of an insurance policy risks which are not provided for in the policy or which are expressly excluded therefrom. We have concluded that the rule is a good one and should be adopted by us. As appellee's petition for rehearing states, equitable principles have historically been used to promote fair play and prevent wrongful conduct. The doctrine of estoppel *in pais* is available in both law and equity and is not confined to issues of insurance coverage. *See Branch* v. *Standard Title Co.*, 252 Ark. 737, 480 S.W.2d 568 (1972). The Arkansas Supreme Court has recently, for the first time, held that the doctrine may be available against the state. *See Foote's Dixie Dandy* v. *McHenry*, 270 Ark. 816, 607 S.W.2d 323 (1980). We hold, therefore, that the doctrine of estoppel was available for appellee's use in this case, and we turn now to discuss the question of agency in regard to the conduct of Eddie Lucas and Aubrey Holt.

AGENCY

The appellant contends that Lucas was not its agent and his knowledge and actions were not imputed to it and, since Holt was only a soliciting agent, his knowledge and actions were not imputed to appellant. But in the application of the doctrine of estoppel, we think the law makes appellant responsible for the knowledge and actions of both Lucas and Holt.

In *DeSoto Life Insurance Co.* v. *Johnson*, 208 Ark. 795, 800, 187 S.W.2d 883 (1945), the court said:

> The majority rule has long been followed by this court. It was reiterated in the recent case of *Southern National Insurance Co.* v. *Heggie*, 206 Ark. 196, 174 S.W.2d 931, where our cases were reviewed and this court

> said: "It has been frequently held by this court that, where an applicant for insurance makes to the agent of the insurer a full disclosure of the facts inquired about in the application, but the agent fails to write down the answers of the applicant correctly, and the applicant is permitted by the agent to sign the application without reading it or hearing it read, the knowledge of the agent as to the physical condition of applicant is imputed to the company and, if a policy is issued on such an application, the company is estopped in an action on said policy to set up the falsity of the answers in the application."

In *Interstate Fire Insurance Co.* v. *Ingram*, 256 Ark. 986, 989, 511 S.W.2d 471 (1974), the appellate court said the trial court "did not err" in giving the following jury instruction:

> You are instructed that where facts have been truthfully stated to an agent of an insurance company, but by the agent's fraud, negligence, or mistake the facts are misstated in the application, the company cannot after accepting the premium and issuing the policy, set up such misstatements in the application in avoidance of its liability, where the agent is acting within his real or apparent authority and there is no fraud or collusion upon the part of the insured.

And, this court, in *Gilcreast* v. *Providential Life Insurance Co.*, 14 Ark. App. 11, 683 S.W.2d 942 (1985), reversed and remanded a case because the trial court had given an instruction telling the jury that the knowledge of the appellant's previous condition had by the insurance company's soliciting agent could not be imputed to the company. Our opinion relied upon a number of cases and quoted from *Aetna Life Insurance Co.* v. *Routon*, 207 Ark. 132, 179 S.W.2d 862 (1944), where the court said:

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

> the agent is acting within the apparent scope of his authority."

The law in the above cases also applies where the agent, in filling out the application, relies upon information obtained from others rather than information from the applicant. The general rule is set out in 7 *Couch on Insurance* 2d § 35.187 (rev. ed. 1985), as follows:

> Where an agent is furnished with a blank application which he is authorized by the insurer to fill out, and he relies, in so doing, upon information obtained from others, rather than upon that obtained from the applicant, and a policy is issued thereon, the insurer cannot avoid liability on such policy, but is bound by its agent's acts, even where the applicant signs the application, provided he is ignorant of the false statements thereon.

This is also the rule in Arkansas. In the early case of *People's Fire Insurance Association of Arkansas* v. *Goyne*, 79 Ark. 315, 96 S.W. 365 (1906), the Arkansas Supreme Court quoted from the United States Supreme Court case of *Insurance Company* v. *Wilkinson*, 13 Wall. 222 (1871), in which that court assumed a factual situation where the soliciting agent obtained no answers from the applicants but "wrote the representation to suit himself." The court said estoppel would apply to prevent the company from taking advantage of that situation. The Arkansas Supreme Court approved of the *Wilkinson* holding and applied it in *Goyne* even though the Arkansas court knew that the United States Supreme Court had already issued another opinion disapproving of part of the language in *Wilkinson*. And in *Maloney* v. *Maryland Casualty Co.*, 113 Ark. 174, 184, 167 S.W. 845 (1914), the Arkansas Supreme Court said:

> Moreover, the undisputed testimony shows that the application was written up by the agent of the insurance company, and that the answers were written by him without consulting the assured. Therefore, the company is chargeable with the knowledge of its own agent, and is also estopped from denying that which its own agent has asserted to be true. See *Peebles* v. *Eminent Household of Columbian Woodmen*, 164 S.W. 296, 111 Ark. 435.

Thus, since there is evidence in the present case to support a finding that Lucas filled out the application incorrectly, without Holt ever being present, we think the jury could have found the appellant bound by that application because the evidence will also support a finding that Holt, who had the contractual responsibility for "asking all questions and correctly recording all answers" signed the application relying upon information he received from Lucas and not upon information he received from the Graveses. This fits precisely the general rule from *Couch* and the Arkansas rule in *Goyne* and *Ingram, supra.* We must now, however, apply the estoppel and agency issues to the liability issue in this case.

ESTOPPEL AND AGENCY APPLIED

As we have seen, where the information called for by the application is correctly stated to the soliciting agent but he fills out the application incorrectly, the insurance company is bound by the information on the application unless the applicant knows what the agent wrote or was guilty of fraud or collusion. Since the evidence here would support a finding that the appellant was bound by the information on the application, the Arkansas cases quoted from above clearly show that the incorrect information on the application will not prevent a recovery on the policy. We also think the evidence will support a finding that the appellant is estopped to question Linda Graves' preexisting condition. This will, of course, allow recovery for her medical expenses which were incurred for a condition that first manifested itself more than 15 days after the policy was in force. And this will broaden the coverage of the policy issued by the appellant. But we think, under the particular facts in this case, this is a proper application of the well-established doctrine of estoppel. It is based upon the evidence from which the jury could find (1) that the Graveses, without any fraud or collusion on their part, did not know that Lucas had filled out the application incorrectly, (2) that the issuance and delivery of the policy by appellant misled the Graveses by causing them to believe that the policy was valid and enforceable, (3) that they relied upon the issuance and delivery of the policy, (4) to drop their other policy which was paying for Mrs. Graves' visits to the doctor's office and to pay the premiums on the new policy for more than a year. See the

elements of estoppel listed in the previously cited case of *Crescent Co., Inc.* v. *Insurance Company of North America*, 225 S.E.2d 656 (S.C. 1976).

Our application of the doctrine of estoppel is not based upon the evidence that Lucas assured the Graveses that Time's policy would cover Mrs. Graves' preexisting condition. Although that evidence is relevant, under Arkansas law the promise of coverage is ordinarily not within the scope of a soliciting agent's authority. *Continental Insurance Companies* v. *Stanley*, 263 Ark. 638, 569 S.W.2d 653 (1978). In this case, however, where the jury could find that the appellant is bound by the information contained on the application, the appellant's vice-president testified that the policy would not have been issued if the application had correctly reflected the information given by the Graveses, and the Graveses dropped their other policy and paid the premiums on the Time policy for more than a year, we think there is sufficient evidence to invoke the doctrine of estoppel in order to prevent the appellant from claiming there can be no recovery on the policy for the medical expense sought to be recovered. Although this uses the doctrine of estoppel to extend coverage of the policy, there is precedent for it. To hold otherwise would be, as stated in *Harr* v. *Allstate Insurance Company*, 255 A.2d 208 (N.J. 1969), "an unfortunate triumph of form over substance."

JURY INSTRUCTIONS

The appellant also contended that this case should have been reversed because two jury instructions given at the request of the appellee should not have been given and one instruction requested by the appellant should have been given.

Instruction No. 14, given at appellee's request read:

> If you find that Holt was furnished with blank applications which he was authorized by Time to fill out and that Holt relied upon information obtained from Lucas in doing so, rather than upon that obtained from the Graves, and a policy is issued thereon, Time cannot avoid liability on such policy, but is bound by the acts of its agent Holt, even where the Graves signed the application provided the Graves are ignorant of the false statements

contained therein.

It is argued by appellant that this instruction was a binding instruction and allowed the jury to find for the appellee solely on the basis that Lucas filled out the blank application furnished by Holt. We think the phrase "cannot avoid liability on such policy" is subject to the vice of which appellant complains.

The appellee relies upon *Mutual Aid Union* v. *Blacknall*, 129 Ark. 450, 196 S.W. 792 (1917), which states that an insurance company is bound by the conduct of its soliciting agent acting within the apparent scope of his authority. Even so, "bound by conduct" is not the same as "cannot avoid liability" on the policy. It is clear from our previous discussion that the appellant is not liable on the policy simply because Lucas wrote false statements in the application which the Graveses did not know of, even if Holt signed the application without obtaining any information from the Graveses. This leaves out the reliance and prejudicial change of position elements of estoppel which must be found before the appellant is liable on the policy. Also, the instruction as offered assumes there are false statements in the application.

We think the court committed prejudicial error in giving Instruction No. 14, and we reverse and remand for that error. In view of a retrial, we point out that we believe Instruction No. 11, given at appellee's request, was argumentative and that which of two innocent parties must suffer for the wrongful act of a third party is not really an issue in the case. Also, appellant's requested Instruction No. 2, which was refused, dealing with the burden of proving that Lucas was acting in the scope of his authority, did not instruct on an issue in the case.

OTHER ISSUES

The point argued by appellant as to the submission of the case against appellant without also submitting, at the same time, the case against Eddie Lucas may not be involved at retrial. At any event, the circumstances are not likely to be similar enough to warrant our prediction on whether the court would abuse its discretion in submitting the case on retrial. We also do not care to give an advisory opinion on the questions raised in appellee's brief as to admissibility on retrial of the amended

application bearing the signature of William Graves or the admissibility of applications completed by Holt for insurance on other persons not parties in this case. We see no evidence of a cross-appeal in the briefs or the record. See *Lou* v. *Smith*, 285 Ark. 249, 685 S.W.2d 809 (1985).

Reversed and remanded.

CRACRAFT, J., concurs.

CORBIN, C.J., and COULSON, J., dissent.

Bobby Dale KESTERSON *v.* Deborah Kay KESTERSON

CA 86-495 731 S.W.2d 786

Court of Appeals of Arkansas
Division I
Opinion delivered July 1, 1987

Edwin J. Alford, for appellant.

Steel & Steel, by: *George Steel, Jr.*, for appellee.

JAMES R. COOPER, Judge. The appellee, Deborah Kay Kesterson, filed a complaint for divorce against the appellant alleging general indignities as grounds. At a hearing on the complaint, the grounds were uncorroborated and the chancellor entered a decree granting the appellee a divorce from bed and board. Several months later, the appellant requested an ex parte

emergency hearing, alleging that the appellee was preparing to leave the state and requesting that the chancellor prohibit the appellee from removing certain property from the state. After a hearing, the chancellor entered an order dividing the personal marital property. On appeal, the appellant argues four points for reversal: that the chancellor erred in granting the appellee a divorce from bed and board, because it was clearly against the preponderance of the evidence; that the entry of a decree of divorce from bed and board was contrary to the law; that the division of marital property and award of spousal and child support was contrary to the law and principles of equity; and that the court's modification of its decree was contrary to law and equity. We find merit to two of the appellant's arguments, and we therefore affirm the chancellor's award of support, but we reverse and remand as to the divorce and property division.

We review chancery cases *de novo* on appeal and the chancellor's findings of fact will not be reversed unless they are clearly against the preponderance of the evidence. *Pennybaker* v. *Pennybaker*, 14 Ark. App. 251, 687 S.W.2d 524 (1985). We review the testimony in the light most favorable to the appellee, and indulge all reasonable inferences in favor of the decree, *Gooch* v. *Gooch*, 10 Ark. App. 432, 664 S.W.2d 900 (1984), and we give due regard to the chancellor's superior opportunity to assess the credibility of the witnesses. *Cox* v. *Cox*, 17 Ark. App. 93, 704 S.W.2d 171 (1986).

The appellant's first two arguments regarding the decree of divorce from bed and board are closely related and we will discuss them simultaneously. We agree that the chancellor erred in entering a decree of divorce from bed and board because the grounds were not corroborated; however, we find that the chancellor could have entered an order of separate maintenance.

Divorce from bed and board is a statutory remedy and is based on the same grounds as those specified for an absolute divorce. *Lytle* v. *Lytle*, 266 Ark. 124, 583 S.W.2d 1 (1979). As in a proceeding for absolute divorce, grounds for divorce from bed and board must be corroborated. Ark. Stat. Ann. § 34-1202 (Supp. 1985). In the present case it is uncontroverted that the appellee's grounds were not corroborated.

However, grounds and corroboration of grounds are

unnecessary in an action for separate maintenance. All that must be established are a separation and an absence of fault. *Lytle, supra; Hill* v. *Rowles, Chancellor*, 223 Ark. 115, 264 S.W.2d 638 (1954). There is no statutory authority for an action for separate maintenance; instead it is maintained under the broad power of equity. *Wood* v. *Wood*, 54 Ark. 172, 15 S.W. 459 (1891).

Although the appellant does not directly argue that the chancellor could not enter a decree of separate maintenance, he does argue that he is without fault because the appellee asked him to leave the marital home. However, we find that there is sufficient evidence to support a finding of lack of fault on the appellee's part.

At the hearing, the appellee testified that she and the appellant had been having problems for several years and that the situation had become intolerable. She testified that it had been four or five years since the appellant had sexual relations with her, and that, at one point, he had told her that she no longer "excited" him and that if she was interested in sex she should find a lover. She stated further that the appellant was no longer affectionate with her or with their child, and that he told her that he didn't want them to touch him. When the appellee went to Iowa to assist her mother who had just had surgery, the appellant told her that it was not necessary for her to return. Based on this testimony, the chancellor found that the appellee was entitled to a decree of "legal separation or a divorce from bed and board." Based on our *de novo* review of the record, we reverse the chancellor's award of divorce from bed and board, and remand for the entry of a decree of separate maintenance.

The appellant's third argument concerns the spousal and child support awarded to the appellee. The appellee was granted custody of the parties' minor daughter and was awarded $450.00 per month as support for herself and her child. At the conclusion of six months, the support was to be reduced to $225.00 per month as child support. The appellant argues that this was error because he was without fault and because the appellee was as capable of earning money as he was. We affirm the chancellor's award.

An independent cause of action will lie for alimony in a court of equity, Ark. Stat. Ann. § 34-1201 (Repl. 1962), and there are no meaningful distinctions between the action for alimony and today's action for separate maintenance. *See Spen-*

cer v. *Spencer*, 275 Ark. 112, 115, 627 S.W.2d 550, 551 (1982) (Dudley, J., concurring); *Rosenbaum* v. *Rosenbaum*, 206 Ark. 865, 177 S.W.2d 926 (1944). The purpose is to provide a dependent spouse with support.

The appellant emphasizes that the abandoned wife must be without fault. However, the only evidence of the appellee's fault we can find in the record is the appellant's testimony the appellee frequently picked fights with him. The appellee testified that she intended to seek employment in Iowa as soon as she knew the results of the proceedings, that she had no education after high school, that the only work skill she possessed was working in the gas station owned by the appellant, and that she did not know of any employment she could do in the area. We have already discussed the allegations of fault on the part of the appellant, and, on these facts, we do not find that it was against the preponderance of the evidence for the chancellor to award the appellee support for six months.

As for child support, a parent has a legal duty to support his minor children. *Brown* v. *Brown*, 233 Ark. 422, 345 S.W.2d 27 (1961). Since child custody actions are derivative of divorce or separate maintenance, *Robins* v. *Arkansas Social Services*, 273 Ark. 241, 617 S.W.2d 857 (1981), we find no error in the chancellor's granting child support to the custodial parent, the appellee.

Finally, the appellant questions the chancellor's order dividing the marital property. At the hearing, the appellee testified that she wanted to return to Iowa to live. She stated that Iowa was her original home, and that all of her family lived there. The chancellor refused to grant the appellant's request that the appellee be prohibited from leaving the state. As the appellee was preparing to leave for Iowa, the appellant filed a request for emergency ex parte relief, alleging that the appellee was taking marital property out of the state. At the conclusion of a hearing, the chancellor ordered the parties to divide the property, which they did. From the bench, the chancellor clearly stated that he was awarding only temporary possession of the items; however, in the final order, the "ownership" of the property was determined.

The appellant correctly argues that the chancellor cannot enter an order absolutely dividing the marital property in

an order granting legal separation. *Spencer* v. *Spencer, supra.* However, possession of the property may be awarded. *See Coleman* v. *Coleman*, 7 Ark. App. 280, 648 S.W.2d 75 (1983). We therefore remand this matter to the chancellor for the entry of whatever order the court deems appropriate to divide possession of the marital property.

Affirmed in part.

Reversed and remanded in part.

CORBIN, C.J., and MAYFIELD, J., agree.

Leonard McLEROY *v.* Thomas E. WALLER

CA 86-247 731 S.W.2d 789

Court of Appeals of Arkansas
Division II
Opinion delivered July 1, 1987

Meredith Wineland, for appellant.

William Clay Brazil, for appellee.

BETH GLADDEN COULSON, Judge. The appellant, Leonard McLeroy, brings this appeal from an order of the Faulkner County Circuit Court which denied his petition to set aside an arbitration award. The appellant argues that the arbitration panel exceeded its authority by awarding punitive damages in a suit involving the alleged breach of a lease agreement and that the panel improperly refused to postpone its hearing when a subpoenaed witness left before being called to testify. Both parties cite *L.L. Cole & Sons, Inc.* v. *Hickman*, 282 Ark. 6, 665 S.W.2d 278 (1984), as determinative of the punitive damages issue and focus on the extent to which this case involves a tortious breach of contract.

We certified this case on April 16, 1987, pursuant to Rule 29(1)(o) of the Rules of the Supreme Court and Court of Appeals, but the case was returned by the supreme court; accordingly, jurisdiction is with this court. We affirm the circuit court to the extent that it upheld the arbitration panel's award of compensatory damages, notwithstanding the panel's refusal to postpone its hearing, because the appellant has failed to bring up a record sufficient for us to determine whether the refusal was improper. However, because we find that the arbitration panel was without authority to make an award of punitive damages, the panel's award is to that extent invalid on its face, and we modify the circuit court's order by reducing the amount awarded to the appellee by $2,000.00 (the punitive damages award).

In April of 1981, the parties entered into a lease agreement whereby the appellant leased approximately 120 acres of farm land to the appellee for a period of five years. Sometime in 1983, the appellant notified the appellee that the lease was being terminated. The appellee brought suit seeking damages for wrongful termination, and the appellant counterclaimed. Pursuant to a provision in the lease, the matter was submitted to an arbitration panel. The appellant had subpoenaed a witness to present testimony showing that the appellee had failed to fulfill the terms and conditions of the lease. The witness appeared on the day of the hearing but was not present when called, and the arbitration panel refused to postpone the hearing.

The arbitration panel awarded the appellee compensatory damages for lost profits suffered as a result of the wrongful termination. The panel also found that the appellant's termination had been wilfull and had been motivated by a desire to benefit from the appellee's preparation of the land; this finding led to an award of $2,000.00 in punitive damages. The circuit court denied the appellant's motion to vacate that award, and from that order comes this appeal.

In Arkansas, arbitration is strongly favored by public policy and is looked upon with approval by courts as a less expensive and expeditious means of settling litigation and relieving congested court dockets. *Dean Witter Reynolds Inc.* v. *Deislinger*, 289 Ark. 248, 711 S.W.2d 771 (1986). The decision of the arbitration board on all questions of law and fact is conclusive, and the award shall be confirmed unless grounds are established to support vacating or modifying the award. Ark. Stat. Ann. §§ 34-521 — 34-523 (Supp. 1985); *Wessell Brothers Foundation Drilling Co.* v. *Crossett Public School District, No. 52*, 287 Ark. 415, 701 S.W.2d 99 (1985).

The fact that parties agree to submit their disputes to arbitration implies an agreement to be bound by the arbitration board's decision, and every reasonable intendment and presumption is in favor of the award; it should not be vacated unless it clearly appears that it was made without authority, or was the result of fraud or mistake, or misfeasance or malfeasance. Unless the illegality of the decision appears on the face of the award, courts will not interfere merely because the arbitrators have mistaken the law, or decided contrary to the rules of established practice as observed by courts of law and equity. *Alexander* v. *Fletcher*, 206 Ark. 906, 175 S.W.2d 196 (1943); *Kirsten* v. *Spears*, 44 Ark. 166 (1884).

The appellant argues that the arbitration panel's decision should have been set aside because the panel improperly refused to postpone its hearing when it was discovered that the appellant's witness, who had been subpoenaed and had appeared, left before being called to testify. Ark. Stat. Ann. §§ 34-521 and 34-522(4) (Supp. 1985) combine to provide that the grounds for vacating or modifying an arbitration award may include both the refusal of the arbitrators to postpone the hearing upon sufficient

cause being shown, and the refusal to hear evidence material to the controversy so as to substantially prejudice the rights of a party. Unfortunately, the proceedings at the arbitration hearing, including the testimony of witnesses and the discussion between counsel for the parties and the panel, were neither transcribed nor recorded, and we are unable to determine whether error occurred.

This court, citing Rule 6 of the Rules of Appellate Procedure, has held that where an appellant has made no attempt to make a record in compliance with the rule, we must presume that the matters presented in an unrecorded hearing support the trial court's findings. *Wagh* v. *Wagh*, 7 Ark. App. 122, 644 S.W.2d 630 (1983). While the record does contain a six paragraph narrative statement of the proceedings at the hearing, there is no indication that this statement was made in compliance with the requirements of subsection (d) of Rule 6, and the statement is otherwise so deficient as a reconstruction of the events at the hearing that we are unable to make a meaningful review on this issue. The burden is upon the appellant to bring up a record sufficient to demonstrate that there was error below. *SD Leasing, Inc.* v. *RNF Corp.*, 278 Ark. 530, 647 S.W.2d 447 (1983). We find that the appellant failed to meet this burden and have no choice but to affirm the circuit court's order on this point. *SD Leasing, supra.*

In arguing the propriety of the arbitration panel's award of punitive damages, both parties cite *L.L. Cole & Sons, Inc.* v. *Hickman*, 282 Ark. 6, 665 S.W.2d 278 (1984), and contend that the dispositive issue is whether this action sounds in tort, in contract, or in both. The appellee argues that this case involves tortious conduct by the appellant, and punitive damages could therefore be awarded. The appellant does not dispute that tortious conduct may support an award of punitive damages but argues that the suit was one for breach of contract, and punitive damages are therefore not permissible. We find it unnecessary to determine the extent to which the facts of this case involve either a breach of contract or some element of a tort.

An award of punitive damages under the facts of this case required evidence of tortious conduct. Arkansas law does not permit cases involving torts to be resolved by arbitration. As such, the arbitration panel was without power to rule upon any action

by the parties which would have supported an award of punitive damages. Ark. Stat. Ann. § 34-511 (Supp. 1985) provides that sections 34-511 — 34-532 (the Uniform Arbitration Act) do not apply to tort matters. In *Jim Halsey Co.* v. *Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985), our supreme court determined that cases which present questions in the law of torts are not subject to resolution by arbitration. *See also* Annot., 83 A.L.R. 3d 1037 (1978), *Arbitrator's Power To Award Punitive Damages.*

For the foregoing reasons, the circuit court's order is modified to reflect a reduction of $2,000.00 in the amount awarded to the appellee pursuant to the arbitration panel's award. The order is otherwise affirmed.

Affirmed as modified.

CRACRAFT and JENNINGS, JJ., agree.

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