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David LONG *v.* Bill CAUTHRON, Sheriff

CA 86-380 731 S.W.2d 792

Court of Appeals of Arkansas
Division II
Opinion delivered July 8, 1987

John W. Settle, for appellant.

Steve Clark, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Judge. David Long appeals from an order denying his petition for a writ of habeas corpus and release from his detention under a governor's warrant for his extradition to the State of California. We find no error and affirm.

On January 22, 1986, appellant was taken into custody pursuant to a governor's warrant for his extradition to the State of California. The validity of the governor's warrant is not questioned. On February 21, 1986, the appellant filed a petition for a writ of habeas corpus in which he alleged that more than thirty days had elapsed since his arrest under the governor's warrant; that the delay in delivering him to the agent from California was inexcusable; and that the warrant should be quashed and he released from custody pursuant to 18 U.S.C. § 3182 (1982). At a hearing on the petition, the trial court found that any delay in delivery of the appellant to the authorities from California was not the fault of that state; that appellant had not been unduly prejudiced by the delay; and that the thirty-day provision in the federal statute was directory, as opposed to mandatory, and did not bar extradition in this case.

In *Cadle* v. *Cauthron*, 266 Ark. 419, 584 S.W.2d 6 (1979), the Arkansas Supreme Court recognized that the only requirement of the United States Constitution with reference to extradition is that, upon demand of a requesting state, the executive authority of the asylum state is bound to deliver the fugitive. U.S. Const. art. IV, § 2, cl. 2. *Cadle* further declared that the requirements for extradition were set forth in 18 U.S.C. § 3182 and that neither the United States Constitution nor the United States Code required any particular type of proceeding concerning extradition matters, the details of extradition proceedings being left to the various states.

18 U.S.C. § 3182 provides as follows:

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the execution authority of the State, District, or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner *may* be discharged. [Emphasis added.]

Arkansas has adopted the Uniform Criminal Extradition Act (Ark. Stat. Ann. § 43-3001 et seq. (Repl. 1977 and Supp. 1985)), which conforms to the requirements of both the Constitution and the United States Code. Our act, however, does not place any limit on the time during which the agent of the demanding state must take charge of the prisoner.

Appellant argues that the federal statute has preempted the field of extradition procedures and that our courts are bound to follow the federal statute. He contends that under the

United States Code it was mandatory that the agent for the State of California appear within thirty days of his arrest or that he be released. While we agree that we must follow federal statutes regarding extradition, *Cadle* v. *Cauthron, supra*, we do not agree that the terms of 18 U.S.C. § 3182 mandate the result sought by the appellant in this case. The word "may" as contained in the federal statute is generally construed as permissive. Although "may" can, in certain contexts, be construed to mean "shall," we are cited no cases in which the federal courts have so held with respect to this statute, and we note that various state courts have held the language to be permissive rather than mandatory. *See People* v. *Superior Court of Los Angeles County*, 130 Cal. App.3d 776, 183 Cal. Rpt. 132 (1982); *Prettyman* v. *Karnopp*, 192 Neb. 451, 222 N.W.2d 362 (1974); *McEwen* v. *State*, 224 So.2d 206 (Miss. 1969).

We do not construe the federal statute as mandating the release of a prisoner held on a governor's warrant where the demanding state has not taken him into custody within thirty days of the arrest. The asylum state is bound by the Constitution to take him into custody and deliver him to the demanding state. The thirty-day provision in the federal statute does no more than release the asylum state from its constitutional obligation to hold the prisoner if the demanding state does not appear within thirty days. Nothing in it prohibits a state from holding him for a reasonable time thereafter. Here, the prisoner was in custody under our governor's warrant for thirty-one days prior to the filing of the petition for the writ. We do not find this to be unreasonable.

We likewise find no merit in appellant's argument that the permissible period for holding him under the warrant ran from the time of his arrest until the date of the hearing on his petition. Any delay incurred after the filing of the petition for a writ of habeas corpus is the result of appellant's own act. The purpose in filing the habeas corpus action was to test the validity of his detention. The receiving state should not be penalized for failing to send its agent to claim the fugitive for extradition before the termination of litigation to avoid it. *Smith* v. *Idaho*, 373 F.2d 149 (9th Cir. 1967); *People* v. *Superior Court of Los Angeles County, supra.*

Affirmed.

COULSON and JENNINGS, JJ., agree.

CITY NATIONAL BANK OF FORT SMITH *v.* FIRST NATIONAL BANK AND TRUST COMPANY OF ROGERS, et al.

CA 86-471 732 S.W.2d 489

Court of Appeals of Arkansas
Division I
Substituted Opinion on Denial of Rehearing
September 23, 1987.*

*Original opinion delivered July 8, 1987.

[redacted]

Harper, Young, Smith & Maurras, by: *S. Walton Maurras*, for appellant.

Cypert, Crouch, Clark & Harwell, by: *James E. Crouch*, for appellee Northwest National Bank.

Kelley & Luffman, by: *Eugene T. Kelley*, for appellee First National Bank and Trust Company of Rogers and First National Bank of Siloam Springs.

JAMES R. COOPER, Judge. First National Bank and Trust Company of Rogers, Arkansas (First Rogers) and First National Bank of Siloam Springs, Arkansas (First Siloam) brought an action against Northwest National Bank (Northwest) on a $409,000.00 letter of credit, dated April 15, 1983, issued by

Northwest to First Rogers. Northwest filed a third-party complaint against City National Bank of Fort Smith, Arkansas (City National), alleging that City National had participated in the letter of credit to the extent of $309,000.00, and asking that the letter of credit be reformed to reflect City National's liability in the amount of $309,000.00, and Northwest's liability in the amount of $100,000.00. After a trial, it was ordered that First Rogers and First Siloam have judgment against Northwest in the amount of $409,000.00, plus interest and costs, and that Northwest have judgment against City National for $309,000.00, plus interest and costs. From that decision, comes this appeal.

The evidence shows that the letter of credit arose out of a project initiated by Thomas Comley. In 1983, Comley formed the Shadyridge Limited Partnership in order to build and operate an apartment project. The construction of the project was financed by housing bonds issued through First Rogers. One of First Rogers's loan requirements was for Shadyridge to obtain a letter of credit in the amount of $409,000.00 for the benefit of First Rogers. Shadyridge obtained the $409,000.00 letter of credit from Northwest on April 15, 1983. City National agreed to participate in the letter of credit to the extent of $309,000.00. The terms of City National's participation were set out in a letter of commitment issued from City National to Northwest on April 13, 1983. City National's letter of commitment set forth several conditions upon which its participation was based, including the conditions that Northwest would have a second mortgage on the then-unbuilt apartment complex, and that Northwest would have a security interest in the Raspberry note, a contract of sale between M. O. Raspberry and Thomas Comley.

On August 16, 1984, First Rogers assigned a $329,000.00 participation in the letter of credit to First Siloam, and Northwest acknowledged notice of the assignment. Whether Northwest effectively notified City National of the assignment is a subject of dispute; the chancellor found that, at some point, City National received a copy of the assignment. Between December 27, 1984, and March 15, 1985, First Rogers advanced $80,000.00 under a note secured by the $409,000.00 letter of credit. Between August 27, 1984, and August 28, 1984, First Siloam advanced $329,000.00 under a note which was also secured by the letter of credit. Whether these advances were made to Thomas Comley personally, or to Comley as agent for Shadyridge, is disputed on appeal.

In October 1984 Comley pledged the Raspberry note to McIlroy Bank and Trust Company of Fayetteville, Arkansas, as security for a $324,000.00 letter of credit which otherwise is unrelated to the issues in the case at bar. In April 1985, Thomas Comley and Fran Sabbe, an employee of Northwest, met with George Beattie, the loan officer for City National who was handling the Shadyridge account. They discussed extending the expiration date of the letter of credit to December 31, 1985, and the release of the Raspberry note as collateral for the letter of credit. They agreed to extend the letter of credit's expiration date. The appellant, City National, denies that Beattie agreed to release the Raspberry note as collateral. The appellee and cross-appellant, Northwest, asserts that Beattie did authorize Northwest to release the note as collateral. It is undisputed that Northwest did in fact release the Raspberry note on May 9, 1985.

On August 21, 1985, First Rogers made a written demand upon Northwest under the $409,000.00 letter of credit, and subsequently added City National's name to the demand at the request of Northwest. Northwest offered to pay First Rogers $100,000.00 on the letter of credit in exchange for a release, but First Rogers refused. City National subsequently denied liability on its participation in the letter of credit and refused to pay. With both Northwest and City National refusing to fully honor the letter of credit, First Rogers and First Siloam filed the action which gave rise to this appeal.

For reversal, the appellant, City National, contends that Northwest failed to prove that City National agreed to release the Raspberry note as collateral; that any agreement by City National to release the Raspberry note is void for lack of consideration; that First Rogers's assignment of a $329,000.00 interest in the letter of credit to First Siloam had the effect of releasing City National from its obligation; that Northwest's release of the Raspberry note as collateral released City National from liability; that the chancellor erred in excluding the testimony of Tom Reed, a witness called by City National; and that the chancellor erred in permitting Fran Sabbe to testify concerning an oral modification of the written letter of commitment which set forth the terms of City National's participation in the letter of credit.

The appellee and cross-appellant, Northwest, disputes City National's contentions and additionally argues that the chancellor erred in failing to find that no demand on the letter of credit was made on Northwest by First Siloam; that a condition

precedent to First Rogers's and First Siloam's right to demand payment of the letter of credit did not exist; that the chancellor erred in failing to find that Northwest's issuance of the letter of credit in the amount of $409,000.00 was unenforceable as an illegal contract; and that the chancellor erred in awarding thirteen percent interest.

We first address the points for reversal advanced by the appellant, City National. The appellant initially contends that Northwest failed to prove that City National agreed to the release of the Raspberry note as collateral. Citing *APCO Oil Corp.* v. *Stephens*, 270 Ark. 715, 606 S.W.2d 134 (Ark. App. 1980), the appellant argues that clear and convincing evidence is required to prove an oral modification to a written agreement, and asserts that Northwest did not present clear and convincing evidence that City National consented to the release of the Raspberry note. Although the appellant correctly states that an oral modification of a prior written contract must be established by clear and convincing evidence, *Freeman* v. *Freeman*, 20 Ark. App. 12, 722 S.W.2d 877 (1987), a requirement that the evidence be "clear and convincing" does not mean that the evidence must be uncontradicted. *Freeman*, 20 Ark. App. at 15.

The evidence in the case at bar shows that, on April 4, 1985, Thomas Comley, Fran Sabbe of Northwest, and George Beattie of City National met to discuss the extension of the letter of credit's expiration date to December 31, 1985, and the release of the Raspberry note as collateral. At this meeting, Comley asked Beattie to release the note, and told him that there was enough equity in the apartment complex to secure the debt. Because the release of the note would leave only a second mortgage on the apartment complex as collateral, Beattie indicated that he would need to see the apartments and review his file before agreeing to release the note. Fran Sabbe telephoned Beattie several times during April 1985 to discuss the extension of the letter of credit and the release of the collateral. Beattie viewed the apartment complex on May 1, 1985, and was favorably impressed with the project, which was by then virtually complete.

The most significant point of divergence in the testimony of the witnesses centers upon a conversation between Sabbe and Beattie that took place on May 8 or 9, 1985. Sabbe testified that Beattie agreed to extend the letter of credit until December 31, 1985, and that Beattie made no objection when Sabbe stated that it was her understanding that the extension would be secured only

by the second mortgage on the project. Sabbe followed up this conversation with a letter to Beattie dated May 10, 1985, in which she enclosed a new promissory note and mortgage. The promissory note, dated April 15, 1985, stated that the note was secured by a second mortgage on the Shadyridge apartment complex. The Raspberry note was not listed as collateral. Sabbe later received a letter from Beattie, dated May 28, 1985, in which Beattie acknowledged receipt of the documents. Despite the fact that the Raspberry note was not listed as collateral on the promissory note, Beattie made no objection to the release of the Raspberry note.

Beattie's testimony concerning the events leading up to the release of the Raspberry note is markedly different from Sabbe's account. He stated that he had no recollection of any request by Comley or Northwest to release the note as collateral. With respect to the promissory note of April 15, 1985, Beattie testified that the fact that a box on the note was checked to indicate that the promissory note was secured by a U.C.C. security interest led him to believe that there were two items of collateral securing the promissory note, a mortgage and the Raspberry note. The appellant contends that Beattie's letter of May 28, 1985, indicates that he had not consented to the release of the Raspberry note as collateral, because in that letter he refused to execute a participation agreement, forwarded by Sabbe, which would have given Northwest the right to release collateral without City National's consent. Beattie's letter also shows that he was unaware that any disbursements had been made under the letter of credit when, in fact, disbursements had been made for the entire $409,000.00 amount of the letter of credit.

Although chancery cases are tried *de novo* on appeal, we do not reverse the chancellor's findings of fact unless they are clearly erroneous. *Ballard* v. *Carroll*, 2 Ark. App. 283, 621 S.W.2d 484 (1981). We review the evidence in the light most favorable to the appellee, and indulge all reasonable inferences in favor of the decree. *Id.*, 621 S.W.2d at 486. The chancellor in the case at bar found that City National, through Beattie, agreed to the release of the Raspberry note as collateral. When the burden of proving a disputed fact in chancery is by "clear and convincing" evidence, the question on appeal is whether a finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous. *Freeman* v. *Freeman, supra.*

Viewing the evidence in the light most favorable to

the appellee, we cannot say that the evidence that City National released the Raspberry note as collateral is not clear and convincing. Although some of the evidence is circumstantial, circumstantial evidence may be sufficient to show that the parties entered into a contract. *Steed* v. *Busby*, 268 Ark. 1, 593 S.W.2d 34 (1980). Moreover, the chancellor's opportunity to assess the credibility of the witnesses is especially important where, as here, the testimony is in hopeless conflict. Although the appellant argues that the fact that the U.C.C. box was checked on the April 15, 1985, promissory note had the effect of leading Beattie to believe that the promissory note was secured by the Raspberry note, we do not think that the promissory note was intrinsically misleading: City National's vice-president for commercial lending, Larry Smith, reviewed the Shadyridge file when Beattie was on vacation in the summer of 1985, and was able to determine from his review that the Raspberry note was no longer listed as collateral. Furthermore, the evidence makes it clear that Beattie reviewed the documents sent to him by Sabbe and objected to various provisions set out therein. Despite this evidence of close scrutiny, there is no indication that Beattie ever objected to the Raspberry note's release until after the letter of credit had been called. Under these circumstances, we hold that the chancellor did not err in finding that Beattie agreed to the release of the Raspberry note.

The appellant next contends that City National's agreement to release the Raspberry note is void for lack of consideration, and argues that City National Bank obtained no benefit in exchange for its agreement to release the note. We disagree. Both Northwest and City National agreed to release the collateral and extend the letter of credit, and mutual promises constitute consideration for each other. *Freeman, supra.*

City National also contends that it is released from its duty to honor the letter of credit because First Rogers assigned a $329,000.00 interest in the letter of credit to First Siloam. This contention is based upon Ark. Stat. Ann. § 85-5-116(1) (Supp. 1985), which provides that "[t]he right to draw under a credit can be transferred or assigned only when the credit is expressly designated as transferable or assignable." We find no merit in the appellant's argument. The chancellor specifically found that the right to call the letter of credit remained with First Rogers, despite the partial assignment of an interest therein to First Siloam. A chancellor's findings of fact will not be reversed on appeal unless they are clearly against the preponderance of the

evidence. *Pennybaker* v. *Pennybaker, supra.* We review the evidence in the light most favorable to the appellee, indulging all reasonable inferences in favor of the decree, and giving due deference to the chancellor's superior opportunity to judge the credibility of the witnesses. *Cox* v. *Cox, supra; Gooch* v. *Gooch, supra.*

The evidence shows that the terms of the partial assignment of the letter of credit provided that all terms of the original letter of credit remained in effect. This would include the required procedure that the letter of credit was to be called by First Rogers, accompanied by First Rogers' signed statement that the amount drawn was due in connection with a loan to Shadyridge. Although there was some testimony to the effect that First Siloam's officers were consulted by First Rogers and consented to First Rogers calling the letter of credit, the evidence clearly shows that the actual call was made by First Rogers, with the notation that the amount was drawn under Northwest's letter of credit. In light of the evidence that the partial assignment preserved the original terms of the letter of credit, and that the letter of credit was in fact called under the terms specified in the original agreement, we hold that the chancellor did not err in finding that the right to call the letter of credit remained with First Rogers, and that the assignment of an interest in the letter of credit to First Siloam did not release City National from its duty to honor the letter of credit.

We do not reach the appellant's contention that City National is released from liability because the assignment was in violation of Ark. Stat. Ann. § 85-3-407(1)(a) (Repl. 1961), because there is no indication in the abstract that the possibility of a violation of this statute was raised in the trial court. Arkansas courts have consistently held that issues raised for the first time on appeal will not be considered. *Ferguson* v. *City of Mountain Pine,* 278 Ark. 575, 647 S.W.2d 460 (1983). Moreover, we do not think that the appellant's argument would be found to have merit even had it been properly preserved for appeal. Section 85-3-407 (Repl. 1961) deals with alterations of an *instrument.* An instrument is defined in Ark. Stat. Ann. § 85-3-102(1)(e) (Repl. 1961) as a negotiable instrument. To be a negotiable instrument, a writing must "contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article." Ark. Stat. Ann. § 85-3-104(1)(b) (Repl. 1961). The letter of credit in the case at bar did not contain an unconditional

promise or order to pay; instead, payment was specifically conditioned upon receipt of a signed statement that the amount drawn was due in connection with a loan to Shadyridge, Ltd. Even if the letter of credit in the case at bar were considered to be a negotiable instrument, City National would be discharged under § 85-3-407 only in the event of an alteration by the holder that was both material and fraudulent, and City National has failed to prove that the assignment of an interest in the letter of credit to First Siloam was made for a fraudulent purpose. Thus, we think that the appellant's argument would fail, even had it been raised below.

Next, the appellant contends that the release of the Raspberry note as collateral released City National from liability. This contention is based on Ark. Stat. Ann. § 85-3-606 (Repl. 1961), which, in pertinent part, provides that "[t]he 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. . . ." (Emphasis supplied.) We need not decide whether the letter of credit in the case at bar was a negotiable instrument in order to address the appellant's contention, because we have affirmed the chancellor's finding that City National consented to Northwest's release of the Raspberry note as collateral. In light of that finding, the appellant's argument lacks merit.

The appellant also argues that the chancellor erred in excluding the testimony of Tom Reed, a witness called by City National. We do not reach this contention, for the appellant has failed to cite any authority in support of its position. Assignments of error unsupported by convincing arguments or authority will not be considered on appeal unless it is apparent without further research that the assignments of error are well taken. *Western Auto Supply Co.* v. *Bank of Imboden*, 17 Ark. App. 4, 701 S.W.2d 394 (1985). In light of the fact that City National never listed Reed as a witness in its answers to interrogatories, we do not think the appellant's argument is so convincing as to merit consideration on appeal in the absence of citation to authority.

The appellant next asserts that the chancellor erred in permitting Fran Sabbe to testify concerning the oral agreement to release the Raspberry note as collateral, and argues that Sabbe's testimony was improper as parol evidence introduced to change or alter a contract in writing. Although it is true that the Parol Evidence Rule prohibits the introduction of evidence of all

prior or contemporaneous agreements of the parties which would vary the express terms of their written agreement, *see Sterling* v. *Landis*, 9 Ark. App. 290, 658 S.W.2d 429 (1983), it is well established that this rule is not violated by proof of a subsequent oral agreement modifying the terms of a written one. *Id.*, 658 S.W.2d 429. Because Sabbe's testimony was not offered to prove an agreement that was prior to or contemporaneous with the agreement embodied in the letter of commitment between City National and Northwest, but instead related to an oral agreement reached after the letter of commitment had been executed, we hold that the chancellor did not err in admitting Sabbe's testimony.

We next address the contentions advanced by the cross-appellant, Northwest, for reversal of the decree entered against it in favor of First Rogers and First Siloam. Northwest first contends that the failure of First Siloam to call the letter of credit precludes First Siloam from seeking a judgment on it arguing that First Rogers assigned to First Siloam the duty of calling the letter of credit. We disagree. Although we have said that an assignment couched in general terms is an assignment of the assignor's rights and a delegation of his unperformed duties under the contract unless the language or the circumstances indicate the contrary, *see Newton* v. *Merchants & Farmers Bank*, 11 Ark. App. 167, 668 S.W.2d 51 (1984), we think that both the language of the assignment and the circumstances of the case at bar indicate that First Siloam was not assigned the duty of calling the letter of credit. The partial assignment provided that it was to operate upon the same conditions as the letter of credit. One of the conditions of the credit was that it was to be called by First Rogers under a draft drawn on Northwest. Moreover, there is no evidence to show that First Siloam ever intended to assume First Rogers's duty of calling the letter of credit; to the contrary, First Siloam has neither claimed the right to call the letter of credit nor attempted to do so. We think that the evidence clearly shows that the purpose of the assignment was merely to provide security for First Siloam's loan to Comley, and that no delegation of duties was intended. Under these circumstances, we hold that the chancellor did not err in failing to dismiss First Siloam's complaint against Northwest.

Next, Northwest contends that the conditions for First Rogers to call the letter of credit did not exist. This argument is without merit. Northwest states in its brief that the letter of credit required First Rogers to state in its call that the First Rogers's

loan to Shadyridge was due, and argues that this condition was not satisfied because there is no evidence to show that First Rogers's loan was to Shadyridge, Ltd., as opposed to Thomas Comley individually. However, the letter of credit did not require that the loan be made to Shadyridge *per se*, but only provided that the demand must specify that the amount drawn was *in connection with* the loan to Shadyridge, Ltd. Because the record clearly shows that the proceeds of the loans to Comley were deposited in the account of Shadyridge, Ltd., we hold that First Rogers's demand met the conditions set out in the letter of credit.

Northwest next asserts that the chancellor erred in failing to find that Northwest's issuance of the letter of credit in the amount of $409,000.00 was unenforceable as an illegal contract. Northwest's argument is based upon 12 U.S.C. § 84 (1982), which sets lending limits for national banks. Virginia Morris, Northwest's chief executive officer, testified that Northwest's lending limit with respect to the Shadyridge letter of credit was approximately $105,000.00. She further stated that Northwest could avoid exceeding its lending limit by having another bank participate, and that City National was asked to participate in the letter of credit. Because Northwest had never before engaged in a participation involving a letter of credit, she asked David Marley of City National for guidance, and sent all of the paperwork to Marley for approval. When Ms. Morris asked Marley whether two letters of credit should be issued, one from Northwest and another from City National, Marley told her that only one letter of credit should be issued, and that it should be issued by Northwest, to which the request had originally been addressed. Finally, Morris stated that she made First Rogers aware of City National's participation by notifying two of First Rogers's officers, James Glenn and John Carpenter. Northwest asserts that its issuance of the letter of credit in the amount of $409,000.00 violated the lending limits imposed by 12 U.S.C. § 84 (1982), and that the letter of credit is thus an illegal contract which cannot be enforced.

The general rule with respect to illegal contracts is that neither courts of law nor of equity will interpose to grant relief to the parties, if they have been equally cognizant of the illegality. *Womack* v. *Maner*, 227 Ark. 786, 301 S.W.2d 438 (1957). An exception to the general rule exists, however, in cases where the party suing, though *particeps criminis*, is not *in pari delicto* with the adverse party: under those circumstances, the party suing will not be barred from asserting rights under the

transaction. *Dillard* v. *Kelley*, 205 Ark. 848, 171 S.W.2d 53 (1943). We think that First Rogers's knowledge of Northwest's loan limit is the crucial factor in determining whether First Rogers was *in pari delicto* with Northwest with respect to Northwest's asserted violation of the federal statute governing lending limits. *See National Farmers Organization, Inc.* v. *Kinsley Bank*, 731 F.2d 1464 (10th Cir. 1984). In its brief, Northwest states that Ms. Morris testified that she made First Rogers aware of the lending limit problem and the need for City National's participation. Although it is true that Ms. Morris stated that both Comley and City National were aware that the participation was required in order to avoid exceeding Northwest's lending limit, we find no indication in the record that First Rogers was also made aware of the lending limit problem. Instead, Morris merely stated that she made First Rogers aware of City National's participation by contacting Glenn and Carpenter. Glenn testified that, while he was aware of City National's participation in the letter of credit, he did not suspect that the reason for the participation was that Northwest had a problem with its lending limits. On this record, we cannot say that First Rogers was aware that Northwest exceeded its lending limit in issuing the letter of credit, and that First Rogers was thus *in pari delicto* with Northwest concerning any violation of 12 U.S.C. § 84 that may have occurred. The law will not presume that the parties to a contract intended an illegal act. *Stroud* v. *Pulaski County Special School District*, 244 Ark. 161, 424 S.W.2d 141 (1968). We therefore hold that First Rogers was not precluded from enforcing the letter of credit against Northwest in the amount of $409,000.00.

We finally address Northwest's contention that the chancellor erred in awarding interest at the rate of thirteen percent. Northwest argues that the letter of credit was a contract in which no rate of interest was agreed upon, and that prejudgment interest is thus limited to six percent per annum under Ark. Const. art. 19, §13, amend. 60, § 1(d)(i) (1982). We agree. *See Rest Hills Memorial Park, Inc.* v. *Clayton Chapel Sewer Improvement District*, 6 Ark. App. 180, 639 S.W.2d 519 (1982). Although the promissory note which First Rogers issued to Comley provided for interest at the rate of thirteen percent, the letter of credit itself made no provision for the payment of interest. We therefore modify the chancellor's decree to provide for the payment of prejudgment interest at the rate of six percent

rather than the thirteen percent rate the chancellor awarded.

Affirmed on direct appeal.

Affirmed as modified on cross-appeal.

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

Dennis TURNBULL *v.* STATE of Arkansas

CA CR 87-28 731 S.W.2d 794

Court of Appeals of Arkansas
Division I
Opinion delivered July 8, 1987

Achor & Rosenzweig, by: *Jeff Rosenzweig*, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with driving while intoxicated, and convicted after a trial in the City Court of Kensett, Arkansas. After a *de novo* appeal to the Circuit Court of White County, Arkansas, the appellant was found guilty of driving while intoxicated, first offense. He was fined $600.00, his driver's license was suspended for ninety days, and he was sentenced to ten days in the White County Detention Center. From that decision, comes this appeal.

For reversal, the appellant contends that the circuit judge erred in failing to find that the arrest was invalid on the ground that the arresting officer was an auxiliary policeman who was not under the direct supervision of a full-time certified law enforcement officer. He also argues that the arresting officer was not acting in his capacity as an auxiliary policeman at the time of the arrest, but instead was acting as a member of the Kensett Neighborhood Watch. We affirm.

There is evidence to show that the appellant was driving erratically within the city limits of Kensett on March 22, 1986. Carthel Kelsey, an auxiliary law enforcement officer of the Kensett City Police and president of the Kensett Neighborhood Watch, was patrolling Kensett when he observed the appellant's vehicle weave, go into the ditch on the left side of the road, and come out again. Kelsey gave chase and arrested the appellant. At the time of the arrest, Kelsey was certified as an auxiliary law enforcement officer, and was dressed in the uniform of the Kensett Police Department. Larry Smith, a fireman, was riding with Kelsey as he made his patrol. Smith was a member of the Kensett Neighborhood Watch, but he was not a law enforcement officer or an auxiliary law enforcement officer. When Kelsey left

the patrol car to apprehend the appellant, he told Smith to wait in the car, and Smith took no part in the apprehension. Chief Webb of the Kensett Police Department, a certified law enforcement officer and Kelsey's supervising officer, arrived on the scene after Kelsey made the arrest, but he did not otherwise participate in the arrest. Kelsey stated that he was in radio contact with Chief Webb while on patrol; that he had talked to Webb by radio approximately ten minutes before he observed the appellant driving erratically; and afterwards informed Chief Webb by radio that he was in pursuit of the appellant.

The appellant first asserts that Kelsey was not under Chief Webb's direct supervision when the arrest occurred, and contends that the trial court thus erred in failing to find that the arrest was invalid. We disagree. The authority of an auxiliary law enforcement officer is governed by Ark. Stat. Ann. § 42-1404 (Supp. 1985), which provides in part that:

> (a) An auxiliary law enforcement officer shall have the authority of a police officer as set forth by statutes of this State when the auxiliary law enforcement officer is performing an assigned duty and is under the direct supervision of a full-time certified law enforcement officer.
>
> (b) When not performing an assigned duty and when not working under the direct supervision of a full-time certified law enforcement officer, an auxiliary law enforcement officer shall have no authority other than that of a private citizen.

The essence of the appellant's argument is that Kelsey's radio contact with Chief Webb did not provide the "direct supervision" that the statute requires. We find no merit in this contention, because the physical presence of a supervising officer is not required to validate an arrest made by an auxiliary law enforcement officer. Ark. Stat. Ann. § 42-1401 (Supp. 1985). Moreover, direct supervision of an auxiliary law enforcement officer can be provided by radio contact. *See McAfee* v. *State*, 290 Ark. 446, 720 S.W.2d 307 (1986). Under these circumstances, we hold that the trial court did not err in failing to find that the arrest was invalid.

Next, the appellant asserts that the evidence was

insufficient to support a finding that Kelsey was acting in his capacity as an auxiliary law enforcement officer when he arrested the appellant, and that the evidence shows that Kelsey was acting as a member of the Kensett Neighborhood Watch when the arrest was made. Where the sufficiency of the evidence is at issue, we review the evidence in the light most favorable to the State, and we affirm if the verdict is supported by substantial evidence. *Lair* v. *State*, 19 Ark. App. 172, 718 S.W.2d 467 (1986). Substantial evidence is evidence which induces the mind to go beyond mere suspicion or conjecture, and which is of sufficient force and character to compel a conclusion one way or the other. *Dillard* v. *State*, 20 Ark. App. 35, 723 S.W.2d 373 (1987). Although it is true that Kelsey was a member of the neighborhood watch, and was accompanied by another watch member as he made his patrol, Kelsey unequivocally stated at trial that, on the night in question, he was on patrol as an auxiliary police officer and not as a member of the neighborhood watch. There is also evidence to show that Chief Webb had assigned Kelsey to patrol duty on the night in question; that Kelsey was in the uniform of the Kensett Police Department; and that Smith, the fireman, took no part in the appellant's arrest. Viewing the evidence in the light most favorable to the State, we hold that the evidence was sufficient to support a finding that Kelsey was acting in his capacity as an auxiliary policeman when he arrested the appellant.

Affirmed.

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

Bennie MOORE *v.* DARLING STORE FIXTURES

CA 86-472 732 S.W.2d 496

Court of Appeals of Arkansas
Division II
Opinion delivered July 8, 1987

Anthony W. Bartels, for appellant.

Walker, Snellgrove, Laser & Langley, by: *David N. Laser*, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Workers' Compensation Commission holding that appellant had failed to prove by a preponderance of the evidence that he had sustained a work-related injury. We reverse and remand.

On February 24, 1983, appellant fell while at work. There were no witnesses to the fall and appellant has no memory of how it happened. He was discovered unconscious on the floor by co-workers. Appellant was taken to the emergency room at a Corning, Arkansas, hospital where he was diagnosed by Dr. DeLuca as having sustained a concussion with possible skull fracture and possible intracerebral bleeding or subdural hematoma. He was then transferred by ambulance to St. Bernard's Regional Medical Center in Jonesboro and, upon admission, it was discovered he had an abnormal electrocardiogram. Dr. R. G. Burns originally diagnosed an acute myocardial infarction, and after treatment, appellant was discharged on March 4, 1983, with a diagnosis of acute closed-head injury, two skull fractures, and acute myocardial infarction. On April 26, 1983, he had a coronary artery bypass at Baptist Memorial Hospital in Memphis, Tennessee.

Appellant filed a workers' compensation claim contending he suffered a compensable head injury when he fell and that this contributed to his heart attack. At the hearing before the law judge, appellant testified that he was standing on a forklift, putting merchandise on a shelf; that he got off the forklift, then started to get back up on it, and "that's the last thing I remember." He said he felt no blow to his head or anything else. The next thing he knew, he woke up in the hospital with a lump on his head. He also testified that a few weeks earlier some steel shelving had fallen and hit him in the left eye requiring a few stitches. He denied that this caused him any problems with his head or heart.

Appellant's mother and two of his friends testified that, prior

to his fall at work, appellant had suffered no heart disease or dizzy spells that they knew of, and that he had not complained of headaches or dizzy spells.

The medical records introduced into evidence contained a letter written by Dr. DeLuca on September 12, 1983, in which he stated that it was his opinion that appellant was not suffering from a heart attack at the time the doctor examined him in the emergency room on February 24, 1983, and another letter dated January 17, 1986, in which Dr. DeLuca stated, "It is a high probability that Mr. Moore had a heart attack on route by ambulance to St. Barnards [sic]."

The law judge held that appellant's fall and subsequent heart attack were not contributed to or caused by his employment and denied compensation. The full Commission affirmed, stating:

> The general test of compensability for a fall at work is set forth in Larson, *Workmen's Compensation Law*, § 12.11 and *Nu-Way Laundry & Dry Cleaners* v. *Palmer*, 12 Ark. App. 31, 670 S.W.2d 464 (1984). Compensation is denied when the basic cause of the harm is personal and the employment has not *significantly* added to the risk of injury.
>
> The claimant testified that he did not remember how or why he fell. He testified that he had not suffered from black-outs or heart trouble prior to the accident. His testimony is in direct conflict with the medical history given to Dr. Burns:
>
>> It was subsequently learned from the patient and from his mother and father he had complained of generalized body weakness associated with some discomfort in upper extremity for indeterminant period of time from days to weeks, prior to the head injury.
>
> Whether a fall at work is categorized as "unexplained" or "idiopathic" is a fact question to be determined by the Commission. . . . We find that the claimant sustained an idiopathic fall. . . .
>
> From the testimony, we are unable to tell if the claimant was on level ground when he fell, or if he was back on the

> forklift at a dangerous height, or if he hit his head against any machinery. . . .
>
> Claimant has failed to establish by a preponderance of the credible evidence of record that his injury arose out of his employment. Additionally, he has not shown that his employment significantly increased his risk of injury.

When one suffers an injury at work, the cause is, obviously, either known or unknown. Larson's treatise on workers' compensation law states that the most common example of a situation in which the cause of the harm is unknown is the unexplained fall in the course of employment and that most courts confronted with that situation have seen fit to award compensation. 1 Larson, *The Law of Workmen's Compensation*, § 10.31, at 3-87 (1985). However, injuries from idiopathic falls do not arise out of the employment unless the employment contributes to the risk or aggravates the injury by, for example, placing the employee in a position which increases the dangerous effect of the fall, such as on a height, near machinery or sharp corners, or in a moving vehicle. Larson § 12.11.

The word "idiopathic" is defined in *Webster's Third New International Dictionary, Unabridged* (1976), as (1) peculiar to the individual, (2) arising spontaneously or from an obscure or unknown cause. Although the two concepts are frequently confused, Larson says "unexplained-fall cases begin with a completely neutral origin of the mishap, while idiopathic-fall cases begin with an origin which is admittedly personal and which therefore requires some affirmative employment contribution to offset the prima facie showing of personal origin." Larson § 12.11, at 3-314.

Our Arkansas cases have followed the above rules. In *Fairview Kennels* v. *Bailey*, 271 Ark. 712, 610 S.W.2d 270 (Ark. App. 1981), we relied upon a statement from Larson § 10.31 that "It is significant to note that most courts confronted with the unexplained fall problem have seen fit to award compensation," and we held that the claimant's explanation that, while engaged in her work-related duties she "fell and couldn't get up," was sufficient for the Commission to find that the claimant fell in the course of her employment. 271 Ark. at 715.

In *Country Pride* v. *Holly*, 3 Ark. App. 216, 624 S.W.2d 443 (1981), we discussed the rules pertaining to idiopathic falls and quoted from Larson. However, we upheld the finding of the Commission that appellant's fall in that case was caused by his voluntary intoxication and therefore was not compensable. *See* Ark. Stat. Ann. § 81-1305 (Repl. 1976). Thus, the idiopathic fall issue was not the decisive issue in that case.

In *Roc-Arc Water Co.* v. *Moore*, 10 Ark. App. 349, 664 S.W.2d 500 (1984), we upheld an award of compensation made on the basis that the claimant had suffered an unexplained fall, even though there was evidence in the record from which the Commission could have found the fall was idiopathic. An idiopathic fall was described in that case as being "an occurrence caused by a non-occupational illness or weakness personal to the claimant." 10 Ark. App. at 350.

Our most recent case is *Nu-Way Laundry & Cleaners* v. *Palmer*, 12 Ark. App. 31, 670 S.W.2d 464 (1984), in which we reversed a decision of the Commission that the claimant's fall arose out of and in the course of her employment. We said the Commission, in arriving at its decision, had fused the distinct categories of "unexplained" and "idiopathic" falls, and after reviewing the above case law in Arkansas, we stated:

> The present case goes further than any of the earlier ones in the unexplained/idiopathic line. The Workers' Compensation Commission relied upon *Fairview Kennels, supra*, and its own decision in *Moore* v. *Roc-Arc Water Co.*, WCC Claim No. D113610 (June 6, 1983), in holding that when a fall is attributable to either an unexplained or an idiopathic condition it is nonetheless compensable if the injury occurs while the claimant is doing required work. This ruling of the Commission extends the "unexplained" fall theory to the general rule stated by this Court in *Country Pride* v. *Holly, supra*. If we were to endorse the Commission's position in the instant case, any distinction between unexplained and idiopathic falls would become blurred and irrelevant.

12 Ark. App. at 33-34.

In Arkansas, a workers' compensation claimant

bears the burden of proving that his injury was the result of an accident that arose in the course of his employment, and that it grew out of, or resulted from the employment. *American Red Cross* v. *Wilson*, 257 Ark. 647, 649, 519 S.W.2d 60 (1975). "Arising out of the employment" refers to the origin or cause of the accident, while the phrase "in the course of the employment" refers to the time, place and circumstances under which the injury occurred. *Owens* v. *National Health Laboratories, Inc.*, 8 Ark. App. 92, 97, 648 S.W.2d 829 (1983). When a truly unexplained fall occurs while the employee is on the job and performing the duties of his employment, the injury resulting therefrom is compensable. This has been the effect of our holdings in *Fairview Kennels* v. *Bailey*, *supra*, and *Roc-Arc Water Co.* v. *Moore, supra*, and is in keeping with Larson's statement that "most courts confronted with the unexplained fall problem have seen fit to award compensation." Larson § 10.31, at 3-87. Larson says "work connection is shown by the fact that the injury occurred in the course of employment, and that the employment brought the employee to the place where he was injured at the time he was injured." Larson § 10.31, at 3-100.

Courts have approached this question in various ways but we agree with that taken in North Carolina. In *Taylor* v. *Twin City Club*, 260 N.C. 435, 132 S.E.2d 865 (1963), the court said:

> In the instant case the immediate cause of the fall is unknown. We have held that where an employee, while about his work, suffers an injury in the ordinary course of his employment, the cause of which is not explained, but which is a natural and probable result of a risk thereof, and the Commission finds from all of the attendant facts and circumstances that the injury arose out of the employment, an award will be sustained. *Robbins* v. *Bossong Hosiery Mills, supra*. In the Robbins case the employee, while reaching up to take some objects from a rack in the course of her employment, lost her balance and fell for some undisclosed reason. There was no evidence tending to show that the fall was caused by a hazard to which the employee was exposed apart from the employment. An award of compensation was upheld.
>
> . . . .

> This rule in unexplained-fall cases, which is applied in North Carolina and in most jurisdictions, was first declared in an English case—*Upton* v. *Great Central Railway Company* (1924) A.C. 302 (H.L.). In that case an employee fell on a railway platform in the course of a business errand. The platform was not slippery or defective in any way; the cause of the fall was completely unknown. Lord Atkinson said: "Having been done in the course of the employment of deceased, and the accident having been caused by the doing of it even incautiously, it must, I think, be held that the accident arose out of the employment of the deceased." The decision of the House of Lords was unanimous.
>
> It has been suggested that this result in unexplained-fall cases relieves claimants of the burden of proving causation. We do not agree. The facts found by the Commission in the instant case permit the inference that the fall had its origin in the employment. There is no finding that any force or condition independent of the employment caused or contributed to the accident. The facts found indicate that, at the time of the accident, the employee was within his orbit of duty on the business premises of the employer, he was engaged in the duties of his employment or some activity incident thereto, he was exposed to the risks inherent in his work environment and related to his employment, and the only active force involved was the employee's exertions in the performance of his duties.

In the instant case, the Commission found appellant's fall to have been idiopathic in origin. However, the Commission's own comment on the evidence upon which it bases that finding demonstrates that the finding is not supported by substantial evidence. The Commission relies on a statement in the hospital discharge summary of Dr. Burns which indicates appellant may have been having some symptoms of heart problems prior to his fall. But the Commission states in its opinion, that "The exact time of the heart attack cannot be determined from the record . . . and it would be sheer speculation to say that the heart attack caused his fall. . . ." Moreover, the opinion states, "We are

unable to tell if the claimant was on level ground when he fell, or if he was back on the forklift at a dangerous height, or if he hit his head against any machinery. . . ."

Therefore, we hold there was not substantial evidence in the record on which the Commission could base its conclusion that the appellant suffered an idiopathic fall. Since this leaves no force or condition outside the employment from which the fall could have resulted, the appellant has met his burden of proving that his injury was the result of an accident that arose in the course of his employment and that it grew out of, or resulted from, the employment. We reverse the decision of the Commission and remand for it to determine the extent of the injury suffered by appellant as a result of his fall, any disability resulting therefrom, and the amount of compensation to which appellant is entitled.

Reversed and remanded.

COULSON and JENNINGS, JJ., agree.

Joe W. MOSLEY *v.* STATE of Arkansas

CA CR 86-230 732 S.W.2d 861

Court of Appeals of Arkansas
Division II
Opinion delivered July 8, 1987

[redacted]

Brockman & Norton, for appellant.

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

MELVIN MAYFIELD, Judge. This is an appeal from a conviction for driving while intoxicated. Appellant was sentenced to pay a fine of $150.00 plus court costs, to attend an alcohol treatment program, and his driver's license was suspended for 90 days.

The evidence showed that shortly after midnight on January 24, 1986, appellant was driving down Middle Warren Road in Jefferson County, Arkansas, when he lost control of his truck, left the road on the right side and struck a mailbox, crossed the road and struck a driveway culvert on the left side of the road and landed in a ditch. According to a statement given police officers, appellant got out of the truck, inspected the damage, and went to a nearby house to call his wife who came and took him to the hospital.

Officer Laron Braswell of the Jefferson County Sheriff's Department received a call reporting the accident at 2:17 a.m. on January 24, 1986. He investigated the scene of the accident, then went to the hospital to interview appellant who had suffered head and facial injuries in the accident and also had a broken jaw. When Officer Braswell arrived at the hospital, appellant was drifting in and out of consciousness and Braswell was unable to communicate with him. Because he detected an odor of alcohol about appellant, Braswell issued a citation for DWI.

On January 27 at 10:15 p.m., Officer Braswell, accompanied by Sergeant Boe Fontaine, interviewed appellant at his home. He was given his Miranda rights and signed the rights form. Appellant then told the officers that he had been to a cookout on the evening of the accident and had consumed a six pack or more of beer. He said he started home around midnight and was driving

about 50-55 miles per hour when a deer suddenly ran in front of him. When he swerved to miss the deer, he lost control of his truck and wound up in the ditch. Sergeant Fontaine testified that appellant was very cooperative and hospitable during the interview. The two officers were the only witnesses at trial.

At the trial, the prosecutor offered in evidence, under the Hospital Records Act, a copy of the results of a blood alcohol test performed on appellant while he was at the hospital emergency room. Defense counsel first objected on the basis that the Hospital Records Act, Ark. Stat. Ann. § 28-936 — § 28-943 (Supp. 1985), did not apply in criminal cases; second, that section 1045(a) of the Omnibus DWI Act, Ark. Stat. Ann. § 75-1031.1, § 75-1045(a), § 75-2501—§ 75-2514 (Supp. 1985), lists three criteria under which a driver is deemed to have consented to a blood alcohol test, none of which applied in this case; and third, that there was no evidence that the test was conducted according to methods approved by the Arkansas State Board of Health, as required by section 75-1045(c)(1) of the Omnibus DWI Act. The copy of the test result was admitted and appellant was convicted. The judge stated:

> The Court finds that the defendant was in fact under the influence of alcohol at the time he was driving the vehicle and that the accident happened, as a matter of fact was intoxicated at the time this examination was made—the hospital records indicating .16 per cent with the normal being 0.

On appeal it is argued that failure to comply with the Omnibus DWI Act pertaining to chemical testing of DWI suspects precludes the introduction or use of other chemical test results at trial; that the Hospital Records Act was misapplied; and that there was insufficient evidence to sustain the conviction.

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. Under *Harris*, if that evidence is insufficient to convict, the case must be reversed and could not be tried again. After reviewing all

the evidence introduced, even if inadmissible, we hold that there is sufficient evidence in the record to convict appellant of driving while intoxicated. This is based upon evidence that he smelled of alcohol shortly after being involved in a one-vehicle accident; that a blood alcohol test taken at the hospital showed a result of 0.16%; and that appellant admitted to police officers that he had been drinking beer before the accident occurred.

We now consider the appellant's contention that the Hospital Records Act was improperly used in this case. Section 28-937 of that Act provides in pertinent part:

> Except as hereinafter provided, when a subpoena duces tecum is served upon a custodian of records of any hospital . . . and such a subpoena requires the production of all or any part of the records of the hospital related to the care or treatment of a patient in the hospital, it shall be sufficient compliance therewith if the custodian delivers, by hand or by registered mail to the court clerk or the officer, court reporter, body or tribunal issuing the subpoena or conducting the hearing, a true and correct copy of all records described in such a subpoena together with the affidavit described in Section 5 [§ 28-940] hereof; . . . .

Section 28-938 of the Act requires that the records be sealed in an inner envelope which is then enclosed in an outer envelope, and section 28-939 contains the following provision:

> Before directing that such inner envelope or wrapper be opened, the judge, court, officer, body or tribunal shall first ascertain that either (1) the records have been subpoenaed at the instance [insistence] of the *patient involved* or his counsel of record, or (2) the *patient involved* or someone authorized in his behalf to do so for him *has consented thereto and waived any privilege of confidentiality involved*. . . .(Emphasis added.)

The record in this case clearly shows that the blood alcohol report was introduced into evidence without compliance with the above provisions of the Hospital Records Act. There was no indication whatsoever that the report was sealed in an inner envelope which was also sealed in an outer envelope. To the contrary, it appears from the record that the prosecutor simply

had a copy of the report which he handed to the court.

In addition, it seems clear that the confidential medical records of a patient cannot be used against him in a criminal proceeding without the waiving of his privilege of confidentiality and certainly not over his objections. We realize the Omnibus DWI Act provides that under certain conditions a driver is deemed to have consented to chemical tests of his blood, urine or breath for the purpose of determining the blood alcohol content; however, we do not think any of those conditions are present here. The first condition provided is where a driver is arrested for any offense arising out of acts alleged to have been committed when driving while intoxicated or when there was 0.10% or more of alcohol in the person's blood. *See* Ark. Stat. Ann. § 75-1045(a)(1) (Supp. 1985). Here, the appellant was given a citation to appear in court. This is not an arrest. *See* Criminal Procedure Rules 5.2 and 5.3. Moreover, the citation was for driving while intoxicated, not for an act committed when driving while intoxicated. The second condition is that the driver is involved in a fatal accident. *See* Ark. Stat. Ann. § 75-1045(a)(2) (Supp. 1985). Here, appellant's accident involved no fatality. The third condition is that the driver is stopped by a law enforcement officer who has reasonable cause to believe that the driver is intoxicated. *See* Ark. Stat. Ann. § 75-1045(a)(3)(Supp. 1985). Here, appellant was not stopped; he was simply handed a citation after being admitted to the hospital.

Appellee argues, however, that there was no objection to the introduction of the blood test on the specific basis that there had been a failure to comply with the provisions of the Hospital Records Act which we have discussed. It is pointed out that defense counsel simply stated:

> Your Honor, first of all, I don't think the Hospital Records Act has any application to a criminal proceeding. I think it has only application to civil proceedings. That would be my first objection.

While only the specific objections made at trial are considered on appeal, and all others are deemed waived, *see Mincy* v. *State*, 19 Ark. App. 80, 717 S.W.2d 213 (1986) and *Biniores* v. *State*, 16 Ark. App. 275, 701 S.W.2d 385 (1985), the appellant also objected to the introduction of the blood test on the specific basis

that there was no evidence that it was conducted or administered in accordance with statutory requirements. We agree that there is a total absence of any evidence indicating the test was performed in compliance with the Omnibus DWI Act's provision requiring that the chemical analysis be performed according to methods approved by the Arkansas State Board of Health. Ark. Stat. Ann. § 75-1045(c)(1)(Supp. 1985).

It has been held that substantial compliance with these provisions is sufficient. *Sparrow* v. *State*, 284 Ark. 396, 683 S.W.2d 218 (1985); *Munn* v. *State*, 257 Ark. 1057, 521 S.W.2d 535 (1975). But such tests must be monitored carefully to assure reliability. *Newton & Fitzgerald* v. *Clark*, 266 Ark. 237, 582 S.W.2d 955 (1979). In the present case, only the bare piece of paper containing the copy of the test result was introduced. There is no showing whatsoever that the test was performed according to a method approved by the health department. However, the appellee cites *Weaver* v. *State*, 290 Ark. 556, 720 S.W.2d 905 (1986), as authority for the admissibility of the test report. In that case, the appellant, who was charged with DWI, argued that the result of a blood test was not admissible because it was not shown that the test was conducted according to Ark. Stat. Ann. § 75-1046(b)(Repl. 1979). That statute is apparently still in effect and makes the same requirement for blood test admissibility as is made in Ark. Stat. Ann. § 75-1045(c)(1)(Supp. 1985). Under both sections the chemical analysis of a person's blood, urine or breath must be performed according to methods approved by the State Department of Health in order to be considered valid under the provisions governing admissibility as evidence.

In *Weaver*, the court held that the blood test had not been ordered by the defendant or a police officer and had not been ordered for use as evidence in a criminal case; therefore, the court said, the question was not whether the test complied with the strict procedures of Ark. Stat. Ann. § 75-1046 but whether the test result was admissible under A.R.E. Rule 803(4). That rule is an exception to the hearsay rule and provides that "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history or past or present symptoms, pain or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are not excluded by the hearsay rule. The court held

there was no error in admitting the result of the test in *Weaver* because a doctor testified that the test was performed in accordance with the usual procedures for blood tests at the Baptist Medical Center and that those procedures complied with the requirements of the State Health Department.

We do not believe *Weaver* is controlling here. No one testified in this case about the method employed in obtaining appellant's blood sample or in analyzing it. As pointed out in the dissent in *Weaver*, the State Department of Health has adopted the following regulation:

> *Sample Collection.* Blood samples may be collected from living individuals only by persons authorized by law and by means of a sterile, dry syringe and hypodermic needle or other sterile equipment. The skin at the area of puncture shall be thoroughly cleansed and disinfected with an aqueous solution of nonvolatile antiseptic such as benzalkonium chloride (zephiran). Alcohol or other volatile organic disinfectant solutions shall not be used as a skin antiseptic or to clean hypodermic needles, syringes, or containers.

290 Ark. at 561.

One of the obvious purposes of this regulation is to prevent the blood sample from being contaminated with the alcohol which otherwise might be used to sterilize the skin before a blood sample is drawn. In the instant case, there is no evidence whatsoever of who ordered the blood alcohol test, who drew the blood, what type of supplies were used or whether they were sterile. There is no evidence of whether a nonalcohol skin sterilant was used or whether the test was contaminated by an alcohol swab used to sterilize the skin. And there is no evidence of what method was used to test the blood alcohol and whether that method was approved by the State Department of Health. In this case, we do not have a doctor's opinion of the validity of the test as was present in *Weaver*. Here we have no evidence at all regarding the procedure used—only the bare-bones result of the test. We think this is insufficient to allow its introduction into evidence.

Furthermore, we point out that Ark. Stat. Ann. § 75-1046(a) (Repl. 1979) provides: "Percent by weight of alcohol in

the blood shall be based upon milligrams of alcohol per one hundred cubic centimeters of blood." The blood alcohol report contained in the record in this case states only "Blood Alcohol 0.16% (Normal 0)."

For the reasons stated above, this case is reversed and remanded for new trial.

COULSON and JENNINGS, JJ., agree.

Sykes HARRIS, Jr. *v.* FIRST STATE BANK OF WARREN, Warren, Arkansas

CA 87-55 732 S.W.2d 501

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

Haley, Claycomb, Roper & Anderson, by: *H. Murray Claycomb*, for appellant.

Robert E. Garner, P.A., by: *Robert E. Garner*, for appellee.

JAMES R. COOPER, Judge. The appellee in this civil case, First State Bank of Warren, Arkansas, made a loan to Dan-Sal, Inc. on February 3, 1983. Security for the note included a personal continuing guaranty executed by the appellant, Sykes Harris, Jr. Dan-Sal, Inc. defaulted on the note, and on May 8, 1986, the appellee brought an action against Dan-Sal, Inc., Daniel and Sally Barnett, and the appellant for the unpaid balance. Trial was set for October 10, 1986. On October 6, 1986, the Barnetts filed for bankruptcy, and Dan-Sal, Inc. did likewise on October 9, 1986. On the day before trial, the appellant filed a motion for a continuance or dismissal, and on the morning of trial the appellant filed an amended answer. The amended answer asserted that he was the beneficiary of an agreement between the appellee and the Barnetts to release him from liability, and that the appellee was estopped to deny that it had released the appellant from his guaranty agreement. Copies of the motion and amended answer were delivered to the appellee's attorney in court prior to the commencement of trial. The appellant and the appellee agreed to proceed with the trial, and agreed that evidence relating to the theories contained in the amended answer would be presented, subject to the trial court's later ruling on the motion and the amended answer. In an order entered *nunc pro tunc* on October 21, 1986, the trial court denied the appellant's motion for a continuance, and dismissed the amended answer on the grounds that the affirmative defenses pled therein were available to the appellant at the origination of the action, and were not affected by the bankruptcy of his co-defendants. The court entered judgment against the appellant for the unpaid

balance of the note. From that decision, comes this appeal.

For reversal, the appellant contends that the trial court erred in dismissing his motion for a continuance and the amended answer. The appellant additionally argues that the trial court should have considered the evidence supporting the theories contained in the amended answer, and that, upon that evidence, the trial court should have found that the appellant was released from any obligation to the appellee. We reverse.

The record shows that, in 1983, the appellant was a stockholder and officer of Dan-Sal, Inc. In February 1983, he signed a promissory note issued by the appellee to Dan-Sal, Inc. and also executed a continuing guaranty in the amount of $83,890.94 which, by its terms, guaranteed payment of any indebtedness of Dan-Sal, Inc. to the appellee, including indebtedness that might arise subsequent to the execution of the guaranty. The guaranty agreement provided that it would be in force until written notice of discontinuance was served upon an executive officer of the appellee bank.

The appellant subsequently left the corporation, selling his shares to the other shareholders, Daniel and Sally Barnett, for consideration which included a release from any corporate obligations. When the February 1983 note came due, Daniel Barnett arranged for its renewal. A new note listing Dan-Sal, Inc. as the borrower was thus executed by the Barnetts in February 1984. The appellant's name did not appear on the 1984 note. However, no written notice of discontinuance of the guaranty was ever served upon the appellee, and the appellant was named as a defendant in the appellee's action to enforce the note. In his answer, the appellant asserted as affirmative defenses that the guaranty lacked consideration, and that the obligation guaranteed had been materially altered. He also filed a cross-complaint against the Barnetts, alleging that the Barnetts had assumed all corporate obligations under the terms of their buy-out agreement with the appellant.

We agree with the appellant's contention that the trial court erred in dismissing the amended answer and motion. Rule 15(a) of the Arkansas Rules of Civil Procedure provides, in part, that:

> With the exception of pleading the defenses mentioned in Rule 12(h)(1), a party may amend his pleadings at any time without leave of the court. Where, however, upon motion of an opposing party, the court determines that prejudice would result or disposition of the cause would be unduly delayed because of the filing of an amendment, the court may strike such amended pleading or grant a continuance of the proceeding.

Under this rule, the trial court may strike an amended pleading only upon a determination that the amendment would be prejudicial to the adverse party, or that the amendment would entail undue delay. No question of undue delay is present under the circumstances of the case at bar, because, upon the suggestion of the attorney for the appellee, the parties proceeded to trial as scheduled. Dismissal of the amended answer would thus be proper only if the trial court determined that the amendment would be prejudicial to the appellee. However, the trial court did not determine that prejudice would result, but instead based the dismissal of the amended answer on a finding that the defenses embodied in the amended answer had been available to the appellant at the origination of the action. Because there has been no determination of either undue delay or prejudice, we hold that the trial court erred in dismissing the amended answer.

The record reveals that Daniel Barnett testified that, in conversations with an officer of the appellee bank, he specifically asked that the appellant be released of all obligation for the debt, and that he understood that this had been accomplished at the time that the renewal note was executed. Moreover, there was evidence that the renewal note did not list the appellant's guaranty as security for the note in the Truth-in-Lending section of the document. Viewing the evidence in the light most favorable to the appellant, we think that the trier of fact could have found that the appellee agreed to release the appellant from all liability for the corporate debt as part of the agreement between the appellee and the Barnetts that culminated in the renewal note, and that the appellant was a third-party beneficiary of that agreement. The error was thus prejudicial and, accordingly, we reverse and remand for a new trial.

Reversed and remanded.

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

Loren E. GOODMAN *v.* FARMERS & MERCHANTS BANK and Zelma GOODMAN

CA 86-280 732 S.W.2d 866

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

Manatt & Crego, for *Loren E. Goodman*, for appellant.

Ponder & Jarboe, for appellee, Farmers & Merchants Bank.

Rifel, King & Smith, by: *Kirby Riffel*, for appellee, Zelma Goodman.

BETH GLADDEN COULSON, Judge. The appellant, Loren Goodman, brings this appeal from an order of the trial court dismissing the appellant's cross-complaint by which he sought to establish his right to at least one half of the monies represented by a certificate of deposit. We find no merit in the arguments presented on appeal and affirm.

On October 2, 1981, Charles Goodman purchased a certificate of deposit from Farmers & Merchants Bank in the amount of $13,275.09. The certificate was made payable to Charlie E.

Goodman or Zelma L. Goodman or Loren E. Goodman, or either. A signature card bearing the account number recorded on the certificate contained the signatures of Charles and Loren Goodman. Charles Goodman died on July 22, 1983. Shortly thereafter, Loren Goodman instructed the bank to retain on his behalf one half the value of the certificate should Zelma Goodman present the certificate for payment. The bank did so, and Zelma Goodman subsequently brought suit against the bank for the unpaid amount. The bank in turn sought to interplead the parties' respective claims for a determination by the court as to which party was entitled to the remaining funds on deposit. Loren Goodman filed a cross-complaint.

Zelma Goodman, the sole devisee of Charles Goodman, died, and her successors in interest were substituted as plaintiffs. The court found that the funds on deposit should be paid to Zelma Goodman's successors in interest and that Loren Goodman had failed to prove by a preponderance of the evidence that he was entitled to any monies by virtue of the certificate. Farmers & Merchants Bank filed an appeal, and Loren Goodman filed the present cross appeal. Farmers & Merchants Bank failed to pursue its appeal, and we therefore decide only the points raised by the appellant, Loren Goodman.

The appellant cites *Corning Bank* v. *Rice*, 278 Ark. 295, 645 S.W.2d 675 (1983), and argues that as a third-party beneficiary to the contract between Farmers & Merchants Bank and Charles Goodman, the appellant should have recovered a sum equal to the amounts on deposit. He argues that the bank was negligent in failing to carry out the alleged intent of Charles Goodman to create a survivorship interest in the appellant by virtue of his having been named as a payee on the certificate. The appellant also argues that, under the provisions of Ark. Stat. Ann. § 67-552(a) (Repl. 1980), the facts of this case support a finding that the appellant and separate appellee Zelma Goodman held the certificate as joint tenants with right of survivorship.

We certified the matter pursuant to Rule 29(1)(o) of the Rules of the Supreme Court and Court of Appeals as presenting a question in the law of torts, but the supreme court refused jurisdiction and returned the case.

In *Rice*, our supreme court stated that any banking

institution which receives money from its depositors in exchange for certificates of deposit holds itself out to issue the certificates in such a manner as to comply with the wishes of the depositor and that mishandling of the transaction between the bank and its depositor may result in liability to a third-party beneficiary. 278 Ark. at 298-99. *Rice* involved unequivocal evidence of the depositor's intent that the amounts represented by the certificates of deposit be paid on the depositor's death to the named payee (the third-party beneficiary). The bank even undertook to have the certificates conform to the depositor's express intent but failed to inform him of the statutory requirement that he designate his intent in writing. *Id.* at 297. The record before us contains no such evidence of Charles Goodman's intent to create a survivorship interest in the appellant.

To overcome this deficiency, the appellant makes frequent reference to the fact that he was named as a payee on the certificate and that his name appeared on the signature card, and he asks us to infer the depositor's intent from these facts. However, we have previously stated that the mere issuance of a certificate of deposit in the name of the parties, without other manifestations of intent, does not create any survivorship interest in the named payee. *Hayse* v. *Hayse*, 4 Ark. App. 160-B, 630 S.W.2d 48 (1982). The appellant emphasizes that the bank's compliance with his instructions to hold half the monies on deposit suggests knowledge on the part of the bank that Charles Goodman had intended to create a joint tenancy with right of survivorship in Loren Goodman and Zelma Goodman. The appellant then points to his testimony that Charles Goodman had stated to the appellant that he (Loren Goodman) was to have an interest in the certificate.

The findings of the trial judge sitting as fact finder will not be reversed on appeal unless clearly against a preponderance of the evidence. The question of a preponderance of the evidence turns largely on the credibility of the witnesses, and we defer to the superior position of the fact finder in that regard. We find nothing in the record to support the appellant's assertion that the bank was aware of an intent on the part of Charles Goodman to create a survivorship interest in the appellant, and we are otherwise unable to say that the trial court's failure to find for the appellant on the basis of the bank's alleged negligence was clearly

against a preponderance of the evidence.

The appellant's next argument deals with the provisions of Ark. Stat. Ann. § 67-552(a) (Repl. 1980). We first note that Act 843 of 1983 amended section 67-552(a), and the change was substantial. However, the effective date of the amendment was March 25, 1983, and the certificate at issue was purchased in 1981. In *Martin* v. *First Security Bank*, 279 Ark. 273, 651 S.W.2d 70 (1983), our supreme court stated that the repeal of the earlier law was not merely one affecting matters of procedure and, therefore, would be prospective rather than retroactive. As such, we look to the case law interpreting the former statute.

It is well settled that upon the depositor's death, as between the depositor's estate and a named payee, the payee's entitlement to funds represented by a certificate of deposit depends upon the depositor having designated "the survivor in a separate writing, other than as payee, if the transaction is to be treated as one of joint tenancy with right of survivorship." *Estate of Pettyjohn* v. *Ballard*, 10 Ark. App. 34, 37, 661 S.W.2d 406, 407 (1983). *See also Penn* v. *Penn*, 284 Ark. 562, 683 S.W.2d 930 (1985); *Walker* v. *Hooker*, 282 Ark. 61, 667 S.W.2d 637 (1984); *Morton* v. *McComb*, 281 Ark. 125, 662 S.W.2d 471 (1983); *Carlton* v. *Baker*, 267 Ark. 949, 591 S.W.2d 696 (Ark. App. 1979). There need not be a strict and literal compliance with the wording of the statute, but there must be a substantial compliance. *Estate of Pettyjohn, supra.* We find nothing in the record whereby the depositor, Charles Goodman, designated in a separate writing that the appellant was to have a survivorship interest by virtue of the certificate, other than the appellant's designation as payee and his signature on the signature card. That is clearly not enough.

For the foregoing reasons, the order of the trial court is affirmed in all respects.

Affirmed on cross appeal.

CRACRAFT and JENNINGS, JJ., agree.

GENERAL AGENTS INSURANCE COMPANY *v.* ST. PAUL INSURANCE COMPANY

CA 86-497 732 S.W.2d 868

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

Laser, Sharp & Mayes, P.A., for appellant.

Friday, Eldredge & Clark, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes from the Pulaski County Chancery Court, Fourth Division. Appellant, General Agents Insurance Company, appeals the court's order granting a reformation of an insurance policy issued by appellant to Sonny Roswell, d/b/a Roswell Used Cars, to include liability coverage. We affirm.

Appellee, the St. Paul Insurance Company, sued to reform an insurance contract to require the issuing company, appellant, to add garage liability coverage for Sonny Roswell, Individually, and Sonny Roswell, d/b/a Roswell Used Cars. The facts were stipulated by the parties. Sonny Roswell, Individually, and Sonny Roswell d/b/a Roswell Used Cars, was a customer of Mathis-McClellan Insurance Agency, an insurance agency in Little Rock, Arkansas. The St. Paul Insurance Company was the errors and omissions insurance carrier for Mathis-McClellan. Mathis-McClellan would place Roswell's insurance needs with companies, such as Lloyd's and appellant, by acting through an insurance broker, Arkansas All Risks. Lloyd's and appellant are surplus lines carriers and subscribers to surplus lines insurance policies issued by the M.G.A. Agency. Mathis-McClellan had no binding authority with appellant or Lloyd's. In order to place, renew or amend coverage with those companies, Mathis-McClellan would obtain information required by those companies for underwriting purposes and submit such information to Arkansas All Risks. Arkansas All Risks was, at all times relevant hereto, a general agent for appellant. Mathis-McClellan acted as a soliciting agent for appellant with respect to submitting the request for renewal on behalf of Roswell. Mathis-McClellan had no written or oral agency contract with appellant or Arkansas All Risks. Appellant and Arkansas All Risks did encourage and solicit agents such as Mathis-McClellan Insurance Agency to submit applications for insurance with them.

From September 25, 1980, through April 29, 1981, Lloyd's Insurance Company, under Policy #LGL 101 215, insured Roswell Used Cars with open-lot and garage liability coverage. Roswell procured this policy through Mathis-McClellan, which acquired the policy through the insurance broker Arkansas All

Risks, Inc. This coverage was renewed to be effective April 29, 1981, to June 11, 1981. The policy initially contained no garage liability coverage. During the policy term Mathis-McClellan requested such coverage be added to the policy. Before the expiration of the Lloyd's insurance policy, Roswell requested that his insurance coverage be renewed. Mathis-McClellan Insurance Agency caused to be issued General Agents Insurance policy #GLA 105 814, issued by appellant, to be effective June 11, 1981, to June 11, 1982. Mathis-McClellan again procured this policy through Arkansas All Risks, Inc. Mathis-McClellan failed to request that Arkansas All Risks include garage liability coverage and Arkansas All Risks bound the coverage that was requested by Mathis-McClellan. The General Agents policy contained the notation that it was a renewal of the prior Lloyd's policy.

On January 20, 1982, a collision occurred in Pulaski County, Arkansas, between a vehicle owned by Southern Investment Company and a vehicle owned by Roswell, d/b/a Roswell Used Cars, and being driven by Edward A. Lamb. Thereafter, Roswell made demand upon appellant through Mathis-McClellan to defend any claims and indemnify for any damages arising out of the incident. Appellant denied coverage, advising that the garage liability coverage which existed under the prior Lloyd's policy was not within the ambit of Policy #GLA 105 814.

The parties also stipulated that the prior Lloyd's insurance policy, as subsequently endorsed, did provide coverage that would have covered the damages resulting from the accident occurring on January 20, 1982. Appellant stipulated that it would have provided the coverage on the same terms as the Lloyd's policy, had the proper premium been paid and if the risk was acceptable.

Roswell, d/b/a Roswell Used Cars, paid insurance premiums, which were financed through a bank or through Mathis-McClellan, and Roswell had no personal knowledge of the exact annual premium. Roswell relied on Mathis-McClellan Insurance Agency to provide the same coverage that was provided under the Lloyd's insurance policy. Neither appellant nor Arkansas All Risks had any direct contact with Roswell, they dealt exclusively with Mathis-McClellan. Roswell, either individually or through Mr. Bobby Carrier, an employee, had requested that Mathis-McClellan renew coverage on the same terms as the prior Lloyd's

coverage.

As a result of the January 20, 1982, collision, a lawsuit was filed against Roswell that resulted in a jury verdict against Roswell Used Cars in the amount of $827.04 for James Elliott, $4,787.00 to Leon B. Bush, Jr., and $63,000.00 to Edward J. Powell. In addition, prejudgment interest in amount of six percent per annum was assessed on the property damages claims. The judgments by all other individual plaintiffs have been satisfied by the St. Paul Insurance Company.

In addition to the stipulated facts, certain facts were developed through depositions which were made a part of the record for consideration by the court. The policy that is to be reformed in this action clearly states on its face that it is a renewal of the prior Lloyd's policy. The Lloyd's policy provided the necessary coverage to protect the insured.

All parties to this action moved for a summary judgment. The only issue in this case is one of law, i.e., whether, under these undisputed facts, appellee, as the liability insurance carrier for Mathis-McClellan, was entitled to have the insurance policy reformed to contain liability coverage. Appellant argues three points for reversal of the trial court's reformation of the policy: (1) There was no mutual mistake of the parties in issuance of appellant's policy; (2) the negligence or mistake of Mathis-McClellan is not imputable to appellant, since Mathis-McClellan had no authority to bind coverage for appellant; (3) reformation was improper to be applied to a new and separate contract issued by a separate carrier from the carrier who initially insured the risk.

■ We find that this case is controlled by the case of *American Casualty Co.* v. *Hambleton*, 233 Ark. 942, 349 S.W.2d 664 (1961), which held that it is the duty of an insurer to issue a renewal policy on the same terms and conditions as the original contract, and, if it fails to do so, the renewal policy may be reformed to give effect to this result. In *Hambleton*, where the insurer did not notify the insured that the renewal differed from the original policy, the insured's personal representative was entitled to have the renewal policy reformed.

In *Hambleton*, a partnership procured through an insurance

agent, George Walker, a workers' compensation policy covering all employees of the partnership. The partners themselves were not employees within the policy. However, by a special endorsement on the policy, the partners were included in the coverage and paid an additional premium for that coverage.

The following year the partnership renewed its policy with the same coverage of the partners and the additional premium was paid. The next year the partnership ordered the policy renewed and the agent, Walker, ordered a renewal contract from the insurance company. A policy was forwarded to Walker. This policy did not include the coverage for the partners and Walker did not know the contents of the policy and did not explain the change of coverage to the partners.

One of the partners was fatally injured while operating a tractor for the partnership. The administratrix of the deceased partner's estate brought an action against the insurance company requesting that the policy be reformed to include coverage for the partners in accordance with the coverage of the policies of prior years.

The Arkansas Supreme Court held as follows:

> "An insurance policy, like any other contract, which by reason of mistake in its execution does not conform to the real agreement of the parties, may be reformed in a court of equity," *Phoenix Insurance Company* v. *State*, 76 Ark. 180, 88 S.W. 917 [Citing *Thompson* v. *Insurance Co.*, 136 U.S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408; *Snell* v. *Insurance Co.*, 98 U.S. 85, 25 L. Ed. 52; *Jamison* v. *State Insurance Co.*, 85 Iowa 229, 52 N.W. 185.]
>
> . . . .
>
> The renewal of an insurance policy is basically nothing more than the moving of the terminal date to a later time and if the appellant [the insurer] saw fit for any reason to vary the terms of the policy it had been requested to renew, the duty was clearly upon it to advise the insured of the changes which had been made. [citation omitted]
>
> . . . .
>
> "An insurance policy may be reformed even after the

> loss insured against, so as to express the parties' real intent. Since it is the duty of an insurer to issue a renewal policy on the same terms and conditions as the original contract, if it fails to do so, the renewal policy may be reformed to give effect to this result. This is true though the insured did not read the policy and discover a material change until after occurrence of the loss. It may, however, be discretionary with the court as to whether to grant or deny relief on the ground of the plaintiff's neglect to discover the change sooner."

Id. at 944-947, 349 S.W.2d at 666-668 (citation omitted).

In the case at bar, we find that appellant is estopped by reason of its nondisclosure. The policy clearly states on its face that it is a renewal of the Lloyd's policy. The parties stipulated that the Lloyd's policy included liability coverage. Appellant had a duty to notify the insured that the coverage was changed on the renewal policy. It has been established by the facts in the record that no notice of change was given. Therefore, appellant is estopped from asserting the absence of liability coverage in the renewal policy.

Appellant's argument, that there was no mutual mistake, is based on the fact that the application for insurance submitted by Mathis-McClellan requested dealer's open lot and driveway collision, and it did not request liability coverage. In its brief, appellant states that it is undisputed that Roswell asked Mathis-McClellan for liability coverage but Mathis-McClellan, through mistake or neglect, failed to write that on the renewal application. Appellant agreed that Mathis-McClellan is appellant's soliciting agent, however, appellant argues that, as a soliciting agent, Mathis-McClellan had no authority to bind appellant.

Appellant's argument does not convince us that *Hambleton* should not apply to this case. Where the facts have been truthfully stated to the soliciting agent, but, by fraud, negligence, or mistake, are misstated in the application, the company cannot set up the misstatements in avoidance of its liability, if the agent was acting within his real or apparent authority and there is no fraud or collusion on the part of the insured. *Southern National Insurance Co.* v. *Heggie*, 206 Ark. 196, 174 S.W.2d 931 (1943).

There is no evidence of fraud or collusion in this case and appellant stipulated that Mathis-McClellan was appellant's soliciting agent. Therefore, appellant is estopped from asserting the absence of a request for liability coverage in the application.

We find no merit in appellant's argument that the renewal policy was a separate contract issued by a separate carrier. The policy clearly states on its face that it is a renewal of the Lloyd's policy, which policy did contain the necessary coverage. The fact that it was issued by appellant does not preclude application of the rule in *Hambleton.*

For the reasons stated above the trial court's order granting reformation of the policy is affirmed.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

Gene KING *v.* ELKINS PUBLIC SCHOOLS

CA 87-36 733 S.W.2d 417

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

Mitchell & Roachell, by: *Paul J. Ward*, for appellant.

Niblock Law Firm, by: *Nancy L. Hamm*, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the circuit court of Washington County, the fourth judicial district, second division. Appellant, Gene King, appeals the decision of the circuit court affirming the nonrenewal of appellant's contract by appellee, the Elkins Public Schools. We affirm.

Appellant argues as his sole point for reversal that the circuit court erred in affirming appellee's nonrenewal of appellant's contract for insubordination without requiring proof of an intentional violation of school policy by appellant. Appellant asserts that insubordination must consist of some willful disobedience by the teacher in order to constitute a "cause which is not arbitrary, capricious, or discriminatory" under Arkansas Statutes Annotated § 80-1266.9(b) (Supp. 1985). Appellant acknowledges in his brief that he has found no Arkansas law that defines insubordination in the school context. Appellant cites cases from other states where insubordination has been defined.

The standard of review on appeal from the trial court's review of a school board's decision not to renew a teacher's contract is that this court will affirm unless the trial court's findings are clearly erroneous. The determination not to renew a teacher's contract is a matter within the discretion of the school board and this court cannot substitute its opinion for that of the board in the absence of an abuse of discretion by the board. *Leola*

School District v. *McMahan*, 289 Ark. 496, 712 S.W.2d 903 (1986).

Arkansas Statutes Annotated § 80-1266.9(b) provides in pertinent part as follows:

> (b) Any certified teacher who has been employed continuously by the school district three (3) or more years (or who may have achieved nonprobationary status pursuant to Section 2 [§ 80-1266.1] herein), may be terminated or the board may refuse to renew the contract of such teacher for any cause which is not arbitrary, capricious, or discriminatory, or for violating the (the) reasonable rules and regulations promulgated by the school board.

The question before the trial court in the case at bar was whether the board refused to renew appellant's contract for reasons permitted by the Teacher Fair Dismissal Act. A school board's action in this regard is arbitrary, capricious, or discriminatory only if the board's decision is not supportable on any rational basis. *Kirtley* v. *Dardanelle Public Schools*, 288 Ark. 86, 702 S.W.2d 25 (1986).

Appellant was employed by the Elkins School District as head football coach for six years. He was notified in April of 1985 by James K. Carter, Superintendent of the Elkins School District, that he was not being recommended for employment in the Elkins schools for the 1985-86 school year. The reasons given for the nonrenewal recommendation were failure to follow school policies and insubordination.

On May 20, 1985, appellant requested a public hearing before the school board and a specification of the charges upon which the nonrenewal recommendation was based. On May 28, 1985, appellant was notified by a letter that a meeting would be held on May 30, 1985, in order to conduct a hearing. The letter explained that the reasoning behind the superintendent's nonrenewal recommendation was appellant's insubordination and failure to abide by the policies, regulations, and recommendations of the superintendent and the board, particularly with regard to the use of volunteer personnel in athletic events, the most blatant example being the use of a volunteer in the St. Paul versus Elkins game. The letter went on to state that, at the St.

Paul-Elkins game, a volunteer acted as an assistant coach in derogation of the instructions from the superintendent and the board, and in violation of the AAA regulations, and that this problem had been pointed out to appellant by the board, the superintendent, and the principal.

On May 30, 1985, a public hearing was held before the Elkins School Board on the superintendent's recommendation that appellant's contract not be renewed for the 1985-86 school year. The board met on June 4, 1985, and unanimously voted to nonrenew appellant's contract. The board concluded in a letter, dated June 5, 1985, that appellant was well informed by the superintendent and the athletic director-principal of the expectations and regulations of the school board concerning the use of noncertified personnel at the interscholastic athletic events. The letter concluded that, in spite of the wishes of the board and the administration, appellant had persisted in pursuing a course of action and conduct inconsistent with the policies concerning use of the volunteers at interscholastic events. The letter stated that appellant violated the board's policy in his use of volunteer assistants at the St. Paul versus Elkins football game in the 1984 season, and that such act was an act of insubordination.

Appellant appealed this decision to the Washington County Circuit Court and, after a trial on September 26, 1986, the circuit court upheld the nonrenewal, finding that the nonrenewal decision on the part of the board was not an arbitrary or capricious decision because it was based upon credible evidence presented to the board that appellant had violated the policies concerning the use of non-certified volunteer coaches at the St. Paul and Greenland games in the 1984-85 school year.

The issue before us now is whether the court erred in affirming appellee's nonrenewal for insubordination without requiring proof of an intentional violation of school policy by appellant. We find that the court did not commit an error and that proof of intent is not required by the law.

The evidence of record supports the trial court's findings. The school board promulgated a rule that stated as follows: "Voluntary help with any athletic team will only be permitted during practice under the supervision of a certified coach and with prior approval of the school administration. No voluntary

person will be permitted on the playing field or sidelines during pre-game or during any athletic event with the exception of members of the officiating unit, such as the chain gang or downs marker for football." Appellant acknowledged that he had read the rule and that he had talked with the administration concerning enforcement of the rule on a number of occasions. Appellant asserts in his brief that he did not intentionally violate the policy of the school board. He admitted in testimony, however, that he understood the rule to state that the volunteers, under no circumstances, were to coach the players during athletic events.

Testimony established that during the St. Paul-Elkins game on October 26, 1984, a non-certified volunteer assistant, Dale White, got in front of the rope on the sidelines that keeps spectators from getting on the playing field. The referee told White to get in the coach's box because he was in front of the rope and he was transmitting signals to the players. Coach King told White to get behind the rope. Appellant admitted that, though White did get behind the rope, he was still transmitting signals to the players. The referee then penalized the Elkins team and informed appellant that if White didn't get in the coach's box Elkins would be penalized again. Eventually White did get in the coach's box.

Appellant testified that White was "relaying signals" to the players, not making his own coaching calls. White himself testified that he was "coaching." Appellant testified that he called the volunteer assistants "coaches," and that he thought that the rule permitted them to signal the players from the stands during games.

The superintendent testified that the non-certified volunteers were very evident at the Farmington game and that he told appellant after that game that this was not permissible. The superintendent stated that later, at the Greenland game, the volunteer aides were there just as if nothing had been said. He testified that the volunteer aides were "actually physically coaching." According to the superintendent, each time the superintendent talked to appellant about this problem, appellant's response was that he didn't have any control over the volunteers.

There is evidence in the record that appellant had been told

that the volunteer coaching situation was causing problems between the administration and the parents. Appellant admitted that he was aware that the parents were upset and that there had been a "march" by the parents on this issue. The board members testified that they were concerned that the school was violating the AAA rules which prohibited coaching by non-certified persons. There was evidence that violation of the AAA rules might have resulted in forfeiture of a game had the Elkins team won.

As stated earlier, appellant cites no Arkansas case law defining "insubordination." Appellant attempts to persuade this court to adopt a definition of "insubordination" which would require a showing of some willful disobedience by the teacher in order to constitute a "cause which is not arbitrary, capricious, or discriminatory" under § 80-1266.9(b).

The school board explained the reasons behind appellant's nonrenewal as his insubordination *and* his failure to abide by the policies, regulations, and recommendations of the board and the superintendent. The appellate court does not reverse a trial court if its judgment is correct for any reason. *Leola School District* v. *McMahan*, 289 Ark. 496, 712 S.W.2d 903 (1986). We do not adopt the definition promoted by appellant, which requires a showing of willful disobedience, though the evidence in the record could support a finding of willful disobedience. The statutes and the case law have addressed this issue and, while not specifically defining "insubordination," have enunciated the test to be applied in nonrenewal cases, *i.e.*, the board may refuse to renew the contract for any cause which is not arbitrary, capricious, or discriminatory. We hold that the trial court's findings affirming the board are not clearly erroneous. Therefore, we affirm.

Affirmed.

COOPER, J., dissents.

ROBERTS AND COMPANY, INC. *v.* Francesco SERGIO and Giovanni SERGIO, d/b/a PIAZZA SERGIO

CA 86-167 733 S.W.2d 420

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

Junius Bracy Cross, Jr., for appellant.

Hoover, Jacobs & Storey, by: *O.H. Storey III* and *Joyce Bradley*, for appellee.

JAMES R. COOPER, Judge. The appellant, Roberts and Company, Inc., initiated this action by filing suit against the appellees for breach of contract. The appellant alleged that the appellees had contracted with it to build a shell building and to construct a restaurant in a portion of the building. The appellant complained that the breach occurred when the appellees allowed another builder, Bill Horvath, to construct the restaurant. The appellees answered with a general denial. The appellees then filed suit against Roberts, Horvath, and their respective bonding companies alleging that the builders had breached their contracts by failing to perform in a workmanlike manner and breach of warranties. The appellees had discovered that the roof leaked and claimed damages for repair of the roof, and additional damages for the destruction of personal property due to the leaks. All of the cases were consolidated for trial. Shortly before trial, the appellees reached a settlement with Horvath, and an escrow account which had been established pending the litigation was distributed. The suit between Roberts and the appellees went to trial, and the jury awarded the appellees a judgment for $20,000.00. On appeal, the appellant argues that the trial court erred in failing to instruct the jury on the definition of substantial performance, and in refusing the appellant's request to disclose to the jury the amount of the settlement between the appellees and Horvath. We find no merit to the appellant's arguments and we affirm.

At the conclusion of the evidence, the jury was instructed as follows:

> You are instructed that a contractor is required to produce a building that is in substantial compliance with the requirements of the contract and specifications. That is to say that when the building substantially complies with the plans and specifications, it is acceptable even though there may be some deviations from the contract.

> It is for you to decide if there is substantial compliance with the contract.

The instructions proffered by the appellant were essentially the same except for the following passage which was added at the end of the above instruction:

> [e]ven though there may be some deviations from the contract as are inadvertant or unintentional or not due to bad faith, do not impair the structure as a whole, or remedial without doing material damage to other parts of the building in tearing down and reconstruction.

It is the appellant's contention that the proffered addition to the instruction defines the legal term "substantial compliance," and that the trial court erred in refusing to instruct the jury according to the proffered instruction.

The trial judge is under a duty to instruct the jury as to the law applicable in the case. *Life and Casualty Insurance Co. of Tennessee* v. *Gilkey*, 255 Ark. 1060, 505 S.W.2d 200 (1974). The instruction must be an objective statement of the law. *Hough* v. *Continental Leasing Corp.*, 275 Ark. 340, 630 S.W.2d 19 (1982). Each party to the proceeding has the right to have the jury instructed upon the law of the case with clarity and in such a manner as to leave no ground for misrepresentation or mistake. *W.M. Bashlin Co.* v. *Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982). However, a party is not entitled to his particular wording of the jury instructions and a trial judge is not required to say the same thing in different words. *Hopper* v. *Denham*, 281 Ark. 84, 661 S.W.2d 379 (1983); *Hough, supra.*

We hold that the instruction given by the trial court was adequate. Substantial performance cannot be determined by a mathematical rule relating to the percentage of the cost of completion. *Pickens* v. *Stroud*, 9 Ark. App. 96, 653 S.W.2d 146 (1983), and the issue of substantial performance is a question of fact. *Prudential Insurance Co.* v. *Stratton*, 14 Ark. App. 145, 685 S.W.2d 818 (1985). In the case of a building contract, it is not easy to find the ratio between the unperformed part of the contract and the full promised performance. The difference may be in quality of workmanship and materials. 3A Corbin, *Corbin on Contracts* § 705 (1951). Corbin goes on to discuss degree of

deviation, degree of frustration of purpose and the degree and value of the nonperformance. 3A Corbin, *Corbin on Contracts* §§ 705 and 706 (1951). The restatement discusses substantial performance in terms of the materiality of the failure to perform. *See* Restatement (Second) of Contracts §§ 237 and 241 (1979). It is clear that there is no precise formula to use to instruct a jury as to when there is substantial performance. We find that the instruction used by the trial court clearly explained to the jury the proper standards to use in order to decide the issue of substantial performance.

The appellant next argues that the amount of the settlement between Horvath and the appellees should have been disclosed to the jury or, in the alternative, the judgment against the appellant should have been reduced by the amount of the settlement. Again, we disagree.

The theory of the appellant's defense was that it was Horvath's workmen who damaged the roof, not its workmen. There was extensive testimony as to who was on the roof, who actually worked on the roof, and at what point in time the damage occurred. In order words, the appellant is requesting contribution and cites the Uniform Contribution Among Tortfeasors Act, Ark. Stat. Ann. §§ 34-1001 through 34-1009 (Repl. 1962). However, the appellant's argument is flawed in two respects. First, even though the appellees pled breach of warranty, the case at bar was limited to an action for breach of contract and the Act applies only to persons liable for torts. *Coleman* v. *Texaco*, 286 Ark. 14, 688 S.W.2d 741 (1985). Second, it must appear that, at least originally the person seeking contribution and the person from whom contribution is sought must have been under a common legal liability to the injured party. *Welter* v. *Curry*, 260 Ark. 287, 539 S.W.2d 264 (1976). Any liability on Horvath's part arose under a contract separate and apart from the contract the appellant had with the appellees.

The jury was instructed that, if Horvath's acts intervened and caused damage, then the appellant's acts were not a proximate cause of the damage. Because there was extensive testimony on the issue of Horvath's actions, and because the jury was properly instructed, we find no error in the trial court's refusal to inform the jury of the amount of the settlement or in its

refusal to reduce the judgment.

Affirmed.

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

Terry Lynn SHELLS *v.* STATE of Arkansas

CA CR 87-27 733 S.W.2d 743

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

Thomas E. Brown, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with criminal use of a prohibited weapon and battery in the second degree, violations of Ark. Stat. Ann. §§ 41-3104 (Repl. 1977) and 41-1602 (Supp. 1985). In an amended information it was alleged that the appellant had been found guilty of two or more previous felonies and should be punished under the provisions of the Habitual Offender Act, Ark. Stat. Ann. § 41-1001 *et seq.* (Supp. 1985). After a jury trial, the appellant was found guilty of both offenses and, after the jury was informed of his prior felony convictions, he was sentenced to twelve years in the Arkansas Department of Correction on each count. The trial court ordered that these sentences were to be served consecutive to each other, and consecutive to the sentence the appellant is presently serving. From that decision, comes this appeal.

For reversal, the appellant contends that the evidence was insufficient to support a finding of guilt on either charge; that the trial court erred in allowing the appellant's prior felony convictions to be admitted into evidence because the appellant was not notified of the amended information; that the trial court erred in admitting four prior felony convictions into evidence when the amended information alleged only two or more felony convictions; and that the trial court erred in admitting evidence of previous convictions other than by certified copies of those convictions or a certificate of a chief officer of the penal institution where the appellant was incarcerated. We reverse in part and affirm in part.

Pursuant to *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), we first consider the sufficiency of the evidence to support the appellant's convictions. In so doing we review the evidence in the light most favorable to the appellee and affirm if the verdict is supported by substantial evidence. *Lair* v. *State*, 19 Ark. App. 172, 718 S.W.2d 467 (1986). Substantial evidence is evidence which induces the mind to go beyond mere suspicion or conjecture, and is of sufficient force or character to compel a conclusion one way or the other with reasonable certainty. *Dillard* v. *State*, 20 Ark. App. 35, 723 S.W.2d 373 (1987).

The evidence reflects that Lieutenant Coleman, an employee of the Arkansas Department of Correction, observed a number of inmates entering the barracks for lunch. He testified that he saw the appellant move to his left, and then Lieutenant Coleman went outside to investigate. He then saw the appellant standing approximately fifteen feet from another inmate, Vaulah Shaw. Coleman spoke to the appellant, and noticed an icepick-like object called a shank lying on the ground. Coleman also stated that he saw what appeared to be blood on Vaulah Shaw's shirt. The incident was further investigated by Sergeant J.W. Hale of the Arkansas State Police, who testified that he interviewed the appellant. Hale stated that the appellant told him that he made the shank by rubbing part of a broom handle on a concrete floor to sharpen it, and that he had possessed the weapon for three or four months. Hale further stated that the appellant told him that he planned to stab three different inmates, and that Vaulah Shaw just happened to be nearby. There was also testimony that the appellant told Hale that he had requested to be transferred to another unit of the Department of Correction; when his request for transfer was refused, he decided to force the department to transfer him by creating a disturbance at every opportunity. Marvin Evans, assistant warden of the Tucker Maximum Security Unit where the appellant was incarcerated at the time of the incident, stated that the appellant had made numerous requests for transfer to another unit or penitentiary. Evans also stated that he received a letter from the appellant telling him that he had picked out three different inmates to assault, and that Vaulah Shaw was just the closest to him at the time.

Arkansas Statutes Annotated § 41-1602(1)(b) pro-

vides that a person commits battery in the second degree if "with the purpose of causing physical injury to another person, he causes physical injury to any person by means of a deadly weapon." "Physical injury" is defined as "the impairment of physical condition or the infliction of substantial pain." Ark. Stat. Ann. § 41-115(14) (Repl. 1977). The only evidence of physical injury in the case at bar is Lieutenant Coleman's testimony that he saw what appeared to be blood on Vaulah Shaw's shirt. Shaw was called as a witness, but refused to testify. No evidence of any physical impairment to Shaw as a result of the assault appears in the record. In the absence of evidence regarding the severity of the attack, the extent of Shaw's wound, or that the injury was to an area that is especially sensitive to pain, we hold that the evidence was insufficient to support a conviction for battery in the second degree. *Lair* v. *State, supra; Holmes* v. *State*, 15 Ark. App. 163, 690 S.W.2d 738 (1985).

With respect to the appellant's conviction for criminal use of a prohibited weapon, Ark. Stat. Ann. § 41-3104(1) (Repl. 1977) provides that a person commits that offense if he possesses, makes, or otherwise deals in an implement for the infliction of serious physical injury or death which serves no common lawful purpose. The appellant cites *Bryant* v. *State*, 16 Ark. App. 45, 696 S.W.2d 773 (1985), for the proposition that a conviction cannot be based upon an extrajudicial confession unless that confession is corroborated, and argues that the requisite corroboration was lacking in the case at bar. We disagree. Although the confession of a defendant must be accompanied by other proof that the offense was committed, Ark. Stat. Ann. § 43-2115 (Repl. 1977), the statutory requirement of corroboration is satisfied by proof that the crime was committed by someone. *Trotter* v. *State*, 290 Ark. 269, 719 S.W.2d 268 (1986). There was testimony at trial to show that others had seen the shank, that it was an object similar to an icepick, and that it had been found near the appellant soon after the incident occurred. We think this evidence sufficient to show that someone made or possessed the weapon, and we hold that the appellant's conviction on this charge is supported by substantial evidence.

Next, the appellant contends that the trial court erred in allowing his prior felony convictions into evidence in the sentencing phase of the trial when the appellant, who proceeded

pro se, was not notified of the amended information asserting habitual offender status until after the State had rested its case. The appellant acknowledges that the prosecution has a right to amend the information up to submission of the case to the jury, but argues that the late notice in this case was unconscionable because the appellant was proceeding *pro se*. We do not agree. Although an accused who knowingly and willingly forgoes his right to counsel and is willing and able to abide by rules of procedure and protocol is entitled to conduct his own defense, he who exercises the right of self-representation must bear the responsibility for his own mistakes. *Gilbert* v. *State*, 282 Ark. 504, 669 S.W.2d 454 (1984). The record shows that the appellant requested permission to represent himself; that the court appointed standby counsel for the appellant; and that the court instructed the appellant that he would be bound by the same rules of evidence and procedure as would be applicable were he an attorney. The Supreme Court has held that, in the absence of prejudice or surprise, the State may amend the information even after the trial has started. *Finch* v. *State*, 262 Ark. 313, 556 S.W.2d 434 (1977). We find no surprise or prejudice under the circumstances presented in the case at bar. The appellant was aware that he had previously been convicted of felonies, and any prejudice resulting from his choice to represent himself must be charged to him. *See Gilbert, supra.* We therefore hold that the trial court did not err in permitting evidence of his prior convictions for the purpose of sentence enhancement.

We next address the appellant's contention that the trial court erred in admitting evidence of previous convictions other than certified copies of those convictions or a certificate of a chief officer of the penal institution where the appellant was incarcerated. The record reveals that Warden Evans returned to the Department of Correction during a recess at trial and obtained copies of the appellant's "pen pack" as evidence of the appellant's prior convictions. Warden Evans testified that the photocopies had been made by a secretary and were not notarized. The trial court allowed the photocopies into evidence as proof of the appellant's prior felony convictions, stating that they were permissible as being a "certified true copy of [the appellant's] prior felony convictions." The appellant argues that the trial court thus required the State to produce copies certified by

the warden or chief of records officer of the Tucker unit. We find no error. The photocopies were certified as true and correct copies by Loretta Quin of the records office at the maximum security unit, and Warden Evans testified that the photocopies were made from his records at the penitentiary. We think this sufficient to explain the trial judge's remark, and hold that the photocopies of the appellant's "pen pack" were properly introduced as evidence of his prior felony convictions. *See* Ark. Stat. Ann. § 41-1003 (Supp. 1985).

The appellant next contends that the trial court erroneously allowed four of his prior felony convictions to be admitted because the amended information alleged only two or more prior convictions. We agree. In *Malone* v. *State*, 292 Ark. 243, 729 S.W.2d 167 (1987), the Supreme Court stated that it would be error to permit the State to prove four or more prior offenses where the defendant was only charged with two or more prior felonies. Although the appellant in the case at bar received a sentence of twelve years on his conviction for criminal use of a prohibited weapon, which is within the permissible range for a class D felony under Ark. Stat. Ann. § 41-1001(1)(e) (Supp. 1985), we cannot say that permitting the State to prove four felonies did not prejudice the appellant, whose twelve-year sentence was the maximum permissible under subsection (1)(e). We therefore reduce the appellant's sentence to six years, the minimum punishment for a class D felony under subsection (1)(e). *See Scott* v. *State*, 1 Ark. App. 207, 614 S.W.2d 239 (1981); Ark. Stat. Ann. § 41-3104(3) (Repl. 1977).

Reversed in part, affirmed in part as modified.

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

Omar ALMOBARAK *v.* STATE of Arkansas

CA CR 87-29 733 S.W.2d 422

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

Hickam, Roberts, Williams & Williams, P.A., by: *D. Scott Hickam*, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant, Omar Almobarak, was convicted of DWI, first offense, fined $450.00 plus court costs of $300.05, his driver's license was suspended for 90 days, and he was ordered to attend and complete a ten-hour alcohol safety program.

Appellant was stopped in Hot Springs at approximately 4:30 a.m. on August 29, 1984, when Officer Mike McKinney observed his vehicle weaving across the center line. Although appellant's speech was clear, McKinney detected an odor of alcohol about appellant and arrested him for driving while intoxicated. Appellant was taken to the police station where a breathalyzer test was performed after he was given his *Miranda* rights. The breathalyzer test showed appellant had 0.17% alcohol in his blood.

The machine used to perform the breath test had been certified by the Arkansas Department of Health on July 17, 1984. On October 15, 1984, when the health department next checked the machine for certification, it was discovered that the machine was not properly responding to acetone and use of the machine was suspended until it was readjusted.

Appellant made a motion to suppress the result of the breath test on the basis that the machine was not in proper working order at the time his test was administered and that law enforcement personnel who administered the test had not complied with the procedures promulgated by the Arkansas Department of Health for assuring the quality and accuracy of the test. Both motions were denied by the trial court and the test result was admitted into evidence.

The portion of the motion pertaining to the failure of law enforcement personnel to comply with health department proce-

dures was based on the contension that the Hot Springs officers failed to observe appellant for a twenty-minute period preceding the administration of the test as required by health department regulations. Appellant points out that he was arrested at 4:38 a.m. and the test was performed at 5:01 or 5:02 a.m., an elapsed time of only 23 or 24 minutes. He then argues that, since Officer McKinney testified that he did not keep his eye on him the entire time appellant was in the back seat of the police car in transport to the station, McKinney did not observe him for the full, uninterrupted period of time required. Also, because the officer testified he could not recall whether appellant belched or ingested any fluid or food during that time, appellant contends that the test result should not have been admitted into evidence.

The law in this regard was recently discussed in *Williford* v. *State*, 284 Ark. 449, 683 S.W.2d 228 (1985), where the court said the health department regulations did not require that the police officer stare fixedly at the arrested person for 20 minutes. The court also said the arresting officer's testimony that he had observed Williford for a period of 26 minutes beginning at the scene of the arrest, continuing in the patrol car's rear view mirror, and concluding at the police station and he would have been aware if Williford put anything in his mouth, presented a prima facie showing of compliance with the regulation. *See also, Girdner* v. *State,* 285 Ark. 70, 684 S.W.2d 808 (1985).

In the instant case, Officer McKinney testified that he had stopped appellant prior to the 4:38 a.m. time period listed on the arrest report; he said that was the time he placed appellant in the patrol car for the trip to the police station. McKinney also testified that he had appellant in his custody from then until the breath test was administered and observed him for at least 20 minutes prior to the giving of the test. Furthermore, Officer Gary Miller, who administered the breath test to appellant, testified that he had observed appellant for a period of 20 minutes and was sure appellant had taken nothing orally. We think appellant's argument goes to the weight to be given the evidence, not to its admissibility. A.R.E. Rule 104 provides that preliminary questions concerning the admissibility of evidence are decided by the trial court; our responsibility on review is to determine if there has been an abuse of discretion by that court. *Derring* v. *State*, 273 Ark. 347, 619 S.W.2d 644 (1981); *Wilson* v. *City of Pine Bluff*, 6

Ark. App. 286, 641 S.W.2d 33 (1982). We cannot say the trial court abused its discretion in allowing the result of the breath test to be introduced into evidence in this case.

Appellant also argues that the result of the breathalyzer test should have been suppressed as a matter of law because the machine was shown not to have been functioning properly on October 15, 1984. He argues that it is impossible to know exactly when the machine malfunctioned and, therefore, all tests performed between the July 17 certification and October 15 decertification by the health department should be invalidated. At oral argument, counsel for appellant admits he has no precedent for this argument but insists that "in all fairness" this should be our holding. We cannot agree.

■ There was evidence that the machine had registered properly, when a known solution of alcohol was run through the machine for calibration purposes, a few hours before and a few hours after appellant was tested. This is some evidence that the machine was operating properly at those times. Appellant contends, however, that the calibration did not check the machine for sensitivity to acetone and, in fact, there was no way for the operator to know whether the machine was acetone sensitive or not at the time appellant was tested. However, Officer Miller testified that, if the acetone interference light on the machine comes on, the test must be stopped, but that the light did not come on during the administration of appellant's test. The machine had been certified by the health department within the time period called for in the regulations and the operator testified he had no difficulty with the machine. Again, we think appellant's argument goes to the weight of the evidence, not to its admissibility. We are asked to hold that the trial court erred in not suppressing the test result of the machine. We cannot say that the court abused its discretion in allowing the test result into evidence. *Derring* v. *State, supra; Wilson* v. *City of Pine Bluff, supra*; A.R.E. Rule 104.

■■ On appeal, we must review the evidence in the light most favorable to the appellee and affirm if there is any substantial evidence to support the trial court's judgment. *Harris* v. *State*, 262 Ark. 680, 561 S.W.2d 69 (1978); *Holloway* v. *State*, 11 Ark. App. 69, 666 S.W.2d 410 (1984). When considered in

that light, we think there is substantial evidence to support the appellant's conviction.

Affirmed.

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

David ASHLEY *v.* STATE of Arkansas

CA CR 86-225 732 S.W.2d 872

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

Baxter, Eisele, Duncan & Jensen, for appellant.

Steve Clark, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. A Pulaski County Circuit Court jury convicted appellant, David Ashley, of aggravated robbery and sentenced him to fifteen years in the Arkansas Department of Correction. He argues on appeal that the court erred in admitting into evidence certain identification testimony and that the evidence was insufficient to support the verdict.

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 that about 10:30 p.m. on November 20, 1985, the owner and a clerk of a liquor store in southwest Little Rock were sitting behind the counter at the front of the store when two white men entered. One of the men remained at the front while the other man, who was wearing a jacket and had his hands in his pockets, went to the back of the store and looked into a beer cooler and into the storeroom where customers were not authorized to go. A little while later, the man at the front took a beer from a cooler and asked the man at the back if he had what he wanted or if everything was okay, and the man said "Yeah." The owner of the store testified that this caused him to feel that something was going to happen so he got up and walked to the rear of the store, passing the man in the jacket who was returning to the front of the store.

About that time, the man in the front of the store pulled a pistol on the clerk, told him not to move, and that this was a robbery. The owner then emerged from the storeroom with a

shotgun and yelled, the clerk dropped to the floor, and the men ran out the door and into the woods. The owner chased them for a distance and fired a shot in the air, but both men disappeared into the woods. Nothing was taken from the store and no one was hurt.

Several days later the store owner identified, from a photographic array, the appellant as the man in the jacket who went to the back of the store. He made the same identification at trial. Although the clerk identified the gunman, he was unable to identify the man in the jacket.

Robbery is committed when a person employs or threatens to employ physical force upon another with the purpose of committing a theft. Ark. Stat. Ann. § 41-2103 (Repl. 1977). Aggravated robbery is committed if a person is armed with a deadly weapon when he commits a robbery. Ark. Stat. Ann. § 41-2102 (Supp. 1985). A person is an accomplice of another if he aids another in planning or committing an offense. Ark. Stat. Ann. § 41-303 (Repl. 1977). An accomplice is criminally liable for the conduct of another person. Ark. Stat. Ann. § 41-302 (Repl. 1977).

Appellant relies on *Hicks* v. *State*, 271 Ark. 132, 607 S.W.2d 388 (1980), in support of his argument that he was only an innocent bystander during this episode and that the state failed to show he had the necessary intent to show accomplice liability. In *Hicks*, two black men and a black woman entered a 7-11 store. While the woman distracted the clerk, one of the men took several bills out of the cash register. After being apprehended, that person implicated Hicks. However, the pictures taken by a hidden surveillance camera showed only that Hicks stood near the cash register and near the other two people and that he had a bill in his hand. The court held this was insufficient evidence to sustain a conviction as an accomplice. The court stated:

> The term accomplice does not embrace [one] who had guilty knowledge or who is morally delinquent; it includes only one who takes or attempts to take some part, performs or attempts to perform some act or owes some legal duty to the victim of the crime to prevent its commission; and mere presence, acquiescence, silence, or knowledge that a crime is being committed, in the absence of some legal duty to act, concealment of knowledge or failure to inform officers

> of the law, is not sufficient to make an accomplice.

271 Ark. at 136.

Appellant also cites *Green* v. *State*, 265 Ark. 179, 577 S.W.2d 586 (1979), in which our supreme court reversed and dismissed the conviction of a man who had entered a Church's Fried Chicken place and made a purchase. As soon as he returned to the car, his companions entered and robbed the restaurant. Although one of the accomplices testified that it was Green's job to see how much money was in the cash register, the court said:

> The question of evidence necessary to corroborate an accomplice's testimony to the extent of allowing a case to be submitted to a jury is necessarily governed by the facts and circumstances of each case as it is presented. Evidence which is merely suspicious in nature is insufficient, or if it is as consistent with innocence as guilt, it is not enough to submit the question of the defendant's guilt to the jury.

265 Ark. at 182.

On appeal, we review the evidence in the light most favorable to the state and affirm if there is substantial evidence to support the conviction. *Harris* v. *State*, 262 Ark. 680, 561 S.W.2d 69 (1978). Substantial evidence is evidence that is of sufficient force and character that it will compel a reasonable mind to reach a conclusion one way or the other, but it must force the mind to pass beyond suspicion or conjecture. *Jones* v. *State*, 269 Ark. 119, 598 S.W.2d 748 (1980); *Pickens* v. *State*, 6 Ark. App. 58, 638 S.W.2d 682 (1982). Intent is a state of mind which is not ordinarily capable of proof by direct evidence, but it may be inferred from the circumstances. *Johnson* v. *State*, 7 Ark. App. 172, 646 S.W.2d 22 (1983). The fact that evidence is circumstantial does not render it insubstantial. *Williams* v. *State*, 258 Ark. 207, 523 S.W.2d 377 (1975). Presence of an accused in the proximity of a crime, opportunity, and association with a person involved in the crime in a manner suggestive of joint participation are relevant factors in determining the connection of an accomplice with the crime. *Redman* v. *State*, 265 Ark. 774, 580 S.W.2d 945 (1979). Jurors are allowed to draw upon their common knowledge and experience in reaching a verdict from the facts directly proved. *Johnson & Carroll* v. *State*, 276 Ark. 56, 632

S.W.2d 416 (1982). Furthermore, the action of fleeing from the scene of the crime is relevant to the issue of guilt. *Jones* v. *State*, 282 Ark. 56, 665 S.W.2d 876 (1984); *Murphy* v. *State*, 255 Ark. 90, 498 S.W.2d 884 (1973).

We do not think the *Hicks* and *Green* cases, relied upon by appellant, can be taken to mean that the evidence in this case is insufficient for conviction. Both of those depended upon the testimony of an accomplice which must be corroborated in order to support a conviction. In this case, when viewed in the light most favorable to the state, there is evidence, that does not come from an accomplice and needs no corroboration, from which the jury could find that appellant and the gunman were acquainted; that they entered the liquor store together on foot; that appellant surveyed the back of the store and when asked if everything was okay, replied that it was; that this served as a signal to the gunman who then attempted to rob the store; and when confronted with the owner brandishing a shotgun, instead of dropping to the floor as an innocent bystander would do, appellant put himself directly in the line of fire by fleeing into the woods with the gunman. The appellant's argument is based strictly on his interpretation of the facts. However, reconciling conflicts in the testimony and weighing the evidence are matters within the exclusive province of the jury, *Brown* v. *State*, 278 Ark. 604, 648 S.W.2d 67 (1983), and the jury's conclusion on credibility is binding on this court. *Thomas* v. *State*, 266 Ark. 162, 583 S.W.2d 32 (1979).

Appellant also argues that the trial court erred in admitting into evidence the identification made of him by the liquor store owner. Appellant filed a motion to suppress the identification because of a photographic lineup on December 2, 1985. The motion was denied by the trial court and appellant argues this was error because the photospread was unduly suggestive and created a substantial likelihood of an in-court misidentification.

The law regarding photographic arrays was summarized in *Beed* v. *State*, 271 Ark. 526, 609 S.W.2d 898 (1980), as follows:

> Although the reliability of eyewitness identification is normally a question for the jury, the fundamental fairness of identification procedures addresses itself to the trial

> court. . . . Although the question whether a pretrial photograph identification procedure is unduly prejudicial may be a mixed question of law and fact, . . . we should not reverse the trial judge's decision unless, viewing the totality of the circumstances, it is clearly erroneous. . . . Identification testimony is properly admissible, if from the totality of the circumstances the confrontation did not give rise to a very substantial likelihood of irreparable misidentification. . . . [Citations omitted.]
>
> . . . .
>
> The test we apply in such identifications is based on factors stated in *Manson* v. *Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed. 2d 140 (1977). *McCraw* v. *State*, 262 Ark. 707, 561 S.W.2d 71. They are: the opportunity of the witness to view the criminal at the time of the crime, the degree of attention of the witness, the accuracy of the prior description of the criminal, the level of certainty demonstrated at the confrontation and the time between the crime and the confrontation.

271 Ark. at 539 and 541.

Applying those factors to the evidence in this case reveals that appellant was in the liquor store for five to six minutes; the store owner was watching him carefully because his conduct had aroused suspicion; less than two weeks after the robbery, the owner chose appellant's picture out of six similarly appearing men; just two days after the robbery, the owner viewed a photospread which did not contain appellant's picture, and made no identification; and the owner unequivocally identified appellant in court. An in-court identification can be held inadmissible as a matter of law only if, after viewing the totality of the circumstances, it can be said that the identification was patently unreliable. *Perry* v. *State*, 277 Ark. 357, 642 S.W.2d 865 (1982). We reverse the trial judge on this issue only if we find he was clearly wrong. *Beed* v. *State, supra.* We cannot say the trial judge was clearly wrong in this case.

Affirmed.

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

Kimmy R. REDDING *v.* STATE of Arkansas

CA CR 87-7 733 S.W.2d 424

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

Hurst Law Office, by: *Larry Honeycutt*, for appellant.

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

BETH GLADDEN COULSON, Judge. By felony information dated October 21, 1985, the appellant, Kimmy R. Redding, was charged with three counts of delivery of a controlled substance. On December 20, 1985, the appellant entered a plea of guilty as to each count and was sentenced to eight years imprisonment in the Arkansas Department of Correction and fined $1,000.00. A commitment order was filed that same day, and the appellant was remanded to the custody of the Montgomery County Sheriff's Office. On January 2, 1986, some two weeks after the commitment order was filed and while in custody and awaiting transfer to the penitentiary, the appellant filed a motion to set aside his guilty

plea. The trial court granted the motion and set the matter for trial. The appellant was convicted by jury verdict and was sentenced to ten years imprisonment and fined $10,000.00 on one count and placed on ten years probation on a second count. From that conviction comes this appeal.

The appellant first argues that the facts of this case support the defense of entrapment and, additionally, that the court erred in denying a motion for change of venue. The appellant also argues that the court erred in granting his motion to set aside the guilty plea as the court was without the power to modify, amend or revise the original sentence because it lost jurisdiction over the matter once the appellant was remanded to the custody of the sheriff after the filing of the first commitment order. Although the State fails to address the first two points by conceding the third, we find the appellant's arguments to be without merit and affirm.

Entrapment is an affirmative defense, and the appellant had the burden of proving that defense by a preponderance of the evidence. *Harper* v. *State*, 7 Ark. App. 28, 643 S.W.2d 585 (1982). The appellant argues that entrapment was established as a matter of law, which is only true where there were no factual issues to be resolved by the fact finder. *Harper, supra; Leeper* v. *State*, 264 Ark. 298, 571 S.W.2d 580 (1978). On appeal, we review the evidence in the light most favorable to the State and will reverse only if there is no substantial evidence to support the jury's verdict.

At trial, the State introduced the testimony of an informant, Larry Wornick, who had approached the Montgomery County sheriff with an offer of information concerning drug operations in the county in exchange for a recommendation by the prosecutor's office that Wornick's sentence in an unrelated case be suspended. The sheriff testified that in addition to assistance on other cases, he wanted Wornick to attempt a purchase from the appellant (who had been under investigation by the sheriff's department for over two years). Wornick subsequently made repeated visits to the appellant's residence. On or about August 17, 1985, he allegedly purchased marijuana from the appellant for $100.00, which sum was reimbursed by the sheriff.

Thereafter, on August 28, 1985, a meeting was arranged involving Wornick, the sheriff, a deputy prosecutor, and two

undercover officers. Wornick accompanied one of the undercover officers to the appellant's residence to attempt another purchase. Wornick testified that upon arriving at the residence he approached the appellant, stated that he had someone in the car who was interested in purchasing marijuana, and asked whether the appellant wanted to meet that person. According to Wornick, the appellant responded in the affirmative. The trio then moved to the rear of the appellant's residence where the appellant produced a large shopping bag containing marijuana.

Wornick testified that the undercover officer purchased the contents from the appellant for $250.00, of which $50.00 was forwarded by the appellant to Wornick for his services in procuring a buyer. Wornick and the officer then left. Subsequently, the officer returned to the appellant's residence on September 12, 1985, and purchased an additional quantity of marijuana for approximately $300.00. The appellant, according to the testimony, stated on several occasions that more marijuana would be available later.

The appellant's testimony was that Wornick frequently complained of a lack of funds and that he had loaned Wornick $200.00 as a favor. He then testified that Wornick left marijuana at the appellant's residence because the police were watching Wornick's home. The transaction on August 28, 1985, according to the appellant, involved no more than a sale by Wornick to the officer of the marijuana which Wornick allegedly left at the appellant's residence. The appellant's receipt of the $200.00 from the sale was simply payment by Wornick for the earlier loan, with the extra $50.00 being returned to Wornick. Wornick testified that he had never delivered marijuana to the appellant's residence and denied that the appellant had loaned him money.

The jury was not required to believe the appellant's testimony nor give it greater weight than that of any other witness. *Harper, supra.* The testimony of the undercover officer, which the appellant failed to abstract, corroborated that of the informant Wornick. We have no testimony concerning the events of the sale on September 12, 1985, because the appellant failed to abstract that portion of the record.

Section (2) of our statute governing entrapment, Ark. Stat. Ann. § 41-209 (Repl. 1977), provides:

> Entrapment occurs when a law enforcement officer or any person acting in cooperation with him, induces the commission of an offense by using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

Although more importance is attributed to the conduct of the law enforcement officers than to the predisposition of the defendant, the defendant's conduct and predisposition, both prior to and concurrent with the transactions forming the basis of the charge, are still material and relevant on the question of whether the officers only afforded the accused the opportunity to commit the offense. *Webber* v. *State*, 15 Ark. App. 261, 692 S.W.2d 255 (1985). Conduct of the officers or informant merely affording the accused the opportunity to do that which he is otherwise ready, willing and able to do is not entrapment. *Webber, supra.*

In the case at bar, on the issue of entrapment, several facts were in dispute. We therefore cannot say that the defense of entrapment was proved as a matter of law. *Walls* v. *State*, 280 Ark. 291, 658 S.W.2d 362 (1983). Viewing the evidence in the light most favorable to the appellee, as we must on appeal, we find substantial evidence to support the jury's verdict on this issue.

The appellant filed a petition for change of venue pursuant to Ark. Stat. Ann. § 43-1501 (Repl. 1977). The petition was based upon three articles printed in a local Montgomery County newspaper. The first set forth the charges filed against the appellant and noted his entry of a plea of not guilty. The second stated that the appellant had entered a negotiated plea of guilty and described his sentence. The third related that the appellant was subsequently to be given a trial in the matter. The articles were accompanied by others which reported the charges and pleas in drug related offenses committed by other defendants. The appellant argued that knowledge of his earlier plea of guilty, evidenced by publication in a widely circulated local paper, would preclude a fair trial in Montgomery County.

A change of venue should be granted only when it is clearly shown that a fair trial is not likely to be had in the county. *Richardson* v. *State*, 292 Ark. 140, 728 S.W.2d 189 (1987). The

burden of proof is on the defendant, and the decision of the trial court will be upheld unless it is shown that there was an abuse of the trial court's discretion in denying the petition. *Richardson, supra.* The trial court heard the testimony of several witnesses, in addition to considering the affidavits in support of the petition, and concluded that the appellant could receive a fair trial in that jurisdiction. Under those circumstances, we review only the court's exercise of its discretion. *Berry* v. *State*, 290 Ark. 223, 718 S.W.2d 447 (1986).

Section 43-1501 provides that any criminal case pending in any circuit court may be removed by order of the court to the circuit court of any other county whenever it shall appear "that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair and impartial trial cannot be had therein." Ark. Stat. Ann. § 43-1502 (Repl. 1977) requires that the application for removal by the defendant be by petition and be supported by affidavits.

The appellant filed several such affidavits and introduced witnesses at the hearing on his petition. One of these witnesses stated that he had "signed something" but that "to tell you the truth, I didn't even read it [the affidavit]." In response to the question as to whether the appellant could receive a fair trial in the county, he said: "Well, that I just don't know." The witness providing the strongest testimony for the appellant's allegation was appellant's mother. The State introduced testimony by numerous witnesses from various townships within the county to testify that they knew of no reason why the appellant could not receive a fair trial in Montgomery County.

Our supreme court has held that there can be no error in the denial of a petition for change of venue if an examination of the jury voir dire shows that an impartial jury was selected and that each juror stated that he or she could give the defendant a fair trial and follow the instructions of the court. *Richardson, supra; Berry, supra.* Unfortunately, the appellant has failed to abstract the voir dire portion of the trial. A movant in a change of venue proceeding must demonstrate that countywide prejudice against him exists before his petition for change of venue will be granted. In view of the conflict in the testimony, we are unable to say that any abuse of discretion was shown.

The appellant's final argument is that the sentence originally imposed at the time he first entered a plea of guilty should be reinstated because the trial court was without power to grant his motion to withdraw the guilty plea (which led to the trial by jury) as the court lost jurisdiction of the matter after it imposed sentence, filed a commitment order, and remanded the appellant to the custody of the sheriff. We disagree.

The argument is based upon a long line of cases which have firmly established that once a valid sentence is put into execution, the trial court is without jurisdiction to modify, amend or revise it. *Coones* v. *State*, 280 Ark. 321, 323, 657 S.W.2d 553, 555 (1983); *Cooper* v. *State,* 278 Ark. 394, 645 S.W.2d 950 (1983); *Hunter* v. *State*, 278 Ark. 428, 645 S.W.2d 954 (1983); *Shipman* v. *State*, 261 Ark. 559, 550 S.W.2d 454 (1977); *Emerson* v. *Boyles*, 170 Ark. 621, 280 S.W. 1005 (1928). Where the defendant has "entered upon the execution of a valid sentence," the court loses jurisdiction over the case. *Emerson, supra.* Thereafter, any attempt to amend or revise the sentence is of no effect, and the original sentence remains. *Williams, Standridge & Deaton* v. *State*, 229 Ark. 42, 313 S.W.2d 242 (1958). We dispose of this final issue by first addressing a related matter.

The appellant's motion to set aside his guilty plea was filed pursuant to Rule 26.1 of the Arkansas Rules of Criminal Procedure. Such a motion is timely even if filed after the entry of judgment, if made with due diligence. However, our supreme court has stated that the motion "must be filed prior to sentencing." *Carter* v. *State*, 285 Ark. 256, 685 S.W.2d 812 (1985); *Rawls* v. *State*, 264 Ark. 954, 581 S.W.2d 311 (1979). The supreme court has emphasized that trial courts can, in the exercise of their discretion, consider a Rule 26.1 motion any time before sentencing; but, thereafter, the motion must have been amended so that it can be treated as a motion under Rule 37. *Shipman, supra.* The appellant concedes that this was not done. On its face, therefore, the appellant's motion to set aside his guilty plea appears to have been untimely, notwithstanding his argument as to jurisdiction, because the motion was filed two weeks after sentencing.

Having said this much, we hasten to point out that the

phraseology "before sentencing" is, at first glance, misleading. We find that the supreme court's *Shipman* opinion actually establishes that a Rule 26.1 motion is not untimely, therefore not requiring amendment, until the sentence has been put into execution. "Such a Motion must necessarily be made under Rule 37, *if the sentence has been carried into execution.*" (Emphasis ours.) 261 Ark. at 563. As such, both the timeliness of the appellant's motion, and his argument as to the court's loss of jurisdiction, are controlled by a determination of when, under our laws, the appellant's sentence was put into execution.

Our cases clearly establish that sentences of imprisonment are not put into execution until the defendant is placed in the custody of the Department of Correction. In *Nelson* v. *State*, 284 Ark. 156, 680 S.W.2d 91 (1984), the supreme court found that the trial court was without jurisdiction to modify a particular sentence once the original sentence had been put into execution and "the sentence was put into execution *because the appellant was placed in the custody of the Department of Correction.*" (Emphasis ours.) 284 Ark. at 157. The rationale behind the court's loss of jurisdiction is that the power to exercise discretion over a defendant's sentence has passed to the executive branch of government. *Nelson, supra; Charles* v. *State*, 256 Ark. 690, 510 S.W.2d 68 (1974).

The appellant's argument that the trial court had lost jurisdiction must fail, therefore, because the motion to set aside the guilty plea was filed prior to the time that the original sentence was put into execution; namely, the appellant had not been transferred to the custody of the Department of Correction. For similar reasons, the appellant's motion was timely under *Shipman.* That he was in the custody of the sheriff of Montgomery County does not change our holding, and we are not persuaded that *Coones, supra*, requires otherwise. In *Coones*, the supreme court found that the trial court was without jurisdiction once the appellant had been remanded to the custody of the sheriff and had served a portion of his sentence. However, the sentence was for a misdemeanor and it was the local jail where that sentence was to have been served; hence, it had been put into execution—which is not the case here. Although *Williams, Standridge & Deaton, supra*, states that the court loses jurisdiction once a defendant has served a portion of his sentence, the appellants in *Williams* were

already serving time in the Department of Correction, and the case is therefore distinguishable.

Although the issue of the trial court's loss of jurisdiction over the appellant was not raised by the parties prior to taking this appeal, it is a general rule that subject matter jurisdiction is always open, cannot be waived or conferred by consent of the parties, can be questioned for the first time on appeal, and can even be raised by this court. *Coones, supra.* Having considered the issue of jurisdiction, we find no error and affirm.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

ARKANSAS BLUE CROSS AND BLUE SHIELD, INC.
v. John DOE, as Parent and Next Friend of Jane DOE

CA 86-406 733 S.W.2d 429

Court of Appeals of Arkansas
En Banc
Opinion delivered July 29, 1987
[Rehearing denied September 9, 1987.]

Wright, Lindsey & Jennings, for appellant.

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

GEORGE K. CRACRAFT, Judge. Arkansas Blue Cross and Blue Shield, Inc., appeals from a judgment of the Lee County Circuit Court, sitting as a jury, finding it liable to appellee policyholders for benefits provided for a physical condition rather than those provided for a mental one and allowing the pro se appellee an attorney's fee. It contends that the trial court erred in finding that appellee's daughter's hospitalization and treatment were for a physical illness rather than a mental condition, in excluding the testimony of appellant's actuarial manager, and, because appellee was also a witness in the case, in holding that he, as a pro se attorney, was entitled to an allowance of fees.

On February 25, 1987, we granted a joint motion to certify this case to the supreme court pursuant to Rule 29(1)(c) and (4)(b) of the Rules of the Arkansas Supreme Court and Court of Appeals. On June 9, 1987, the case was remanded to the court of appeals for decision. Accordingly, jurisdiction lies in this court. We find no error and affirm.

The appellee and his minor daughter were insured under a group health insurance policy issued by appellant to appellee's law firm. The policy provided liberal benefits for hospitalization and medical treatment for physical illness and accidental injury, but limited coverage for medical and hospital expenses incurred as a result of mental, psychiatric, or nervous conditions. The policy did not define either mental or psychiatric condition. Appellee's daughter was hospitalized and treated for a disorder diagnosed as bipolar affective disorder. The appellee submitted the expenses for her hospitalization and treatment but only those limited benefits provided for mental conditions were paid. Appellant contended that the child's disorder was a mental condition for which she had received psychiatric treatment and therefore was entitled only to limited benefits. The appellee brought this action to recover full benefits provided in the policy for an illness of a physical nature.

The appellee testified that he was a practicing attorney and the father of the insured minor whose developing problem became acute in 1984. She spent a great deal of time in bed crying and developed eating and sleeping problems. She lost weight and at times was in deep depression. In those periods, she would lose interest in all those things in which other children her age were engaged. At times, she was suicidal and talked about dying. At other times, she was energetic and her sleeping and eating patterns were near normal. She was subsequently hospitalized and was seen by psychiatrists. She was prescribed medications for her condition and has improved to such an extent that she is now a different person. Her mood, weight, and eating problems have stabilized and are now normal. Her sleeping patterns, though variable, are near normal. She is attending a special school and has reasonable expectation for a normal life so long as she remains on her medication.

Dr. Thomas Harris, a treating psychiatrist, testified that those of the medical profession who dealt in mental conditions had historically categorized these illnesses by symptom rather than cause. He stated that bipolar affective disorder, referred to in the past as manic-depressive disorder, is characterized by those symptoms described by the appellee but that "I think most laymen, and actually I think most physicians and most people in psychiatry now classify illnesses by cause or origin." Although

classified according to symptoms as a mental disease by some in the profession, he stated it is in fact a physical disorder. "The medical research is now, in my opinion, overwhelming in that regard." He stated that it was an illness of the brain and body rather than of the mind and stemmed from a chemical imbalance which responds to medication. This illness, like many others he described, manifests some behavioral or emotional disturbances, but the causes of those manifestations are physical and biological in nature as distinguished from mental.

There was evidence that, although bipolar affective disorder originates as a physical illness which requires and responds to medical treatment, psychotherapy is utilized in several ways in treatment of the disease, as was done in Jane Doe's case. It helps the patient accept the fact of her illness and learn to cope with it. It also assists the patient in becoming accustomed to normal feelings and reactions and learning the importance of taking the prescribed medication necessary to continued recovery. It is further utilized in measuring the effect of medication on a person's mood levels in order that proper adjustment could be made in medicine dosages.

Dr. John Leite, a clinical psychologist who treated the minor appellee, testified that "[o]f all the kids I've seen, [Jane Doe's] is most clearly a biologically-based illness." Dr. Anne Utley, a treating psychiatrist, stated that, although bipolar affective disorder is classified as a mental problem, there are physical causes for it. Dr. Dolores DiGaetano, a psychiatrist, agreed that bipolar affective disorder was caused by hormonal imbalance and that it was a biological condition. Dr. Douglas Stephens, a clinical psychologist, testified positively that bipolar affective disorder was a physical disorder resulting from metabolic imbalance. Dr. Stuart Harris, a psychiatrist, also agreed that it was a biological, physical disorder of the brain function with multiple symptomatic manifestations.

There was evidence from medical witnesses that the classification of illnesses by symptoms by those in the psychiatric field was a primitive way of classification and that the profession was moving away from that method. It was pointed out that the Arkansas Psychiatric Society at its 1986 meeting had declared "[b]ipolar affective disorder is an illness whose origin is

biological."

Appellant offered evidence of its director of claims that the classification system used by Blue Cross-Blue Shield was the same as that generally used by medicare and most hospitals, physicians, and clinics in the country. Under that system, bipolar affective disorder is classified as a mental disorder. Though most of the doctors who testified in person or by deposition indicated that the psychiatric field did classify bipolar affective disorder as a mental condition, all but one of those agreed that it was so classified by symptom rather than cause.

We agree with the trial court that the issue for its determination was whether bipolar affective disorder is a physical illness or a mental or psychiatric condition within the terms of the policy. On conflicting evidence, it expressly found that "the illness of Jane Doe is a physical condition within the meaning of the Blue Cross contract" and not a mental one. Findings of fact of a circuit court sitting as a jury will not be reversed on appeal unless clearly against a preponderance of the evidence and, in making that determination, we give due regard to the superior position of the trial court to judge the credibility of the witnesses. *National Investors Fire & Casualty Insurance Co.* v. *Chandler*, 4 Ark. App. 116, 628 S.W.2d 593 (1982). We cannot conclude on the facts of this case that the finding of the trial court is clearly against a preponderance of the evidence.

Appellant argues that the trial court erred in its conclusions because words of art connected with a profession are to be given the meaning given them by experts in that field. *Les-Bil, Inc.* v. *General Waterworks Corp.*, 256 Ark. 905, 511 S.W.2d 166 (1974). It contends that, as the manuals used by most hospitals, insurers, and those in the mental health profession classify bipolar affective disorder as a mental condition, the trial court should have so found.

Although the expert witnesses testified that bipolar affective disorder was classified as a mental condition, all but one agreed that only its symptoms fell within that classification and its cause was physical. There was credible evidence from which the court could have found that classification of illnesses by symptom rather than cause was falling into disfavor within the mental health profession, and a large number of physicians and

people in psychiatry were now classifying illnesses by their cause or origin. There was also evidence that the Arkansas Psychiatric Society had declared bipolar affective disorder to be an illness having a biological, rather than mental, origin. Furthermore, we agree with the trial court that those classification manuals used by physicians, hospitals, and medical insurers would not be controlling on this issue because they were not adopted in, referred to, or made a part of the policy. Certainly, upon this evidence, a question of fact was made for the factfinder to determine. *See Mutual Benefit Health & Accident Assn.* v. *Rowell*, 236 Ark. 771, 368 S.W.2d 372 (1963).

Appellant next contends that the trial court erred in excluding the proffered testimony of its actuarial manager pertaining to underwriting and rating criteria used by Blue Cross-Blue Shield to calculate risks and determine premium charges. He testified that the insurer did offer a broader mental condition coverage but for a higher premium. He testified as to experience in other states and reached the conclusion that the extended coverage for mental illness would require substantial increases in cost to Blue Cross-Blue Shield and/or in premiums to its customers.

The appellee's objection to the appellant's actuarial evidence was taken under advisement by the trial court but, at the close of the trial, was sustained because the court found the evidence to be irrelevant to the issues then before it. Appellant argues that it was relevant because the cost factors of additional coverage for mental conditions were taken into account when the premiums were set. It argues that calculation of risk and concomitantly the amount of premiums are factors to be considered in interpreting policy provisions.

Although the amount of the premium may not affect the plain wording of the policy, it is a fact which may be taken into consideration in construing doubtful or ambiguous policy language. 2 *Couch on Insurance* §§ 15:52 and 15:82 (1984). Here, the actuarial testimony dealt with the entire field of conditions classified as mental in nature, including those that truly may not have physical causes. Bipolar affective disorder was said by the medical experts not to be a mental condition and to affect only one percent of the population. There was no evidence as to how coverage for this particular disease might have affected premium

calculation. Furthermore, we note that the trial judge ruled that, even if that evidence was considered, it would not have altered his decision. The determination of the relevancy of evidence lies within the sound discretion of the trial court, and its ruling on this issue will not be disturbed in the absence of an abuse of that discretion. *Dooley* v. *Cecil Edwards Construction Co., Inc.*, 13 Ark. App. 170, 681 S.W.2d 399 (1984). We cannot conclude that the trial court abused its discretion in this case.

After judgment for the full amount claimed under the policy was announced, the court granted a subsequent motion allowing appellee penalties, interest, and attorney's fees pursuant to Ark. Stat. Ann. § 66-3238 (Repl. 1980). Appellant does not question that appellee recovered the full amount claimed in his amended complaint or that the attorney's fee allowed by the court was a reasonable one. It contends only that, as the appellee was litigant, advocate, and witness in the case, neither he nor his law partners are entitled to attorney's fees. Appellant relies on the well-established rule that an attorney may not appear for his client as both advocate and witness as declared in *Milburn* v. *State*, 262 Ark. 267, 555 S.W.2d 946 (1977). It further argues that one acting in such a dual capacity may not even be allowed fees for his prior preparation of a case unless he has completely withdrawn from further participation, citing *Aetna Casualty and Surety Co.* v. *Broadway Arms Corp.*, 281 Ark. 128, 664 S.W.2d 463 (1984).

That line of cases is based upon the ethical rule that a lawyer not accept employment in litigation if he knows, or it is obvious that he, or a lawyer in his firm, ought to be called as a witness. There are many sound reasons for such a rule, most of which are set out in the commentaries to the rule and in *Ford* v. *State*, 4 Ark. App. 135, 628 S.W.2d 340 (1982). In *Boling* v. *Gibson*, 266 Ark. 310, 584 S.W.2d 14 (1979), the court cited a number of cases in which it had recognized exceptions to that rule, none of which are applicable here.

The appellee makes a very persuasive argument that this rule has no application because he had a right to appear and present his case pro se. He contends that his right to act as pro se counsel carries with it the right to participate in all phases of the case and those rights should not be curtailed because he happens to be a licensed attorney. We do not reach that issue, however,

because we conclude that, on the facts of this case, the appellee's right to participate as litigant, advocate, and witness is expressly excluded from the provisions of the present rule governing professional conduct.

Rule 3.7 of the Model Rules of Professional Conduct[1] provides as follows:

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness *except where*:
>
> (1) *the testimony relates to an uncontested issue*;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

(Emphasis added).

Here, appellee testified that he was a licensed, practicing attorney and the father of Jane Doe. He outlined to the court his observations of her behavioral pattern prior to seeking medical assistance, her present condition, pursuits, and plans for the future. None of his testimony related to an issue in controversy nor conflicted with the testimony of any other witness. All medical witnesses for both sides agreed that the child did have those behavioral patterns and symptoms to which he testified and all based their professional opinions and conclusions on that statement of history. The symptoms that the father described were not in issue. The material issue in the case was not what her symptoms were, but the conclusions to be reached from that agreed upon medical history.

The commentary to Rule 3.7 points out that, because a witness is required to testify on the basis of personal knowledge while the advocate is expected to explain and comment on the

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[1] Adopted by the Arkansas Supreme Court on December 16, 1985, in the per curiam *In the Matter of the Arkansas Bar Association: Petition for the Adoption of Model Rules of Professional Conduct*, 287 Ark. 495, 702 S.W.2d 326 (1985), to become effective January 1, 1986.

evidence given by others, it may not be clear to the factfinder whether the statement by an advocate witness should be taken as proof from personal knowledge or as analysis of that proof by an advocate. It further recognizes, however, that, if the testimony is uncontested, the ambiguities resulting from the dual role become purely theoretical. As the appellee's testimony did not relate to any contested issue, the prohibition contained in Rule 3.7 applied to neither him nor his partners.

At the time the petition for award of attorney's fees was filed, appellee's partners filed an affidavit with the court in which they stated they were making no claims for any attorney's fee in the case. It is argued that the pro se appellee should not be allowed fees under these circumstances. We do not agree.

It is well settled that attorney's fees are awarded under Ark. Stat. Ann. § 66-3238 not as property of the attorney but by way of indemnity to the litigant. *Equitable Life Assurance Society of the United States* v. *Rummell*, 257 Ark. 90, 514 S.W.2d 224 (1974). In this case, appellee was the litigant. The rule applied in the majority of decided cases, with which we agree, allows statutory attorney's fees to pro se litigants. The rule is discussed in *McMahon* v. *Schwartz*, 109 Misc.2d 80, 438 N.Y.S.2d 215 (1981), as follows:

> [T]he party, being an attorney, gives the professional time, knowledge, and experience in the conducting or defense of his suit, which he would otherwise have to pay an attorney for rendering. It can make no difference to the defeated party, who is by law bound to pay the costs of the prevailing party, or a fixed equivalent under the Code for it, whether that attorney is the prevailing party himself or another attorney employed by him. The plaintiff, like any other professional man, is paid for his time and services, and if he renders them in the management and trial of his own cause it may amount to as much pecuniary loss or damage to him as if he paid another attorney for doing it.

See also Parker 72nd Associates v. *Isaacs*, 109 Misc.2d 57, 436 N.Y.S.2d 542 (1980); *Winer* v. *Jonal Corp.*, 169 Montana 247, 545 P.2d 1094 (1976); *Weaver* v. *Laub*, 574 P.2d 609 (Okla. 1977); Annot., 78 A.L.R.3d 119 (1977).

Affirmed.

Ronald W. DALE *v.* Jimmie Dwayne FRANKLIN and Deborah Kaye FRANKLIN

CA 87-47 733 S.W.2d 747

Court of Appeals of Arkansas
Division I
Opinion delivered July 29, 1987

John H. Admetz, Jr., for appellant.

Harold W. Madden, for appellee.

JAMES R. COOPER, Judge. The appellant in this adoption case is the natural father of two minor sons, Jonathan and Christopher Dale. The probate court found that it was in the best interest of the children to grant the petition for adoption filed by the appellees, Jimmie and Deborah Franklin. For reversal, the appellant argues four points: that the trial court erred in concluding that the appellant had failed significantly for one year to communicate with or support his children without justifiable cause; that the evidence is insufficient to support the judgment of the trial court; that the trial court considered inadmissible

evidence in arriving at its decision; and that the trial court erred in deciding the case in the absence of the children to be adopted and the appellees. We agree that the trial court erred in granting the petition to adopt, and reverse.

We review probate proceedings *de novo* on the record. It is well settled that the decision of a probate judge will not be disturbed unless clearly erroneous, giving due regard to the opportunity and superior position of the trial judge to determine the credibility of the witnesses. *Lindsey* v. *Ketchum*, 10 Ark. App. 128, 661 S.W.2d 453 (1983).

The appellant was married to Cinda Dale, and they are the parents of the two children who are the subject of this appeal. According to the appellant's testimony, he entered the hospital late in March 1985. When he was released from the hospital, he discovered his wife and children had moved out. On April 9, 1985, Cinda and the appellant signed consents to the adoption of the two children, and waived the right to further notice of adoption proceedings.

It is undisputed that the appellant's signature was obtained by fraud on the part of Cinda. The appellant testified that he signed the consent because Cinda told him she was a prostitute for the Mafia and that the children would be harmed if he did not consent to the adoption. Cinda testified that she did tell the appellant this and added that she didn't think he believed it so she also told him that she would reconcile with him if he consented.

The next day, April 10, 1985, the appellant contacted the attorney who was handling the adoption, Harold Madden. According to the appellant, Mr. Madden told him that his children would be returned to him. The appellant later followed up the oral withdrawal of consent with a written withdrawal on April 15, 1985. At trial Mr. Madden stipulated that the appellant had indeed contacted him and withdrawn his consent.

Knowing that the appellant had withdrawn his consent, Mr. Madden filed a petition to adopt on behalf of the appellees on May 1, 1985, alleging that the appellant and Cinda consented to the adoption and attaching the consents to the petition. The appellant filed his objection to the adoption on May 15, 1985, alleging that he had withdrawn his consent and that his consent had been

obtained fraudulently. On October 8, 1985, the probate judge ordered that the children be placed in the custody of Social Services and ordered the agency to do an investigation of Cinda, the appellant, and the appellees.

Trial was held on April 29, 1986. The only evidence offered was the testimony of the appellant, Cinda, a character witness for the appellant, and the home study reports done by social services. On July 10, 1986, an order was entered *nunc pro tunc* for April 29, 1986, which found that it was in the best interest of the children to grant the petition for adoption.

The appellant first argues that the trial court erred in concluding that the appellant had failed significantly for one year to communicate with or support his children without justifiable cause as provided by Ark. Stat. Ann. § 56-207 (Supp. 1985). We agree.

It is well settled that statutory provisions involving the adoption of minors are strictly construed and applied. *Bemis* v. *Hare*, 19 Ark. App. 198, 718 S.W.2d 481 (1986); *Roberts* v. *Swim*, 268 Ark. 917, 597 S.W.2d 840 (Ark. App. 1980). An exception to the rule that the natural parents must consent to an adoption is found in Ark. Stat. Ann. § 56-207(a)(2) (Supp. 1985). That exception provides that if a child is in the custody of another and if the parent, for a period of one year, fails significantly without justifiable cause to communicate with the child or provide for care and support, then the consent of that parent is not required for an adoption. However, there is a heavy burden upon the party seeking to adopt a child without the consent of a natural parent to prove the failure to communicate or the failure to support by clear and convincing evidence. *Harper* v. *Caskin*, 265 Ark. 558, 580 S.W.2d 176 (1979); *Bemis, supra.* Because one should not be permitted to assert a right until the facts upon which it is predicated have accrued, the one year period, after which a parent may lose his right to consent to his child's adoption if he does not communicate with or support his child, must accrue before the adoption petition is filed. *Dixon* v. *Dixon*, 286 Ark. 128, 689 S.W.2d 556 (1985).

In the case at bar there is no evidence whatsoever that the appellant failed to communicate with or support his children prior to the filing of the petition. Cinda testified that the appellant

had always worked, except for short periods of time when he was laid off. The appellant testified that he had supported his children up to the time he left the hospital at the end of March, 1985. Cinda explained that after she left the appellant she kept the children with her for two weeks, and then, after hearing from a friend that the appellees were interested in adopting children, turned the children over to the appellees. Failure of communication and support was proven for four to six weeks at the most. We therefore hold that the consent of the appellant was necessary.

The appellant argues next that the evidence was insufficient to support the trial court's granting the petition to adopt. The appellant contends that it was proven that his consent was obtained by fraud, or, in the alternative, that his consent was effectively withdrawn. We agree.

Prior to Arkansas's enactment of the Revised Uniform Adoption Act, Ark. Stat. Ann. §§ 56-210 et seq. (Supp. 1985), a parent could revoke his consent to adoption before an interlocutory order was made. *Combs* v. *Edison*, 216 Ark. 270, 255 S.W.2d 25 (1949). After the entry of an interlocutory order, but before the final order was entered, consent could be withdrawn if the court found it to be in the best interest of the child. *Bradford* v. *Fitzgerald*, 252 Ark. 655, 480 S.W.2d 336 (1972), *Martin* v. *Ford*, 224 Ark. 993, 277 S.W.2d 842 (1955).

Under the provisions of the Revised Uniform Adoption Act, consent to adopt cannot be withdrawn after the entry of the final order. Prior to the entry of the adoption decree, consent can be withdrawn if it is found to be in the best interest of the child and the court orders the withdrawal of the consent. Ark. Stat. Ann. § 56-209 (Supp. 1985). However, the statute is silent as to whether consent can be withdrawn prior to the filing of the petition.

Relinquishment of parental rights may be withdrawn within ten days after the petition is signed or after the child is born, whichever is later. Ark. Stat. Ann. § 56-220 (Supp. 1985). We think under the facts and circumstances of this case, where the parent withdrew consent less than ten days after signing the consent and at least two weeks before the filing of the petition for adoption, the trial court erred in granting the petition to adopt. This is especially true in light of the fact that it is uncontroverted that the consent was obtained by fraud. Even in

the case of a final adoption decree, consent to adopt may be withdrawn upon a proper showing of fraud, duress or intimidation. *McCluskey* v. *Kerlin*, 278 Ark. 338, 645 S.W.2d 948 (1983); *Matter of Adoption of Dailey*, 20 Ark. App. 180, 726 S.W.2d 292 (1987). If a consent that was obtained by fraud can be withdrawn after entry of a final order, then it can certainly be withdrawn prior to the filing of the petition.

Because we have reversed the order of the probate court pursuant to the appellant's first two arguments, we do not find it necessary to address the last two issues raised by the appellant. Our opinion expresses no opinion with reference to the court's orders granting custody of the children to social services, but is limited to the consideration of the adoption decree.

Reversed.

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

Otha BOYD *v.* GENERAL INDUSTRIES and AETNA LIFE & CASUALTY

CA 87-10 733 S.W.2d 750

Court of Appeals of Arkansas
Division II
Opinion delivered July 29, 1987
[Rehearing denied September 9, 1987.]

James M. Ammel, for appellant.

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

JOHN E. JENNINGS, Judge. This is an appeal from a decision of the Workers' Compensation Commission denying benefits to the appellant, Otha Boyd. The sole issue on appeal is whether the Commission's decision is supported by substantial evidence. We hold that it is not so supported and reverse and remand this case for the Commission to determine the extent of disability.

Otha Boyd is a 47-year-old woman with a high school education. She has an I.Q. of approximately 70 and functions academically on a fifth grade level. She began working for General Industries as an assembly line worker in 1966 and worked there continuously for 13 years. In February, 1980, Boyd suffered an admittedly compensable back injury. Although it is undisputed that she has physically recovered from that relatively minor injury, her contention before the Commission was that she is now disabled by pain which is a symptom of a psychoneurosis and that her disability is causally related to the 1980 back injury. The Commission found that she was not disabled, and that if she were disabled, there was no causal relationship between the back injury and the disability.

In considering a claim the Commission is required to follow a liberal approach and draw all reasonable inferences favorable to the claimant. *Williams* v. *National Youth Corps.*, 269 Ark. 649, 600 S.W.2d 27 (Ark. App. 1980). In making a factual determination, the Commission should give the claimant the benefit of the doubt. *Brower Manufacturing Co.* v. *Willis*, 252 Ark. 755, 480 S.W.2d 950 (1972). But we do not make a *de novo* application of these rules on appeal. *Herman Wilson Lumber Co.*

v. *Hughes*, 245 Ark. 168, 431 S.W.2d 487 (1968).

On review, we must view the evidence in the light most favorable to the findings of the Commission and give the testimony its strongest probative force in favor of the action of the Commission. *McCollum* v. *Rogers*, 238 Ark. 499, 382 S.W.2d 892 (1964). Our standard of review on appeal is whether the decision of the Commission is supported by substantial evidence. *City of Fayetteville* v. *Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Phillips* v. *State*, 271 Ark. 96, 607 S.W.2d 664 (1980). We do not reverse a decision of the Commission unless we are convinced that fair minded persons with the same facts before them could not have arrived at the conclusion reached. *Silvicraft, Inc.* v. *Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983). These rules insulate the Commission from judicial review and properly so, as it is a specialist in this area and we are not. But a total insulation would obviously render our function in these cases meaningless.

The Commission correctly recognized that Boyd's problems are now essentially psychological. In 1981, both Dr. Kaplan, a neurosurgeon, and Dr. Seibel noted that she had a functional or emotional overlay in relation to the back pain. In 1983, Dr. McMurtry noted that there was an obvious psychogenic component to her pain experiences and recommended that she be given a Minnesota Multiphasic Personality Inventory (MMPI). This test was given by Dr. Stevens, a clinical psychologist, and showed "a classical conversion pattern for people with chronic pain." Stevens explained, "Such people utilize denial. . . and typically complain of weakness, fatigue, along with ongoing pain. They unconsciously tend to convert any stress or pressure into additional or amplified complaints." His diagnosis at that time was "psychological factors affecting physical condition" with "some hysterical conversion dynamics present." Dr. Bevilacqua, a psychiatrist, diagnosed Boyd as having "psychophysiologic musculoskeletal disorder with conversion, anxiety and depressive symptoms." Dr. Kaczenski, also a psychiatrist, diagnosed Boyd as suffering from "conversion disorder, psychogenic pain disorder." In a 1985 report Dr. Stevens said:

> When I first saw this lady in June, 1983, . . . she had a work injury that initially produced physical symptoms in keeping with the injury and the findings. The type of injury she had typically improves over time, though for some small percentage of patients, the associated pain continues and in some cases; even increases. This occurs when an interacting mind-body situation is set up at the unconscious level. . . . When this occurs, it has traditionally been referred to as a psychophysiological musculoskeletal reaction and under the newer nomenclature is now referred to as psychological factors affecting physical condition. . . . As time went on the emotional component. . . became the more significant disabling factor. This was recognized by Dr. Chakales, Dr. Seibel, Dr. McMurtry, Dr. Kaczenski, and Dr. Bevilacqua, as well as myself. The series of medical and psychological reports in the file are a consistent chain of reports, describing in somewhat different terms the same disorder. There is more commonality in these reports than differences. However, the semantics of the reports are important to identify.

The threshold issue is whether the effects of this kind of mental disorder or psychoneurosis, if causally related to an on-the-job injury, are compensable. In *Wilson & Co.* v. *Christman*, 244 Ark. 132, 141, 424 S.W.2d 863, 869 (1968), the supreme court approved the following statement from Larson:

> . . .[W]hen there has been a physical accident or trauma, and claimant's disability is increased or prolonged by traumatic neurosis, conversion hysteria or hysterical paralysis, it is now uniformly held that the full disability including the effects of the neurosis is compensable. Dozens of cases, involving almost every conceivable kind of neurotic, psychotic, depressive, or hysterical symptom or personality disorder have accepted this rule.

Clearly the disabling effects of this type of disorder are compensable if the requirement of a causal connection is met. Although arguments can be made that this type of mental disorder ought not to be compensable, *see, e.g.*, the discussion in *Deziel* v. *Difco Laboratories, Inc.*, 403 Mich. 1, 268 N.W.2d 1 (1978), neither we nor the Commission are free to disregard the

supreme court's holding in *Christman.*

Our next inquiry is whether there is substantial evidence to support the Commission's finding that Boyd is not disabled. "Disability" means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury. Ark. Stat. Ann. § 81-1302(e) (Repl. 1976). In 1983, Dr. Stevens expressed the opinion that she suffered a "current total disability." By 1985, it was Steven's opinion that Boyd was permanently and totally disabled. He said:

> [t]his type of emotional disorder is the single most refractive area to treatment. The individual resists any psychological interpretation and steadfastly maintains a physical cause. National statistics show that less than 5% of the individuals disabled for more than two years ever return to any form of productivity.

In 1981, Dr. Seibel noted that the prognosis was difficult and stated that it was unknown whether Boyd would ever be able to return to her previous job. Dr. Hutt, a clinical psychologist, said that her anxiety and depression would not independently preclude work but noted that her limitations regarding pain should be addressed by others. Dr. Bevilacqua said, "[S]he will not improve at all within the next twelve months, regardless of the type treatment she receives. In my opinion, her prognosis is very poor," and that her ability to work was "markedly impaired." It is undisputed that Boyd has not worked since the 1980 injury. She testified that she was not able to work because of the pain. The Commission's decision that Boyd is not disabled essentially rests on one sentence contained in Dr. Kaczenski's 1985 report: "I did not find evidence of a physical or mental disability." In the next sentence, however, Dr. Kaczenski states, "Mrs. Boyd does have a personality disorder, the features of which significantly impair her functioning in interpersonal, social, and occupational areas."

Whether Boyd is "medically" disabled or not, if she suffers from a disorder which "significantly impairs her functioning in occupational areas," she is disabled within the meaning of the law. This is the essence of legal disability. Medical opinions are admissible and frequently helpful in workers' compensation cases, but they are not conclusive. *Wilson & Co.* v. *Christman,*

supra. When Dr. Kaczenski's statement is read in the context of his entire report, it is clear that it does not constitute substantial evidence to support the Commission's conclusion that Boyd is not legally disabled.

The Commission's finding of no disability also rests, in part, on evidence that Boyd has never undergone surgery, she has not been hospitalized, and that "all objective tests have been negative." If by "objective tests" the Commission means physical tests, the Commission is correct, but the observation is irrelevant as Boyd admits there is no longer a physical problem. However, the MMPI test which Boyd underwent is an "objective" test and the results were not "negative" in the sense of normal. It is also irrelevant that she has not had surgery or been hospitalized. No doctor has recommended either course of treatment for this neurotic condition.

The next issue which we must reach is whether the Commission's finding that there was no causal relationship between the disability and the on-the-job injury is supported by substantial evidence. We hold that it is not. In reviewing the evidence on this issue, the Commission emphasized Dr. Kaczenski's testimony. Dr. Kaczenski, as we have said, diagnosed Boyd as having a conversion disorder. He said:

> There is a temporal relationship between the injury on February 14, 1980, and the subsequent symptoms; however, there is no causal relationship. Mrs. Boyd's symptoms are related to a psychological conflict or need. Her personality structure, not her injury, determines the character of the symptoms. This symptom response is not obligatory. It is an unconscious choice to handle life's stresses in this manner, and is likely a pattern that is accidently [sic] set-up in childhood. Again, the injury is an environmental stimulus, but not the cause of the symptoms.

Dr. Stevens, in a subsequent report said:

> [Dr. Kaczenski] in a very specific way indicates that her symptoms are a reaction to the injury and indicates that it is inaccurate to say that the injury caused this response. I would agree with him in the strict interpretation of the

> word cause. Rather, it is more appropriate to describe the injury as having precipitated, released, triggered or even aggravated a pre-existing, though asymptomatic, condition. In some ways it is similar to the individual with asymptomatic osteoarthritis, where the individual has no problems until a physical injury triggers the problems into a highly symptomatic condition. It is true that this lady had pre-existing personality characteristics that made her a higher risk for this happening. However, but for the job related injury, it is unlikely that these symptoms would have ever surfaced or become symptomatic. What I have just described is the essential characteristic of the psychophysiological disorder now called psychological factors affecting physical condition. There are always pre-existing personality characteristics that predispose the individual toward this condition, just as there are pre-existing personality characteristics for every emotional disorder that develops, anxiety, depression, or psychosis. Dr. Kaczenski chose to describe the situation as a psychogenic pain disorder and I would not disagree with this as an adequate descriptor. Notice both his diagnosis and my own involve pain that exceeds what might be expected on the basis of objective physical findings. It also involves a temporal relationship between an environmental stimulus and the initiation of pain (the job injury). For these reasons I perceive Dr. Kaczenski's reports to be in keeping with the other reports in the file and indicative of the work related injury being the precipitating factor in her present emotional impairment and ongoing chronic pain. . . .
>
> [T]he absence of symptoms prior to the injury and the presence of symptoms immediately following the injury and continuing to the present time reflect the initiating or triggering responsibility of the workrelated injury.

The Commission took the position that Dr. Kaczenski's opinion conflicted with that of Dr. Stevens and chose to believe Dr. Kaczenski. We do not view the two reports as inconsistent. In *Murray* v. *Industrial Commission*, 87 Ariz. 190, 349 P.2d 627 (1960), the Arizona Supreme Court was faced with a similar problem. The court said:

> In the opinion of the doctors this injury did not "cause" the hysteria from a medical point of view. However, what constitutes proximate cause is a legal question primarily, dependent for its answer on the facts of the particular case. In the field of medicine, opinions of doctors qualified by training and experience as to causation are competent, and in many cases controlling and binding upon the trier of facts; however, when the medical facts on which such opinions are based are clearly shown, and the medical opinion as to causation conflicts with the inescapable legal conclusion, the former must give way to the latter. The difference in the medical and legal concept of cause results from the obvious differences in the basic problems and exigencies of the two professions in relation to causation. By reason of his training, the doctor is thinking in terms of a single, precise cause for a particular condition. The law, however, endeavors to reach an inference of reasonable medical certainty, from a given event or sequence of events, and recognizes more than one cause for a particular injurious result. In the law of torts, it is said that the tortfeasor is not entitled to a perfect specimen upon which to inflict injury. Likewise, in the field of Workmen's Compensation, the employer takes his employee as he is. In legal contemplation, if an injury, operating on an existing bodily condition or predisposition, produces a further injurious result, that result is caused by the injury.

87 Ariz. at 199, 349 P.2d at 633. *See also Thum* v. *MRO Services Co., Inc.*, 430 So. 2d 1298 (La. Ct. App. 1983). Again, we find no inconsistency between Dr. Kaczenski's report and Dr. Stevens's report. The "temporal" relationship between Boyd's back injury and her subsequent symptoms, described by Kaczenski, is fully consistent with the "triggering" mechanism described by Stevens. As Kaczenski said, the injury was an environmental stimulus of the symptoms. In cases of this type, where conversion disorder follows a physical, on-the-job injury, the causal requirement is met if it is shown that the symptoms of the neurosis were triggered or precipitated by the physical injury. We discussed this principle in a somewhat different context in *Conway Convalescent Center* v. *Murphree*, 266 Ark. 985, 987, 588 S.W.2d 462,

463 (1979), where we approved this statement from Larson:

> Pre-existing disease or infirmity of the employee does not disqualify a claim under the 'arising out of employment' requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought. This is sometimes expressed by saying that the employer takes the employee as he finds him.

We also said:

> The pre-existing condition may be any kind of weakness. . . When an industrial injury *precipitates* a disability from a latent prior condition, such as heart disease, cancer, back disease and the like, the entire disability is compensable. (Emphasis added and citations omitted.)

266 Ark. at 987-88, 588 S.W.2d at 463-64.

On the facts of the case at bar the Commission's determination that there was no causal relationship between Boyd's disability and the admittedly compensable physical injury is not supported by substantial evidence.

The Commission also based its decision on its stated concerns over Boyd's credibility. Boyd argues that because her testimony was given before the administrative law judge and that the administrative law judge made no such finding, the Commission was not entitled to do so from the cold record. We reject this argument. We have said many times that the credibility of witnesses is for the Commission to decide.

We have also said, however, that the Commission may not refuse compensation to a claimant simply because he is untruthful. *Guidry* v. *J&R Eads Const. Co.*, 11 Ark. App. 219, 669 S.W.2d 483 (1984). In the case at bar, Boyd's credibility is only relevant on the issue of whether she is malingering, and the Commission's decision carries with it an implicit finding that she is malingering. As the supreme court said in *Wilson & Co.* v. *Christman*:

> It goes without saying, and without the necessity for citation of cases, that true malingering is not a form of disability of any sort. It is a form of ability rather than

> disability. It is a form of ability to feign injury or disability that does not exist. Had appellee in this case been malingering his disability, the Commission might well have determined that he had none.

244 Ark. at 141, 424 S.W.2d at 868-69.

Here, there is no substantial evidence to support a finding of malingering. Dr. Hutt, upon whose testimony the Commission particularly relied, said that Boyd's perceptions of pain are "very real to her," and that there was no evidence of malingering or intentional distortion of perceived severity of pain. Dr. Bevilacqua stated that Boyd appeared "very sincere and reliable" and that "she has absolutely no insight into her obvious emotional conflicts." Dr. Kaczenski said Boyd was not malingering. None of the many doctors who have seen Boyd have so much as suggested that she might be malingering. Although compensation claims predicated upon mental disorders must be carefully scrutinized in order to protect the employer against unwarranted claims, the danger of denying recovery to a deserving claimant must be guarded against with equal enthusiasm. *Royer* v. *Cantrelle*, 267 So. 2d 601 (La. Ct. App. 3rd (1972), *writ denied*, 263 La. 626, 268 So. 2d 680 (1972).

To summarize, the evidence in this case clearly establishes that:

1. Boyd suffered a compensable but relatively minor back injury in 1980, which has now completely healed.
2. At the time of the injury she was neurotic, but without symptoms.
3. She now suffers pain which causes her to be unable to work.
4. This pain is a symptom of her neurosis.
5. She is not malingering.
6. Her injury did not cause the neurosis - the neurosis was a pre-existing condition, and
7. Although the on-the-job injury did not "cause" her present pain in a medical sense, it was the precipitating event which brought forth this symptom, and was

therefore a legal cause of her resulting disability.

For the foregoing reasons, this case is reversed and remanded to the Commission for a determination of the extent of Boyd's disability.

Reversed and remanded.

CRACRAFT and COULSON, JJ., agree.

David STEELE, d/b/a S & S CONCRETE CONSTRUCTION *v.* Curtis NICHOLSON

CA 87-150 732 S.W.2d 876

Court of Appeals of Arkansas
En Banc
Opinion delivered July 29, 1987

PER CURIAM. Appellee's pro se motion to file a belated brief and for brief time is granted.

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

MELVIN MAYFIELD, Judge, dissenting. I want to express my dissent from the decision by the majority of this court allowing a late brief to be filed for the appellee in this case.

The brief was due to be filed on July 5, 1987. On June 30, 1987, a motion was filed by an attorney asking that this court "relieve him as attorney of record for the reason that the appellee, Curtis Nicholson, has failed and refused to pay his fees in the above entitled cause."

However, on July 10, 1987, the appellee filed a motion, which he signed, stating that his brief was due on July 5, 1987, admitting that he had "failed to pay an attorney to represent my interest," claiming to now have the money and being "willing to employ an attorney," and requesting that this court grant him additional time in which to file his brief.

Just last month, the Arkansas Supreme Court said that a party who had failed to "keep up" with her case could not be heard to complain when a judgment was taken against her at a trial she did not attend. *See Diebold* v. *Myers General Agency, Inc.*, 292 Ark. 456, 731 S.W.2d 183 (1987). In the case before us, the appellee's attorney has said the appellee "has failed and refused" to pay his fee, and the appellee himself admits this is true. Based upon the *Diebold* v. *Myers General Agency, Inc.* case, I would deny the appellee's request to extend the time limit so he can file his brief late.

Under the Model Rules of Professional Conduct, an attorney *may* "in some circumstances" withdraw from representation of a client "if it can be accomplished without material adverse effect on the client's interests." (See ARCP Rule 64 for requirements of a motion to withdraw.) One of the circumstances under which an attorney *may* withdraw is where the client "refuses to abide by the terms" of an "agreement concerning fees." *See* "Comment" following Rule 1.16, 287 Ark. at 548. I do not know whether appellee's attorney was justified in seeking permission to withdraw in this case, but if he was, it seems clear to me that the appellee does not have a sufficient excuse to allow him to file a brief late. At least, his motion gives no information from which I can find such an excuse.

Therefore, I dissent from the granting of appellee's motion to file a belated brief. I am authorized to say that Chief Judge Corbin joins in this dissent.

Terry SADLER *v.* Dewey STILES, Director of Labor, and QUALITY COMPLETIONS, INC.

E 86-155 735 S.W.2d 708

Court of Appeals of Arkansas
Division I
Opinion delivered September 16, 1987

Western Arkansas Legal Services, for appellant.

Allan Pruitt, for appellees.

JAMES R. COOPER, Judge. In this unemployment compensation case, the appellant was awarded unemployment benefits by the agency. On appeal, the Appeals Tribunal reversed the agency and found that the appellant was discharged for misconduct in connection with his work. The Board of Review adopted and affirmed the findings and conclusions of the Appeals Tribunal. On appeal to this Court, the appellant argues that the Board's decision is not supported by substantial evidence. We agree with the appellant's argument and reverse.

Whether the findings of the Board of Review are supported by substantial evidence is a question of law; this Court will reverse when the Board's findings are not supported by substantial evidence. *Maybelline Co.* v. *Stiles*, 10 Ark. App. 169, 661 S.W.2d 462 (1983). Whether an employee's actions consti-

tute misconduct in connection with work sufficient to deny unemployment benefits is a question of fact for the Board. *Olson* v. *Everett*, 8 Ark. App. 230, 650 S.W.2d 247 (1983). This Court will determine whether the Board could reasonably reach its results upon the evidence before it, but will not replace its judgment for that of the Board even though this Court might have reached a different conclusion based upon the same evidence the Board considered. *Harris* v. *Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978).

In order for an employee's action to constitute misconduct so as to disqualify him, the action must be a deliberate violation of the employer's rules, an act of wanton or willful disregard of the standard of behavior which the employer has a right to expect of his employees. *Exson* v. *Everett*, 9 Ark. App. 177, 656 S.W.2d 711 (1983). In *Willis Johnson Co.* v. *Daniels*, 269 Ark. 795, 601 S.W.2d 890 (Ark. App. 1980), this Court stated that:

> Mere inefficiency, unsatisfactory conduct, failure of good performance as the result of inability or incapacity, inadvertencies, ordinary negligence or good faith errors in judgment or discretion are not considered misconduct for unemployment insurance purposes unless it is of such a degree or recurrence as to manifest culpability, wrongful intent, evil design, or an intentional or substantial disregard of an employer's interests or an employee's duties and obligations. [Citation omitted.]

The record shows that the appellant had been employed by the appellee for thirteen months before he was dismissed. The appellant testified that when he got off of work on a Friday evening his supervisor told him that he would let the appellant know Sunday whether he had to work on Monday. On Saturday morning the appellant left to go camping. He called a co-worker Sunday evening and was told that his rig was down and that he did not have to work on Monday. The appellant then decided to remain on the camping trip until Monday morning.

The appellant also testified that he rode to work every day with the co-worker he contacted and that the supervisor had left messages with this co-worker when he could not reach the appellant. The appellant stated that he arrived at home on

Monday between ten and eleven in the morning. When he contacted his supervisor Monday evening he was told he was fired.

Under the facts of this case we do not believe that the appellant's actions were unreasonable. There is no evidence in the record that the appellant had ever received any warnings from his employer, *see Exson, supra*, or that the appellant had any recurring or excessive absences from work. *See, Coker* v. *Daniels*, 267 Ark. 1000, 593 S.W.2d 59 (1980), and *Weavers* v. *Daniels*, 1 Ark. App. 55, 613 S.W.2d 109 (1981).

The employer did not appear at the hearing. The only evidence in the record to refute the appellant's testimony is a statement taken from the appellant's supervisor over the phone by an employee of the Employment Security Division. In that conversation, the supervisor stated that he could not get the appellant to answer the phone or come to the door. He believed that the appellant was home because the appellant's only car was in the driveway. He further stated that several members of the crew had threatened to quit and one did indeed quit.

The telephone conversation between the employer and the agency employee was hearsay, and on these facts, that evidence does not constitute substantial evidence to support the Board's decision, *Young* v. *Everett*, 6 Ark. App. 295, 641 S.W.2d 39 (1982), though hearsay evidence may constitute substantial evidence.

Since the reported telephone conversation does not rise to the dignity of substantial evidence, and since that item of evidence was the only evidence upon which the Board could have based its decision, we reverse and hold that the claimant is not disqualified from receiving benefits based on the Board's finding of misconduct in connection with the work. The case is reversed and remanded to the Board for such further proceedings as may be necessary to determine the appellant's eligibility for benefits and the amount and duration of those benefits.

Reversed and remanded.

CORBIN, C.J., and COULSON, J., agree.

Christopher GOBER *v.* STATE of Arkansas

CA CR 87-3 736 S.W.2d 18

Court of Appeals of Arkansas
Division I
Opinion delivered September 16, 1987

Gibson & Deen, by: *Thomas D. Deen*, for appellant.

Steve Clark, Att'y Gen., by: *Mary Beth Sudduth* and *J. Brent Standridge*, Asst. Att'ys Gen., for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a conviction of resisting arrest and refusing to submit to a breathalyzer test. For resisting arrest, appellant was fined $500.00, and for refusing to submit to a breathalyzer test, his driver's license was suspended for six months.

The evidence disclosed that on the night of January 18, 1986, appellant was driving on Highway 81 through Monticello, Arkansas, when Officer Sam Norris observed that the orange Volkswagen appellant was driving had no license tags on it. After Norris began to follow the Volkswagen, appellant pulled into a gas station and turned back onto the highway traveling in the opposite direction. Norris thought appellant cut too close in front of an oncoming car so he turned on his blue lights and stopped appellant. According to Norris, appellant got out of his car cursing and asking why he had been stopped. Appellant said he had just purchased the Volkswagen in Little Rock and had not had time to get it licensed. He also claimed he was being harassed by the Monticello police. Because appellant was "very irate and carrying on" and because Norris could detect an odor of alcohol on appellant, Norris asked him about drinking. He testified appellant said he had three or four beers and that there was a six pack in the car. However, appellant refused to let Norris search the car.

Norris then placed appellant under arrest for driving while intoxicated. Appellant continued cursing and refused to cooperate so Norris called for back-up assistance. Sheriff David Taylor Hyatt, Jr., Special Deputy Walter Harris, and Captain Chuck Cater responded. Appellant was handcuffed and taken to the station where he refused to take the breathalyzer test. He was then placed in a cell. Approximately one hour later, his father arrived and encouraged him to take the test; however, because of the length of time which had elapsed, the officers would not allow appellant to be tested. No alcohol or drugs were discovered in a subsequent search of appellant's car.

Appellant was charged with DWI, resisting arrest, and refusing to submit to a breathalyzer test. At the close of all the evidence, the trial court granted a defense motion to dismiss the charge of DWI. The jury found appellant guilty of the other two charges.

Appellant's first contention on appeal is that the trial court erred in denying his motion for a directed verdict on the charge of resisting arrest. He argues that the applicable statute does not encompass passive resistance and this was all the state proved.

Ark. Stat. Ann. § 41-2803 (Repl. 1977) provides:

> (1) A person commits the offense of resisting arrest if he knowingly resists a person known by him to be a law enforcement officer effecting an arrest.
>
> (2) "Resists," as used in this section, means using or threatening to use physical force or any other means that creates a substantial risk of physical injury to any person.

The commentary to this section explains that "Resistance must take the form of physical opposition to the arrest. *Completely* passive refusal to submit to an officer attempting to effect an arrest does not constitute resistance." (Emphasis in the original.)

As described by the police officers present at the scene, appellant simply backed up against his car with his fists clenched behind him so handcuffs could not be placed on him. Sheriff Hyatt testified that he and Norris physically laid appellant down on the ground and handcuffed him but appellant did not fight, kick, bite or scratch. The sheriff said he knew appellant and his family and, while appellant was extremely agitated and upset and refused to calm down, he did not physically resist when they laid him down to handcuff him. Sheriff Hyatt said that appellant's conduct was a "passive-type resistance." Officer Norris described appellant's conduct as uncooperative. Thus, appellant argues, his conduct does not constitute resisting arrest as contemplated by the statute.

As further evidence that passive resistance should not be considered "resisting arrest" under section 41-2803, appellant points out that Act 261 of 1987 amended the section by adding the following subsection:

> (b) Refusal to submit to arrest.
>
> (1) A person commits the offense of refusal to submit to arrest if he knowingly refuses to submit to arrest by a person known to him to be a law enforcement officer effecting an arrest.

> (2) 'Refusal' under this section means active or passive refusal.

We agree that this is persuasive evidence that at the time of appellant's arrest the statute in effect did not prohibit passively resisting arrest.

Penal statutes are to be strictly construed in favor of the accused. *Clayborn* v. *State*, 278 Ark. 533, 647 S.W.2d 433 (1983); *Breakfield* v. *State*, 263 Ark. 398, 566 S.W.2d 729 (1978). Since the state failed to show that appellant did anything more than refuse to cooperate with the arresting officers and to proclaim his innocence of any conduct for which he could be arrested, albeit with offensive language, the conviction for resisting arrest is reversed and dismissed.

Appellant also argues that the trial court erred in not granting his motion for directed verdict on the charge of refusing to submit to a breath test. Appellant admits he refused to take the test but contends that under Ark. Stat. Ann. § 75-1045(a)(1) and (3), he was not deemed to have given consent under the law to the test, so his refusal was not a violation of that statute. Ark. Stat. Ann. § 75-1045(a) (Supp. 1985) provides in pertinent part:

> (a) Any person who operates a motor vehicle in this State shall be deemed to have given consent, . . . to a chemical test or tests of his or her blood, breath or urine for the purpose of determining the alcohol or controlled substance content of his or her blood if:
>
> (1) the driver is arrested for any offense arising out of acts alleged to have been committed while the person was driving while intoxicated or driving while there was 0.10% or more of alcohol in the person's blood, or
>
> (2) the driver is involved in a fatal accident; or
>
> (3) the driver is stopped by a law enforcement officer who has reasonable cause to believe that the driver is intoxicated or that the driver has 0.10% or more of alcohol in the person's blood.

Since appellant was not involved in an accident involving a fatality, subsection (2) is clearly inapplicable. Subsection (3) involves cases in which a police officer has reason to believe a

driver is intoxicated and stops a vehicle for that reason. However, the record clearly shows that Officer Norris did not have reasonable cause to believe appellant was intoxicated before he was stopped, and the officer admitted that he did not stop appellant for a suspected DWI. This leaves subsection (1)—where a driver is arrested for any offense arising out of acts alleged to have been committed while the person was driving while intoxicated. Even if the appellant had been arrested for failure to have a license plate on his car or because he pulled out too close in front of another vehicle, the trial court held there was not enough evidence to find appellant guilty of driving while intoxicated and there is no appeal from that finding. Therefore, the record shows the appellant was not arrested for any offense arising out of acts committed while driving while intoxicated.

So, under the law and evidence in this case, we must agree with appellant's argument that he could not be convicted for refusing to take the breath test. In *Roberts* v. *State*, 287 Ark. 451, 701 S.W.2d 112 (1985), officers found Roberts asleep at 1:30 a.m. behind the wheel of a car which was lodged against a building in a parking lot. The car and the building were damaged, the key was in the "on" position, the shift lever was in drive, but the engine was not running. The appellant was awakened but had to be wrestled from behind the steering wheel. He smelled of intoxicants, was unsteady on his feet, and his speech was slurred. The court held this was sufficient evidence to sustain a conviction of driving while intoxicated but reversed a conviction for violation of the implied consent law because none of the subsections of Ark. Stat. Ann. § 75-1045 applied. The court said:

> The appellant was not arrested for any act committed while driving while intoxicated. Nor was he involved in a fatal accident or "stopped" by an officer who had reasonable cause to believe him to have been intoxicated.

287 Ark. at 454.

We also reverse and dismiss appellant's conviction for refusing to take a breathalyzer test.

Reversed and dismissed as to both charges.

CRACRAFT and JENNINGS, JJ., agree.

Dexter Gene MARTIN *v.* STATE of Arkansas

CA CR 87-34 736 S.W.2d 287

Court of Appeals of Arkansas
Division I
Opinion delivered September 16, 1987
[Rehearing denied October 21, 1987.]

Dale Lipsmeyer, for appellant.

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

BETH GLADDEN COULSON, Judge. This appeal is from a conviction for battery in the first degree. The appellant, Dexter Gene Martin, argues that the trial court erred in exempting the State's expert witnesses from the requirement that all witnesses be excluded from the courtroom during appellant's trial once counsel for the appellant had invoked the witness-exclusion rule. The appellant also argues that the court erred in imposing a 12 year sentence of imprisonment and a $5,000.00 fine when the jury verdict form could be read as a recommended sentence of either 12 years imprisonment "or" a $5,000.00 fine. We find no error and affirm.

At trial, after appellant's counsel had requested the rule, the trial judge required all witnesses to leave the courtroom until called to testify. He then stated, "Ordinarily, that would not apply to expert witnesses, if you have any doctors." The State indicated that two of its witnesses were experts. No other exchange occurred between the court and counsel on this issue until the State's first expert witness was called to testify. At that time, counsel for the appellant inquired as to whether the rule would permit the exclusion of one expert from the courtroom while another was testifying. Counsel for the State argued that all expert witnesses could remain in the courtroom for the duration of the trial, and the court concurred. Thereafter, counsel for the appellant neither objected to the presence of these witnesses nor attempted to have their testimony excluded.

Rule 615 of the Arkansas Rules of Evidence provides that upon the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. The standard of discretion given to the trial judge by this part of the rule is that of no discretion. *Blaylock* v. *Strecker*, 291 Ark. 340, 724 S.W.2d 470 (1987). Use of the word "shall" makes exclusion of the witnesses mandatory. If a party requests the rule, it must be granted. *Blaylock, supra; Arkansas Power &*

Light Co. v. *Melkovitz*, 11 Ark. App. 90, 668 S.W.2d 37 (1984).

The remainder of the rule exempts certain persons from the rule's operation. It provides, in part: "This rule does not authorize exclusion of . . . (3) a person whose presence is shown by a party to be essential to the presentation of his cause." When an exception to the rule is sought under subsection (3), it is likely to be based upon Rule 703 of the Arkansas Rules of Evidence. Rule 703 implies that the particular expert witness will be present in court to hear the evidence. *Melkovitz, supra.* The exception provided by subsection (3) is not automatic, however, and depends upon the extent to which the expert will base his opinion upon testimony presented in court. When a party seeks to exempt an expert witness under subsection (3) of Rule 615, the decision is within the discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion.

The appellant places great weight upon the trial court's action in exempting the State's expert witnesses under subsection (3) prior to a showing by the State that the experts were going to base their opinions on testimony heard at trial rather than their own independent investigations—thereby making their courtroom presence essential to the State's case. Violation of the witness-exclusion rule, however, is a matter which goes primarily to witness credibility—not competency. The appellant was free to challenge the credibility of the experts' testimony on the basis that they had heard testimony by prior witnesses. From our reading of the record we are not convinced that the appellant was prejudiced by the trial court's action. Absent any prejudice to the appellant, we cannot say that the trial judge abused his discretion. *Cooley* v. *State*, 4 Ark. App. 238, 629 S.W.2d 311 (1982).

The appellant's second argument is that the court erred in imposing a 12 year sentence of imprisonment and a $5,000.00 fine when the jury verdict form was completed in a manner indicating a sentence of either 12 years imprisonment "or" a fine of $5,000.00. The jury verdict form, in accordance with the judge's instructions, read:

> We, the Jury, find DEXTER GENE MARTIN guilty of battery in the first degree and fix his sentence at:
>
> (A) A term of _____
> (not less than 5 years nor more than 20 years)

in the Arkansas Department of Correction; OR,

(B) A fine of _____ dollars; OR,
(not exceeding $15,000.00)

(C) Both a term of _____
(not less than 5 years nor more than 20 years)

in the Arkansas Department of Correction and a fine of

_____ dollars.
(not exceeding $15,000.00)

The jury inserted "12 YRS" on line (A) and "$5,000.00" on line (B). In open court, the trial judge read the verdict as 12 years "and" a fine of $5,000.00. The judge then inquired of the jury foreman whether the verdict was unanimous and received an affirmative response. Counsel for the appellant then polled the jury and each member of the jury panel indicated that their verdict had been in accordance with the verdict as read by the trial judge. Appellant's counsel was not made aware of the discrepancy between the completed jury verdict form and the proceedings in open court until a hearing on the day following the trial. At that hearing, the judge stated that after being handed the jury verdict form he had noted that it was possibly an improper verdict but then failed to bring it to the attorneys' attention. The judge eventually ruled that pronouncement of the verdict in open court using the conjunctive "and" followed by a polling of the jury cured any defect in the written verdict form.

In the past, in verdict forms, the blank space for the prison term was frequently followed by the phrase ". . . and/or a fine of ___ dollars." This use of "and/or" was considered so misleading that in some cases it constituted grounds for reversal. *Harris* v. *State*, 262 Ark. 680, 561 S.W.2d 69 (1978). Elaborating on a better practice, our supreme court has set forth a preferable verdict form similar to the one at issue in this case. *Shelton* v. *State*, 261 Ark. 816, 552 S.W.2d 216 (1977). Unfortunately, as is evidenced by this case, use of the preferred form has not completely eliminated the confusion.

[redacted] We find, however, that any error which might have occurred was harmless because the ambiguity between the written verdict form and the verdict announced in open court was cured both by the acknowledgment of the jury foreman that the

verdict as read was the unanimous verdict of the jury and by the subsequent jury poll by counsel for the appellant. *Hoke* v. *State*, 270 Ark. 134, 603 S.W.2d 412 (1980). We note also that the trial judge had fully instructed the jury as to the various sentencing options—instructions which did not include the option of recommending an "either/or" sentence. *Rowland* v. *State*, 263 Ark. 77, 562 S.W.2d 590 (1978).

Affirmed.

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

Angelete GAUTREAUX *v.* STATE of Arkansas

CA CR 86-222 736 S.W.2d 23

Court of Appeals of Arkansas
Division II
Opinion delivered September 23, 1987
[Rehearing denied October 21, 1987.]

Hurst Law Office, by: *Q. Byrum Hurst, Jr.*, for appellant.

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

JAMES R. COOPER, Judge. The appellant pled guilty to a charge of theft on July 27, 1981 and the trial court sentenced her to five years in prison. However, execution of the sentence was stayed and the appellant was placed on probation for five years. On May 23, 1985, a petition was filed alleging that the appellant had violated conditions of her probation. The appellant was arrested on July 14, 1985, and after a hearing her probation was revoked on August 26, 1986. The court sentenced her to six months in the Arkansas Department of Correction. On appeal the appellant argues that the trial court was without jurisdiction to revoke her probation because the term of her probation had lapsed. We find that the appellant's argument has merit and we reverse and dismiss.

The State, citing Ark. Stat. Ann. § 41-1208(5) (Repl. 1977), contends that the trial court could revoke the appellant's probation because the appellant was arrested for violations of the conditions of her probation prior to the expiration of the probationary time period. The State's contention is correct where a defendant has pled guilty and imposition of sentence was suspended, or where the defendant is simply placed on probation. However, that is not the situation in the case at bar. Here the trial court imposed the sentence and suspended execution of the sentence. Under our criminal code, a sentence is imposed when the court pronounces a fixed term of imprisonment as opposed to simply specifying a definite period of probation. *McGee* v. *State*, 271 Ark. 611, 609 S.W.2d 73 (1980); *Jefferson* v. *State*, 270 Ark. 909, 606 S.W.2d 592 (1980). According to Ark. Stat. Ann. § 43-2332 (Supp. 1985), if sentence is imposed, then the probationer can only be required to serve the remainder of the time imposed. *Easley* v. *State*, 274 Ark. 215, 623 S.W.2d 189 (1981). Therefore, since the revocation did not occur until after the completion of the appellant's imposed sentence, the trial court could not sentence the appellant to serve additional time in prison.

Because we have reversed and dismissed this case based on the appellant's first argument, it is unnecessary for us to consider the other issues raised by the appellant on appeal.

Reversed and dismissed.

CORBIN, C.J., and COULSON, J., agree.

PREWAY, INC., et al. *v.* Paulette DAVIS

CA 87-101 736 S.W.2d 21

Court of Appeals of Arkansas
Division II
Opinion delivered September 23, 1987

Michael E. Ryburn, for appellant.

Joe Holifield, for appellee.

BETH GLADDEN COULSON, Judge. In this appeal from a decision of the Workers' Compensation Commission, appellant raises two points for reversal. We find neither persuasive, and we accordingly affirm the Commission's order granting appellee benefits.

In July, 1984, while employed by appellant Preway, Inc., appellee, Paulette Davis, suffered a compensable back injury. She underwent surgery and, in August, 1985, was rated at fifteen percent permanent partial disability. Appellee was advised to return for medical treatment as needed. According to the record, she sought permission from appellant Travelers Insurance Company to see a physician in her home town of Paragould, Arkansas, for treatment of back pain and was advised instead to return to her treating physician in Memphis, Tennessee. Although the office of the doctor in Memphis maintained a satellite clinic in Jonesboro, Arkansas, the earliest appointment with the group that appellee could obtain was at the Memphis office.

Appellee stated that she left her house shortly before 8:00 a.m. on October 11, 1985, for her 1:00 p.m. appointment with the

physician in Memphis. She intended to drop off her son at his grandmother's house, which was on the road to Memphis. At 7:50 a.m., a tie rod on her car broke, causing the vehicle to wreck. Appellee suffered a broken ankle. At a hearing before an administrative law judge, appellant insurance company contended that appellee was not on a direct route to the doctor's office at the time of the accident and that the injury to her ankle was not within the scope and course of employment and constituted an independent intervening cause. Appellee argued that her injury arose out of the scope and course of her employment. The law judge awarded benefits, holding that the injury to the ankle was compensable. The award was affirmed by the Workers' Compensation Commission. From that decision, this appeal arises.

In their first point for reversal, appellants argue that the Commission erred in finding that appellee was in the course and scope of her employment when she was injured in an automobile accident while en route to a doctor for treatment of a prior compensable injury. The terms in which appellants have framed their argument do not quite fit the circumstances at hand. There are no Arkansas cases directly on point regarding this issue. It is noted in 1 Larson, *Workmen's Compensation Law*, § 13.13 (1985), that

> when an employee suffers additional injuries because of an accident in the course of a journey to a doctor's office occasioned by a compensable injury, the additional injuries are generally held compensable, although there is some *contra* authority. . . . But . . . a fall or automobile accident during a trip to a doctor's office has usually been considered sufficiently causally related to the employment by the mere fact that a work-connected injury was the cause of the journey, without any necessity for showing that the first injury in some way contributed to the fall or accident.

It appears that the majority of jurisdictions award compensation in situations similar to the present case.

Appellants rely, in part, on *Guidry* v. *J & R Eads Construction Co.*, 11 Ark. App. 219, 669 S.W.2d 483 (1984), for the proposition that appellee's second injury resulted from an independent intervening cause—the automobile accident. *Guidry*

involved a claimant who sustained injuries in a collision that occurred about six months after the date of his compensable injury. The distinction, as pointed out by appellee, between that case and hers is clear. In *Guidry*, no evidence was presented to indicate that the automobile accident that occurred was in any way connected to the claimant's employment or to his seeking medical treatment for his prior injury. In the instant case, appellee was acting at the explicit direction of appellant insurance company in obtaining medical treatment for the compensable injury.

In his treatise, Larson has developed the concept of "quasi-course of employment" as an analytical tool in dealing with cases such as the present one:

> By this expression [quasi-course of employment] is meant activities undertaken by the employee following upon his injury which although they take place outside the time and space limits of time employment, and would not be considered employment activities for the usual purposes, are nevertheless related to the employment in the sense that they are necessary or reasonable activities that would not have been undertaken but for the compensable injury. Quasi-course activities in this sense would include, for example, making a trip to the doctor's office. . .
>
> When the injury following the initial compensable injury arises out of a quasi-course activity, such as a trip to the doctor's office, the chain of causation should not be deemed broken by mere negligence in the performance of that activity, but only by intentional conduct which may be regarded as expressly or impliedly prohibited by the employer.

1 Larson, § 13.11(d). Under these principles, appellee could be said to have been acting reasonably. She was engaged in activities rendered necessary by her compensable injury. Appellant's attempt to suggest that appellee was acting negligently in driving a car with a faulty tie rod, an assertion that under Larson's rule is immaterial. We cannot say that appellee was in violation of an express or implied prohibition of her employer when she made it her purpose to deliver her child at his grandmother's house on the way to Memphis. Such an arrangement is hardly to be considered

unreasonable.

Appellants erroneously attempt to invoke the going and coming rule. That mode of analysis is irrelevant for the purposes of this case, where appellee was not traveling to and from her place of employment, but instead to a doctor's office to be treated for a prior compensable injury. We believe that the Commission did not err in finding that appellee was injured within the scope and course of her employment.

In their second argument, appellants contend that the Commission erred in holding them responsible for any injuries to appellee's ankle following her fall in a bathtub after the automobile accident. The operative reports of the surgeon, however, indicate that the first surgery was required as a result of the car wreck, and the second surgery, performed after the bathtub fall, was needed to remove plates which had been inserted in the earlier operation. This question was simply one of fact for the Commission to decide. We cannot say, on the basis of the record, that the Commission decided wrongly.

Affirmed.

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

Clifton HENSON *v.* CLUB PRODUCTS and HOME INSURANCE COMPANY

CA 87-137 736 S.W.2d 290

Court of Appeals of Arkansas
Division II
Opinion delivered September 30, 1987

James F. Swindoll, P.A., for appellant.

Lovett Law Firm, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes from the Arkansas Workers' Compensation Commission. Appellant, Clifton Henson, appeals the Commission's finding that he is not entitled to workers' compensation benefits for psychiatric treatment for psychological disorders that appellant claims constituted a pre-existing condition which was aggravated by his compensable burn injury. We affirm.

On June 18, 1982, appellant, Clifton Henson, was in an accident in which he was burned and disfigured while acting in the course and scope of his employment with appellee, Club Products. In February of 1984, appellant was hospitalized for almost two months for severe psychiatric problems.

Appellant's medical and psychiatric history indicates he was admitted to Arkansas State Hospital twice in 1981 and both

times was discharged against medical advice without a formal diagnosis. The medical records indicate appellant was depressed, confused, and believed his life was threatened. The provisional diagnosis for appellant indicated paranoia and alcohol abuse. Appellant was also admitted to Baptist Medical Center psychiatric unit in 1981 for alcohol abuse, emotional and family problems. Appellant was hospitalized in 1982 for his burn injury and also received psychiatric treatment at this time. In 1983 appellant was admitted to Baptist Medical Center for possible abdominal ascites secondary to alcoholic cirrhosis with the diagnosis stating there was abnormal liver function probably secondary to alcohol, no cirrhosis. In 1984, appellant was admitted to the BridgeWay with a diagnosis of major depressive episode and major depressive episode with psychotic features. The BridgeWay's master treatment plan for appellant listed alcohol abuse as one of appellant's problems and observation for DT's as one of his needs. While still being treated at the BridgeWay in 1984, appellant was sent to Riverview Hospital for evaluation of chest pains. The diagnosis revealed alcohol withdrawal, alcohol jealousy, bronchitis, and paranoia.

By an opinion dated July 29, 1986, the Administrative Law Judge found that appellant's medical treatment for the burn injury was compensable, but the psychiatric treatment was not. The full Commission affirmed the Administrative Law Judge in a two to one decision on January 21, 1987, finding that appellant's psychological disorders were not causally connected to his compensable burn injury. The Commission concluded that appellant had been experiencing a progressively deteriorating psychological condition since 1981, prior to his burn injury. The Commission noted that appellant's condition is complicated by his deafness, family problems, alcoholism and substance abuse. The Commission stated that it was apparent that alcoholism was a continuing factor in claimant's progressing emotional disorders. The Commission considered conflicting medical testimony regarding whether appellant's mental disorders were causally connected to his burn injury and held there was no causal connection between the appellant's psychological disorders and his compensable burn injury.

For reversal, appellant makes the following argument with two sub-issues: (I) Claimant suffered an aggravation of a pre-

existing condition which is compensable under Arkansas law; (A) the full Commission erred by not addressing the issue of aggravation of pre-existing condition, therefore, its finding is incorrect as a matter of law; (B) the full Commission's finding that there was no causal connection between the industrial accident and claimant's subsequent psychological treatment is not supported by substantial evidence, and is, therefore, incorrect as a finding of fact.

On appellate review of workers' compensation cases the evidence is reviewed in the light most favorable to the finding of the Commission and given its strongest probative value in favor of its order. The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding. *Bearden Lumber Company* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). 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. *Burks* v. *Anthony Timberlands*, 21 Ark. App. 1, 727 S.W.2d 388 (1987). To reverse a decision of the Commission, we must be convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Franklin Collier Farms* v. *Chapple*, 18 Ark. App. 200, 712 S.W.2d 334 (1986).

The principle applicable to the case at bar is addressed by Professor Larson as follows:

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct.

1 A. Larson, *The Law of Workmen's Compensation* § 13.00 (1985). This principle was accepted by the Arkansas Supreme Court in *Aluminum Company of America* v. *Williams*, 232 Ark.

216, 335 S.W.2d 315 (1960). This court cited *Williams* as follows:

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

Bearden, 7 Ark. App. at 71, 335 S.W.2d at 319 (citations omitted).

In the present case, the Commission considered all of the evidence and found no causal connection between appellant's psychological disorders and his compensable burn injury. The medical testimony regarding the causal connection was conflicting. At the hearing, appellant's psychiatrist, Dr. Farrell, testified that claimant's emotional problems were related to his burn injuries. Specifically, Dr. Farrell testified that he found appellant to be psychotic and extremely depressed. He was hallucinating and hearing voices. Dr. Farrell noted that appellant was not in touch with reality and was unable to care for himself at home. Dr. Farrell stated that when appellant was in the BridgeWay, appellant thought he was smelling burning hair. One patient had had her hair permed and appellant smelled that and became extremely paranoid and delusional, which Dr. Farrell interpreted as evidence indicating that appellant's psychiatric problems were the result of the burn.

The record contains evidence that another psychiatrist, Dr. Winston Brown, opined that there was little or no connection between the burn and appellant's psychiatric disorders and that the BridgeWay treatment procedures were not appropriate for appellant. Pertinent parts of Dr. Brown's letter regarding appellant's treatment at the BridgeWay are as follows:

> It is quite obvious that alcoholism preceded his burn injury. His working diagnosis by his physician since the burn has been major depressive episodes with psychotic features. It is said the treating physician feels this effective disorder is directly related to his burn.
>
> There are a number of contradictions in the medical records to suggest that this is not an accurate diagnosis for this man. . . .
>
> Because of the contradictions mentioned above, I feel this man's psychiatric treatment may well be aimed toward psychiatric conditions existing before his burn injury. In addition, although it is said that his emotional difficulties are the result of trauma secondary to the injury, I find little, and almost nothing in the records to suggest that any emotional trauma following the accident is being dealt with by his physician or other medical staff members.

The Commission considered the testimony of both doctors and held there was substantial evidence to conclude that there was no causal connection between appellant's emotional problems and his compensable burn injuries. The Commission noted that the descriptions of paranoia, confusion and people trying to harm him were no different than those findings made in 1981 at the Arkansas State Hospital. The Commission also noted that it was apparent that alcoholism was a continuing factor in claimant's progressing emotional disorders and that there is an unexplained gap between his burn injury and his hospitalization at the BridgeWay. The Commission concluded that the lone fact that appellant thought he smelled burning hair after smelling another patient's hair permanent chemicals was not enough to sustain the burden of proving his emotional problems were caused by his burn injuries.

Medical opinions are admissible and frequently helpful in Workers' Compensation cases, but they are not conclusive. *Boyd* v. *General Industries*, 22 Ark. App. 103, 733 S.W.2d 750 (1987). This court held in *Fletcher* v. *Farm Bureau Insurance Company*, 10 Ark. App. 84, 661 S.W.2d 431 (1983), that when medical evidence is conflicting, the resolution of the conflict is a question for the Commission, and when the Commission chooses to accept the testimony of one physician in such cases, the court is

powerless to reverse the decision. In the present case, the Commission resolved the conflicting medical testimony in favor of the appellee and found no causal connection between appellant's psychological disorders and his compensable burn injury. We find there is substantial evidence to support the Commission's finding that appellant failed to show by a preponderance of the evidence that his psychological disorders were causally connected to his burn injury.

Appellant's other contention for reversal is that the Commission erred in failing to address the issue of aggravation of a pre-existing condition. Professor Larson discusses the issue of compensation for aggravation of a pre-existing condition as follows:

> Pre-existing disease or infirmity of the employee does not disqualify a claim under the "arising out of employment" requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought. This is sometimes expressed by saying that the employer takes the employee as he finds him.

1 A. Larson, *The Law of Workmen's Compensation* § 12.20 (1985). Professor Larson addresses the subject of compensation for psychological injuries resulting from trauma by stating that:

> [w]hen there has been a physical accident or trauma, and claimant's disability is increased or prolonged by traumatic neurosis, conversion hysteria, or hysterical paralysis, it is now uniformly held that the full disability, including the effects of the neurosis, is compensable.

1B A. Larson, *The Law of Workmen's Compensation* § 42.22(a) (1987). This rule was restated in *Boyd v. General Industries*, 22 Ark. App. at 108, 733 S.W.2d at 752 (1987), where we stated, "clearly the disabling effects of this type disorder are compensable if the requirement of a causal connection is met." In the case at bar, we hold there is substantial evidence to support the Commission's finding that appellant's psychological disorders are not causally connected to his burn injury.

Without the causal connection, there is no basis for arguing the issue of aggravation of a pre-existing condition. In the

case at bar, the requirement of a causal connection is not met; therefore, the Commission did not err in not finding appellant's psychological disorders compensable as an aggravation of a pre-existing condition.

Affirmed.

COOPER and COULSON, JJ., agree.

A. C. BANNING *v.* STATE of Arkansas

CA CR 87-31 737 S.W.2d 167

Court of Appeals of Arkansas
Division I
Opinion delivered September 30, 1987

Sexton, Kirkpatrick, Nolan, Vanwinkle & Caddell, P.A., by: *Sam Sexton, Jr.*, for appellant.

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

GEORGE K. CRACRAFT, Judge. A.C. Banning appeals from an order of the circuit court of Franklin County revoking his suspended sentence and ordering it executed. He argues that the trial court erred in not holding that the violation of the terms of his suspended sentence was excusable; that the trial court erred in revoking the suspension for the occurrence of an event which occurred prior to the imposition of the sentence; and that the evidence is insufficient to support the conviction. We find no error and affirm.

On May 29, 1986, the appellant entered a plea of guilty to a misdemeanor charge and was fined $1,000.00 and sentenced to one year in jail. Nine months of that sentence was suspended, conditioned on his good behavior and that he commit no offense punishable by imprisonment during the period of suspension or while serving the ninety days. The court further gave the appellant the privilege of serving his jail time on weekends. On the day he was sentenced, the appellant gave to the sheriff a check in payment of the $1,000.00 fine. The check was twice returned marked "Insufficient Funds." A petition to revoke the suspension was thereafter filed and a hearing held. The court found that the evidence preponderated in favor of the finding that the appellant had issued the check in payment of a fine with intent to defraud the county.

The appellant first argues that the evidence is insufficient to sustain the finding that he had violated the condition of his suspended sentence. In revocation hearings, the burden is on the State to prove the violation by a preponderance of the evidence. On appellate review, this court will not reverse a decision of the trial court unless it is clearly against a preponderance of the evidence, and the burden rests upon the appellant to show that the findings were erroneous. *Smith* v. *State*, 9 Ark.

App. 55, 652 S.W.2d 641 (1983); *Farr* v. *State*, 6 Ark. App. 14, 636 S.W.2d 884 (1982).

The State offered oral testimony that, on the day the appellant pled guilty and his sentence was announced, he delivered to the sheriff his check for $1,000.00 in payment of the fine. The check was returned by the bank because there were insufficient funds to honor it. The check was redeposited and returned a second time. The appellant's bank statement, dated June 2, 1986, showed that his balance as of May 28, 1986, the day before he gave his check to the sheriff, was $5.48. It was shown that on June 2 the bank notified the appellant that the check had not been honored because of insufficient funds and that his balance was at that time $270.48. On June 17, the bank again notified him of the insufficiency of his account to cover the check and that his balance was $335.06.

Arkansas Statutes Annotated § 67-720 (Supp. 1985) provides that it shall be unlawful for any person to pay any fine or court costs by making, drawing, uttering, or delivering, with the intent to defraud, any check knowing at the time that he does not have sufficient funds on deposit with the bank for the payment of such check. Arkansas Statutes Annotated § 67-722 (Supp. 1985) declares that, for the purposes of this section, it is prima facie evidence that the maker intended to defraud and knew at the time of the making of the check that it would not be honored if the check bears the endorsement or stamp of a collecting bank indicating the instrument was returned because of insufficient funds. The statute makes the drawing of such a check in excess of $200.00 but less than $2500.00 a class C felony.

The evidence was clearly sufficient to show that the appellant wrote the check in the amount of $1,000.00 for the payment of a fine; that there were insufficient funds in his account both before and after the check was written; that the appellant was notified on two occasions that the check had not been honored; and that the check bore the stamp of the bank indicating the check was returned because of insufficient funds. Although the appellant offered testimony that he never received notice that his check had been returned, the court was not required to believe him. *Smith* v. *State*, 9 Ark. App. 55, 652 S.W.2d 641 (1983).

The appellant further argues that the trial court erred

in not finding his conduct excusable. He stated that the checks were returned because two checks totaling $700.00 he had deposited in his account had been charged back to his account. The record shows that these checks were returned more than a month before the check was written in payment of his fine, and that, even if the checks had been credited to his account, there would not have been sufficient funds to cover the check he gave to the sheriff. Nor do we find merit in his contention that the sheriff had a duty to inform him that the check had been dishonored or demand payment of the fine at some subsequent date.

At the close of the State's case, appellant moved to dismiss the petition because the evidence before the court failed to show that there was an attempt to defraud the county. There was no other objection made to the revocation. Appellant now argues that his suspended sentence was revoked for an event that occurred before judgment was actually entered of record and before he received a written statement of the conditions of his suspension. As the appellant at no time raised these issues by pointing them out to the trial court at the revocation hearing, this court will not consider them for the first time on appeal. *Hoffman* v. *State*, 289 Ark. 184, 711 S.W.2d 151 (1986); *Lane* v. *State*, 288 Ark. 175, 702 S.W.2d 806 (1986). Although Ark. Stat. Ann. § 41-1203(4) (Repl. 1977) requires that a defendant be given a written statement specifically setting forth the conditions of his suspended sentence, this procedural right, like any other, may be waived. *Cavin* v. *State*, 11 Ark. App. 294, 699 S.W.2d 508 (1984). With respect to appellant's argument that his suspension could not be revoked for an event which occurred before judgment was entered of record, we additionally note that the supreme court made it clear in *Standridge* v. *State*, 290 Ark. 150, 717 S.W.2d 795 (1986), that, in a criminal case, a sentence is effective from the date of rendition.

It is finally contended that the trial court erred because it revoked the suspension before the period of suspension began to run. It is argued that, although this issue was not raised in the trial court, as the court lacked subject matter jurisdiction to revoke the sentence in these circumstances, the issue may therefore be raised for the first time on appeal. We do not address the question, however, because we conclude that the court did not lack jurisdiction to revoke the suspension and the failure of appellant

to raise the issue in the trial court precludes our consideration of it for the first time on appeal. *Nation* v. *State*, 283 Ark. 250, 674 S.W.2d 939 (1984).

The rule of almost universal application is that there is a distinction between want of jurisdiction to adjudicate a matter and a determination of whether the jurisdiction should be exercised. Jurisdiction of the subject matter is power lawfully conferred on a court to adjudge matters concerning the general question in controversy. It is power to act on the general cause of action alleged and to determine whether the particular facts call for the exercise of that power. Subject matter jurisdiction does not depend on a correct exercise of that power in any particular case. If the court errs in its decision or proceeds irregularly within its assigned jurisdiction, the remedy is by appeal or direct action in the erring court. If it was within the court's jurisdiction to act upon the subject matter, that action is binding until reversed or set aside. *West Coast Exploration Co.* v. *McKay*, 213 F.2d 582 (D.C. Cir. 1954); *City of Phoenix* v. *Rodgers*, 44 Ariz. 40, 34 P.2d 385 (1934); *Davis* v. *Oliver*, 304 Ill. App. 71, 25 N.E.2d 905 (1940); *Conrad* v. *Le Moines*, 253 Iowa 320, 112 N.W.2d 360 (1961); *Mulligan* v. *Bond & Mortgage Guarantee Co.*, 193 App. Div. 741, 184 N.Y.S. 429 (1920). *See also* 20 Am. Jur. 2d *Courts* §§ 88 and 90 (1965); and cases collected in 23(A) Words and Phrases, *Jurisdiction of the Subject Matter* (1967). This distinction has also been recognized and applied in our courts. *See Lamb* v. *Howton*, 131 Ark. 211, 198 S.W. 521 (1917); *Cavin* v. *State, supra.*

In Arkansas, a circuit court has subject matter jurisdiction to hear and determine cases involving violations of criminal statutes. It is also empowered with authority to impose or suspend sentences, and to revoke those suspended sentences. The statutes conferring this authority prescribe the method the court should follow in exercising its assigned jurisdiction, but the failure of the court to properly pursue those statutes is an entirely different matter from its jurisdiction to determine whether to exercise that power or not. *Lamb* v. *Howton, supra.* Failure to follow the statutory procedure in the exercise of its power constitutes reversible error but does not oust the jurisdiction of the court. *Cavin* v. *State, supra.*

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

Tommy DONOHO *v.* C.C. DONOHO

CA 86-422 737 S.W.2d 170

Court of Appeals of Arkansas
Division II
Opinion delivered September 30, 1987
[Rehearing denied November 4, 1987.]

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

Jones, Gilbreath, Jackson & Moll, by: *Robert L. Jones, Jr.* and *Charles R. Garner, Jr.*, for appellee.

JAMES R. COOPER, Judge. Tommy Donoho appeals from a judgment entered on a jury verdict against him in the amount of $78,054.08 with interest at ten percent from September 23, 1980, and dismissing his counterclaim for damages resulting from alleged misrepresentations of fact by the appellee, C.C. Donoho. We find no merit in the five points of error advanced by the appellant, and we affirm.

The appellee brought this action on a promissory note dated September 23, 1980, which was executed by the appellant. The note was in the principal sum of $78,054.08, bearing interest at ten percent per annum and due on demand. In a second count, the appellee alleged that the appellant had orally agreed to divide with the appellee the proceeds from the sale of a lake house, asserting that, although the title to the lake house property was in the name of the appellant, the property had been conveyed to the appellant with the understanding that any profits from the appellant's sale of the property would be divided equally with the appellee. The appellee further alleged that the lake house had been sold by the appellant for $85,000.00, and that he had received no share of the proceeds.

In his answer, the appellant asserted that the note had been obtained through fraudulent misrepresentations of fact, and he further pled the affirmative defenses of statute of limitations,

laches, and estoppel. He denied the allegations concerning the asserted agreement to divide the proceeds of the lake house property. By way of counterclaim, the appellant sought damages stemming from the alleged misrepresentations of the appellee.

At trial, the appellee testified that he and the appellant entered into their father's insurance agency in 1946. At that time, the father and his two sons each had an equal share in the business. During the 1960's their father transferred his one-third interest to four of his grandchildren. Two of the appellant's children and two of the appellee's children thus obtained an undivided one-twelfth interest in the agency. The appellant's son-in-law, Phillip Merry, later came into the business as an employee. The appellee stated that, as a result of a misunderstanding between himself and Merry, Merry offered to purchase the appellee's interest in the agency. However, the appellee did not sell his interest to Merry, but instead sold his interest and that of his children to the appellant for a price based on three times the agency's annual commissions plus book value. With respect to the lake house property, the appellee testified that it had been conveyed to the appellant with the understanding that, when it was sold, the appellee would receive one-half of the profits of the sale.

The appellant denied having agreed to share the proceeds of the sale of the lake house with the appellee. Concerning the sale of the appellee's interest in the agency, the appellant testified that, shortly before the sale took place, he learned that Merry and the appellee had been engaged in negotiations for the purchase of the appellee's interest. He stated that at that time Merry had offered him a sum equal to three times earnings, and that it was well worth three times earnings or more in order to gain control over the agency. After several days of further negotiations the agreement which is the subject of this suit was reached. The appellant testified that, during negotiations, he suggested calling Bubba Benton, an experienced real estate agent, to obtain his opinion about the prices then being paid for insurance agencies. According to the appellant, the appellee called Benton in his presence, and then told the appellant that Benton had informed him that insurance agencies were selling for two to three times annual earnings. The appellant stated that, on the basis of Benton's relayed opinion as to value, he agreed to pay three times annual

commissions.

Benton testified that, although he recalled having a conversation with the appellee during the time in question, he could not recall what he had told the appellee concerning the value of insurance agencies. Although he did not recall the specifics of his conversation, Benton stated that he felt he would have told the appellee that almost any agency was worth one times annual commissions; a good agency would be worth one and one-half times annual commissions; and an excellent agency for which the personnel would remain unchanged would be worth two times annual commissions.

The appellee was recalled to the stand, and testified that he had no recollection of any conversation with Benton and, regardless of what Benton might have told him had such a conversation occurred, he was not willing to accept less than three times annual commissions, as had been offered to him by Merry. He further stated that, if he had talked to Benton, he would have told the appellant exactly what Benton said whether it was good, bad, or indifferent, but he would have adhered to his own opinion that his interest should be sold on the basis of three times annual commissions.

The trial court entered judgment on a jury verdict in favor of the appellee for the amount due on the note plus ten percent interest from the date of execution, and dismissed the appellant's counterclaim for damages resulting from misrepresentation. The appellee's claim for a portion of the proceeds from the sale of the lake house property was also dismissed. From these judgments against him, the appellant brings this appeal. The appellee does not appeal from the judgment concerning the lake house property.

The appellant first contends that the jury verdict with respect to the note and misrepresentation issues was against the clear preponderance of the evidence. On appellate review of jury verdicts, we review the evidence in the light most favorable to the verdict, and we will not disturb the verdict if it is supported by substantial evidence. *Duggar* v. *Arrow Coach Lines, Inc.*, 288 Ark. 522, 707 S.W.2d 316 (1986). In the case at bar, there was evidence that there was no conversation between the appellee and Benton; that, if such a conversation took place, no misrepresenta-

tions were made with respect to the content of that conversation; and that the negotiations for the sale of the agency began with an offer by the appellant's son-in-law to purchase the agency for a price based on three times annual commissions. Moreover, the appellant admitted that it would be well worth paying such a price to gain control of the agency. Finally, the appellee testified that the figure ultimately agreed upon was based upon his own opinion of the agency's value, and that he would not have sold it for less. On this testimony, we cannot conclude that the jury's verdict is not supported by substantial evidence.

The appellant also argues that the trial court erred in failing to direct a verdict in his favor with regard to that portion of the appellee's suit which concerned the lake house property. Although the appellant ultimately prevailed on that point when the jury found in his favor and the appellee's claim for a share in the proceeds of the sale of the house was dismissed, he asserts that the failure to direct a verdict in his favor resulted in his prejudice. To support this argument, the appellant suggests that the jury was inclined towards granting the appellant something in this case, and compensated for its verdict in favor of the appellee on the note by giving the appellant a favorable finding with respect to the lake house issue. He further suggests that, had the latter issue been removed from the jury's consideration, the jury's favorable inclination toward the appellant would have been expressed in the form of a verdict for the appellant on the note and misrepresentation issues. This theory is unsupported by anything to be found in the record in the case at bar, and we find it to be unpersuasive. To accept the appellant's assertion of prejudice, which is made without reference to facts in the record which might support it, would be tantamount to presuming that any error which may have occurred was prejudicial to the appellant, even though the appellant ultimately prevailed on the issue with which the asserted error was concerned. Error is not presumed to be prejudicial, *Jim Halsey Co., Inc.* v. *Bonar*, 284 Ark. 461, 688 S.W.2d 275 (1985), and we do not reverse the trial judge on the basis of facts outside the record. *Harvey* v. *Castleberry*, 258 Ark. 722, 529 S.W.2d 324 (1975). We hold that, under the circumstances here presented, any error resulting from the trial judge's failure to direct a verdict in the appellant's favor on the lake house issue was harmless.

Next, the appellant contends that the trial court erred in permitting the appellee to introduce erroneous calculations of the amount of interest due on the note. We find no merit in this contention, because the jury did not attempt to calculate the interest, but merely returned a verdict for the face amount of the note, plus interest and attorney's fees. Any error resulting from the introduction of erroneous interest calculations was thus rendered harmless. *See Insured Lloyds* v. *Mayo*, 244 Ark. 82, 427 S.W.2d 164 (1968).

The appellant also argues that the jury was improperly instructed. The trial court instructed the jury that, in order to sustain the defense of misrepresentation, the appellant must prove that the appellee made a false statement of material fact, knowing that it was false, and intending for the appellant to act in reliance upon it. They were instructed that the appellant must have been justified in his reliance, and must have in fact relied upon the misrepresentation to his damage. The court further instructed the jury that a statement as to value was only a statement of opinion and not a representation of fact. The appellant does not find fault with the court's misrepresentation instruction, but argues that the instruction regarding opinions misled the jury because "[a]lthough the statement of Bubba Benton as to the valuation of insurance businesses was an opinion, the publication of that opinion to third parties under the circumstances of this case, was a representation of fact."

The appellant's theory of the case was that material facts regarding a conversation between the appellee and Benton were misrepresented to him, and he was entitled to have the jury instructed on his theory. By the same token, the appellee was equally entitled to have the jury instructed on his theory of the case, i.e., that he had not misrepresented any facts to the appellant, and that the value placed upon the agency was based upon his own opinion of its worth. The appellant had an opportunity to argue to the jury the position he now argues to us, and an opportunity to offer an instruction stating that position had he desired to do so. Because the trial court was not presented with a correct instruction detailing the appellant's theory of the publication of Benton's opinion as being a misrepresentation of fact, and because the court's instruction regarding opinions was a correct statement of the law supported by the evidence, we find no

merit in this contention. *See Simmons* v. *Frazier*, 277 Ark. 452, 642 S.W.2d 314 (1982).

The appellant also contends that the trial court erred in not giving his proffered instruction that, if a person makes a representation without knowing whether it is true or false, or without regard to its truth or falsity, he may be found to have made the representation recklessly and with indifference to the consequences, and that if the jury found that those conditions existed and that the appellant relied upon the representations to his detriment, it should return a verdict in his favor for the amount they found him to have been damaged. Although the proffered instruction did contain a correct statement of the law, it was abstract in that none of the evidence at trial tended to show that the appellee made any representations without knowledge of their truth or with indifference to their consequences. To the contrary, the evidence with respect to the alleged misrepresentations showed that, if such misrepresentations were in fact made by the appellee, they were made deliberately for the purpose of obtaining a higher price for the agency than would have been offered in the absence of such misrepresentations. We think that the proffered instruction was potentially misleading and could have resulted in a finding of liability upon an issue unsupported by proof, and hold that the trial judge correctly refused to give the instruction. *See Courson* v. *Chandler*, 258 Ark. 904, 529 S.W.2d 864 (1975).

Finally, the appellant argues that other instructions offered by him were erroneously refused. We find no merit to these arguments because each of the rejected instructions was fully covered by other instructions given by the court. A party is not entitled to his particular preference in the wording of jury instructions. *Hough* v. *Continental Leasing Corp.*, 275 Ark. 340, 630 S.W.2d 19 (1982).

Affirmed.

CORBIN, C.J., and COULSON, J., agree.

SECOND INJURY FUND *v.* Eddie L. ROBISON, et al.

CA 87-105 737 S.W.2d 162

Court of Appeals of Arkansas
Division I
Opinion delivered September 30, 1987

David L. Pake, for appellant.

Walker & Morris, by: *Eddie H. Walker, Jr.*, for appellee Eddie L. Robison.

Warner & Smith, by: *G. Alan Wooten*, for appellees Golden Acorn, Inc. and Fireman's Fund Insurance Companies.

JAMES R. COOPER, Judge. Eddie Robison, an appellee in this Workers' Compensation case, was employed by Ayers Furniture Company for approximately eighteen years. While in the employ of Ayers Furniture on May 22, 1980, Robison sustained a back injury while lifting a fifty-five gallon barrel of glue. As a result of that injury, Robison underwent surgery by Dr. Dulligan, who assigned him a fifteen percent permanent partial impairment rating on January 22, 1981. A hearing was held on April 16, 1981, and it was determined that Robison suffered disability in the amount of forty percent to the body as a whole as a result of his May 1980 injury. Robison returned to work at Ayers in September 1980, but underwent another period of hospitalization in November 1980. Upon release from hospitalization, Robison found that Ayers Furniture no longer had a job for him. In November 1982 Robison began work for the appellee, Golden Acorn, Inc. On December 3, 1984, Robison sustained another back injury while lifting a table in the course of his employment with Golden Acorn. Robison's primary treating physician, Dr. Duffner, assigned him a permanent partial impairment rating of fourteen percent. A hearing was held on September 24, 1985, to determine the issues of rehabilitation and the extent of Robison's disability. The administrative law judge determined that, inasmuch as it was the appellant Second Injury Fund and not Robison that requested that a rehabilitation analysis be performed, the cost of any such analysis should be paid by the Second Injury Fund rather than by Golden Acorn. In an opinion dated May 21, 1986, the administrative law judge found that Robison fell within the odd lot category of employees, and that he was permanently and totally disabled. The administrative law judge additionally found that Robison suffered a wage-loss disability in the amount of forty percent prior to his injury of December 1984 at Golden Acorn, and that the appellant Second Injury Fund was liable for all benefits in excess of the fourteen percent permanent partial disability rating assigned by Dr. Duffner. The Workers' Compensation Commission adopted the administrative law judge's decision in an opinion filed January 21, 1987. From that decision, comes this appeal.

For reversal, the appellant Second Injury Fund contends

that there is no substantial evidence that Robison suffered from any disability resulting from a condition existing prior to and at the time of his injury of December 1984; that there is no substantial evidence that Robison is permanently and totally disabled; and that the Commission erred in adopting the opinion of the administrative law judge because, the appellant asserts, that opinion was devoid of specific findings of fact. We affirm.

The appellant first argues that there is no substantial evidence that Robison suffered from a disability prior to and at the time of his last injury, that of December 1984. In determining the sufficiency of the evidence to support the findings of the Workers' Compensation Commission, we review the evidence in the light most favorable to the Commission's findings, and we must affirm if there is any substantial evidence to support them. *Central Mahoney, Inc.* v. *York*, 10 Ark. App. 254, 663 S.W.2d 196 (1984).

Viewed in that light, the evidence reflects that Robison suffered a compensable injury in May 1980 and was treated by surgery. Moreover, Robison returned to work at Ayers Furniture for several months in 1980, but was rehospitalized in November of that year due to continuing trouble. When Robison returned to Ayers Furniture after this second period of hospitalization, he learned that he no longer had a job. Robison had been employed by Ayers Furniture for approximately eighteen years at the time of his termination. In January 1981, Dr. Dulligan assigned Robison a permanent partial impairment rating of fifteen percent. Robison testified that, although he never had trouble finding a job before, he experienced substantial difficulty securing employment after his injury at Ayers Furniture. Finally, Robison testified that he gave up hobbies such as hunting and fishing after his May 1980 injury, and spent his off-work hours lying down and resting. The essence of the appellant's argument is that there is an absence of substantial evidence to support a finding that Robison had a pre-existing condition that was independently causing a loss of earning capacity prior to the second injury which continued to do so after that injury, as required by *Second Injury Fund* v. *Coleman*, 16 Ark. App. 188, 699 S.W.2d 401 (1985), and *Harrison Furniture* v. *Chrobak*, 2 Ark. App. 364, 620 S.W.2d 955 (1981). The appellant cites *Second Injury Fund* v. *Fraser-Owens, Inc.*, 17 Ark. App. 58, 702 S.W.2d 828 (1986), for the

proposition that prior rejection for employment does not constitute substantial evidence to invoke Second Injury Fund liability under the above-stated requirement, and *Second Injury Fund* v. *Coleman, supra*, as support for its contention that an award of compensation by an administrative law judge is not substantial evidence to prove the existence of a pre-existing condition causing a loss of earning capacity prior to the second injury and thereafter.

We note that the circumstances presented in the case at bar are clearly distinguishable from the facts of *Fraser-Owens, Inc.* In that case, we held that a Workers' Compensation Commission finding of a pre-existing disability was not supported by substantial evidence where the only evidence of loss of earning capacity was the claimant's rejection for employment on one occasion, ten years prior to his compensable injury. The claimant's rejection was based upon a pre-employment physical in which X-rays of his lower lumbar spine revealed evidence of a spondylolysis involving L5. The claimant in *Fraser-Owens, Inc.* testified that he was shocked at this revelation because he had never had any back problems. There was evidence that the claimant was born with his back condition, and that persons suffering from spondylolysis were more susceptible to back injuries than people without it. Following his rejection for employment, the claimant in *Fraser-Owens, Inc.* worked in a number of strenuous occupations, including installing septic systems, digging ponds, building roads, and working as a welder on an offshore drilling rig. Despite his engagement in these taxing occupations, the claimant in *Fraser-Owens, Inc.* suffered no back problems up until the time of his compensable injury, ten years after the rejection for employment.

In contrast, the claimant in the case at bar, Robison, suffered an initial injury which required surgical correction and two separate periods of hospitalization. Moreover, he was dismissed by his employer of eighteen years following his second hospitalization. Finally, Robison testified that, despite numerous applications for employment, he experienced a great deal of difficulty in finding a job after his initial injury, and that it was not until approximately two years after his injury at Ayers Furniture that he finally obtained employment with Golden Acorn.

Nor are the circumstances in the case at bar completely

analogous to those presented in *Second Injury Fund* v. *Coleman, supra.* Although the claimant's initial injury in *Coleman* resulted in a joint petition awarding him $12,000.00 in settlement of his claim, there was no mention of any degree of permanent disability in either the order or the petition; to the contrary, the only report by Coleman's surgeon prior to the second injury stated that Coleman was doing extremely well and would soon be able to return to a job requiring him to lift 200 pounds, and no degree of permanent disability was assigned. In contrast, in the case at bar, Robison's initial injury resulted in the assignment of a fifteen percent permanent partial impairment rating, culminating in a determination that Robison suffered forty percent disability to the body as a whole as a result of his initial injury.

The appellant argues that Robison's employment by Golden Acorn demonstrates that he regained his earning capacity prior to the time of his second injury. We are not unmindful of the fact that Robison eventually secured employment with Golden Acorn in a position similar to the one he held at Ayers Furniture at the time of his May 1980 injury, or that his wages at Golden Acorn were somewhat higher than those he had been earning at Ayers Furniture. Nevertheless, we have held that a worker may be entitled to additional wage-loss disability even though his wages remain the same or increase after the injury. *City of Fayetteville* v. *Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984). We think that the same general principle is applicable in the case at bar, where the issue is whether Robison was suffering from a disabling condition prior to and at the time of his second injury, because "disability," in the workers' compensation sense, is not based upon loss of earnings *per se*, but rather is defined in terms of loss of earning *capacity*. *See* Ark. Stat. Ann. § 81-1302(e) (Repl. 1976). Under the circumstances presented in the case at bar, where the appellee/claimant suffered an initial injury requiring surgery, resulting in a permanent partial disability rating and a determination by the Commission of forty percent disability to the body as a whole; where he returned to work for his initial employer but was terminated following a second period of hospitalization stemming from that injury; and where there is evidence that he subsequently attempted to obtain employment but encountered substantial difficulty in doing so, we hold that there is substantial evidence to support the Commission's finding

that he suffered a disability resulting from a condition existing prior to and at the time of his second injury.

The appellant next argues that there is no substantial evidence to support the Commission's finding that Robison is permanently and totally disabled. The Workers' Compensation Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other elements affecting wage loss, such as the claimant's age, education, and experience. *Oller* v. *Champion Parts Rebuilders, Inc.*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). The Commission's specialization and experience make it better equipped than we are to analyze and translate evidence into findings of fact. *Bemberg Iron Works* v. *Martin*, 12 Ark. App. 128, 671 S.W.2d 768 (1984). In the case at bar there was evidence that Robison was assigned a permanent partial impairment rating of fourteen percent following his second injury; that he attempted to return to Golden Acorn for light work following that injury but was unable to continue; that he is approximately fifty years of age with work experience only in manual, unskilled labor; and that, with his second-grade education, he is unable to read or write on a functional level. Where, as here, the issue is whether a finding of the Commission is supported by substantial evidence, we must affirm if reasonable minds could reach the conclusion arrived at by the Commission, even when a preponderance of the evidence might indicate a contrary result. *Osage Oil Co.* v. *Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985). We believe that reasonable minds could conclude, on the record in the case at bar, that Robison was permanently and totally disabled, and we hold that the Commission's finding is supported by substantial evidence.

Next, the appellant contends that the Commission erred in adopting that portion of the administrative law judge's opinion holding that the Second Injury Fund is responsible for the costs of rehabilitation. However, neither the opinion of the Commission nor that of the administrative law judge state that the appellant Fund was required to pay the cost of rehabilitation. Instead, reference to this issue is found in a letter from the administrative law judge to the attorneys involved in this case where the administrative law judge stated that "[i]f the Second Injury Fund wishes a rehab report, it is up to the Second Injury Fund to pay for it. The Claimant has not requested one." This statement must be

viewed in the context of efforts by the Second Injury Fund to determine Robison's willingness to participate in a rehabilitation program. In his answers to interrogatories, Robison indicated that he was not interested in pursuing rehabilitation. At the hearing, Robison stated that he would be willing to undergo rehabilitation analysis, although he had little hope that he would be able to be successfully retrained. Thereafter, in a letter to the administrative law judge, Robison's attorney made it clear that it was the Second Injury Fund and not Robison that was requesting rehabilitation analysis in this case. There followed an exchange of letters between the parties' counsel through the administrative law judge characterized by the Second Injury Fund's persistent attempts to obtain a rehabilitation analysis of Robison at Golden Acorn's expense and to obtain a definite statement from Robison as to whether he would consent to such analysis at Golden Acorn's expense. These letters make it clear that the position of the parties was that Robison did not request an analysis but would consent to analysis at the Second Injury Fund's expense; that Golden Acorn would not pay for an analysis in the absence of a request for rehabilitation by the claimant; and that the Second Injury Fund wanted either an analysis performed at Golden Acorn's expense, or a statement by Robison that he refused to consent to analysis.

Arkansas Statutes Annotated § 81-1310(f) (Supp. 1985) makes it clear that an employee shall not be required to enter a vocational rehabilitation program against his consent, but instead must take the affirmative step of filing a request to enter such a program with the Commission. If the employee's request is granted, the employer is responsible for additional payments for vocational rehabilitation. The crucial fact in the case at bar is that Robison never requested vocational rehabilitation, but merely consented to undergo rehabilitation analysis at the Second Injury Fund's request, provided that the Fund would bear the expense.

The appellant also contends under this point for reversal that Robison was unwilling to participate in rehabilitation, and that his unwillingness should have been taken into consideration by the Commission under *Oller* v. *Champion Parts Rebuilders, supra*. In *Oller*, we stated that:

> [T]here is the matter of appellant's lack of interest in exploring vocational rehabilitation. . . . [T]he Arkansas

> Supreme Court has said: "Whether or not an injured employee can be retrained is a pertinent factor in determining the amount, if any, of wage earning loss. If no rehabilitation evaluation is made, the Commission has no way of knowing whether the employee could have been retrained." *Smelser* v. *S.H. & J. Drilling Co.*, 267 Ark. 996, 593 S.W.2d 61 (1980).
>
> In a recent case we upheld the commission's award of 35% permanent partial disability to a claimant who testified that while he could no longer follow his former occupation as a welder, he had made no real effort to either seek employment in other fields for which his education and experience might qualify him or to determine whether he was able to perform the duties of such other pursuits. In that case, the Commission had found that these circumstances effectively blocked full assessment of all factors in determining ultimate disability. *Rapley* v. *Lindsey Construction Co.*, 5 Ark. App. 31, 631 S.W.2d 844 (1982).
>
> If, in the instant case, appellant's lack of interest in exploring vocational rehabilitation was an impediment to the commission's full assessment of appellant's loss of earning capacity, she cannot be heard to complain of that now. The commission has found she has not sustained her burden of proving, by a preponderance of the evidence, that she is permanently and totally disabled. We cannot say its finding of 25% permanent partial disability is not supported by substantial evidence.

Oller, 5 Ark. App. at 312-13.

In the *Smelser* case, cited in *Oller* for the proposition that a rehabilitation analysis is a pertinent factor in determining the amount of wage-earning loss, the claimant refused to undergo rehabilitation despite the fact that the Commission directed him to do so. That portion of the Commission's opinion quoted in *Smelser* reveals that the Commission did not believe that the evidence supported an award of disability benefits in excess of the claimant's physical impairment rating, and implies that the reason for this lack of evidence was the claimant's refusal to undergo rehabilitation analysis. Under these circumstances, the Supreme Court stated that "[i]f no rehabilitation analysis is

made the Commission has no way of knowing whether he could be retrained." *Smelser*, 267 Ark. at 998. Likewise, in *Rapley*, the Commission found that its efforts to assess the extent of the claimant's disability were blocked by the claimant's "lack of interest in vocational rehabilitation." 5 Ark. App. at 34.

We think that the above-cited cases demonstrate that the Commission may properly take a claimant's refusal to pursue rehabilitation into account in determining his degree of disability where that refusal hinders the Commission's attempts to assess the extent of disability. However, it is clear that, in the case at bar, the Commission did not consider Robison's failure to request rehabilitation analysis to be an impediment to its determination of permanent total disability, which it found based upon his physical injury, his age, his second-grade education, and his unskilled manual labor experience. Under these circumstances, we hold that the Commission was not required to consider Robison's failure to request rehabilitation in determining the degree of his disability.

The appellant finally contends that the Commission erred in adopting the opinion of the administrative law judge, asserting that the opinion did not include specific findings of fact as required by *Wright* v. *American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986). We do not agree. In the case at bar, the Commission adopted the administrative law judge's findings that Robison had a permanent partial impairment of fourteen percent to the body as a whole; that he fell within the odd lot category of workers and was permanently and totally disabled; that he had a permanent partial wage-loss disability of forty percent prior to his injury of December 1984; and that the Second Injury Fund was responsible for the payment of all benefits in excess of a fourteen percent impairment to the body as a whole. Robison's medical history, injury, work experience and educational background were discussed both in the Commission's opinion and in the opinion of the administrative law judge. We hold that the findings and the discussion of facts in the Commission's opinion were sufficient to satisfy the standard enunciated in *Wright, supra.*

Affirmed.

CORBIN, C.J., and COULSON, J., agree.

Haril L. ASHBY (Dec'd) *v.* ARKANSAS VINEGAR COMPANY and AMERICAN MANUFACTURING MUTUAL INSURANCE COMPANY

CA 87-154 737 S.W.2d 177

Court of Appeals of Arkansas
En Banc
Opinion delivered October 7, 1987

Jay N. Tolley, for appellant.

Davis, Cox & Wright, by: *Constance G. Clark*, for appellee.

GEORGE K. CRACRAFT, Judge. The sole issue presented by this appeal is whether the Arkansas Workers' Compensation

Commission erred in holding that the provisions of our compensation act require that, when a worker's death arises out of his employment and his widow subsequently remarries and receives in one lump sum payment equal to 104 weeks compensation, the increase in benefits payable to her children on her remarriage is postponed until the end of the 104 weeks following the remarriage. We conclude that the Commission erred in not holding that the additional benefits payable to the children on the remarriage of the widow became due immediately and reverse and remand this case.

The determination of death beneficiaries and the amount of the average weekly wage payable to each is controlled by Ark. Stat. Ann. § 81-1315 (Repl. 1976 and Supp. 1985), which provides in pertinent part as follows:

> (c) [Beneficiaries—Amounts.] Subject to the limitations as set out in Section 10 [§ 81-1310] of this Act, compensation for the death of an employee shall be paid to those persons who were wholly and actually dependent upon the deceased employee in the following percentage of the average weekly wage of the employee, and in the following order of preference.
>
> First. To the widow if there is no child, thirty-five percent (35%), and such compensation shall be paid until her death or remarriage.
>
> * * *
>
> Second. To the widow or widower if there is a child, the compensation payable under First above and fifteen percent (15%) on account of each child.
>
> Third. To one child if there is no widow or widower, fifteen percent (15%) for each child, and in addition thereto, thirty-five percent (35%) to the children as a class, to be divided equally among them.
>
> * * *
>
> (d) [Terminations of dependence.] In the event the widow remarries before full and complete payment to her of the benefits provided in Subsection (c), there shall be

> paid to her a lump sum equal to compensation for one hundred four (104) weeks, subject to the limitation set out in Section 10 [§ 81-1310] of this Act.
>
> * * *
>
> (g) Cessation of compensation to part. Upon the cessation of compensation under this section to or on account of any person the compensation of the remaining persons entitled to compensation for the unexpired part of the period during which their compensation is payable shall be that which such persons would have received if they had been the only persons entitled to compensation at the time of the decedent's death.

The maximum amounts of compensation payable to death beneficiaries is governed by Ark. Stat. Ann. § 81-1310(b)(C) (Supp. 1985), which provides that the compensation payable to the surviving dependents shall be sixty-six and two-thirds percent of the average weekly wage, but not to exceed $154.00 per week in the aggregate.

The facts in this case were stipulated. Haril L. Ashby was fatally injured on June 11, 1984. He was survived by a dependent widow and five children. Appellees accepted the claim as compensable and paid the maximum weekly benefits of $154.00 to the widow for her own use and that of her five minor children until the widow remarried. At the time of her remarriage, appellees paid the widow a lump sum equal to her proportionate share of compensation for 104 weeks pursuant to the provisions of § 81-1315(d). Appellees then began paying to the children weekly benefits in that amount they would have received for their benefit prior to their mother's remarriage, contending that the increase in benefits provided for them upon her remarriage is postponed under the provisions of § 81-1315(g) to the end of the 104-week period. The appellant contended that the minor children were entitled to the increase in benefits immediately upon their mother's remarriage.

On these facts, the Commission found for the appellees as follows:

> After carefully reviewing the entire record *de novo* on

> appeal by claimant, we find the Administrative Law Judge correctly determined that claimant is not entitled to immediate maximum dependency benefits. . . . If the widow's proportionate share of the $154.00 weekly benefits (which has already been paid to her in a lump sum and represents 104 weeks of benefits) were redistributed to the five minor children now, the compensation payable to the deceased claimant's dependents would be in excess of the maximum of $154.00 weekly, as limited by § 10(b)(C). Only *after* 104 weeks from the lump sum payment to the widow can her share be redistributed to the children without contravening the clear intent of the statute. [Emphasis in original.]

We conclude that such a holding is contrary to both the letter and spirit of our compensation act. We find nothing in the act to support a conclusion that the legislature intended for the lump-sum payment to be treated as an advance of weekly benefits. The act clearly provides that the widow is to be paid weekly benefits until her remarriage. Worthy of note is the fact that the legislature did not state, as it easily could have, that upon remarriage a widow is to receive 104 weeks of compensation in a lump sum. Instead, the act provides that she is to receive a sum "equal to" 104 times the weekly benefits she had been receiving. There is nothing to indicate an intention that this payment be anything other than an additional benefit to compensate the widow for the loss of future weekly benefits occasioned by her remarriage, and we conclude that the reference to 104 weeks contained in § 81-1315(d) was merely intended to serve as a basis by which to determine the amount of the sum to be paid to her.

Nor do we find anything in § 81-1315(d) or (g) mandating that the increased payments to the subsequent beneficiaries be postponed. The statutes provide that the widow shall receive weekly benefits until she remarries. Upon remarriage, those payments terminate, and upon termination of those payments the minor beneficiaries' increased benefits should become due and payable immediately. The provisions of the Workers' Compensation Act are to be construed liberally in favor of the claimant in light of its beneficent and humane purposes, and all doubtful issues must be resolved in favor of the claimant. *Crain Burton Ford Co.* v. *Rogers*, 12 Ark. App. 246, 674 S.W.2d 944

(1984).

The widow's right to receive weekly benefits as a dependent of her deceased husband was terminated upon her remarriage. At that point, the death benefits were required to be reapportioned among the remaining dependents. The statute does not provide that the widow remain a dependent for two years after marriage. The intent of the act is to provide benefits for dependents of those employees killed or disabled in the course of their employment, and the fact that the legislature chose to give the widow an additional benefit upon her remarriage should not prevent the immediate reapportionment of weekly death benefits to the remaining dependents.

In reaching its conclusion, the Commission has followed the decisions of the Texas and New Mexico courts in construing similar statutes in *Freeman* v. *Texas Compensation Insurance Co.*, 603 S.W.2d 186 (Tex. 1980), and *Employers' National Insurance Co.* v. *Winters*, 101 N.M. 315, 681 P.2d 741 (1984). However, we prefer to follow the rule adopted in *State ex rel. Endlich* v. *Industrial Commission of Ohio*, 16 Ohio App. 3d 309, 139 N.E.2d 1309 (1984); *Yardley* v. *Montgomery*, 580 S.W.2d 263 (Mo. 1979); and *Builders Exchange, Inc.* v. *Workers' Compensation Appeal Board*, 64 Pa. Commw. 94, 439 A.2d 215 (1982), which appears to be more in tune with the spirit and intent of our legislation.

Reversed and remanded.

Edward Grady PARTIN, Jr. *v.* STATE of Arkansas

CA CR 87-33 737 S.W.2d 461

Court of Appeals of Arkansas
Division I
Opinion delivered October 7, 1987

Laws, Swain & Murdock, P.A., for appellant.

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

GEORGE K. CRACRAFT, Judge. Edward Grady Partin, Jr., appeals from his conviction of possession of a controlled substance. Introduced into evidence at his trial was a quantity of marijuana seized from his home pursuant to a search warrant. The sole issue on this appeal is whether the trial court erred in not suppressing that evidence. We find no error and affirm.

The search warrant was issued by an authorized magistrate on an affidavit of the sheriff of Van Buren County in which he averred that, in July of 1986, he was engaged in a search, along with other officers in a helicopter, for marijuana being grown in that county. He stated that the aerial search disclosed two patches of marijuana, and, from a description of the area given him by the helicopter officers, he determined that the marijuana was growing on property on which the appellant was residing. He stated that he was also informed that there were clearly defined trails leading from the curtilage of appellant's dwelling to the marijuana fields. He further stated that the search warrant was being sought because, from his experience, he had learned that persons growing marijuana utilized their residences and outbuildings to cure the contraband. He stated that he was familiar with appellant's premises because he had arrested him on previous occasions for similar offenses. The search warrant was issued and, pursuant to it, contraband was discovered in appellant's home.

Although the record discloses no written or verbal motion setting out any grounds for suppression of that evidence, a "suppression hearing" was held. At that hearing, Officer Jerry Snowden testified that he went to the appellant's residence and followed a well-defined trail leading from his house directly to one of the fields where the marijuana had recently been cut. He testified that he found marijuana leaves and other residue of marijuana along the trail for a considerable distance, but that the marijuana leaves and other vegetation did not lead all the way to the appellant's house, stopping "close to the bottom of the hill." The officer stated that there was another dwelling on that trail between appellant's house and the marijuana field and that he had learned that the field was not on appellant's property. Officer Bobby Harkrider testified that he followed another clearly defined trail leading from appellant's house to a second field in which marijuana was being grown. He testified that there was yet another dwelling on that trail between appellant's residence and the marijuana patch. The sheriff testified that, on arriving near the scene, he talked to the officers and, from the information that he received from them, executed the affidavit and obtained the warrant.

At the conclusion of the hearing, the appellant contended

that, as one of the officers had learned that the contraband was not growing on appellant's property, there were other dwellings along the two trails, and there was no information that the residence contained contraband, the warrant was issued without probable cause. On appeal, however, he first contends that the trial court erred in not suppressing the evidence because the affidavit was misleading and obtained by willful and material omissions and statements which created a set of facts the affiant knew to be false or would have known was false except for a reckless disregard for the truth. *United States* v. *Leon*, 468 U.S. 897 (1984); *Lincoln* v. *State*, 285 Ark. 107, 685 S.W.2d 166 (1985).

In *Leon*, the United States Supreme Court held that the exclusionary rule does not bar the use of evidence obtained by officers acting in good faith and reasonable reliance on a search warrant issued by a neutral magistrate, even though it be subsequently determined that the warrant was not supported by probable cause. The court did recognize that, even though great deference should be given the determination of the magistrate, this deference is not boundless and does not preclude the inquiry into, among certain other things, knowing or reckless falsity contained in an affidavit where the false statements are necessary to the finding of probable cause. *See Franks* v. *Delaware*, 438 U.S. 154 (1978); *Lincoln* v. *State, supra*. The rule in *Franks*, however, requires specific allegations and a preliminary showing of perjury or reckless disregard for the truth, that these allegations be established by a preponderance of the evidence, and that the material remaining after the false information has been removed from the affidavit be insufficient to establish probable cause. Innocent misrepresentations or omissions, even if material, do not vitiate the warrant. *United States* v. *House*, 604 F.2d 1135 (8th Cir. 1979); *United States* v. *Botero*, 589 F.2d 439 (9th Cir. 1978).

Even assuming that the issue was properly raised in the trial court, we find no error. The appellant made no allegation in the trial court that the sheriff perjured himself in the affidavit or showed a reckless disregard for the truth. The sheriff was not questioned as to whether he was informed of the existence of the other dwellings along the trails and, if so, his reason for not mentioning it to the magistrate. There was testimony that the marijuana fields were not on appellant's land, but the sheriff was

not asked how he had determined that it was appellant's property or if, at the time he executed the affidavit, he knew that it was not his property. Neither officer was questioned along these lines. From our examination of the record, we cannot conclude that the trial court erred in denying the appellant's motion to suppress.

The appellant next argues that, notwithstanding the omission of material facts, the affidavit still lacked sufficient information to support a finding of probable cause necessary for the issuance of a search warrant. We find no error. Not only does the argument not correspond to any of the situations in which suppression remains an appropriate remedy, *see Leon*, 468 U.S. at 923, but we find the affidavit to in fact provide sufficient evidence to support a finding of probable cause. The affidavit established that there were two marijuana fields found near the appellant's residence, that there were trails leading from his residence to those fields, that the appellant was seen leaving the area soon after the discovery, and that the marijuana from one of the recently discovered fields had been "pulled" and could not be located. This information, along with the sheriff's statement that, from his experience, individuals who cultivate marijuana often use their residences to "manicure" it into a smoking state, combined in our opinion to provide sufficient information for both the sheriff and the issuing magistrate to reasonably believe that the appellant's residence would contain the missing marijuana.

Affirmed.

MAYFIELD and JENNINGS, JJ., agree.

J. Carlton RIGGS *v.* Jo Ann SHERIDAN

CA 87-108 737 S.W.2d 175

Court of Appeals of Arkansas
Division II
Opinion delivered October 7, 1987

Joe Cambiano, for appellant.

Brazil, Clawson & Adlong, by: *Matthew W. Adlong*, for appellee.

JAMES R. COOPER, Judge. The appellant in this civil case, a real estate broker, negotiated the sale of the appellee's home in

Fairfield Bay to David T. Hopkins and Barbara Hopkins for the sum of $106,500.00. The sale contract provided that the buyers would pay for the property by making a cash down payment of $10,000.00 at closing and executing a deed of trust for the balance. The appellant's commission, $6,390.00, was to be deducted from the down payment as part of the closing costs. At the appellant's suggestion, however, the buyers made a cash down payment at closing of only $2,797.00 in addition to the $1,000.00 earnest money they had previously paid, and gave the appellant a promissory note for $6,300.00 for his brokerage commission, the note being secured by a second mortgage on the property they were purchasing. The buyers subsequently defaulted on their mortgage payments to the appellee, and the appellee filed a foreclosure action against them without making the appellant a party to the action. Prior to trial, the appellee and the buyers arranged a settlement whereby the appellee accepted a quitclaim deed from the buyers in release of their note and first mortgage to her. The appellee then brought an action against the appellant to cancel his second mortgage on the property, alleging fraud and breach of fiduciary duty. The appellant counterclaimed, seeking judgment against the appellee in the amount of the buyer's debt, and foreclosure of his second mortgage. Following trial, the chancellor declared the second mortgage void, struck it from the record, and denied the appellant's counterclaim. From that decision, comes this appeal.

For reversal, the appellant contends that the trial court erred in striking the second mortgage from the record and denying his counterclaim for foreclosure of the second mortgage. We find no error, and we affirm.

The appellant contends that striking his mortgage and denying his counterclaim was error because the appellee took the quitclaim deed from the buyers subject to all mortgages of record. Generally, a mortgage lien is extinguished only by payment or release, *Barnett* v. *Bank of Malvern*, 176 Ark. 766, 4 S.W.2d 17 (1928), and one who purchases land on which there is a recorded mortgage takes with notice of it and subject to the mortgagee's rights. *First State Bank* v. *Cook*, 192 Ark. 213, 90 S.W.2d 510 (1936); *see Vernon* v. *Lincoln National Life Insurance Co.*, 200 Ark. 47, 138 S.W.2d 61 (1940).

Although it is undisputed that the appellant's second mortgage was recorded, the appellee denies that she had knowledge of that second mortgage prior to filing her foreclosure suit against the buyers. She testified that she was unaware that the buyers had executed a note and mortgage to the appellant for his commission, and that it was her understanding that the appellant had received his commission at closing. The appellee's closing statement indicates that the buyers paid a cash down payment of $10,000.00, and that the appellant's brokerage commission was deducted from that payment. The only indication that more than one mortgage existed on the property is a reference to "attorney's preparation of mortgages and notes (½ of $90.00)," found in the closing statement. The appellee could thus assume, from the documentary evidence, that the appellant had been paid his brokerage commission from the buyers' down payment at closing. We find that the chancellor was presented with sufficient evidence to support a finding that the appellant, who was the appellee's broker, did not fully disclose to the appellee the substance of his negotiations with the buyers.

A real estate broker or seller's agent has a duty to disclose the terms of pending negotiations so that the seller may act advisedly in determining whether an offer is satisfactory; a broker who fails to correctly disclose material facts concerning the negotiations is not entitled to a commission, even if he produces a buyer who is ready, willing, and able to purchase. *Carnahan* v. *Lyman Real Estate Co.*, 170 Ark. 519, 280 S.W. 5 (1926); *Silver Fox, Inc.* v. *Penfield Real Estate, Inc.*, 267 Ark. 805, 590 S.W.2d 869 (Ark. App. 1979). A broker owes his principal the utmost good faith and loyalty, and is at all times required to make a full disclosure to his principal, not withholding any valuable information from him, and a broker who fails to make that disclosure forfeits all rights to compensation and renders himself liable for any profits derived. *Toney* v. *Haskins*, 7 Ark. App. 98, 644 S.W.2d 622 (1983).

Our standard of review is clear. The findings of the chancellor will not be disturbed on appeal unless they are clearly against the preponderance of the evidence and, because the question of the preponderance of the evidence turns heavily upon questions of credibility, we defer in this regard to the chancellor's superior position to determine the credibility of the witnesses.

Toney v. *Haskins, supra*; ARCP Rule 52(a). Although the chancellor in the case at bar made no specific finding of fraud or breach of fiduciary duty on the part of the appellant, he did question the appellant's close personal relationship with the buyers, and whether the appellant fully disclosed to the appellee the negotiations surrounding the purchase. Under these circumstances, we cannot say that the chancellor erred in denying the appellant's counterclaim and striking his mortgage from the record.

Affirmed.

CORBIN, C.J., and COULSON, J., agree.

Pauline JONES (CANADY) *v.* Doyle JONES

CA 87-38 737 S.W.2d 654

Court of Appeals of Arkansas
En Banc
Opinion delivered October 14, 1987
[Rehearing denied November 11, 1987.]

Perroni, Rauls & Looney, P.A., by: *Samuel A. Perroni* and *Rita S. Looney*; and *Friday, Eldredge & Clark*, by: *S. Randolph Looney*, for appellant.

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

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Pulaski County Chancery Court. Appellant, Pauline Jones (Canady), appeals the chancellor's ruling which ordered that the parties' property be sold, with the proceeds to be equally divided after reduction for costs of the sale and for $1,500.00 back child support due to appellant for the support of their handicapped child. We affirm as modified.

The parties were divorced on August 25, 1965, with possession of the parties' home awarded to appellant until further orders of the court. In 1985, the handicapped child moved out of the home and the appellant remarried and remained in possession of the property. On March 10, 1986, appellee filed a petition seeking to have the parties' home sold and the proceeds divided. On April 10, 1986, appellant filed her response and counterclaim, seeking unpaid alimony and child support; or, in the alternative, these amounts in set-off against any amounts due appellee as his interest in the home. The unpaid alimony appellant prayed for was in the amount of $900.00, the unpaid child support was $11,400.00. On September 23, 1986, appellant filed an amended response to appellee's petition seeking the value of improvements and the amounts of repairs made and taxes paid on the property as a set-off against appellee's share of the sales proceeds.

The chancellor's order, entered on October 6, 1986, held that appellant's counterclaim for alimony and child support was barred by the statute of limitations, excluding that portion of the child support which accrued in the immediately preceding five

years. The court held that the parties' ownership of the property in question remained as tenants by the entirety and that appellant's counterclaim for the enhanced value of the property due to improvements made and property taxes would not be allowed under the Betterment Act. The court ruled that it would be contrary to the law to consider appellant's equitable claims based on the doctrines of unclean hands and laches. Therefore, appellant's counterclaim was denied.

Appellant raises the following points for reversal: (1) The trial court erred when it allowed the statute of limitations to bar appellant's claim for unpaid alimony and child support asserted as a defensive set-off against appellee's claim to one-half of the sales proceeds from a judicial sale of the house as a final property settlement in the divorce; (2) the trial court erred when it disallowed appellant's counterclaim for an amount equal to the enhanced value of the property due to improvements made by appellant under the Betterment Act as a set-off against appellee's share of the sales proceeds; and (3) the trial court erred when it disallowed appellant's equitable claims, based on the doctrine of laches and the doctrine of unclean hands, in an amount equal to unpaid alimony and child support as well as the enhanced value of the property due to improvements made by appellant.

In her first point for reversal, appellant alleges that the trial court erred by allowing the statute of limitations to bar her claim for unpaid alimony and child support asserted as a defensive set-off against appellee's claim to one half of the sales proceeds from a judicial sale of the house. The statutory authority is Arkansas Statutes Annotated § 37-233 (Repl. 1962) which provides:

> Limitations apply to demands by way of set-off.—The provisions of this act shall be deemed and taken to apply to the case of any demand alleged by way of set-off on the part of any defendant, either by plea, notice or otherwise, provided however that any demand, right or cause of action, regardless of how same may have arisen, may be asserted by way of set-off in any action to the extent of the plaintiffs demand.

In *Little Rock Crate & Basket Co.* v. *Young*, 284 Ark. 295, 681 S.W.2d 388 (1984), the appellee filed a complaint in 1981 to recover $7,207.20 as the purchase price of logs he sold to the

appellant in 1979. The appellant's answer denied the appellee's claim and asserted a $5,000 set-off arising from the appellant's sale of a core chipper to the appellee in 1972, *a claim apparently barred by limitations*. On appellee's motion for summary judgment, the trial judge disallowed the appellant's set-off. Writing for a unanimous court, Justice George Rose Smith posed this question:

> When a plaintiff brings suit upon a claim arising from a certain transaction, may the defendant successfully assert a setoff that arose from a different transaction and was barred by limitations when the plaintiff's cause of action accrued? The trial judge construed the controlling statute to mean that such a setoff cannot be allowed in reduction of the plaintiff's claim. We disagree.

Id. at 295, 681 S.W.2d at 388. The supreme court reversed, holding that the trial court erred in its disallowance of the $5,000 set-off by summary judgment.

In the case at bar, the chancellor should have allowed appellant's *defensive set-off* for the back alimony and child support. As set out in Arkansas Statutes Annotated § 37-233, the set-off will be limited to the extent of appellee's demand; his claim to one-half of the proceeds from the sale of the parties' home. If the set-off amount exceeds the extent of appellee's demand, the excess will be barred by the statute of limitations. We affirm as modified for the trial court to enter such orders as are necessary to implement this decree.

Secondly, appellant argues that pursuant to the Betterment Act, she is entitled to an amount equal to the enhanced value of the property due to improvements made by appellant as a set-off against appellee's share of the proceeds. The chancellor was correct in finding that the Betterment Act did not apply. The Betterment Act, Arkansas Statutes Annotated § 34-1423 (Repl. 1962), provides that:

> Recovery for improvements and taxes paid on land of another.—If any person, believing himself to be the owner, either in law or equity, under color of title, has peaceably improved, or shall peaceably improve, any land which upon judicial investigation shall be decided to belong to

> another, the value of the improvement made as aforesaid and the amount of all taxes which may have been paid on said land by such person, and those under whom he claims, shall be paid by the successful party to such occupant, or the person under whom or from whom he entered and holds, before the court rendering judgment in such proceedings shall cause possession to be delivered to such successful party.

In the case at bar, appellant did not reasonably believe that she was the sole owner of the property. At the time of the divorce, appellant was given possession of the property "until further orders" of the court. Improvements made with the knowledge that another is claiming an interest in the property can hardly be characterized as improvements made under a *bona fide* belief of ownership. *Lawrence* v. *Lawrence*, 231 Ark. 324, 329 S.W.2d 416 (1959). The Arkansas Supreme Court held as follows: "It will be noted that the statute provides 'peaceably improved.' Even the evidence on behalf of appellant reflects that most of the improvements were made after appellant had notice that appellee was claiming half interest in the property." *Id.* at 330, 329 S.W.2d at 420. In the case at bar, all the improvements made by appellant were made after appellant had notice that she merely had possession of the property until further orders of the court, and that appellee had an interest in the property. Therefore, the Betterment Act does not apply in this case.

We need not address appellant's third argument for reversal as our disposition of the first two issues decides this case.

Affirmed as modified.

Jack C. CARPENTER *v.* Joyce SCHNEIDER, Administratrix of the Estate of Hubert SCHNEIDER, Deceased

CA 87-117 737 S.W.2d 656

Court of Appeals of Arkansas
Division II
Opinion delivered October 14, 1987
[Rehearing denied November 11, 1987.]

Appeal from Pulaski Circuit Court, Sixth Division, *Mike Hulen*, Special Judge;

John H. Adametz, Jr., for appellant.

Dodds, Kidd, Ryan and Moore, for appellee.

GEORGE K. CRACRAFT, Judge. Jack C. Carpenter appeals from a judgment of $11,266.09 entered against him and in favor of the estate of Hubert Schneider, deceased. He advances three points of error, each challenging the sufficiency of the evidence. We find no merit in any of the points and affirm.

After the death of Hubert Schneider, Joyce Schneider, his widow, was appointed administratrix of his estate and brought this action against Jack C. Carpenter to recover $9,500.00 alleged to have been owed by him to the deceased. The action is

based on two written instruments. The first was a writing which stated: "I, Jack Carpenter, owe Hubert Schneider $6,000.00. /s/ Jack Carpenter, 1-26-85." The second was a cancelled check dated February 1, 1985, in the amount of $3500.00, drawn on the account of the deceased, and payable to the order of Jack C. Carpenter and endorsed by him. Appellant answered, pleading the affirmative defenses of accord and satisfaction, failure of consideration, and payment.

At trial, all hearsay evidence was excluded. Appellee introduced the two writings into evidence, stating that she knew nothing of the transactions other than what her husband had told her and rested her case. The appellant testified that the signature on the first writing was genuine and that he had received and cashed the check for $3,500.00. He stated that he and the decedent had planned to go into a business together to which the decedent was to contribute $5,000.00. He stated that the acknowledgment of indebtedness was executed in the amount of $6000.00 in order to show the decedent that the appellant fully expected the venture to be profitable. He testified, however, that the acknowledgment of debt was signed before any funds were advanced under it. He admitted receiving and cashing the check for $3500.00, but claimed that it was intended to be a portion of the $5000.00 to be advanced by the decedent. Appellant also claimed he had repaid the $3500.00 to the decedent the day he was discharged from the hospital but produced no receipts for the money.

The trial court found that appellee had met her burden of proving both that the appellant owed the $6000.00 as evidenced by the acknowledgment of indebtedness and the $3500.00 as evidenced by the check, and that the appellant had failed to prove his affirmative defenses. The appellant contends that the trial court erred in denying his motion for a directed verdict; that the evidence is insufficient to support the judgment; and that the court erred in finding that the acknowledgment of the indebtedness constituted a promissory note raising a prima facie case in favor of the appellee. We find no merit in these contentions.

During the trial and in his closing remarks, the trial court did refer to the acknowledgment of indebtedness as a promissory note and stated that it was sufficient to establish a prima facie case

which shifted the burden to prove the affirmative defenses to the appellant. The appellant argues that this was error because that document did not meet the true definition of a promissory note.

Earlier cases hold that documents similar to the one in question constitute promissory notes payable on demand, even though not negotiable. *Huyck* v. *Meador*, 24 Ark. 191 (1866). Appellant argues that these cases are no longer applicable because Ark. Stat. Ann. § 85-3-102(1)(c) (Add. 1961) requires that a promise be "more than an acknowledgement of an obligation." It is not necessary for us to address that question because we conclude that, whether the document be determined to be a note or acknowledgment of a debt, the burden to prove any affirmative defenses was properly placed upon the appellant.

In *Anderson* v. *Pearce*, 36 Ark. 293 (1880), it was held that an instrument containing an acknowledgment of debt is a "due bill" and creates an enforceable obligation which implies a valid consideration and promise to repay on demand. Here, the appellant acknowledged that the signature on the instrument was genuine. Valid consideration and a promise to repay were therefore implied. The burden of proving his affirmative defenses rested on appellant. The court was not required to believe appellant's testimony that there was failure of consideration.

Appellant next contends that the evidence was insufficient to support a finding that he was obligated to repay the $3500.00 evidenced by the decedent's check. Appellant admitted cashing the check but stated that he had repaid the decedent in cash on the date he was dismissed from the hospital. He stated that the decedent wanted payment in cash because he needed money for a trip to England with the National Guard. He stated that the deceased put the money in his pants' pocket before he left the hospital. Appellee and her daughter, however, testified that appellant did not visit the deceased on the day he was discharged from the hospital. Appellee testified that decedent left the hospital dressed in pajamas, that he was still wearing them when she unpacked his bags for him, and that she found no cash, other than a few coins, among his clothing. Appellee further testified that before her husband left on the trip to England she had cashed checks at grocery stores to obtain cash for him.

We conclude that the trial court properly ruled, on

introduction of the documents and proof of the signature, that the burden of proving any affirmative defenses shifted to the appellant. We cannot conclude that the trial court's finding that appellant failed to meet his burden is clearly against a preponderance of the evidence.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

Armando Perez MUNGUIA and Enrique VEGA
v. STATE of Arkansas

CA CR 87-52 737 S.W.2d 658

Court of Appeals of Arkansas
Division II
Opinion delivered October 14, 1987

Honey & Rodgers, P.A., for appellants.

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

JAMES R. COOPER, Judge. The appellants in this criminal case were charged with possession of a controlled substance with intent to deliver, a violation of Ark. Stat. Ann. § 82-2617 (Supp. 1985). Both of the appellants filed motions to suppress certain evidence, alleging that it was obtained through an illegal search. After a combined joint trial and suppression hearing before the trial judge sitting as the finder of fact, the motions to suppress were denied and the appellants were found guilty. Each was

sentenced to ten years in the Arkansas Department of Correction and assessed a fine of $20,000.00. From that decision, comes this appeal.

For reversal, the appellants contend that the trial court erred in failing to suppress the evidence seized from the appellants' vehicle, asserting that there was insufficient evidence to support a finding of probable cause to search the vehicle, and that the scope of the warrantless search was unreasonably broad. We affirm.

The appellants first contend that the evidence was insufficient to support the finding that there was probable cause to search the vehicle, and they argue that the trial court thus erred in denying their motions to suppress the evidence obtained through that search. In reviewing the trial court's action in granting or denying motions to suppress evidence obtained by warrantless searches, we make an independent determination based on the totality of the circumstances, but we will not set aside the trial court's finding unless it is clearly against the preponderance of the evidence. *Ingle* v. *State*, 8 Ark. App. 218, 655 S.W.2d 2, *cert. denied*, 467 U.S. 1209 (1983). At trial, the State produced evidence to show that the appellants' automobile was being driven erratically and was drifting from one side of its lane to the other. This erratic driving attracted the attention of Officers Brown and Barfield, who were patrolling in separate vehicles. Officer Brown pulled the car over after observing it drift toward the shoulder of the highway two or three times, believing that the operator was either falling asleep or driving while intoxicated. While inquiring about the ownership and registration of the vehicle, Officer Barfield, who was standing near the passenger door, observed a small quantity of marijuana residue scattered on the carpeting near the transmission hump. Officer Brown was consulted, and he agreed that the substance was marijuana. The officers noticed that the interior panel of the passenger door was ill-fitting. Officer Brown raised the edge of the panel and discovered several bundles of marijuana. The officers then searched the vehicle and discovered many more packages of marijuana concealed behind the interior panels of the vehicle.

It is undisputed that the search of the appellants' vehicle was conducted without a warrant and without the appellants' consent. However, a police officer may conduct a

warrantless search of a vehicle if he has reasonable cause to believe that the vehicle contains contraband. *Rowland* v. *State*, 262 Ark. 783, 561 S.W.2d 304 (1978); A.R.Cr.P. Rule 14.1. Reasonable cause exists when the facts and circumstances within the officer's knowledge, or of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Tillman* v. *State*, 271 Ark. 552, 609 S.W.2d 340 (1980); *Rowland* v. *State, supra.*

In the case at bar, the question of the existence of reasonable cause to search the vehicle turns upon the police officers' observation of marijuana in plain view. Under the plain-view doctrine, seized evidence is admissible when the initial intrusion was lawful; the discovery of the evidence was inadvertent; and the incriminating nature of the evidence was immediately apparent. *Johnson* v. *State*, 291 Ark. 260, 724 S.W.2d 160 (1987). The appellants do not dispute the legality of the initial intrusion or the inadvertence of the discovery of the marijuana residue on the floorboard, but argue that the incriminating nature of the substance was not readily apparent. The record shows that the officers observed the residue at approximately 4:00 p.m. on December 5, 1986. Officer Brown testified that he has come into contact with marijuana on hundreds of occasions; that he had never identified a substance as marijuana which was shown by chemical analysis to be a substance other than marijuana; and that he was able to definitely identify the residue on the floor of the appellants' vehicle as marijuana. On this record, we conclude that the evidence is sufficient to support a finding that the incriminating nature of the residue was immediately apparent, and, based on our review of the totality of the circumstances, we hold that the trial court's finding of reasonable cause to search the vehicle is not clearly against the preponderance of the evidence.

Next, the appellants contend that the search of their automobile went beyond the permissible scope of a warrantless automobile search, and assert that the removal of the interior panels was an excessive intrusion. We do not agree. The United States Supreme Court has held that:

> [T]he scope of the warrantless search authorized by [the automobile] exception is no broader and no narrower than

> a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

United States v. *Ross*, 456 U.S. 798, 825 (1982). In the case at bar, the police officers' plain-view observation of the marijuana residue on the floorboard gave rise to probable cause to believe that the automobile contained contraband. Given the discovery of the loose-fitting door panel, we think that a reasonably cautious police officer would have been warranted in the belief that additional marijuana would be found within the door, and that a magistrate could properly have issued a warrant authorizing a search of the recesses behind the interior panels for concealed marijuana. Thus, we hold that the search in the case at bar did not exceed the permissible scope of a warrantless automobile search.

Affirmed.

CRACRAFT and MAYFIELD, JJ., agree.

ELK ROOFING COMPANY, et al. *v.* Donald PINSON

CA 87-60 737 S.W.2d 661

Court of Appeals of Arkansas
Division I
Opinion delivered October 14, 1987

Chester C. Lowe, Jr., for appellant.

Compton, Prewett, Thomas & Hickey, P.A., for appellee.

JOHN E. JENNINGS, Judge. Elk Roofing Company appeals from a decision of the Workers' Compensation Commission awarding Donald Pinson additional medical and temporary total disability benefits for a medical complication, which the Commission found was causally related to an earlier, admittedly compensable injury. We affirm the decision of the Commission.

In 1976, while employed as a truck driver for Elk Roofing, Pinson sustained a compensable injury when he was struck on the left leg with a two-by-four. As a result of the injury Pinson developed thrombophlebitis in the leg.[1] Pinson subsequently

[1] Thrombophlebitis is the inflammation of a vein with the secondary formation of blood clots.

developed pulmonary emboli,[2] and surgery was required. Elk Roofing paid medical and temporary total disability benefits.

In 1978 Pinson was laid off at Elk Roofing, and in October of that year, he developed another pulmonary embolus while working as a truck driver for Cherokee Carpet Mills. Both Elk Roofing and Cherokee Carpet controverted the claim. The Commission found that Pinson's 1978 condition was a recurrence, as opposed to an aggravation or new injury, and held that Elk Roofing was therefore responsible. Pinson was awarded permanent disability benefits based on a 40% permanent partial disability rating. We affirmed the Commission's decision in an unpublished opinion.

In 1984, while working as a short haul truck driver for Great Lakes Chemical Company, Pinson developed deep, non-healing ulcers on his left leg. He sought additional medical and temporary total disability benefits from Elk Roofing, which controverted the claim, contending that Pinson's leg ulcers were not causally connected to the 1976 injury. The Commission held that the requisite causal connection was established and that Elk Roofing had liability.

Elk Roofing now contends that the Commission's award of additional temporary total disability benefits was error as a matter of law, since the Commission had held that Pinson's healing period for the 1976 injury ended in 1978. In support of this argument Elk Roofing cites *Arkansas Secretary of State* v. *Guffey*, 291 Ark. 624, 727 S.W.2d 826 (1987). The actual holding in *Guffey* was that there is no authority in our Workers' Compensation Act providing for awards of "current total disability" benefits, a concept which both the Commission and this court had applied in the past. *See, e.g., City of Humphrey* v. *Woodward*, 4 Ark. App. 64, 628 S.W.2d 574 (1982). The court in *Guffey* also said:

> To the extent that *McNeely* has been interpreted as holding that temporary benefits, regardless of how they are denominated, may be paid after the end of the healing

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[2] These are blood clots which developed in the blood vessels of the leg and then detached and migrated to the arteries going to the lungs.

period, that interpretation is erroneous.[3]

Even before *Guffey*, however, the rule was that temporary disability benefits cannot be awarded after the healing period has ended. *Moro, Inc.* v. *Davis*, 6 Ark. App. 92, 638 S.W.2d 694 (1982); *Mad Butcher, Inc.* v. *Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The validity of this rule is not in question—the issue is its applicability to the facts of this case.

Here Pinson suffered a blow to the leg, which resulted in thrombophlebitis and then pulmonary emboli. His healing period for these conditions ended, and he received an award of permanent partial disability. He now suffers from leg ulcers, which the Commission found to be a complication causally related to Pinson's original 1976 injury. Obviously, Pinson is now in a new "healing period." A claimant's healing period ends when the underlying condition causing the disability has become stable and if nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc., supra.* In the present case the evidence is that treatment of the leg ulcers would significantly improve Pinson's condition. Dr. Moore said in a 1984 report, "he will undergo extensive wide excision of the ulcer in the involved area of the leg with split thickness skin grafting and may require hospitalization for a considerable length of time for healing to occur."

If Pinson had suffered an entirely new injury, totally unrelated to his original leg injury, the fact that his healing period for the earlier injury had ended certainly would not prohibit an award of temporary disability benefits in connection with the new injury. It makes no more sense to hold Pinson is barred from receiving temporary benefits here.

In *Bearden Lumber Co.* v. *Bond*, 7 Ark. App. 65, 71, 644 S.W.2d 321, 324 (1983), we said:

> We conclude that in all of our cases in which a second period of medical complications follows an acknowledged compensable injury we have applied the test set forth in *Williams*—that where the second complication is found to

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[3] *McNeely* v. *Clem Mill & Gin*, 241 Ark. 498, 409 S.W.2d 502 (1966), was the case from which we mistakenly derived the concept of "current total disability."

> be a natural and probable result of the first injury, *the employer remains liable.* (Emphasis added.)

We see no reason to hold that this liability does not include liability for additional temporary benefits, when the claimant undergoes a second, distinct healing period.

In *Burks, Inc.* v. *Blanchard*, 259 Ark. 76, 531 S.W.2d 465 (1976), the supreme court approved an award of additional compensation to a claimant whose recurring symptoms were causally related to his original injury, despite the fact that he had already received an award of permanent disability and therefore his original healing period had presumably ended. In *Home Ins. Co.* v. *Logan*, 255 Ark. 1036, 505 S.W.2d 25 (1974), the supreme court implied that recurring symptoms may give rise to a subsequent healing period, after the original one has ended.

Guffey's prohibition against an award of temporary disability after the healing period ends clearly contemplates a single healing period. There is no indication that the claimant in *Guffey* underwent a second healing period because of a subsequent medical complication. Indeed, the opinion in *Guffey* states that the only question for decision was whether the claimant was entitled to "current total disability" and apparently there was no issue about disability during a healing period.

Elk Roofing also argues that the Commission's finding of a causal connection between the leg ulcers and the 1976 injury is not supported by substantial evidence. In making that determination on appeal we must view the evidence in the light most favorable to the findings of the Commission. *Snow* v. *Alcoa*, 15 Ark. App. 205, 691 S.W.2d 194 (1985). On this issue Elk Roofing points to medical testimony indicating that Pinson had "fully recovered from illnesses arising from the episode of thrombophlebitis in 1976" before the leg ulcers developed, and to other testimony indicating that Pinson's truck driving activities after he left Elk Roofing may have aggravated his condition. The Commission, however, relied on other medical evidence. Dr. Moore said, "it is my opinion that his present problem [the ulcers] dates back to that initial injury. . . ." Dr. Weedman said, "Mr. Pinson has chronic stasis ulcers of his left leg, which is a direct result of venous insufficiency, resulting from the thrombophlebitis that he developed in May, 1976." We hold that the Commis-

sion's finding of fact on the issue of causal connection is supported by substantial evidence.

Affirmed.

CRACRAFT and MAYFIELD, JJ., agree.

Wilburn FOWLER *v.* Tom McHENRY, et al.

CA 87-121 737 S.W.2d 663

Court of Appeals of Arkansas
Division I
Opinion delivered October 14, 1987

Jay N. Tolley, for appellant.

Gerald D. Lee, for appellee.

JOHN E. JENNINGS, Judge. Appellant, Wilburn Fowler, was a long haul truck driver for McHenry Trucking. On April 21, 1985, Fowler had a heart attack while driving his truck. He returned to work in June 1985, and on September 4, 1985, he suffered an attack of angina.

In an opinion dated August 1, 1986, the administrative law judge held that Fowler's heart attack was compensable. The Commission reversed, holding that Fowler had not met his burden of proving that there was a causal relationship between his employment and the heart attack.

On appeal, Fowler argues that the Commission erred in applying Act 10 of 1986 (Second Extraordinary Session) and that the Commission's decision is not supported by substantial evidence. We disagree and affirm.

In its opinion dated January 29, 1987, the Commission stated:

> In reaching the determination [that the claimant has not sustained his burden of proof], we have weighed the evidence impartially and without giving benefit of the doubt to any party in conformity with Act 10 of 1986.

The pertinent provision of that act states:

> Administrative law judges, the Commission, and any reviewing courts shall construe the provisions of this Act liberally, in accordance with the Act's remedial purposes. In determining whether a party has met the burden of proof on an issue, administrative law judges and the Commission shall weigh the evidence impartially and without giving the benefit of the doubt to any party.

Section 15 of the Act, an "emergency clause" in customary language, states:

> It is hereby found and determined by the General Assembly that the increased benefits and improvements in the administration of the Workers' Compensation system in Arkansas is in the best interest of employees, employers, the public in general; therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1986.

In the case at bar, Fowler's injury occurred, and his claim was filed, prior to the effective date of the act. The decisions of both the ALJ and the Commission, however, were rendered after the act went into effect.

The question we must answer is whether the legislature intended that the Commission apply the new rule in cases where the injury occurred before the effective date of the act, but which were heard by the Commission after the effective date. The Commission's application of the rule in this case was retrospective in relation to the date of the injury but prospective in relation to the date of the hearing before the Commission.

Before the 1986 amendment, it was the rule that the Commission, in making a factual determination, was to give the claimant the benefit of the doubt. *See, e.g., American Red Cross*

v. *Wilson*, 257 Ark. 647, 519 S.W.2d 60 (1975). This rule apparently was derived from the statutory requirement that the workers' compensation statute be liberally construed and appears to have had its origin in *Boyd Excelsior Fuel Co.* v. *McKown*, 226 Ark. 174, 288 S.W.2d 614 (1956). The concept was cogently criticized in a dissenting opinion in *Boyd*, but it has frequently been repeated by both our supreme court and this court. *See, e.g., O. K. Processing, Inc.* v. *Servold*, 265 Ark. 352, 578 S.W.2d 224 (1979) and *Central Maloney, Inc.* v. *York*, 10 Ark. App. 254, 663 S.W.2d 196 (1984) (in which the history of the rule is discussed).

It has also been consistently held, however, that the rule requiring the Commission to resolve doubtful cases in favor of the claimant does not mean that a claimant does not have the burden of proving his case by a preponderance of the evidence. *O. K. Processing, Inc., supra.* We have repeatedly said that the rule of liberal construction is not a substitute for a claimant's burden of establishing an injury by a preponderance of the evidence. *See e.g., Central Maloney, Inc., supra.*

Appellant argues that the new legislation is substantive in nature because it changes the burden of proof required of a claimant. As we have seen, however, the burden of proof has always rested upon the claimant and this rule was not affected by the amendment. The Arkansas Supreme Court has said that the rule by which statutes are construed to operate prospectively does not ordinarily apply to procedural or remedial legislation. *Forrest City Machine Works, Inc.* v. *Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981); *Harrison* v. *Matthews*, 235 Ark. 915, 362 S.W.2d 704 (1962). In language more clearly applicable to the case at bar the court in *Dargel* v. *Henderson*, 200 F.2d 564 (Emer. Ct. App. 1952) said:

> We think that this conclusion is in accord with the settled rule that changes in procedural or remedial law are generally to be regarded as immediately applicable to existing causes of action and not merely to those which may accrue in the future unless a contrary intent is expressed in the statute.

We think that the change brought about by the amendment is fairly characterized as a procedural one. We note that even if the amendment had changed the burden of proof, the

amendment still might be fairly characterized as procedural. In *Forrest City Machine Works, supra*, Justice Hickman, concurring in part and dissenting in part, said:

> The statute simply shifts the burden of proof; the statute is therefore purely remedial and creates no new cause of action. It is a fundamental rule of law that statutes relating only to remedies or modes of procedure are generally held to operate retrospectively.

In determining whether to give a statute retrospective application, courts have frequently followed a "vested right" analysis. *See e.g., Forrest City Machine Works*. In that case the issue was whether to apply a new products liability statute, doing away with the plaintiff's burden of proving negligence in design or manufacture, to an injury occurring after the date of the act, but where the product itself was manufactured long before the act was passed. The court conducted a "vested rights" analysis, while noting the valid criticism of this approach. The court said:

> In this context a vested right exists when the law declares that one has a claim against another, or it declares that one may resist the enforcement of a claim by another.

In the case at bar it is difficult to argue that the claimant has a vested right in the procedure the Commission uses to weigh the evidence. This is particularly so in view of the supreme court's holding in *Buckeye Cotton Oil* v. *McCoy*, 272 Ark. 272, 613 S.W.2d 590 (1981). In that case the court held that although the Commission should view the evidence favorably to the claimant in determining where the preponderance lies, its failure to do so is *not* a basis for appellate reversal.

It is also appropriate to consider the issue of retrospective application from the point of view of fairness, *Forrest City Machine Works, supra*, and from the point of view of the reasonableness of any disappointed expectations, *Adams Nursing Home of Williamstown, Inc.* v. *Mathews*, 548 F.2d 1077 (1st Cir. 1977). From either perspective we cannot say that the Commission's application of the amendment to cases heard after the passage of the act, where the injury occurred prior to passage, is inappropriate.

Appellant cites three cases in support of his position:

Aluminum Company of America v. *Neal*, 4 Ark. App. 11, 626 S.W.2d 620 (1982); *Alexander* v. *Lee Way Motor Freight*, 15 Ark. App. 41, 689 S.W.2d 3 (1985); and *A.O. Smith-Inland, Inc.* v. *Dodd*, 15 Ark. App. 108, 690 S.W.2d 367 (1985). We find none of these decisions controlling. In *Neal*, we held that an amendment providing for lump sum attorney's fees was not limited in application only to attorney's fee awards made after the effective date of the act. We said:

> The strict rule of construction contended for does not apply to remedial statutes which do not disturb vested rights, or create new obligations, but only supply a new or more appropriate remedy to enforce an existing right or obligation. These should. . .be given a retrospective effect whenever such seems to have been the intention of the Legislature.

4 Ark. App. at 15, 626 S.W.2d at 622 (quoting *State ex rel Moose* v. *Kansas City & Memphis Railway and Bridge Co.*, 117 Ark. 606, 174 S.W. 248 (1914)).

In *Alexander*, we gave retrospective application to an amendment to the workers' compensation statutes which made it easier for the claimant to obtain a change of physician to a chiropractor. *Dodd* involved an amendment to the portions of the act relating to the application of the second injury fund. The court did hold that the amendments were not applicable to injuries occurring prior to the effective date of the act, but this appears to have been a substantive matter.

Finally, a common-sense reading of the language of the amendment supports the interpretation given to it by the Commission. Had the legislature intended that the new rule be applied only to claims filed after the effective date of the act it could have said so.

We do not intend to imply that we think the amendment affects this court's standard of reviewing the Commission's findings of fact.

Appellant's second argument is that the Commission's finding that there was no causal relationship between appellant's employment and his heart attack is not supported by substantial evidence. On review, we must view the evidence in the

light most favorable to the findings of the Commission and give the testimony its strongest probative force in favor of the Commission's action. *McCollum* v. *Rogers*, 238 Ark. 499, 382 S.W.2d 892 (1964); *Allen Canning Co.* v. *McReynolds*, 5 Ark. App. 78, 632 S.W.2d 450 (1982). We do not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion the Commission reached. *Silvicraft, Inc.* v. *Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983).

A heart attack which occurs on the job may or may not be compensable depending on the circumstances. *See Reynolds Metals Co.* v. *Cain*, 243 Ark. 483, 420 S.W.2d 872 (1967). The burden is on the claimant to show a causal connection between his heart attack and his employment. *Auto Salvage Co.* v. *Rogers*, 232 Ark. 1013, 342 S.W.2d 85 (1961). When it is established that the claimant was putting forth unusual exertion in his work at the time of the heart attack it will ordinarily be held that the requirement of causal connection has been met. *See e.g., Dougan* v. *Booker*, 241 Ark. 224, 407 S.W.2d 369 (1966). Absent "unusual exertion" the applicable test is whether the required exertion producing the injury is too great for the person undertaking the work, whatever the degree of exertion or the condition of his health, provided the exertion is either the sole or a contributing cause of the injury. *Reynolds Metals Co.* v. *Robbins*, 231 Ark. 158, 328 S.W.2d 489 (1959).

The Commission essentially held that the work in which appellant was engaged at the time of his heart attack was not a contributing cause of the attack. Our inquiry on appeal is whether this finding is supported by substantial evidence.

Fowler's heart attack occurred on April 21, 1985. He had left Huntsville, Arkansas, in route to Dallas, Texas, and had driven about three miles when he started having chest pain. There was no indication that on that particular day Fowler had engaged in any particularly stressful activities.

There was evidence that Fowler had done more loading and unloading with fewer layovers since he had begun working for McHenry. There was also evidence, however, that during the three months prior to his heart attack Mr. Fowler's son helped him drive and load.

Medical testimony established that, statistically, truck drivers are more likely to suffer heart attacks than persons in some other occupations. Dr. Inlow attributed this to the "basically unhealthy life style associated with the occupation."

The testimony of the two medical witnesses, Dr. Wilson and Dr. Inlow, was simply inconclusive. Neither could say that Fowler's work was a contributing cause of his heart attack, and neither could say that it was not. Both doctors testified that stress *could* be a factor in bringing about a heart attack, but neither could say that Fowler had been under any stress that could have been a factor in causing his heart attack.

In *Jones* v. *Scheduled Skyways, Inc.*, 1 Ark. App. 44, 612 S.W.2d 333 (1981), there was medical evidence that job related stress was a contributing cause of the claimant's heart attack, and there was medical evidence to the contrary. We held that the question presented was one of fact, within the province of the Commission. In the case at bar the weighing of the medical evidence falls within the province of the Commission. We cannot say that the Commission's finding of a lack of causal connection is unsupported by substantial evidence.

Affirmed.

CORBIN, C.J., and COULSON, J., agree.

SPARKS REGIONAL MEDICAL CENTER *v.* DEATH AND PERMANENT TOTAL DISABILITY BANK FUND

CA 87-71 737 S.W.2d 463

Court of Appeals of Arkansas
Division I
Opinion delivered October 14, 1987

Jones, Gilbreath, Jackson & Moll, by: *Robert L. Jones III* and *Charles R. Garner, Jr.*, for appellant.

Walter A. Murray Law Firm, for Amicus Curiae, Arkansas Self-Insurers' Association.

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

MELVIN MAYFIELD, Judge. This is an appeal from the Arkansas Workers' Compensation Commission and presents the question of whether the employer or the Death and Permanent Total Disability Bank Fund is liable for certain weekly benefits due to the claimant.

The claimant suffered a compensable injury on December 26, 1980. The Commission held that his healing period ended on February 7, 1983, and that he became permanently and totally disabled on that date. It was stipulated that, as of December 6, 1984, the employer had paid weekly indemnity benefits totaling $25,956.00 and medical benefits of $25,540.78. The employer contended that all the weekly benefits paid, whether for temporary total disability or permanent total disability, should be applied toward the employer's liability limit of $50,000.00 as provided in Ark. Stat. Ann. § 81-1310(c)(2) (Supp. 1981), in effect at the time of the injury in this case. This limit was fixed by

Act 253 of 1979, which amended various sections of the workers' compensation law and which, as it existed on December 26, 1980, provided as follows:

> The first Fifty Thousand Dollars ($50,000.00) of weekly benefits for death or permanent total disability shall be paid by the employer or his insurance carrier in the manner provided in this Act. An employee or dependent of an employee who receives a total of Fifty Thousand Dollars ($50,000.00) in weekly benefits shall be eligible to continue to draw benefits at the rates prescribed in this Act but all such benefits in excess of Fifty Thousand Dollars ($50,000.00) shall be payable from the Death and Permanent Total Disability Bank Fund.

The Commission affirmed a law judge's finding that the employer was not entitled to credit its weekly temporary total disability payments against the statutory limit of $50,000.00 as that limit applied only to weekly indemnity benefits paid for permanent and total disability. After quoting the statute, the Commission's opinion stated:

> Of course, the second reference to the $50,000.00 is not followed by "weekly benefits for death or permanent total disability" but in context clearly refers to permanent disability payments. It would be a total distortion of legislative intent and plain and clear meaning of an unambiguous statute to find that temporary total disability should be counted toward the ceiling. The reference to "all such benefits" plainly refers back to the "weekly benefits for death or permanent total disability."
>
> The authors of the Statute could not have intended for temporary disability benefits and permanent disability benefits to be treated as interchangeable since they are plainly authorized only in diametrically opposed situations. The worker who qualifies for temporary benefits is paid while in his healing period and until his condition stabilizes. Until the healing period is ended, there is no way to determine whether there is permanent disability. This distinction is maintained in the case law. See *Mad Butcher, Inc.* v. *Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982) for a discussion of the healing period and the

necessity for the injury to stablize before it is ended. Temporary total disability benefits are just that—"temporary"—we could not award them past the end of the healing period even if we wanted to because the Arkansas Supreme Court has defined temporary total disability as "that period *within* the healing period in which the employee suffers a total incapacity to earn wages" (emphasis supplied). *Arkansas State Highway & Transportation Department* v. *Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). Temporary total disability benefits were recognized as a legitimate form of benefits distinct from permanent benefits in *International Paper Company* v. *McGoogan*, 255 Ark. 1025, 504 S.W.2d 739 (1974). That case settled the precise issue of whether such a form of benefits could be awarded in addition to scheduled (permanent) benefits. Since there are clearly two separate forms of disability payments, i.e., temporary and permanent, it is compatible with a common sense interpretation of § 10(c)(2) to find that only permanent disability benefits are to be counted toward the ceiling at which the Bank Fund takes over since permanent benefits are the benefits which are payable by the Bank Fund and are the benefits which are clearly referred to in the statute. To construe the statute to include payments of temporary total disability benefits would be to disregard the patent language and time honored distinction between the two types of benefits in our statutes and decisions. If the legislature intended such a convoluted interpretation as the respondents maintain, it would have said so. We note that several cases are cited, but they are not controlling. While the two types of benefits may have been added together to reach the ceiling in those cases, no objection was raised, and the issue was not decided or discussed.

On appeal to this court the employer argues that section 81-1310(c)(2), as fixed by Act 253 of 1979, is ambiguous and contends that the phrase "first $50,000.00 of weekly benefits for death or permanent total disability" could refer to either the condition of the claimant as ultimately determined by the Commission or to the characterization of the weekly benefits. This contention is more clearly put by an amicus curiae brief

which states that disability payments made before it is determined the claimant is totally and permanently disabled are "nonetheless 'weekly benefits for death or permanent disability.' " It is conceded that medical and rehabilitative expenses would not apply toward the statutory maximum but it is argued that all weekly benefits paid for both temporary total disability and permanent total disability should apply toward the statutory maximum.

We do not agree that the section is ambiguous, and we think the Commission's interpretation is correct. This section was involved in the case of *Hill* v. *CGR Medical Corporation*, 9 Ark. App. 334, 660 S.W.2d 171 (1983), affirmed by the Arkansas Supreme Court in 282 Ark. 35, 665 S.W.2d 274 (1984), and the Commission's decision is in harmony with the decision in *Hill*. The appellant calls attention to Ark. Stat. Ann. § 81-1310(a)(C)(Supp. 1981) (which also came from Act 253 of 1979), and points to the $56,700.00 provided there as the employer's limit of liability for weekly benefits. However, that section expressly states that the limit does not apply "in cases of permanent total disability." As the Commission's opinion points out, it is clear that there is a distinction between permanent total disability and temporary total disability and we do not think the limit of $56,700.00 (based upon 450 weeks at the then maximum weekly benefit of $126.00) provided in section 81-1310(a)(C) causes any ambiguity in regard to section 81-1310(c)(2).

Appellant also argues that even if we find there is no ambiguity we should reach the result appellant submits because it has made an advance payment of compensation for which it should be reimbursed pursuant to Ark. Stat. Ann. § 81-1319(m)(Repl. 1976). Again, we do not agree. Under Ark. Stat. Ann. § 81-1310(c)(2)(Supp. 1981), the first $50,000.00 of weekly benefits for death or permanent total disability must be paid by the employer or its insurance carrier before the Bank Fund becomes liable. The payments appellant made to the claimant prior to February 7, 1983, were for temporary total disability. Only those payments made after that date were for permanent total disability and only those payments may be applied toward the maximum of $50,000.00.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

Frederick RIDEOUT *v.* STATE of Arkansas

CA CR 87-48 737 S.W.2d 667

Court of Appeals of Arkansas
Division I
Opinion delivered October 14, 1987

John Wesley Hall, Jr., for appellant.

Steve Clark, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

BETH GLADDEN COULSON, Judge. The appellant, Frederick Rideout, was convicted of driving while intoxicated. His drivers license was suspended for a period of 90 days, and he was fined $150.00 plus costs and sentenced to 24 hours already served in jail. On appeal, it is argued that the trial court erred in finding that the arresting officer had sufficient probable cause to arrest the appellant for DWI. We find no error and affirm.

At trial, the arresting officer testified that on October 13, 1985, at approximately 2:21 a.m., he was traveling westbound on Interstate 40 when his radar clocked the appellant's vehicle doing 74 miles per hour in a 55 mile per hour zone. The officer also observed the appellant's vehicle drive several feet off the main road onto the shoulder before returning to the roadway. The officer stopped the appellant and noticed a moderate odor of alcohol about the appellant's person. The officer administered various field sobriety tests, which the appellant failed, and then arrested the appellant for speeding and for DWI. The officer testified that in his opinion the appellant was driving under the influence of intoxicants. A breathalyzer test was later administered, and the appellant registered 0.13%.

At no time had the appellant moved to suppress the results of the breathalyzer test nor had he objected to this evidence when introduced. At the close of all the evidence, the appellant moved for a judgment of acquittal based upon a lack of probable cause for the arrest. This appeal was prompted by the trial judge's comment that he found probable cause by virtue of the justifiable stop for speeding and the officer's detection of the odor of alcohol on the appellant's person, but that he attached no value to the results of the field sobriety tests. We decline to reach the merits of the issue raised by the appellant because the issue was not

properly presented to the trial court.

The appellant's motion for a judgment of acquittal based on lack of probable cause was in reality a motion to suppress the evidence coupled with a motion for a directed verdict. *Holt* v. *State*, 15 Ark. App. 269, 692 S.W.2d 265 (1985). Our decision in *Holt* makes clear that defendants should pursue the issue of probable cause under Rule 16.2 of the Arkansas Rules of Criminal Procedure by timely filing a motion to suppress the evidence obtained as a result of the allegedly unlawful arrest. Under Rule 16.2(b), that motion must be filed no later than 10 days before trial, except that the trial court has the discretion to allow a later motion to suppress on a showing of good cause. The appellant, as was the case in *Holt*, failed to timely file his motion to suppress, made no attempt to demonstrate good cause for waiting until the close of all the evidence, and failed to object to the introduction of the evidence which resulted in his conviction.

Rule 16.2(b) is reasonable and should be complied with in the absence of good cause. "The rule facilitates the orderly procedure of the trial court, and gives the court and the parties an opportunity to study preliminary issues before the trial proper and perhaps dispenses with the necessity for a trial." *Dodson* v. *State*, 4 Ark. App. 1, 5, 626 S.W.2d 624, 626, *cert. denied*, 457 U.S. 1136 (1982). We hold that the attempt to suppress the evidence was not timely and need not have been considered by the trial judge. *Holt, supra.*

Having viewed the appellant's motion for a judgment of acquittal as a combined motion—to suppress and for a directed verdict—we test the sufficiency of the evidence to support the conviction. We view the evidence in the light most favorable to the State and affirm if there is substantial evidence to support the verdict. In light of the officer's testimony and the results of the breathalyzer test, we find substantial evidence to support the appellant's conviction for DWI.

Affirmed.

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

David HANEY *v.* YOUNG SALES CORPORATION and LIBERTY MUTUAL INSURANCE COMPANY

CA 87-162 737 S.W.2d 669

Court of Appeals of Arkansas
Division II
Opinion delivered October 21, 1987

Richard S. Paden, for appellant.

Penix Law Firm, for appellee.

GEORGE K. CRACRAFT, Judge. David Haney appeals from an order of the Arkansas Workers' Compensation Commission dismissing his claim for permanent-total disability benefits against his employer, Young Sales Corporation, on grounds that the claim was barred by the statute of limitations. Appellant advances several points in support of his appeal in which we find no merit, but which we address separately and in the order presented.

The appellant, an Arkansas resident hired in Arkansas by a Missouri corporation, was injured on February 3, 1981, while working for his employer in the State of Tennessee. The employer paid all of his medical expenses and temporary-total disability benefits through the end of his healing period on November 8, 1982. On that date it also paid him in one lump sum an amount equal to the benefits for permanent-partial disability of ten-percent to the body as a whole. No compensation or other benefits have been paid to the appellant since that date.

During this period, the employer and carrier were cooperat-

ing with the appellant and his attorney in pursuit of a products liability claim against a third party. The third party was subsequently adjudged bankrupt, and on September 19, 1983, the appellant filed his claim for additional compensation benefits before the Division of Workmen's Compensation of the Department of Labor and Industrial Relations for the State of Missouri. That agency found that jurisdiction of appellant's claim lay exclusively with the Arkansas Workers' Compensation Commission and dismissed appellant's claim on August 27, 1984. Appellant filed a claim for benefits with the Arkansas Workers' Compensation on June 1, 1985, a date more than four years after the injury. It was conceded that this claim would be barred under the provisions of Ark. Stat. Ann. § 81-1318(b) (Repl. 1976) unless some event had in the meantime tolled the period of limitations in appellant's favor. The Commission held that the claim was barred under that section and this appeal followed.

Appellant first argues that the period of limitations was tolled by the filing of the claim in Missouri under Ark. Stat. Ann. § 81-1318(e) (Repl. 1976), which provides in pertinent part as follows:

> (e) Effect of suit. Whenever recovery in an action at law to recover damages for injury to or death of an employee is denied to any person on the ground that the employee and his employer were subject to the provisions of this act [§§ 81-1301—81-1349], the limitations described in subsections (a) and (b) shall begin to run from the date of the termination of such action.

We cannot agree that the filing of the claim before the Missouri Division of Workmen's Compensation would make this section applicable. Actions at law to recover damages for injury are entirely different from claims for compensation on account of disability. Actions at law for damages are brought in constitutional courts having jurisdiction over torts. Claims for compensation for disability are determined by administrative agencies created for that purpose. The distinction between the two and the differences between our Workers' Compensation Commission and our courts of law have been recognized on many occasions. *See e.g., Ward School Bus Manufacturing, Inc.* v. *Fowler*, 261 Ark. 100, 547 S.W.2d 394 (1977); *Owens* v. *Bill & Tony's Liquor*

Store, 258 Ark. 887, 529 S.W.2d 354 (1975); *Petit Jean Air Service* v. *Wilson*, 251 Ark. 871, 475 S.W.2d 531 (1972); *Bryan* v. *Ford, Bacon and Davis*, 246 Ark. 327, 438 S.W.2d 472 (1969); *David* v. *Arkansas Best Freight System, Inc.*, 239 Ark. 632, 393 S.W.2d 337 (1965); *Andrews* v. *Gross and Janes Tie Co.*, 214 Ark. 210, 216 S.W.2d 386 (1949).

Section 81-1318(e) was not intended to apply to claims for statutory benefits for industrial injuries filed before the workers' compensation agencies of sister states but was designed to allow an extension of the period of limitations for the filing of claims by those who mistakenly pursued tort claims against their employers, when in fact the exclusive remedies afforded for their injuries were under the Workers' Compensation Act. As a prerequisite to the tolling of the statute under that section, our courts have held that paragraph (e) requires (1) an action at law for damages; (2) denial of recovery; and (3) that recovery be denied on the ground that the employer and employee were subject to the Workers' Compensation Act. *Bryan* v. *Ford, Bacon and Davis*, 246 Ark. 327, 438 S.W.2d 472 (1969); *Guthrie* v. *Tyson Foods, Inc.*, 20 Ark. App. 69, 724 S.W.2d 187 (1987).

The appellant argues that this case is controlled by the decision in *Aetna Casualty & Surety Co.* v. *Jordan*, 234 Ark. 339, 352 S.W.2d 75 (1961). We do not agree. We can only conclude that *Jordan* is, and certainly ought to be, limited to its peculiar facts. The court in *Jordan* placed great emphasis on the fact that, under Louisiana law, compensation cases are initiated in its courts of law and that such an action is one to recover money for injuries sustained by a claimant. In Missouri, claims for industrial injuries are processed through the Division of Workmen's Compensation, which is not a court but a mere administrative agency. The courts of Missouri have so declared. *See Bliss* v. *Lungstras Dying and Cleaning Co.*, 130 S.W.2d 198 (Mo. App. 1939). Section 81-1318(e), therefore, is not applicable. As more than two years had elapsed from the date of the injury to the date of filing a claim before our Commission, we conclude that the Commission's ruling on this point was a correct one.

Appellant next contends that the statute was tolled under the rule announced in *Houston Contracting Co.* v. *Young*, 267 Ark. 322, 590 S.W.2d 653 (1979), *appeal after remand*, 270

Ark. 1009, 607 S.W.2d 83 (Ark. App. 1980). These decisions hold that the period of limitations prescribed in § 81-1318(b) is tolled where a person hired in Arkansas receives benefits under the law of another state where he is injured but does not actively initiate the proceedings and remains unaware of the source of the payments. Here, the Commission found on conflicting evidence that appellant was aware of the source of the Tennessee payments received. More important, however, is the fact that more than two years had elapsed between the date of the last payment in Tennessee and the filing of the claim in Arkansas. Even if appellant was entitled to the benefit of the *Houston* rule, the period of limitations had run against his claim in this state.

The appellant also argues that the employer should be estopped from pleading the limitations of § 81-1318(b) because it misrepresented to the appellant that the claim should be filed in Missouri and thereby induced him to allow the statute of limitations to run against him in Arkansas. We find no merit in this contention for two reasons. First, the action in Missouri was filed on September 19, 1983, a date more than two years after the date of the accident. It could not at that time have been maintained in Arkansas. Secondly, the witness on which the parties relied to establish the misleading statements that the hiring took place in Missouri was Carl Haney, brother of the appellant. There was no evidence that any action of Carl Haney was intended to mislead his brother or gain any advantage over him. The Commission expressly found the decision to file in Missouri to have been based upon inadequate discovery procedures and not upon any misrepresentation on the part of the employer. We cannot conclude that this finding is not supported by substantial evidence.

The Commission additionally found that, even if the matter had not been barred by the statute of limitations, the appellant had failed in his burden of proving entitlement to an award of permanent and total disability. The appellant contends that the Commission erred in that finding. In view of our conclusion that the claim was barred by limitations, we do not address the issue of the sufficiency of the evidence to support an award.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

GENERAL INDUSTRIES *v.* Martha GIBSON

CA 87-35 738 S.W.2d 104

Court of Appeals of Arkansas
Division II
Opinion delivered October 21, 1987

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

Etoch & Etoch, for appellee.

JAMES R. COOPER, Judge. The appellee, Martha Gibson, was employed by the appellant and was injured in the course of her employment after inhaling kerosene fumes. Her injury was found to be compensable, and further hearings were held before the administrative law judge to determine the extent of her disability and whether the employer was entitled to a fifteen percent credit for a permanent partial disability previously paid. The administrative law judge found the appellee to be permanently and totally disabled, that the appellant was not entitled to a fifteen percent setoff, and that the appellee's attorney was entitled to attorney's fees based on the medical bills that had been paid by Blue Cross/Blue Shield. The full commission adopted the opinion of the administrative law judge. The appellant now argues on

appeal that the evidence was insufficient to support a finding that the appellee is permanently and totally disabled, that the Commission erred in refusing to allow the appellant fifteen percent credit against the award because the appellant had previously paid the appellee for a fifteen percent partial disability, and that the Commission erred in awarding attorney's fees on the medical expenses paid by Blue Cross/Blue Shield. We affirm.

On September 18, 1984, in proceedings not a part of this appeal, the appellee was found to have suffered a compensable injury to her lungs after inhaling kerosene fumes. On June 18, 1985, a hearing was held to determine the extent of her injury. The appellee testified that after two months of working in the kerosene, she began to bleed from her kidneys. The appellee suffers from chest pain, aching in her joints, and occasionally coughs up blood. She stated that she is extremely sensitive to odors and becomes ill in the grocery store and gas station. The appellee's husband testified that since the injury, the appellee spends most of her time in bed and is unable to complete her household chores. Shortly after being hospitalized with pulmonary problems the appellee attempted to return to work. However, the work-related odors made her ill and her doctor recommended that she not work. The appellee now suffers from a chronic hypersensitivity to chemicals.

A rehabilitation report was entered into evidence. The report stated that the appellee had a formal education through eleventh grade and had worked in the past as a nurses's aide, a cook, and on the line in a factory. It was the opinion of the rehabilitation specialist that the appellant would not be able to return to any of the jobs in which she had experience. He further stated that the appellee may in the future, with retraining, be capable of working in an environment where there are no fumes, cigarette smoke, or chemicals. However, the appellee's treating physician, Dr. Worrell, stated that he felt it would be at least two to five years before the appellee could return to work even in a cleaner environment. Dr. Worrell further stated that he did not feel the appellee could even handle the necessary retraining for several years.

It is the appellant's contention that because there was evidence that the appellee may be able to re-enter the work force, the Commission's decision that the appellee is permanently and

totally disabled is not supported by substantial evidence. We disagree.

Under our limited standard of review, decisions of the Workers' Compensation Commission must stand if supported by substantial evidence, and, in determining the sufficiency of the evidence to sustain findings of the Commission, testimony must be viewed in its strongest light in favor of the Commission's findings. *Central Maloney, Inc.* v. *York*, 10 Ark. App. 254, 663 S.W.2d 196 (1984). Findings of fact by the Commission are, on appeal, given the same verity that would attach to a jury's verdict. Substantial evidence has been defined as more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It is of such force and character that it would with reasonable and material certainty and precision compel a conclusion one way or the other. *Id.* at 263, 663 S.W.2d at 200; *DeFrancisco* v. *Arkansas Kraft Corp.*, 5 Ark. App. 195, 636 S.W.2d 291 (1982).

In determining wage loss disability, many other factors are to be determined along with the medical evidence. Consideration should be given the claimant's age, education, experience, and other matters affecting wage loss including the degree of pain endured 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).

In the case at bar, the evidence reflected that the appellee was 53 years old, had worked in two other fields, and had a GED equivalency diploma. Although the rehabilitation therapist testified that the appellee may be able, with retraining, to find employment in five years, such an assessment is speculative. We hold that the evidence supports the Commission's finding that the appellee is totally and permanently disabled.

The appellant next argues that the Commission erred in refusing to offset the award to the appellee by the amounts the appellant had paid to the appellee for a previous back injury suffered by the appellee in 1983. However, the law cited by the appellant applies to situations where the prior injury suffered by a claimant combines with the second injury to cause disability. *See* Ark. Stat. Ann. § 83-1313(f)(1) (Repl. 1976). However, in the present case it is clear that the recent injury suffered by the

appellee in her employment with the appellant, standing alone, left her totally and permanently disabled. In other words, there is no evidence in the record to support a finding that the previous back injury contributed in any way to the appellee's present disability, and the ceilings on compensation found in § 81-1313 (f)(1) do not apply. *Cooper Industrial Products, Inc.* v. *Worth*, 256 Ark. 394, 508 S.W.2d 59 (1974).

The appellant's last argument concerns the fees awarded to the appellee's attorney. Prior to the determination that the injury was compensable, the health insurance carrier, Blue Cross/Blue Shield, paid over $15,000.00 for medical expenses incurred by the appellee. At one point in the case at bar, Blue Cross/Blue Shield was granted permission to intervene; however, they were later dismissed at Blue Cross/Blue Shield's request. The appellee's attorney was awarded a fee partially based on the amount of medical expenses paid by Blue Cross/Blue Shield after a hearing on this issue. The appellant alleges that this was error. We disagree.

The test is that fees are calculated on the amount controverted and awarded. Ark. Stat. Ann. § 81-1332 (Repl. 1976); *Hot Spring County Bicentennial Park* v. *Walker*, 271 Ark. 688, 610 S.W.2d 268 (1981). The appellant in this case disputed that it had any liability at all. Its position at the hearings was that the appellee's injuries could not have been caused by the inhalation of kerosene. The award of medical benefits made by the Commission in the first hearing was not appealed from. We do not find it significant that the medical bills were paid by a collateral source; they were awarded to the appellee by the Commission after being controverted by the appellant. We find no error.

Affirmed.

CRACRAFT and MAYFIELD, JJ., agree.

COUNTRY CORNER FOOD AND DRUG, INC.
v. Robert L. REISS

CA 87-141 737 S.W.2d 672

Court of Appeals of Arkansas
Division I
Opinion delivered October 21, 1987

Larry E. Graddy, for appellant.

Matthew W. Adlong, for appellee.

BETH GLADDEN COULSON, Judge. Appellant, Country Corner Food and Drug, Inc., appeals a decision of the Faulkner County Circuit Court awarding judgment to appellee, Robert L. Reiss, for breach of an agreement to provide family health insurance coverage pursuant to an oral employment contract. We affirm.

In October, 1985, appellee quit his job and moved his family from Kansas in order to begin work for appellant in Greenbrier, Arkansas, as a meat-cutter. At the time that appellee began work for appellant, appellee's wife was pregnant; health insurance coverage for the pregnancy and birth was discussed, as well as

coverage for the entire family, including the child, after its birth. The contract of employment between the parties was never reduced to writing and was of indefinite duration. Appellee's baby was born in January of 1986 and was returned to the hospital within a few weeks for respiratory problems. The expenses incurred as a result of the infant's hospitalization were not covered by insurance, and appellant fired appellee after appellee requested that appellant assume responsibility for the medical bills. Thereafter, appellee sued appellant for breach of contract and requested that appellant be required to pay the amount of the baby's medical expenses.

In his complaint, appellee asserted detrimental reliance on appellant's promises to provide medical insurance for appellee and his family. In its answer, appellant countered that the contract violated the statute of frauds because it was not in writing. After a trial, the circuit court rendered judgment for appellee. In its findings of fact, the circuit court found that the parties entered into an employment contract whereby appellant agreed to provide medical/hospitalization insurance for appellee, his wife, and his child to be, and that no such insurance coverage was perfected. The trial judge also held that substantial part performance removed the contract from the statute of frauds. On appeal, appellant asserts that the trial court erred in refusing to find the contract violated the statute of frauds and that there is insufficient evidence to support the trial court's findings of fact. We disagree with appellant on both points.

Appellant is correct in stating that part performance does not remove an oral contract of employment from the statute of frauds. It has long been held that partial performance of a contract for personal services does not take a verbal contract out of the operation of the statute of frauds except for that part which was performed. *Swafford* v. *Sealtest Foods Division of National Dairy Products Corp.*, 252 Ark. 1182, 483 S.W.2d 202 (1972); *Oak Leaf Mill Co.* v. *Cooper*, 103 Ark. 79, 146 S.W. 130 (1912). *See also Harris* v. *Arkansas Book Co.*, 287 Ark. 353, 700 S.W.2d 41 (1985). This is not determinative, however, of the outcome here, for we find that the employment contract in question does not violate the statute of frauds for other reasons. We do not reverse the trial judge if he reached the right result, even though he gave an erroneous reason. *Worthen Bank & Trust Co.* v.

Adair, 15 Ark. App. 144, 690 S.W.2d 727 (1985); *White* v. *Gladden*, 6 Ark. App. 299, 641 S.W.2d 738 (1982).

Clearly, the employment contract in question was terminable at will by either party because appellee was not bound to serve for a specified period of time. *Proctor* v. *East Central Arkansas EOC*, 291 Ark. 265, 724 S.W.2d 163 (1987). Because the contract was terminable at will by either party and was for an indefinite duration, it did not run afoul of the statute of frauds. *See* Ark. Stat. Ann. § 38-101 (Repl. 1962). "Contracts of employment, beginning in praesenti, and of indefinite duration generally, are held not to be obnoxious to the statute, since they are susceptible of performance within the year from the time of their inception." 72 Am. Jur. 2d *Statute of Frauds*, 11 (1974).

> Ordinarily, it is only oral agreements which *cannot* be performed within the year that are unenforceable under the provision of the statute regarding contracts not to be performed within a year. It is the generally accepted rule that to bring a contract within the operation of this provision of the statute, there must be an express and specific agreement not to be performed within such period, for if there is possibility of performance within a year, the agreement is not within the statute.

Id. at 9.

In *Meyer* v. *Roberts*, 46 Ark. 80 (1885), the Arkansas Supreme Court noted that the statute of frauds applies only to agreements which appear from their terms to be incapable of performance within one year. *See also Halsell* v. *Kimberly-Clark Corp.*, 518 F. Supp. 694 (E.D. Ark. 1981), *aff'd*, 683 F.2d 285 (8th Cir. 1982), *cert. den'd*, 459 U.S. 1205 (1983). Accordingly, we hold that the statute of frauds was not applicable to the contract in question because it was for an indefinite duration and was terminable at the will of either party; hence, the possibility existed that the contract could be performed within one year of its inception.

Even if the statute of frauds were applicable to the employment contract in question, the evidence presented below reveals sufficient detrimental reliance on the part of appellee to take the contract out of the operation of the statute of frauds.

"Where one has acted to his detriment solely in reliance on an oral agreement, an estoppel may be raised to defeat the defense of the statute of frauds." 73 Am. Jur. 2d *Statute of Frauds*, 565 (1974). "An estoppel may be raised to defeat the defense of the statute of frauds although there is no fraud in the inception of the contract." *Id.* at 567. Additionally, we have held that estoppel may prevent the application of the statute of frauds. In *Ralston Purina Co.* v. *McCollum*, 271 Ark. 840, 611 S.W.2d 201 (Ark. App. 1981), we stated:

> A promise is binding if an injustice can be avoided only by enforcing the promise, if the promissor [sic] should reasonably expect to induce action or forbearance of a definite and substantial character by the promissee [sic], and if that action is induced.

Id. at 844.

Here, appellee testified that, in reliance upon appellant's promises of employment and benefits, including health insurance coverage for the pregnancy and birth, as well as family health insurance coverage following the child's birth, appellee quit his job, giving up the benefits attendant thereto, and moved his family to Greenbrier, Arkansas. This is sufficient detrimental reliance to remove the employment contract from the operation of the statute of frauds.

Even if the contract of employment in question had been within the statute of frauds, appellant would still be liable for the compensation due. In *Swafford, supra*, the Arkansas Supreme Court explained:

> While it is true that an oral contract for personal services in excess of one year is void, and that part performance will not remove such contract from the operation of the statute of frauds, it is also true that the employer will be liable for whatever service was rendered.

252 Ark. at 1187. According to appellee, family health insurance coverage was part of the total compensation promised him by appellant in exchange for appellee's services. In Arkansas, it has been held that the terms of the oral contract may be shown as evidence of the amount to be recovered in such instances. *Walker* v. *Shackelford*, 49 Ark. 503, 5 S.W. 887 (1887). Accordingly, we

find no error in appellee's recovery of the amount needed to reimburse him for the infant's hospitalization expenses, because family health insurance coverage was part of the compensation promised appellee by appellant.

Appellant contends that the evidence is insufficient to support the trial court's findings, arguing that appellee failed to prove the existence and breach of a contract and damages for the alleged breach. When the testimony is in conflict on the issue of whether the parties agreed, a fact question arises that is to be determined by the trial judge. *Western Auto Supply Co.* v. *Bank of Imboden*, 17 Ark. App. 4, 701 S.W.2d 394 (1985). We do not reverse on a factual issue as long as there is evidence to support the trial court's finding and the finding is not clearly against the preponderance of the evidence. *Id.*

Appellee testified that appellant promised to pay him $400.00 per week, vacations and holidays, and family insurance coverage. According to appellee, appellant also promised to pay for the conversion of appellee's prior insurance with Pilot Life in order to cover the pregnancy and birth of the child. The evidence demonstrates that appellant did comply with this promise. Appellee also testified that, in addition to the conversion premium, appellant paid him for the $900.00 representing the balance of the pregnancy and birth expenses that were not covered by the conversion plan. Appellee testified that appellant promised that insurance would be provided for the baby after its birth under a new family health insurance policy and that, prior to the baby's birth, two application forms were sent in for the family coverage. The first form was rejected because it was the wrong form; the second form was rejected because it was not sent in to the company on time. Appellee sent the third form in on the same day the baby was put into the hospital, but coverage was denied on that application because of the pre-existing condition exclusion. According to appellee, the mix-up was caused by appellant. Appellant disputed this and placed the blame upon appellee. Appellant admitted that he promised appellee that it would provide appellee with a family medical policy similar to appellant's.

Appellant argues that there was no meeting of the minds because appellee's compensation was to be $350.00 per week

instead of the $400.00 to which appellee testified and because appellee's policy through his prior job would not have covered the baby after its birth anyway. Appellee disputed this assertion. This dispute, however, is not determinative of whether a contract was reached. "The underlying purpose in awarding damages for breach of contract is to place the injured party in as good a position as he would have been in had the contract been performed." *Beardsley* v. *Pennino*, 19 Ark. App. 123, 127, 717 S.W.2d 825 (1986). Regardless of whether appellee's Pilot Life policy provided coverage for the baby after its birth, there can be no question that appellant promised to provide appellee with family health insurance coverage for the baby after its birth; appellant's actions and his admissions at trial clearly support this conclusion. It is also clear that this coverage was not perfected and that the agreement was thereby breached.

We also reject appellant's claim that appellee failed to prove damages. Appellant offered testimony about the amount of medical bills incurred as a result of the hospitalization of the infant following its birth. Appellant had promised to provide appellee with insurance coverage for such expenses. Accordingly, we cannot say that the circuit judge's findings were clearly erroneous or clearly against the preponderance of the evidence.

Affirmed.

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

ROGERS IRON & METAL CORPORATION
v. K & M, INC.

CA 87-161 738 S.W.2d 110

Court of Appeals of Arkansas
Division I
Opinion delivered October 28, 1987

Constance G. Clark of *Davis, Cox & Wright*, appellant.

Craig A. Campbell of *Matthews, Campbell & Rhoads, P.A.*, for appellee.

DONALD L. CORBIN, Chief Judge. Appellee, K & M, Inc., brought suit on open account to collect the sum of $9,957.31 for repair work it performed for appellant, Rogers Iron & Metal Corporation. Appellant answered the complaint raising the affirmative defense of laches and motioned the court to transfer the lawsuit to equity. The circuit court found the doctrine of laches inapplicable to an action at law brought within the statute of limitations, denied appellant's motion to transfer and gave appellee judgment of $9,957.31 together with its costs of $80.25. Appellant appeals contending the trial court erred in denying its motion to transfer the lawsuit to equity and finding appellee's cause of action was not barred by laches. We find no error and affirm.

Appellee filed suit for payment of work it performed on appellant's vehicles between October 3, 1983, and February 18, 1985. Appellee acknowledged at trial that although appellant had been requesting invoices from appellee for its services since

October 3, 1983, it was not until September 5, 1985, that it presented its invoices to appellant for payment. Appellant contends that, because it was not presented with appellee's invoices until nearly two years after the first charges were incurred, it was not able to verify whether appellee actually performed the work and whether the charges shown on the invoices were reasonable. Appellant concludes it was prejudiced by appellee's delay in presenting its invoices, and the doctrine of laches should be applied to bar the enforcement of appellee's claim.

The doctrine of laches is only applicable where equitable relief is sought; where a party is only seeking to enforce a legal right not barred by the statute of limitations and is not seeking equitable relief, the doctrine of laches has no application even if it could otherwise apply. *Rinke* v. *Schuman*, 246 Ark. 976, 440 S.W.2d 765 (1969); *see also Kitchens* v. *Wheeler*, 200 Ark. 671, 141 S.W.2d 34 (1940); *Smith* v. *Maberry*, 148 Ark. 216, 229 S.W. 718 (1921). "The doctrine of laches has no application where the plaintiffs are not seeking equitable relief, but to enforce a legal title and where their action is not barred by the statute of limitations in reference thereto." *Lesser* v. *Reeves*, 142 Ark. 320, 327, 219 S.W. 15 (1920); *see also Waits* v. *Moore*, 89 Ark. 19, 115 S.W. 931 (1909).

In the case at bar, appellee sued appellant to obtain a money judgment, an action at law, against which laches is not a defense. Appellee's action was brought within three years of the date the charges were incurred and thus was not barred by the statute of limitations. See Ark. Stat. Ann. § 37-206 (Repl. 1962); *Accord St. Francis Valley Lumber Co.* v. *Orcutt*, 174 Ark. 282, 295 S.W. 713 (1927).

We also find no merit in appellant's allegation that the trial court erred in denying its motion to transfer the lawsuit to equity.

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

> jurisdiction of other tribunals, with the great residuum belonging concurrently or exclusively to the circuit court. *State* v. *Devers*, 34 Ark. 188 (1879).

Pinckney v. *Mass Merchandisers, Inc.*, 16 Ark. App. 151, 153-4, 698 S.W.2d 310 (1985). The circuit court has jurisdiction of an action on an account. *Accord Harris* v. *Remmel*, 83 Ark. 1, 102 S.W. 716 (1907).

Appellant is correct in stating that if a defendant alleges a defense in his answer which is exclusively cognizable in equity, he is entitled to have such defense tried as in equitable proceedings and the case transferred to equity. Ark. Stat. Ann. § 27-212 (Repl. 1979); *see also Poultry Growers, Inc.* v. *Westark Production Credit Association*, 246 Ark. 995, 440 S.W.2d 531 (1969). Nevertheless, it was not improper to refuse to transfer the case at bar because no equitable defense was pled, except the defense of laches, which is not available to appellant. *See Berg* v. *Johnson*, 139 Ark. 243, 213 S.W. 393 (1919) which held there were no grounds for transferring a cause to the chancery court, where the plaintiff sought only a legal remedy, and defendant offered no equitable defense, except the plea of laches, but the plea was not available where no equitable relief was sought in the complaint. *See also Anders* v. *Roark*, 108 Ark. 248, 156 S.W. 1018 (1913).

Because laches was not available as a defense in the case at bar the trial court did not err in refusing to transfer the suit to chancery court.

Affirmed.

JENNINGS and COULSON, JJ., agree.

Jimmy ROSS *v.* STATE of Arkansas

CA CR 87-64 738 S.W.2d 112

Court of Appeals of Arkansas
Division II
Opinion delivered October 28, 1987

Hankins & Childers, for appellant.

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

JAMES R. COOPER, Judge. The appellant pled guilty to the offense of felon in possession of a firearm on August 6, 1986. The trial court suspended his sentence for three years. In November 1986 the appellant was placed on probation after he had violated a condition of his suspended sentence. From a revocation of the suspended sentence in January, 1987, comes this appeal.

The appellant's first argument concerns the legality of his sentence. He argues first that the trial court could not suspend the execution of his sentence but could suspend imposition of the sentence, and that the trial court erroneously placed him on a suspended sentence and placed him on probation. We find no error in the court's original sentence.

According to Ark. Stat. Ann. § 43-2326.1 (Supp. 1985), a court now has the authority to suspend execution of sentences under the same circumstances as required for suspending imposition of a sentence. This statute was in effect when the appellant pled guilty in August 1986.

The appellant alleges that the trial court placed him on probation and suspended his sentence, and cites *Culpepper* v. *State*, 268 Ark. 263, 595 S.W.2d 220 (1980), for the proposition that the court's action was improper. We hold that the trial court did not err because we find that the appellant was not placed on probation until November 1986.

The judgment states that the appellant received a suspended sentence. However, a second page of conditions is entitled "Conditions of Probation." None of these conditions required the appellant to report to a probation officer. Placing a defendant on probation requires the supervision of a probation officer. *Culpepper, supra.* Furthermore, as between these two seemingly inconsistent documents, the certified copy of the original judgment is conclusive. *Hunter* v. *State*, 278 Ark. 428, 645 S.W.2d 954 (1983); *Smith* v. *State*, 18 Ark. App. 152, 713 S.W.2d 241 (1986). The document entitled "Conditions of

Probation" was merely an attempt to comply with the requirement that a defendant be notified of the conditions of suspension or probation. *See* Ark. Stat. Ann. § 41-1203 (Repl. 1977).

It is clear from the record that the appellant was later placed on probation in November 1986. Prior to November 14, 1986, the appellant had been arrested four times for public intoxication. One of the conditions of the original sentence was that the appellant was to refrain from violating any federal, state, or local law. Rather than revoke the appellant's suspended sentence in November 1986, the trial court decided to place the appellant on supervised probation. The appellant remained in jail through January 14, 1987. On December 5, 1986, the appellant was given a list of conditions of probation which he signed. We do not find any error in the trial court's sentencing in November 1986.

The appellant also argues that the evidence was insufficient to support the revocation. On appellate review, this Court will not overturn the findings of the trial court unless they are clearly against the preponderance of the evidence. *Jared* v. *State*, 17 Ark. App. 223, 707 S.W.2d 325 (1986).

The State alleged that the appellant violated the conditions of his suspended sentence by using alcoholic beverages and refusing to take a breathalyzer test. The State only needed to show that the appellant had violated one of the conditions. *Farr* v. *State*, 6 Ark. App. 14, 636 S.W.2d 884 (1982).

The appellant reported to his probation officer on January 14, 1987. The officer testified that the appellant had an odor of alcohol about him and that he stumbled. The appellant admitted that prior to reporting to the probation officer he had consumed "three beers and a half-pint." The evidence was sufficient to support a conclusion that the appellant violated a condition of his probation by using alcohol.

In November 1986, the trial court ordered the appellant to undergo Antabuse treatments. The appellant was in jail from the time of this hearing until the day before he was arrested at the probation office. The appellant testified that he had never gotten the treatments while in jail. The appellant argues that it was an abuse of the court's discretion to send the appellant to prison for using alcohol because the trial court in effect was sentencing the

appellant because he was an alcoholic. We find no abuse of discretion.

The revocation occurred because the appellant violated a condition of his probation and not because he was an alcoholic. Furthermore, it is obvious that the trial court did take into consideration that the appellant may have had a problem with alcohol because, instead of revoking the suspended sentence after the appellant had been arrested four times for public intoxication, the court attempted to rehabilitate the appellant by placing him on probation and ordering the Antabuse treatments. We find no abuse of discretion.

Affirmed.

CRACRAFT and MAYFIELD, JJ., agree.

Earnie Lawrence PIPES *v.* STATE of Arkansas

CA CR 87-39 738 S.W.2d 423

Court of Appeals of Arkansas
Division II
Opinion delivered October 28, 1987

Henry & Mooney, by: *Wayne Mooney*, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant Earnie Lawrence Pipes was convicted in a jury trial of aggravated assault of a police officer and sentenced to fifteen years. His sole contention on appeal is that his arrest was invalid because it was made by a deputy sheriff who had not met the minimum standards of training for police officers. This issue was raised in the trial court by a pretrial motion to dismiss. The motion was denied. We affirm the conviction.

Ark. Stat. Ann. § 42-1007 (Supp. 1985) provides as follows:

> (a) At the earliest practicable time, the Executive Commission shall provide, by regulation, that no person shall be appointed as a law enforcement officer, except on a temporary basis not to exceed one [1] year, unless such person has satisfactorily completed a preparatory program of police training at a school approved by the Executive Commission. A law enforcement officer who lacks the education and training qualifications required by the Executive Commission shall not have his temporary or probationary employment extended beyond one [1] year, by renewal of appointment or otherwise, unless extraordinary circumstances exist in the majority opinion of the Executive Body of the Commission whereupon the Commission may approve an extension of probation for no more than an eight (8) months period of time.

Section 42-1009 (Supp. 1985) provides that any action taken by an unqualified police officer "shall be held as invalid."

The record discloses that Deputy Sheriff "Jackie" Richardson arrested appellant on September 20, 1986. Richardson had been first employed by the Poinsett County Sheriff's office on April 16, 1984, as a jailer and he served in that capacity until June 16, 1986, when he became a deputy sheriff. There was evidence that as a jailer Richardson was not authorized to make arrests or otherwise function as a law enforcement officer. His duties were confined to serving as dispatcher, insuring that no weapons or contraband entered the jail, guarding prisoners, and transporting

prisoners to the state penitentiary.

Appellant contends, however, that any attempt to distinguish between Richardson and other deputies on the basis of duties is fallacious because Richardson's oath of office and identification card were identical to those of all other deputies, he wore the uniform and badge of a deputy, and he carried a gun. Appellant points out that Ark. Stat. Ann. § 12-1107 (Repl. 1979) provides that every deputy sheriff "shall possess all the powers of his principal, and may perform any of the duties required by law to be performed by the sheriff."

Appellant relies on *Brewer* v. *State*, 286 Ark. 1, 688 S.W.2d 736 (1985), as authority for the argument that the charges against him should have been dismissed. In that case, Brewer had been given a citation for DWI by two unsupervised auxiliary police officers. The Arkansas Supreme Court said that Ark. Stat. Ann. § 42-1403 (Supp. 1983) provided that any auxiliary law enforcement officer who was not supervised as required "shall not take any official action as a law enforcement officer and any action taken shall be held as invalid." The court also said that Ark. Stat. Ann. § 75-2508 (Supp. 1983) authorized law enforcement officers to charge a person with a misdemeanor DWI offense by issuing a citation, but since the auxiliary deputies involved were not properly supervised, their action in issuing the DWI citation was invalid. Hence, because Brewer was not charged by information or in open court, he could not be found guilty of a crime "with which he was never charged."

We think appellant's reliance on *Brewer* is misplaced. He contends that, since Deputy Richardson had not attended law enforcement training, the arrest made by him was invalid and the charges against appellant should have been dismissed. We do not agree that *Brewer* stands for this proposition. The conviction in *Brewer* was dismissed because he was not properly charged—not because he was not properly arrested. In the present case, the appellant was properly charged by an information filed by the prosecuting attorney. Furthermore, we think the appellant is mistaken in assuming that an invalid arrest mandates reversal of his conviction. As we recently stated in *Van Daley* v. *State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987):

The appellant cannot challenge his own presence at trial or

claim immunity to prosecution simply because his appearance was precipitated by an unlawful arrest. An illegal arrest, without more, has never been viewed as either a bar to subsequent prosecution or a defense to a valid conviction. *United States* v. *Crews*, 445 U.S. 463 (1980); 5 Am. Jur. 2d *Arrest* § 116 (1962). In *Crews*, 445 U.S. at 474, the Supreme Court stated:

> The exclusionary principle of *Wongsun* and *Silverthorne Lumber Company* delimits that proof the Government may offer against the accused at trial, closing the courtroom door to evidence secured by official lawlessness. Respondent is not himself a suppressible "fruit," and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by police misconduct.

20 Ark. App. at 135. *See also Lamb* v. *State*, 21 Ark. App. 111, 730 S.W.2d 252 (1987).

An invalid arrest may call for the suppression of a confession or other evidence, but it does not entitle the defendant to be discharged from responsibility for the offense. *O'Riordan* v. *State*, 281 Ark. 424, 665 S.W.2d 255 (1984). Illegal arrest, standing alone, does not void a subsequent conviction. *Williams* v. *State*, 258 Ark. 207, 221, 523 S.W.2d 377 (1975).

Affirmed.

CRACRAFT and COOPER, JJ., agree.

Thurnell HUNDLEY *v.* STATE of Arkansas

CA CR 87-69 738 S.W.2d 107

Court of Appeals of Arkansas
Division I
Opinion delivered October 28, 1987

John L. Kearney, for appellant.

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

BETH GLADDEN COULSON, Judge. Appellant, Thurnell

Hundley, raises two points for reversal of his conviction on a charge of second degree battery. The second of these is couched in terms of a denial of due process, but it is in essence a continuation of the first point, which is addressed to the sufficiency of the evidence. We see no reason, therefore, not to treat the two arguments as one in our opinion. In any event, we find nothing in either argument to persuade us that the trial court was in error, and we accordingly affirm its judgment.

Appellant was charged under Ark. Stat. Ann. § 41-1602(1)(d)(iv) (Supp. 1985) with the criminal offense of battery in the second degree for stabbing Major Robert Perry, Chief of Security at the Tucker Maximum Security Unit of the Arkansas Department of Correction. The statute provides that

> (1) A person commits battery in the second degree if . . .
>
> (d) he intentionally or knowingly without legal justification caused physical injury to one he knows to be: . . .
>
> (iv) an officer or employee of the State while such officer or employee is acting in the performance of his/her duty.

Following a jury trial, appellant, an inmate at the Arkansas Department of Correction, Tucker Unit, was convicted of second degree battery on Major Perry, and was sentenced to nine years imprisonment. From that verdict, this appeal arises.

As noted earlier, the principal point of appellant's argument on appeal is that the evidence presented at trial was insufficient to support the jury's verdict. We must, of course, affirm the jury's verdict if there is substantial evidence to support it. Substantial evidence has been defined as "evidence that is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other." *Jones* v. *State*, 11 Ark. App. 129, 135, 668 S.W.2d 30, 33 (1984). The evidence presented must force or induce the mind to pass beyond a suspicion or conjecture. *Id.* Contrary to appellant's assertion that a decision is to be reached "based on the evidence most favorable to appellant," in determining the issue of sufficiency, we consider the evidence in the light most favorable to the appellee. *Flurry* v. *State*, 18 Ark. App. 64, 67, 711 S.W.2d

163, 164 (1986).

Appellant contends that, at the time the stabbing occurred, Major Perry was not acting within the scope of his "lawful duty"; instead, he claims that the victim had been harassing appellant about the latter's long hair. In a most novel approach to the defense of "legal justification," appellant argues that,

> Taking the totality of the circumstances into account, any person in appellant's position would have reacted as he did. Appellant was at a severe disadvantage, being an inmate at Tucker Maximum Security Unit, and Major Perry knew this fact. He had the prime instrument to use against appellant, and that was to take away all that appellant had left, his hair. No man should be deprived of his only legal pride and joy. Thus, appellant did what any man would have done, he sought to protect that which was his.

In addition, appellant argues that the State failed to prove every element of the crime of second degree battery and thereby violated his right to due process. Specifically, appellant insists that the State failed to show that Major Perry sustained "physical injury," as required by the statute.

The record reveals that, at about 7:00 a.m. on July 14, 1986, Major Perry was assisting with the movement of prisoners in administrative segregation at the Tucker Maximum Security Unit from confinement to their work details. Each prisoner was taken from his cell and escorted out of the building individually at a distance of about fifty feet from the next inmate. None was handcuffed. Major Perry was standing just outside the double doors through which the prisoners were being escorted.

Appellant walked through the doors and proceeded about twenty or twenty-five feet before stopping, turning around, and walking back toward Major Perry. The Security Chief testified that he assumed that appellant, who had been released from punitive isolation the night before, wanted to speak with him as many other inmates, similarly confined, often did. Appellant came within three or four feet of Perry, who noticed he had a glove in his hand and was "fixing to take a swing." Attempting to fend off the blow, Perry leaned to the right but was struck in the left shoulder. Perry and another officer wrestled appellant to the

ground and, with the assistance of a third prison employee, handcuffed and subdued him.

Shortly after delivering appellant to the isolation area, Major Perry began to feel faint. He experienced chest pains and difficult in breathing and went to the infirmary for medical attention. The warden met with him in the infirmary and noticed blood on the back of his shirt. Perry was treated at the prison infirmary and later at the Jefferson Regional Medical Center. The prison official had been stabbed completely through the shoulder with a home-made, three-inch-long knife blade.

According to Major Perry, he never had any conversations with appellant concerning the cutting of his hair. The Department of Correction, Perry noted, has no regulations concerning hair or beards other than requiring them to be sanitary. In his own testimony, appellant stressed that his principal grievance against Major Perry was that the Security Chief had informed him, while he was in isolation prior to the incident, that he could not have returned to him a radio that had been altered and had two shanks stored in the back of it. The radio had been seized as contraband on Perry's orders. Appellant also stated that, besides the loss of the radio, he was retaliating for guards "beating me for, you know, not cutting my hair, you know, playing with my behind with them nightsticks and stuff like that." It appears that, at trial, appellant relegated the issue of his hair to a level of secondary importance. Moreover, on the basis of Major Perry's testimony that he never spoke to appellant about his hair and appellant's testimony pointing to prison guards as the source of comments, appellant's "legal justification"—an extremely shaky argument, at best—collapses under its own inflated weight.

As for appellant's contention that Major Perry was not acting "in the line of duty," the evidence clearly indicates that the Security Chief was fulfilling his official responsibility in supervising and assisting in the transfer of prisoners from administrative segregation to their work details. He was unquestionably performing, in the language of the statute, his "lawful duty" as an officer of the State when appellant attacked him.

Regarding appellant's assertion that the State failed to prove he had inflicted "serious physical harm" on Major Perry, we note that Ark. Stat. Ann. § 41-1602(1)(d) requires proof only

of "physical injury." This term is defined at Ark. Stat. Ann. § 41-115(14) (Repl. 1977) as "the impairment of physical condition or the infliction of substantial pain." In *Lair* v. *State*, 19 Ark. App. 172, 718 S.W.2d 467 (1986), this court affirmed the second degree battery conviction of another inmate at the Tucker Maximum Security Unit, who had struck a prison guard on the left side of his head near the eye with a handcuff. As a result of the blow, seven stitches were required to close the laceration. We found sufficient evidence of substantial pain. Here, the evidence is equally compelling, although the testimony was not as graphic in depicting Major Perry's pain as in *Lair*. The fact, however, that Perry reported chest pains, difficulty in breathing, and faintness after the flush of excitement and adrenaline had subsided is sufficient to show the infliction of substantial pain. Moreover, these same symptoms, which led Major Perry to seek medical attention, also show the temporary impairment of physical condition. Under these circumstances, we cannot say that there was insufficient evidence of physical injury to support a conviction under Ark. Stat. Ann. § 41-1602(1)(d)(iv).

Affirmed.

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

Joan APPLEBY *v.* BELDEN CORPORATION and LIBERTY MUTUAL INSURANCE COMPANY

CA 87-167 738 S.W.2d 807

Court of Appeals of Arkansas
Division I
Opinion delivered November 4, 1987

Tripcony Law Firm, P.A., by: *James L. Tripcony*, for appellant.

Friday, Eldredge & Clark, by: *Elizabeth J. Robben* and *James C. Baker*, for appellee.

JOHN E. JENNINGS, Judge. This is a workers' compensation case. Joan Appleby sustained a compensable injury to her back when she tripped and fell in the parking lot of her employer, Belden Corporation, on June 2, 1983. Her healing period was determined to have ended on December 6, 1983. She received benefits including 5% permanent partial disability. In 1984, her primary physician, Dr. Saer, said that Appleby "should probably be on some form of activity restriction indefinitely. This would involve limited bending and stooping, no heavy lifting over about 25 pounds, and no prolonged sitting or standing."

Mrs. Appleby did not return to work for Belden Corporation and has not sought other employment, but in the spring of 1985 she began helping her husband paint houses. The work was sporadic: she might work as many as six, or as few as three, days a week. Her work involved some carrying of a 14 pound ladder from which she painted. She testified that she had bouts of pain in her back and legs during the time period she was engaged in painting.

On October 9, 1985, Appleby cleaned her house, mopped the floors, went to a funeral, and picked up hickory nuts from her backyard. That evening she had more pain in her back and legs. On October 10, 1985, she painted with her husband briefly and by that night she was in so much pain that she called Dr. Saer and made an appointment to see him the next day. On October 13, 1985, she again contacted Dr. Saer and asked to be hospitalized.

Dr. Saer put her in the hospital on October 17. He testified that "probably her symptoms were caused by her activity level prior to her admission. When you consider her problem from before, the activities such as mopping the floor and painting would be sufficient to cause the type of problems she experienced when I hospitalized her."

The appellant subsequently filed a claim for additional compensation. The Commission held that her activities prior to her hospitalization constituted an independent intervening cause and denied the claim.

Appellant's first argument is that this finding is not supported by substantial evidence. Substantial evidence 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). On review, in workers' compensation cases, we view the evidence in the light most favorable to the findings of the Commission and give the testimony its strongest probative force in favor of the action of the Commission. *McCollum* v. *Rogers*, 238 Ark. 499, 382 S.W.2d 892 (1964). We do not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the Commission. *Silvicraft, Inc.* v. *Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983).

The issue in *Guidry* v. *J & R Eads Construction Co.*, 11 Ark. App. 219, 669 S.W.2d 483 (1984), was the same as the issue here. In *Guidry*, we said that the question is whether there is a causal connection between the primary injury and the subsequent disability; and if there is such a connection, there is no independent intervening cause unless the subsequent disability was triggered by activity on the part of the claimant which was unreasonable under the circumstances.

One of the circumstances which should be considered in deciding if the "triggering activity" was reasonable is the claimant's knowledge of his condition. *See* Larson, *The Law of Workmen's Compensation* § 13.11 (1986). In this case Dr. Saer testified:

> I explained to her that she had an injury to her back and she is likely to have problems with her back, depending on her

> activity level in the future and she will be able to control her symptoms by controlling her activity. We had gone through this before and she had been to the back school before. A lot of people have this problem and do well as long as they're somewhat judicious in activity and if they overdo it, they're likely to cause a flareup and that's basically her situation.

Based on the facts of the case at bar, we believe that the Commission's finding of an independent intervening cause is supported by substantial evidence.

Appellant's second argument is that the case must be reversed because it was decided at the Commission level without a quorum. Ark. Stat. Ann. § 81-1342(e) (Repl. 1976), provides:

> A majority of the Commission shall constitute a quorum for the transaction of business, and vacancies shall not impair the right of the remaining members to exercise all the powers of the full Commission, so long as a majority remains.

This case was decided by the full Commission on January 8, 1987. The order is signed by Commissioner Tatum and Commissioner Farrar, with Commissioner Griffin not participating.

In an opinion delivered June 1, 1987, the Arkansas Supreme Court held that Commissioner Farrar did not meet the statutory requirements for service on the Commission. *Webb* v. *Workers' Compensation Commission*, 292 Ark. 349, 730 S.W.2d 222 (1987). Appellant's argument is that her claim was decided by only one qualified commissioner, and one commissioner does not constitute a quorum. This argument must fail.

Farrar was clearly a *de facto* official. A *de facto* official is one who by some color of right is in possession of office and for the time being performs his duties with public acquiescence, though having no right in fact. The acts of an officer *de facto* are as valid and effectual, while he is permitted to retain the office, as though he were an officer by right. *State* v. *Roberts*, 255 Ark. 183, 499 S.W.2d 600 (1973); *Faucette, Mayor* v. *Gerlach*, 132 Ark. 58, 200 S.W. 279 (1918). The acts of an officer *de facto* cannot be questioned collaterally. If the officer's title is questioned in a proceeding to which he is not a party or which was not

instituted specifically to determine the validity of his title, the attack is collateral. *State* v. *Roberts*, cited above; *see also, Keith* v. *State*, 49 Ark. 439, 5 S.W. 880 (1887).

The official actions taken by Farrar while serving as commissioner were legally valid and effectual notwithstanding the supreme court's determination that he was not qualified to serve.

Affirmed.

CORBIN, C.J., and COULSON, J., agree.

James R. BELCHER *v.* Caleb Philemon BOWLING and Frances Loraine BOWLING

CA 87-259 738 S.W.2d 804

Court of Appeals of Arkansas
Division II
Opinion delivered November 4, 1987

Boyd A. Tackett, Jr., for appellant.

William David Mullen, for appellees.

MELVIN MAYFIELD, Judge. This is an appeal from a probate court order granting appellees' petition for adoption of a minor child without consent of the natural father. Appellees are Frances Loraine Bowling, the natural mother of the child, and her second husband, Caleb Philemon Bowling. The appellant is James Belcher, the child's natural father.

Frances and James Belcher were divorced on December 30, 1983. Under the terms of the divorce decree, custody of their daughter was awarded to the mother and the father was ordered to pay child support in the amount of $23.00 per week. On January 10, 1985, the mother married Caleb Bowling. On July 18, 1986, Frances and Caleb filed a petition for adoption of the child alleging that the natural father's consent was not needed

because, for a period of at least one year, he had failed significantly without justifiable cause to communicate with the child or to provide for the care and support of the child as required by law or judicial decree.

On July 21, 1986, the appellant served the appellees with requests for admission and interrogatories by mailing them to appellees' attorney. Appellees failed to respond within 30 days after service. If the requests for admission were deemed true, the appellees' grounds for adoption would be disproved; therefore, the appellant filed a motion requesting that the requests be deemed admitted pursuant to Ark. R. Civ. P. 36, and asking that the appellees' petition for adoption be dismissed. Appellees answered asking the court to accept Frances Bowling's late answers (her answers were filed on August 26, 1986), and to allow Caleb Bowling additional time in which to answer. Appellees asserted they were in the United States Navy stationed outside the continental United States, and that their failure to respond was occasioned by these circumstances. The appellant filed a motion to strike that response, but the trial court refused to deem the requests admitted and denied appellant's motion to strike.

After a hearing held December 9, 1986, the court granted the appellees' petition for adoption. The court found that appellant had admittedly not paid any child support payments since the divorce; that there had been no significant communication or attempts to establish communication by the appellant with his minor child; and that there had been no care or support furnished by the appellant for at least a period of one year prior to the filing of the adoption petition.

On appeal to this court, appellant first argues that the trial court erred in refusing to strike appellees' response to the requests for admission and in refusing to hold them admitted. He contends the trial court's finding that the appellees had justifiable reason for delay is clearly erroneous. We do not agree.

Ark. R. Civ. P. 36 provides:

> The matter is admitted unless, within 30 days after service of the request, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the

> party or by his attorney. . . . These time periods may be shortened or lengthened by the court.

Ark. R. Civ. P. 6(b) also provides for extensions of time upon motion made after the expiration of the specified time period where the failure to act was the result of "excusable neglect, unavoidable casualty or other just cause." The rule applies to requests for admissions. *Borg-Warner Acceptance Corporation* v. *Kesterson*, 288 Ark. 611, 708 S.W.2d 606 (1986). The policy of the Arkansas Supreme Court has been to require compliance with the rule governing responses to requests for admission. However, the court examines the particular facts of each case and when the facts warrant, requires acceptance of late responses. *Womack* v. *Horton*, 283 Ark. 227, 674 S.W.2d 935 (1984). Here, the trial court found that appellees were outside the continental United States during the time required for response; that they had justifiable reason for delay; and that appellant was not prejudiced by the delay in appellees' response. Under the facts of this case, we cannot say the trial court erred in overruling appellant's motion to strike the appellees' response and refusing to deem the requests admitted.

Appellant also argues that the trial court erred in finding that he failed without justifiable cause to support or communicate with the minor child. Under Ark. Stat. Ann. § 56-206(a)(2) (Supp. 1985), parental consent is required before a minor child may be adopted. However, section 56-207(a)(2) (Supp. 1985) provides an exception as follows:

> (a) Consent to adoption is not required of:
>
> (1) . . .
>
> (2) a parent of a child in the custody of another, if the parent for a period of at least one [1] year has failed significantly without justifiable cause (i) to communicate with the child or (ii) to provide for the care and support of the child as required by law or judicial decree; . . . .

The appellant admitted that he made no attempt to pay any type of support for the child. He attempted to justify this by an alleged agreement with the child's mother to forego support. This court has held that a parent has the obligation to support a minor child, *Dangelo* v. *Neil*, 10 Ark. App. 119, 661 S.W.2d 448 (1983), and

that this duty cannot be excused on the basis of the conduct of others, unless that conduct prevents the performance of the duty, *Bemis* v. *Hare*, 19 Ark. App. 198, 718 S.W.2d 481 (1986). The appellant also admitted that he had not written the child, sent any gifts, or seen the child in more than a year but said this was because he had been enrolled in college and the child was in Puerto Rico with her mother. Appellant knew the child was in Arkansas at Christmas 1985 and made no attempt to see her. During that time, the child's mother took the child to see appellant's father for about six hours. Appellee notified the appellant by phone that she was going to do this, but appellant testified that he did not go to see the child because he had only forty-five minutes to get ready and be at work.

The trial judge made specific findings that there had been no significant communication or significant attempts to establish communication and no care or support for at least one year prior to the filing of the petition for adoption. Under the statute, the judge had to find by clear and convincing evidence that appellant had failed in one or both of the areas. *Dangelo* and *Bemis, supra.* While we review probate proceedings de novo, it is well settled that the decision of the probate judge will not be disturbed unless clearly erroneous (clearly against the preponderance of the evidence), giving due regard to the opportunity and superior position of the trial judge to judge the credibility of the witnesses. Ark. R. Civ. P. 52(a). We simply cannot say that the decision of the probate judge in this case was clearly erroneous or clearly against the preponderance of the evidence.

Because the issues were not raised in the trial court, we do not reach the appellant's arguments that the court erred in entering a decree for adoption without finding that it would be in the best interests of the minor child and that the trial court erred in granting the petition for adoption where no certified birth certificate was tendered. Issues raised for the first time on appeal will not be considered by the appellate court. *Merriman* v. *Yutterman*, 291 Ark. 207, 723 S.W.2d 823 (1987); *Robinette* v. *French*, 20 Ark. App. 102, 724 S.W.2d 196 (1987). Moreover, as to the best interest of the child, since no specific finding was made on that issue, we may assume that the court found in keeping with its decree. *See Shemley* v. *Montezuma*, 12 Ark. App. 337, 339, 676 S.W.2d 759 (1984).

Affirmed.

CRACRAFT and COOPER, JJ., agree.

Roger WILLIAMS *v.* STATE of Arkansas

CA CR 87-42 739 S.W.2d 174

Court of Appeals of Arkansas
Division I
Opinion delivered November 11, 1987

White & Salamo, by: *Michael R. Salamo* and *Esther M. White*, for appellant.

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

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Washington County Circuit Court. Roger Williams appeals his conviction for delivery of a controlled substance. We reverse and remand for a new trial.

Appellant was charged with four counts of delivery of a controlled substance in violation of Arkansas Statutes Annotated § 82-2617 (Supp. 1985), for delivering marijuana to undercover

police officers. At trial, the jury returned not guilty verdicts as to counts one, two, and four and a verdict of guilty as to count three. Appellant was sentenced to ten years in the Arkansas Department of Correction as a habitual offender under Arkansas Statutes Annotated § 41-1001 (Supp. 1985).

For reversal, appellant raises the following arguments: (1) the trial court erred in refusing defendant's requested jury instruction for duress, and (2) the trial court erred in allowing the State to cross-examine appellant on his prior convictions, sentence received, and actual time served. We address his points in order.

At trial, appellant testified that a police department informant had coerced him into delivering the marijuana to the undercover police officers. In support of his contention, appellant presented evidence that: the State's informant and appellant served time in prison together; the informant had stabbed and seriously injured others in the presence of appellant for not doing what the informant told them to do; appellant was black; the informant was a member of the Aryan Society and signified his membership by the number "666" tattooed between his eyes; the Aryan Society is a white racist group known for violence and identified by the tattoo; the informant had made demands upon the appellant which excited fear in appellant and his wife; and appellant attempted to avoid the informant but the informant was constantly able to track him down. Appellant's wife also testified that the informant would make uninvited visits to their house and initiate discussion regarding how he liked to stab people when they failed to do what he wanted. Testimony was elicited from witnesses for both sides as to the frightening appearance of the informant. Other testimony ranged from a police officer's testimony that he wouldn't be surprised to hear that the informant had stabbed someone for failing to do what he wanted, to testimony from a former Razorback football player that although the informant weighed 25-35 pounds less than the witness, the witness would not want to mess with the informant. At the close of all evidence, instructions were read to the jury which included an instruction on entrapment but omitted defendant's instruction on duress.

In refusing the requested instruction for duress, the

trial court stated that since it was admitted that the informant was acting in concert with or at the direction of the police, the duress instruction would be repetitious and had merged into the instruction on entrapment. While we agree that the trial court is not required to give requested instructions where sufficiently covered by other instructions given, *Cobb* v. *State*, 265 Ark. 527, 579 S.W.2d 612 (1979), we find basic differences between the entrapment instruction and the duress instruction. In *Hill* v. *State*, 253 Ark. 512, 487 S.W.2d 624 (1972) the supreme court held that even if an instruction could be said to have covered the matter in a general way, it is reversible error to refuse to give a specific instruction correctly and clearly applying the law to the facts of the case, unless no prejudice resulted. *See also, Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984), *cert. denied*, 470 U.S. 1085 (1985).

The entrapment instruction as read charged the jury that entrapment is an affirmative defense if appellant proves:

> that a law enforcement officer or any person acting in cooperation with him induced the commission of the offense by using persuasion or other means likely to cause a *normally law abiding person* to commit the offense. Conduct merely affording a person the opportunity to commit an offense does not constitute entrapment. (Emphasis added).

Appellant's requested instruction would have charged the jury that duress is an affirmative defense if:

> appellant engaged in the conduct charged because he reasonably believed he was compelled to do so by the threat or use of unlawful force against his person or the person of another that an individual of ordinary firmness in Roger Williams' situation would not have resisted.
>
> Duress is not a defense if Roger Williams recklessly placed himself in a situation in which it was reasonably forseeable that he would be subjected to the force or threatened force.

Jury instructions must fully and fairly declare the law applicable to any defense as to which the appellant has offered sufficient evidence to raise a question of fact. *Hill*, 253 Ark. at

520, 487 S.W.2d at 630. The defense of duress does not require that the defendant be a "normally law abiding person." Duress requires only that an individual of ordinary firmness would have acted in the same manner as the defendant did. Although other elements of entrapment are similar to those for duress, requiring the jury to apply the standard of the "law abiding person" rather than the "individual of ordinary firmness" resulted in prejudice to the appellant, because of evidence produced that appellant was a convicted felon. Furthermore, the duress instruction specifically informs the jury that it may consider compulsion by use or threat of unlawful force and allows the jury to consider the defendant's fear with regard to others, as well as himself.

The State contends that appellant was not entitled to the instruction on duress, because he failed to carry his affirmative burden of showing an immediate threat of harm. In *Hill* v. *State*, 13 Ark. App. 307, 683 S.W.2d 628 (1985) we held that where no evidence exists to support the giving of an instruction, it is not error to refuse to give it. Appellant testified at length to the circumstances surrounding the sale which might support a defense of duress. In our opinion, appellant's testimony regarding the informant's history of unprovoked violence, informant's statements concerning his desire to stab people who would not do what he wanted them to do, and his repeated expression "I kill you" was sufficient to raise a question of fact for the jury, and appellant was therefore entitled to an instruction which fully and fairly declared the law applicable to the defense of duress. *Hill* v. *State*, 253 Ark. 512, 487 S.W.2d 624 (1972). Refusal of the instruction constituted reversible error.

Appellant also argues that the trial court improperly allowed the State to cross-examine the appellant on his prior convictions, sentence received, and actual time served. Because the issue is unlikely to arise at trial on remand, we find it necessary to treat the argument only summarily.

Evidence that the appellant had previous convictions was admissible for the purpose of attacking his credibility. A.R.E. Rule 609. On cross-examination, appellant testified that he had three prior convictions within the past ten years. Appellant's counsel objected when the State asked the appellant where he was in 1977. The trial court overruled the objection and

appellant answered that he was in prison. Over objection, when asked his date of release, appellant answered that he could not remember and the State did not pursue the matter. Although the question regarding his release was impermissible under the evidentiary rules, the answer given by the defendant told the jury nothing about the length of his sentence. We find no prejudice resulting therefrom. Where a defendant gives a negative answer to an isolated, impermissible question, prejudicial or reversible error is not demonstrated. *Cox* v. *State*, 264 Ark. 608, 573 S.W.2d 906 (1978). Likewise we find no prejudice resulting from cross-examination regarding appellant's early release and probation where appellant testified on direct examination that he had been in jail with the informant.

Reversed and remanded.

COOPER and MAYFIELD, JJ., agree.

LANDMARK SAVINGS BANK, F.S.B. *v.* WEAVER-BAILEY CONTRACTORS, INC.

CA 87-170 739 S.W.2d 166

Court of Appeals of Arkansas
Division II
Opinion delivered November 11, 1987

Perroni, Rauls & Looney, by: *Stanley D. Rauls*, for appellant.

Davidson Law Firm, Ltd., by: *Geoffrey B. Treece*, for appellee.

GEORGE K. CRACRAFT, Judge. Landmark Savings Bank, F.S.B., appeals from a decree of the chancery court of Garland County finding it liable to Weaver-Bailey Contractors, Inc., on a contract to pay Weaver-Bailey, a subcontractor, sums allegedly owed by the appellant directly to the general contractor. We find no error and affirm.

In 1985, Larry Carter began development of a condominium complex on lands owned by him in Hot Springs, Arkansas, and entered into an agreement with the appellant under which the appellant would advance sums of money to Carter as the construction of his project progressed. The debt secured by the lien on the project, would be retired out of the sales price of the condominium units when sold. Carter then entered into a contract with the appellee under which appellee was to furnish a portion of the materials and labor for the construction. The appellee was not a party to the financing contract entered into between Carter and appellant, and there was no initial contractual relationship between appellant and appellee. Donald Weaver, an employee of

the appellee, testified that he was initially informed that Jim Gray, senior vice-president and treasurer of the appellant bank, would be in charge of Carter's account and was the person he should contact. There was evidence that during the construction period appellee had reason on a number of occasions to contact the appellant with regard to financial matters. On at least one occasion when Carter defaulted in his payment to appellee under the subcontract, Donald Weaver contacted Gray on behalf of the appellee and discussed the matter with him. He testified that as a result of that conversation the appellee received a check made payable jointly to it and Carter in payment of its claim, and an assurance that additional joint checks would be made. In May of 1985, the project was completed and Carter was in default in his final payment to the appellee in an amount in excess of $70,000.00. Appellee perfected its materialman's lien on Carter's property to secure the payment of that amount. Weaver then again contacted Gray about the matter. According to Weaver, Gray informed him that the appellant was only obligated to advance Carter an additional sum of $38,000.00 but committed appellant to an agreement under which appellant would remit the remaining $38,000.00 due Carter directly to the appellee instead in exchange for a release of appellee's lien on the mortgage asset to that extent.

The appellant denied such an agreement, contending that the evidence did not establish that Gray had made such an agreement or that he was authorized to do so by the appellant. It is contended that, in any event, such an agreement would be void and unenforceable under the statute of frauds. The chancellor found all of the issues against the appellant and this appeal follows. We find no error in the chancellor's actions or findings and affirm the decree as entered.

The appellant first contends that the evidence did not establish that the appellant had promised to make the payment of $38,000.00 directly to the appellee in exchange for its promise of a partial release of its materialman's lien. Whether such promises were exchanged are questions of fact for the trial court to resolve. Here, an agent of the appellee testified positively that such promises were exchanged between himself and Jim Gray, treasurer and senior vice-president of appellant. Gray was not as positive in his testimony but stated that he did not recall making

such a statement and did not believe that he had. He stated that he ordinarily would not have done so and that he was not authorized to make such an agreement. The trial court resolved this conflict in favor of the appellee on the basis of credibility, expressly finding that he attached greater weight to the testimony of Weaver than that of Gray. The findings of fact of a chancellor will not be disturbed on appeal unless clearly against a preponderance of the evidence, and since the question of a preponderance of the evidence turns largely on the credibility of the witnesses we will defer to the superior position of the chancellor in that regard. *Andres* v. *Andres*, 1 Ark. App. 75, 613 S.W.2d 404 (1985); ARCP 52(a).

The appellant next contends that, even if such an agreement was made, it was an oral undertaking to answer for the debt of another and void under the provisions of Ark. Stat. Ann. § 38-101 (Repl. 1962), which requires such agreements to be evidenced by a writing signed by the party sought to be charged. All oral undertakings to answer for the debt of another are not unenforceable under the statute of frauds. A promise by a third party to discharge a preexisting debt of another, without any new consideration or benefit passing to him, is a "collateral" understanding and unenforceable under the statute of frauds. However, notwithstanding the statute of frauds, such a contract is an "original" one and enforceable if founded on new consideration or benefit moving to the promisor. In determining whether the undertaking is collateral or original the court should consider the words of the promise, the situation of the parties, and all circumstances surrounding the transaction. This determination is ordinarily one of fact and not one of law. *Black Brothers Lumber Co.* v. *Varner*, 164 Ark. 103, 261 S.W. 312 (1924); *Barnett* v. *Hughey Auto Parts, Inc.*, 5 Ark. App. 1, 631 S.W.2d 623 (1982).

Consideration has been defined as any benefit conferred or agreed to be conferred upon a promisor to which he is not lawfully entitled, or any prejudice suffered or agreed to be suffered by a promisee other than that which he is lawfully bound to suffer. *McIlroy Bank & Trust Co.* v. *Comstock*, 13 Ark. App. 13, 678 S.W.2d 783 (1984). Here, appellant was allegedly obligated to Carter in the amount of $38,000.00. It had no obligation as such to appellee in any amount. Appellee's claim was against the lands of Carter on which the appellant held a

mortgage. At the time this agreement was made, there were no other liens on Carter's property. Some of the condominiums had been completed and were being advertised for sale. There was evidence that appellant would benefit by such sales by application of the proceeds against Carter's existing debt, thus reducing it.

Appellant argues that an agreement to partially release a lien while retaining a lien for the balance was giving up virtually nothing as consideration for the promise of the payment. Mere inadequacy of consideration will not void a contract. It has been said that adequacy is a matter for the parties to consider at the time the contract is made, and not for the courts at the time it is sought to be enforced. *See, e.g.*, 17 C.J.S. *Contracts* § 127 (1963); 17 Am.Jur.2d *Contracts* § 102 (1964). In *Bloodworth* v. *Booser*, 99 Ark. 238, 241, 138 S.W. 457, 458 (1911), our supreme court stated:

> In estimating the value of the thing as the consideration for a promise, there is a manifest distinction between property of a certain and determinate value, and things which have but a contingent or intermediate value. But, in any event, mere inadequacy of consideration is not sufficient to defeat a promise. It is sufficient that the consideration shall be of some value. It may only be slight value or such as could be of value to the party promising.

That the release was not a complete one is not controlling. The appellant promised to make the payment in exchange for a partial release, which might or might not make the lands more saleable. What is important is that appellant got that which is bargained for in exchange for its promise. We cannot conclude that the chancellor's finding that the undertaking was an original one based on valid consideration is clearly erroneous.

Appellant finally argues that the trial court erred in finding that Gray had authority to make the agreement. We do not agree. Although a number of definitions of apparent authority have been given, our supreme court has declared on a number of occasions that a principal is bound not only by the acts of an agent done under the principal's express authority, but also by those acts of a general agent which are within the apparent scope of his authority, whether they have been authorized or not, and even if they are contrary to express direction. The principal in such a case

is not only bound by the authority actually given to the general agent, but by the authority which the third person dealing with him has the right to believe has been given to him. *Southern Electrical Corp.* v. *Ashley-Chicot Electric Co-op, Inc.*, 220 Ark. 948, 251 S.W.2d 813 (1952). This rule does not conflict with the rule that one dealing with a mere agent is bound to ascertain the nature and extent of his authority and cannot trust the mere presumption of authority or assumption of it by the agent. *See Dixie Life & Accident Insurance Co.* v. *Hamm*, 233 Ark. 320, 344 S.W.2d 601 (1961). It has been held that one dealing with an admitted agent may presume in the absence of notice to the contrary that he was a general agent, clothed with authority coextensive with its apparent scope. *N. O. Nelson Manufacturing Co.* v. *Benjamine*, 189 Ark. 897, 75 S.W.2d 664 (1934).

Although there was evidence that Gray lacked express authority to enter into the agreement, the issue was whether under the circumstances Weaver had a right to believe that Gray had that authority. On conflicting evidence, the chancellor found that Gray was acting within the apparent scope of his authority in entering into the agreement. From our *de novo* review of the record, we cannot conclude that the chancellor's finding is clearly against a preponderance of the evidence.

Affirmed.

JENNINGS and COULSON, JJ., agree.

Elizabeth MITCHELL *v.* Max V. MEISCH, et al.

CA 87-93 739 S.W.2d 170

Court of Appeals of Arkansas
En Banc
Opinion delivered November 11, 1987

Kincaid, Horne & Trumbo, by: *Bass Trumbo*, for appellant.

George E. Butler, Jr., for appellee.

JAMES R. COOPER, Judge. The parties in this civil case were divorced on January 7, 1981. In January 1984 the Arkansas Supreme Court held that, under certain circumstances, pension rights constitute marital property subject to division in divorce cases. *Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984). On June 26, 1986, the appellant filed a complaint seeking an award of a one-half interest in a retirement fund owned by her ex-husband, the appellee. The chancellor granted the appellee's motion for summary judgment, ruling that the retirement fund was not marital property at the time of the divorce, and that the appellant's claim was barred by the doctrine of *res judicata*. From that decision, comes this appeal.

For reversal, the appellant contends that the chancellor erred in entering summary judgment against her. We do not agree. The crux of the appellant's argument is the assertion that an independent action, subsequent to the divorce decree, will lie for the division of marital property. However, Ark. Stat. Ann. § 34-1214 (Supp. 1985) mandates that marital property be divided at the time the divorce is granted. *See Russell* v. *Russell*, 275

Ark. 193, 628 S.W.2d 315 (1982). The Arkansas Supreme Court has carved out exceptions to the requirement that marital property be divided at the time the divorce decree is entered in cases where the parties specifically agree to postpone division of the property to a later date, *Forrest* v. *Forrest*, 279 Ark. 115, 649 S.W.2d 173 (1983), and where a divorce is granted by a foreign court lacking jurisdiction to divide Arkansas marital property. *Woods* v. *Woods*, 285 Ark. 175, 686 S.W.2d 387 (1985). Other cases have permitted actions to settle property rights subsequent to the divorce proceeding where the ex-spouse's asserted property right was not based solely on the marital relationship, but also upon a title interest in the property. *See Fullerton* v. *Fullerton*, 233 Ark. 656, 348 S.W.2d 689 (1961); *Deal* v. *Deal*, 220 Ark. 134, 246 S.W.2d 429 (1952); *Johnson* v. *Swanson*, 209 Ark. 144, 189 S.W.2d 803 (1945).

The appellant in the case at bar asserts that no property issues were settled in the 1981 divorce action, and she argues that her present action is thus not barred by *res judicata*. We do not agree. The appellant does not contend that she has a title interest in the disputed retirement fund, or that the parties specifically agreed to postpone division of the marital property. Nor is this a case involving a foreign divorce decree. The statutory requirement is that marital property must be divided at the time the divorce is granted, and where no exception applies, we hold that the appellant waived any rights she may have had in the retirement fund by failing either to assert those rights in the divorce action, or to appeal from the court's failure to effect the statutorily mandated property division in the divorce decree. The chancellor's grant of summary judgment to the appellee is thus affirmed on the ground that the appellant, in 1986, had no valid cause of action for the partition of the retirement fund. The resolution of this issue makes it unnecessary for us to decide whether *Day* v. *Day, supra*, should be given retroactive application under the circumstances presented in the case at bar.

Affirmed.

Donna JONES *v.* Wayne A. JONES

CA 87-113 739 S.W.2d 171

Court of Appeals of Arkansas
Division I
Opinion delivered November 11, 1987
[Rehearing denied December 9, 1987.]

Peel, Eddy & Gibbons, by: *Richard L. Peel*, for appellant.

Mobley & Smith, by: *William F. Smith*, for appellee.

JOHN E. JENNINGS, Judge. This is a divorce case. Appellant, Donna Jones, and appellee, Wayne Jones, were married in 1961. They had one child, a daughter, who is now grown.

The parties lived in Russellville in Pope County until they separated in May, 1986, when appellee moved to Dardanelle in Yell County and sued for divorce.

At the trial both grounds and property rights were contested and appellant sought to establish the defense of recrimination. The chancellor granted the divorce to appellee and divided the parties' property. On appeal to this court, appellant raises seven issues. Although we affirm the trial court's award of a divorce to the appellee, we find that one argument requires that this case be reversed in part.

Appellee is a certified public accountant and owns one-third of the stock in the accounting firm of Jones, Rose and Lawton, P.A., in Russellville. One of the issues at trial was the value of appellee's interest in the corporation. The stockholders had a buy-sell agreement which valued each one-third interest at $30,000.00. There was also evidence that in early 1986, the most recently added partner, Mr. Lawton, bought into the corporation for $30,000.00. The chancellor found the value of appellee's

interest to be $30.000.00.

In cross-examining Winfred Rose, appellee's partner in the accounting firm, the appellant asked Rose if he would vote to sell the accounting business for $90,000.00. The court sustained appellee's objection to this question. The court then refused to permit appellant to proffer into the record the anticipated answer. Later, in examining a former partner, John Shoptaw, appellant asked how Shoptaw valued the accounting practice for purposes of sale. Again an objection was sustained, and again the court declined to permit a proffer.

The proffering of evidence is governed by Rule 103 of the Arkansas Rules of Evidence. The rule states, in part:

> (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
>
> (b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.
>
> . . .

Although the issue apparently has never arisen in this state, courts generally have held that it is error to refuse counsel the right to make a proffer of evidence excluded by the court. *State* v. *Shaw*, 90 N.M. 540, 565 P.2d 1057 (1977); *State* v. *Davis*, 155 Me. 430, 156 A.2d 393 (1959); *Ex parte Fields*, 382 So. 2d 598 (Ala. 1980); *Hendrix* v. *Byers Bldg. Supply, Inc.*, 167 Ga. App. 878, 307 S.E.2d 759 (1983). In *State* v. *Shaw*, an objection on grounds of relevancy was sustained, after which the

trial court refused to permit the defendant to proffer the excluded evidence. The New Mexico court held that the right to proffer evidence which has been excluded by ruling of the court is almost absolute. The court said:

> Why is a tender of proof required? One reason is to advise the trial court of the nature of the evidence so that the trial court can intelligently consider it. . . .
>
> Another reason is to have the excluded evidence in the record for purposes of appellate review. If a trial court can arbitrarily deny to counsel the right to dictate into the record their offer of proof, he can prevent any consideration upon appeal as to the correctness of his own ruling as to the exclusion of certain evidence. It is obvious that this cannot be the law. (Citations omitted.)

The trial court may certainly maintain control of the proceedings. A.R.E. Rule 103 specifically provides that the trial court may control the form of the proffer. He may also decide when the proffer is to be made. There may be circumstances in which the trial court is justified in rejecting a proffer. The examples given by the New Mexico court are where the request to tender proof is untimely or where the tendered proof is clearly repetitious. Neither of these possible exceptions is applicable here. In the case at bar we are fully persuaded it was error to refuse to permit the appellant to make a proffer. Because the refusal to permit a proffer has left us with no record upon which to decide this issue *de novo* we must return this part of the case (*i.e.*, the matter of valuing and distributing appellee's interest in the accounting firm) to the trial court for retrial. And because this issue must be retried we are obliged to note that we believe the evidence was relevant.

Appellant also argues that the court erred in restricting his cross-examination of appellee's witnesses, but this is clearly another facet of his first argument which, as we have already said, requires reversal.

On the morning of trial, the appellant moved for a continuance. She argued that she was not prepared for trial due to a recent change in lawyers and that three witnesses were not available for a variety of reasons. The testimony of the absent

witnesses related to her defense of recrimination. The trial court denied the motion, noting that the case had been continued previously. The decision to grant or deny a continuance is entrusted to the sound discretion of the trial court. *Rawhide Farms, Inc.* v. *Darby*, 267 Ark. 776, 589 S.W.2d 210 (1979). We do not overturn that decision on appeal unless the trial court has manifestly abused that discretion. *Johnson* v. *Coleman*, 4 Ark. App. 58, 627 S.W.2d 565 (1982). There are a number of good reasons for these rules. One is that the decision may be based, in part, on matters which do not fully appear of record, such as the status of the court's docket, its upcoming trial schedule, and the procedural history of the case. After giving consideration to the expected testimony of the witnesses, the reasons for their unavailability, and the testimony of the available witnesses, we are unable to say that the court manifestly abused its discretion in refusing to grant appellant a continuance.

Appellant next argues that the court erred in finding that appellee had proved general indignities as grounds for divorce. Although the testimony was in conflict, there was evidence which, if believed, would support a finding that appellant was guilty of studied neglect, rudeness, verbal abuse, and public insult, so continuously pursued as to create that intolerable condition contemplated by the statute. *See Pomraning* v. *Pomraning*, 13 Ark. App. 258, 682 S.W.2d 775 (1985).

In *Sowards* v. *Sowards*, 243 Ark. 821, 422 S.W.2d 693 (1968), a case which bears some factual similarity to the case at bar, the supreme court said:

> In any event, the chancellor was in a position to observe the demeanor of the parties and the witnesses as they testified, and was in a better position to weigh and evaluate the testimony and therefore in a better position than we are to determine what does or does not constitute such indignities between these particular parties in this particular case as to render the marriage between them intolerable to one of them.

We cannot say that the chancellor's finding that general indignities were proved is clearly against the preponderance of the evidence.

Appellant argues that the chancellor's division of the parties' property was clearly erroneous. Because this issue relates to the chancellor's division of appellee's interest in the accounting firm, an issue which must be retried, we need not decide it.

Appellant also argues that the trial court erred in not awarding her alimony. Alimony is an effort, insofar as is reasonably possible, to rectify the economic imbalance in the earning power and standard of living of the divorced husband and wife, and the amount awarded must depend on the facts of each case. *See Russell* v. *Russell*, 275 Ark. 193, 628 S.W.2d 315 (1982). The need of the spouse seeking alimony and the ability of the other spouse to pay it are the primary factors to be considered in awarding alimony. *See Boyles* v. *Boyles*, 268 Ark. 120, 594 S.W.2d 17 (1980); *Sutton* v. *Sutton*, 266 Ark. 451, 587 S.W.2d 67 (1979); *Raney* v. *Raney*, 262 Ark. 747, 561 S.W.2d 287 (1978). The relative fault of the parties is no longer a factor unless it meaningfully relates to need or ability to pay. *Russell, supra.* The award of alimony is a question which addresses itself to the sound discretion of the chancellor, and we do not reverse the chancellor's determination unless we find a clear abuse of that discretion. *Bohannon* v. *Bohannon*, 12 Ark. App. 296, 675 S.W.2d 850 (1984). Appellant notes the length of the marriage and the difference between the parties' recent income. On the other hand, the appellee argues that after the payment of set expenses there is no money left with which to pay alimony. He also notes that appellant is a licensed real estate agent and that she received a substantial award of property in the decree. We cannot say that on the facts of this case the denial of alimony was a clear abuse of the court's discretion.

Finally, appellant argues that the court erred in denying her claim for attorney's fees. Again, this is a matter left to the sound discretion of the chancellor. *Paulson* v. *Paulson*, 8 Ark. App. 306, 652 S.W.2d 46 (1983). We reverse the chancellor's decision in awarding attorney's fees only where there has been a clear abuse of his discretion. *Speer* v. *Speer*, 18 Ark. App. 186, 712 S.W.2d 659 (1986). Although the appellant vigorously contested this divorce action, the appellee prevailed. We find no abuse of discretion in the court's declining to award her attorney's fees.

For the reasons stated, this case is reversed in part and remanded to the trial court with directions to retry the issues of the valuation and distribution of appellee's interest in the accounting firm. In all other respects the decision of the chancellor is affirmed.

Affirmed in part, reversed in part and remanded.

CORBIN, C.J., and COULSON, J., agree.

Lester T. ALEXANDER *v.* Loretta B. ALEXANDER

CA 86-486 742 S.W.2d 115

Court of Appeals of Arkansas
Division II
Opinion delivered November 18, 1987

William W. Benton, for appellant.

Thurman Ragar, Jr., for appellee.

GEORGE K. CRACRAFT, Judge. Lester T. Alexander appeals from an order of the chancery court of Jefferson County denying his petition for reduction in alimony and child support payments, holding him in contempt, and ordering him confined until he brought himself into compliance with the court's previous orders. We find no error and affirm.

The parties were divorced on October 9, 1985, by a decree which directed the appellant to pay a certain amount of child support and alimony every two weeks. It also approved a property settlement agreement, in which the appellant agreed to make the payments on the home mortgage until the happening of certain events. At the time the property settlement and decree were entered, the appellant was working as a physician in the Jefferson County Comprehensive Care Center at a salary of in excess of $5000.00 per month. At all times pertinent to the issues here, the appellant was aware that his contract with the care center would expire on July 15, 1986, at which time he expected to enter into private practice, and that he expected to be, and was, married on the day after the decree was entered.

Shortly after the decree was entered, the appellant was ordered to show cause why he had not complied with that part of the order directing him to make payments on the house. The court

found that appellant had obligated himself to make those payments in the property settlement agreement and was fully aware of that obligation. However, as it had not been included in the court's order, he was not held in contempt but ordered to make those payments in the future. He failed to do so.

Subsequently, the appellant petitioned the court to relieve him of his court-ordered obligations because he was soon to enter into private practice and needed the monies he was obligated to pay for child support, alimony, and the house payments for expenses in his new venture. On May 1, 1986, the court denied his petition on finding that there had been no change in circumstances warranting such a modification. In October of 1986, the appellee again instituted contempt proceedings to compel the appellant to comply with the order with regard to child support, alimony, and payment of the house mortgage. The appellant cross-petitioned, again seeking modification of the amounts and an abatement of the obligations until he could establish himself in practice.

Despite the court's ruling on May 1, the appellant admitted he had made no mortgage payments since March 15, 1986, and had paid no alimony or child support for the months of August or September. In his defense, he testified that, since the termination of his employment with the care center on July 15, he had earned only $2000.00, all but $150.00 per month of which had gone toward the payment of overhead expenses.

The chancellor found that the appellant knew at the time he entered into the property settlement agreement and at the time the decree was entered that he would cease to be employed at the clinic on July 15, and was aware of all other facts that affected his ability to pay the amounts imposed upon him in the order and the agreement, including the fact that he would remarry the day after the decree was entered. The chancellor announced that he would deny appellant's petition to modify the agreement, determined that he was willfully in arrears on his court-ordered obligations in an amount in excess of $4000.00, held him in contempt, and ordered him confined until he brought himself in complete compliance with the orders of the court. We find no error.

■ Appellant first argues that the trial court erred in not modifying the decree because orders providing for maintenance

and support are always subject to modification by the application of either party on a showing of a change of circumstances. He argues that his remarriage and decrease in income both constituted bases for a reduction in his court-ordered obligations. We agree with the appellant's argument that the court does have the power to modify its decree in this regard upon a showing of change of circumstances. We do not agree, however, that it is compelled to do so in every such instance, particularly where, as here, the changes were fully anticipated at the time of the initial order.

The appellant argues that, even though he did know that those events would occur, he was unaware that there would be an inability to charge increased fees for his services. The court was not required to believe the testimony with regard to his income. Statements of his accountants were conflicting and contained a number of self-admitted errors in both calculations and information on which they were based. In any event, there was testimony from other physicians that the freeze on certain types of fees had been in effect for a period in excess of two years and was in no way unforeseen. From our review of the record, we cannot conclude that the trial court erred in refusing to modify the decree with regard to the court-ordered child support and alimony.

The appellant next contends that it was error for the court to order him coercively imprisoned under the circumstances of this case. We do not agree. The power of a chancery court to order imprisonment in contempt proceedings as punishment for violation of its orders, to coerce obedience to its orders for the benefit of its litigants, or a merger of the two, cannot be disputed. *Dennison* v. *Mobley*, 257 Ark. 216, 515 S.W.2d 215 (1974). In the present case, the order of the court was intended to coerce compliance with its previous orders. The court had a clear right to do this subject to the following limitations upon that power contained in *East* v. *East*, 148 Ark. 143, 146, 229 S.W. 5, 6 (1921):

> But imprisonment is, as was said by Judge Riddick, speaking for the court in *Ex Parte Caple*, 81 Ark. 504, "only justified on the ground of wilful disobedience to the orders of the court, and, so soon as it is made to appear that

> the defendant is unable to comply with the orders of the court, he should be discharged." The imprisonment cannot be made perpetual for recalcitrancy; and when it becomes manifest that further punishment will not compel obedience, then it is the duty of the court to refrain from further punishment, otherwise it would convert the exercise of the court's power into an instrument for imprisonment for debt or would constitute imposition of unusual and cruel punishment.

This rule has also been applied in our federal courts. There it has been held that the basis for permitting a court summarily to order coercive imprisonment for recalcitrant individuals without affording the safeguards of a criminal proceeding is that the contemnors hold the keys to their prison in their pockets, in that they may purge themselves of contempt at any time. They hold that, although when confinement for civil contempt has lost its coercive force and no longer bears a reasonable relationship to the purpose for which the contemnor was committed, due process may require that the contemnor be released, this does not mean that as a matter of due process a court may not initially order the person to be confined until he complies with the court's order or meets his burden of establishing that there is no substantial likelihood that continued confinement would accomplish its coercive purpose. *See, e.g., Shillitani* v. *United States*, 384 U.S. 364 (1966); *Maggio* v. *Zeitz*, 333 U.S. 56 (1948); *In re Grand Jury Investigation*, 600 F.2d 420 (3rd Cir. 1979).

The appellant does not argue that the law is otherwise. He contends that the evidence does not establish that the noncompliance was willful but merely that it was the result of his inability to comply. We find no merit in his argument. On February 6, 1986, the court entered an order clarifying its previous order, and the property settlement on which it was based, and commanding the appellant to make the payments due on the house until certain events occurred. Although the chancellor found that the appellant was fully aware that he was required to make those payments, he did not find appellant in contempt simply because the conditions were not specifically spelled out in any written order of the court. Thereafter the appellant admitted that he paid only one-half of the house payment due for the month of March, and made no part of those payments for the months of April

through September. He further admitted that he had failed to make his court-ordered child support and alimony payments for the months of August and September. According to the record, at least until July 13, 1986, the appellant was drawing a salary in excess of $5000.00 per month. It is obvious that during that period of time he had the ability to make the payments as ordered by the court but refused to do so. The court could, and did, find that failure to be willful.

Appellant further argues that his employment with the care center ceased on July 15, after which he had entered private practice. He offered evidence that his net income for the months of July and August was approximately $150.00 per month. Although we are unable to understand much of the testimony given by appellant's accountant as to what he earned and when he earned it, he did state that appellant paid in excess of $2000.00 in overhead and expenses for the two-month period of July and August.

The chancellor was not required to believe appellant's testimony as to his indigency but, in any event, could have determined that his preference of all other creditors over his court-ordered ones constituted willful acts of disobedience of the court order. In view of the order the court entered, it is obvious to us that the chancellor did not believe appellant's testimony of his dire financial circumstances and did believe that he had the present ability to bring himself into compliance. We find no grounds for reversal of the court's order, but we are confident that due to the period of time which has now elapsed between the date that order was entered and the termination of this appeal the trial court will, before ordering further confinement, afford the appellant an opportunity to disclose his present financial abilities to pay the arrearages in one lump sum, and thus to bring himself into compliance with the court's order, and, if he does not have that ability, an opportunity to present alternative methods of purge with which he might be able to comply.

Affirmed.

COULSON and JENNINGS, JJ., agree.

Donald Gerald LEONARD *v.* Gayle Barnhill LEONARD

CA 87-211 739 S.W.2d 697

Court of Appeals of Arkansas
Division II
Opinion delivered November 18, 1987
[Rehearing denied December 23, 1987.]

J.H. Cottrell, for cross-appellee.

Friday, Eldredge & Clark, by: *Barry E. Coplin*, for cross-appellant.

JAMES R. COOPER, Judge. This is a divorce action brought by Gayle Leonard against Dr. Donald Leonard. After a trial, the chancellor granted Mrs. Leonard an absolute divorce; awarded her custody of the parties' minor children, child support, and alimony; and ordered that the marital property be divided equally between the parties. From that decision, Dr. Leonard filed a timely notice of appeal, and Mrs. Leonard filed a timely notice of cross-appeal. However, Dr. Leonard abandoned his appeal by failing to file the record of the case and an appellant's brief. Mrs. Leonard timely filed a certified copy of the record and pursued her cross-appeal. This case thus comes before us with Mrs. Leonard as the cross-appellant, and Dr. Leonard as the cross-appellee.

For reversal, Mrs. Leonard contends that the chancellor erred in awarding the marital property held as tenancies by the entireties solely to her as part of her half-share of the marital property. We agree, and we reverse.

The evidence shows that the parties held their marital home in Little Rock and a condominium near Heber Springs as tenancies by the entirety. The chancellor found the home to have a value of $344,000.00, subject to a connected debt of $157,402.00. The condominium was valued at $76,000.00, with a connected debt of $35,211.00.

The problem of property division was complicated by the large amount of debt owed by the marital estate, and the fact that the prime asset was Dr. Leonard's medical professional association, an asset which was not subject to division because Mrs. Leonard, who is not a physician, could not be awarded an ownership interest in it. *See* Ark. Stat. Ann. § 64-2014 (Repl. 1980). In an effort to effect an equal division of the martial property, the chancellor awarded the parties' entireties property solely to Mrs. Leonard.

Although we are not unmindful of the difficulties the chancellor faced in attempting to equally divide this large and complex marital estate, we hold that he erred in awarding the entireties property solely to Mrs. Leonard. The only authority for dividing estates by the entirety is Ark. Stat. Ann. § 34-1215 (Supp. 1985), which provides for the equal division of marital property held by the entirety without regard to gender or fault. *Warren* v. *Warren*, 273 Ark. 528, 623 S.W.2d 813 (1981). A court has two available options for dealing affirmatively with entireties property in the event of the dissolution of the entireties estate by divorce: it may place one of the parties in possession of the property, or it may order the property sold and the proceeds divided equally. *Warren* v. *Warren*, 11 Ark. App. 58, 665 S.W.2d 909 (1984); *see Carrick* v. *Carrick*, 13 Ark. App. 42, 679 S.W.2d 800 (1984). We remand to the chancellor for further proceedings not inconsistent with this opinion. In conducting such further proceedings, the chancellor will not be bound by prior determinations regarding the valuation of assets or the relative share of the marital estate to be awarded to each of the parties, and may permit the introduction of such additional evidence as is necessary for the just resolution of the issues.

Reversed and remanded.

CRACRAFT and MAYFIELD, JJ., agree.

Mary MORTON *v.* DIRECTOR OF LABOR, and PLASTIC & RECONSTRUCTIVE SURGERY ASSOCIATES LIMITED

E 87-22 742 S.W.2d 118

Court of Appeals of Arkansas
Division I
Opinion delivered November 18, 1987

Webb & Doerpinghaus, by: *Charles J. Doerpinghaus, Jr.*, for appellant.

George Wise, Jr., for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Arkansas Board of Review holding that the appellant was not eligible for unemployment benefits because she had quit her last work without good cause connected with the work.

In December of 1979, the appellant went to work for a group of plastic surgeons as a medical transcriptionist. In March of 1981, she was promoted to office manager. According to her testimony, her duties included interviewing and hiring applicants, receptionist, preparing payrolls, ordering supplies, accounts receivable, daily deposits, tax deposits, scheduling surgery and hospital rounds, correcting office problems, and the supervising and firing of employees. In November of 1983, the doctors hired a man as administrative office manager. Over the course of the next year, he assumed a large number of appellant's responsibilities himself or assigned them to someone else. Appellant claims she was relegated to being a bookkeeper; that she no longer had any input into the hiring and firing of employees, or the granting of vacations or pregnancy leave; and that she no longer had any medical duties.

The appellant testified that after the administrative office manager was employed there was job-responsibility confusion and after about eight months of attempting to resolve her work problems, she asked for a conference with the doctors. However, when the meeting began one of the doctors had to leave on personal business. Another meeting was to be scheduled but appellant resigned before the date and time for the next meeting was set.

In support of her argument that she had good cause connected with the work for resigning, the appellant points to the fact that prior to her resignation a nurse was hired to handle the medical responsibilities of the office and after appellant's resignation an executive secretary was hired who does not supervise other employees and is not involved in personnel matters. Appellant cites *Ladish Company* v. *Breashears*, 263 Ark. 48, 563 S.W.2d 419 (1978), as standing for the proposition that a change in work calling for less competence and lower remuneration is cause for work to become unsuitable and good cause for voluntarily quitting. Ark. Stat. Ann. § 81-1106(c)(1) (Repl. 1976), provides that in determining the existence of good cause for an employee to voluntarily leave work it is necessary to consider, among other factors, "the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience and prior earnings, ..." And in *Teel* v. *Daniels*, 270 Ark. 766, 606 S.W.2d 151 (Ark. App. 1980), the court said good cause for quitting work involves good faith, the desire to work, and whether the employee took appropriate steps to remedy the situation causing the problem with the work. Both *Ladish* and *Teel* recognized that the issue presented was a question of fact. It is settled that the factual determinations of the Board of Review must be affirmed if supported by substantial evidence and that this means legal evidence that a reasonable mind might accept as adequate to support a conclusion. *Victor Industries Corporation* v. *Daniels*, 1 Ark. App. 6, 611 S.W.2d 794 (1981).

In the instant case, the appellant's pay did not decrease after the administrative office manager was employed. In fact, her pay increased from $15,000 to $17,000 after he was hired. Moreover, the appellant admitted that the doctors' practice had grown to the point that additional help was needed to run the office. One of the doctors testified that he and the other doctors spoke with appellant and she thought help was needed and that she could work under someone else. This doctor also testified that before the administrative office manager was employed the appellant and the doctors ran the office. He said the doctors were involved in the financial aspects of the office and the hiring and firing of the employees, although the appellant interviewed applicants and had input into the hiring decision. However, the administrative office manager testified that he also made an effort to involve

appellant in the hiring process and that she made suggestions in that regard. He also said he did not want her to leave and that he tried to work with her. It is admitted that appellant quit before the doctors had a second meeting to attempt to solve appellant's problems.

Although the appellant was relieved of some of her duties, there is no evidence that this precluded her from receiving future pay increases or reduced her job to one that was unsuitable for her training and experience. She is not a nurse and some of the duties she lost concerned medical matters and were given to an employee who was a nurse. Many of her duties were helping the doctors oversee the daily operation of the office, and it is clear that the administrative office manager was hired to take over that portion of the doctors' work. In summary, we think there is substantial evidence from which the Board of Review could properly find that the appellant quit her job without good cause connected with the work.

Affirmed.

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

Belinda (Archer) BEASLEY *v.* Charles C. ARCHER

CA 87-6 739 S.W.2d 695

Court of Appeals of Arkansas
Division II
Opinion delivered November 18, 1987

Bob Scott, for appellant.

Charles C. Archer, for appellee.

BETH GLADDEN COULSON, Judge. Appellee and appellant were divorced on September 15, 1981. On March 16, 1984, the appellant filed a petition seeking indefinite suspension of the appellee's visitation rights as to the parties' minor child on grounds of alleged child abuse. After several hearings, orders were entered on December 3, 1985, and on June 19, 1986, providing for periods of supervised visitation and setting forth procedures for the normalization of visitation. From that second order comes this appeal.

During the process of litigation, a contempt proceeding had been initiated against the appellant and appellant's counsel for failure to permit visitation as ordered by the court. While not presiding at the contempt proceeding, the chancellor appeared as a witness against appellant and her counsel. The appellant argues that this mandated the chancellor's recusal as to subsequent hearings on the merits of appellant's original petition. In response to appellant's motion that the chancellor disqualify himself, a

special master was appointed by agreement of the court, appellant, and appellant's counsel. Citing Rule 53(e)(2) of the Arkansas Rules of Civil Procedure, the appellant makes the additional argument that the chancellor erred in failing to adopt the special master's report. We find the appellant's arguments to be without merit and affirm.

Disqualification of a judge is discretionary with the judge himself and will not be reversed absent an abuse of that discretion. *Chancellor* v. *State*, 14 Ark. App. 64, 684 S.W.2d 831 (1985). Judges are presumed to be impartial, and the party seeking disqualification bears a substantial burden in proving otherwise.

In discussing Canon 3.C(1) of the A.B.A. Code of Judicial Conduct, this court has stated that when a trial judge sits as judge and as witness, the judge should disqualify himself in the proceeding because the required appearance of impartiality is destroyed. *Elmore* v. *State*, 13 Ark. App. 221, 682 S.W.2d 758 (1985). Yet, our decision in *Elmore* emphasized that the failure to recuse does not constitute reversible error where no showing has been made that the complaining party was prejudiced. 13 Ark. App. at 227. While the issue before us could be decided on that basis, we find it unnecessary to do so.

An examination of the record clearly shows that appellant's motion for recusal was followed by an agreement that the parties' dispute be referred to a special master. This was done, according to the chancellor, "in the interest of fairness to everyone involved. I did not want any appearance of impropriety or prejudice. . . ." Having agreed to submission of the matter to a special master—which by no means removed the court from its position of final authority—the appellant may not now argue that recusal by the chancellor was mandatory. *See Campbell* v. *State*, 281 Ark. 13, 660 S.W.2d 926 (1983), *cert denied*, 465 U.S. 1069 (1984).

In arguing that the chancellor erred in subsequently failing to adopt the special master's report, the appellant relies upon Rule 53(e)(2) of the Arkansas Rules of Civil Procedure, which provides:

> The court shall accept the master's findings of fact

> unless clearly erroneous. Within 20 days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(c). The court after hearing may adopt the report or modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

The rule requires that the court accept the master's findings of fact unless clearly erroneous, and to the extent that the court adopts the findings, they are considered the findings of the court. *Coyne* v. *Coyne*, 9 Ark. App. 80, 654 S.W.2d 584 (1983).

The special master's report contained findings of fact followed by various recommendations. The appellee filed his objections to those recommendations as provided by Rule 53. During the subsequent hearing which formed the basis for the order of December 3, 1985, the chancellor repeatedly stated that he had adopted the master's findings of fact, but that one of the recommendations would be rejected; others were later modified to meet changed circumstances. What the appellant is actually challenging on appeal is the chancellor's failure to follow the master's recommendations. We find that the chancellor's actions were in substantial compliance with Rule 53, and therefore find no merit to the appellant's argument.

Affirmed.

CRACRAFT, J., and JENNINGS, J., agree.

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