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George Lee DRAYTON *v.* STATE of Arkansas

CA CR 87-99 740 S.W.2d 147

Court of Appeals of Arkansas
Division I
Opinion delivered November 25, 1987

F.N. "Buddy" Troxell, for appellant.

Steve Clark, Att'y Gen., by: *Frank J. Wills III*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. In this criminal case, the appellant was convicted by a jury of rape and burglary, and was sentenced to twenty-two years and five years respectively. On

appeal, the appellant argues that the trial court erred in refusing to disqualify the prosecuting attorney's office from trying the case. We find no error and we affirm.

In August 1986, Clifford J. Henry was appointed by the trial court to represent the appellant, an indigent. On December 22, 1986, Mr. Henry withdrew from representing the appellant because he had accepted a position with the prosecuting attorney's office in Faulkner County. The Court then appointed F.N. Troxell to represent the appellant. Trial was held in Faulkner County. Mr. Troxell filed a motion requesting that the court order the prosecuting attorney's office to withdraw from the case. The appellant, citing Canons 4 and 9 of the Code of Professional Responsibility, argued that allowing the prosecuting attorney's office to proceed with the case imparted an appearance of impropriety. *See also* Rules 1.6 and 8.4(d), Rules of Professional Conduct, 287 Ark. 495, 702 S.W.2d 326 (1985).

Mr. H. G. Foster, Prosecuting Attorney for the 20th Judicial District, informed the trial court that there had been no discussions of the case with Mr. Henry, that he and Mr. Henry did not share office space, telephone lines, filing cabinets or clerical staff, and that on one occasion, when a witness in the case was due to appear in his office, Mr. Henry excused himself and left. The trial court denied the motion, enjoined Mr. Foster from using Mr. Henry in the prosecution, and ordered that the State was not to use any information Mr. Henry had obtained.

On appeal, the appellant concedes that there has been no specific misconduct, but that the Code of Professional Conduct requires attorneys to avoid even the appearance of impropriety. In *Upton* v. *State*, 257 Ark. 424, 516 S.W.2d 904 (1974), the Arkansas Supreme Court affirmed the trial court's refusal to appoint a special prosecutor. In a similar fact situation, the court rejected the appellant's argument that the potential for prejudicial violation of the confidential relationship necessitated the appointment of a special prosecutor. In the case at bar, as in *Upton*, Mr. Henry and the prosecuting attorney, Mr. Foster, scrupulously avoided even the possibility of impairment of the appellant's right to a fair trial insofar as Mr. Henry's previous representation of him was concerned. We cannot say that the trial court abused its discretion under these circumstances. *See,*

Upton, supra.

Affirmed.

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

SAMUELS HIDE AND METAL COMPANY *v.* Michael S. GRIFFIN

CA 87-143 739 S.W.2d 698

Court of Appeals of Arkansas
Division II
Opinion delivered November 25, 1987

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

Zolper, Coop, Robertson & Associates, P.A., by: *Jeannette*

A. Robertson, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from an order of the Workers' Compensation Commission. At a hearing on a joint petition settlement, the administrative law judge suggested that $2,000 to $2,500, in addition to the $5,000 offered, should be paid. Appellant's counsel obtained an additional $2,500 and the law judge approved the joint petition without another hearing. However, the claimant then employed counsel and a motion was filed with the law judge asking that the order approving the joint petition be set aside. The law judge denied the motion and, on appeal to the full Commission, the law judge's order was vacated and the matter remanded with directions to schedule a hearing on the final settlement petition.

The employer has appealed and contends no additional hearing is necessary and that appellee's acceptance of the $7,500 without tendering any portion of it back has estopped appellee from challenging the settlement. We conclude that the order of the Commission is not a final order and, therefore, is not appealable. Even though the issue of appealability was not argued in the briefs, it is a jurisdictional question which the appellate court has the right and duty to raise in order to avoid piecemeal litigation. *Morgan* v. *Morgan*, 8 Ark. App. 346, 652 S.W.2d 57 (1983).

For an order to be appealable it must be a final order. Ark. R. App. P. 2. To be final, an order must dismiss the parties from the court, discharge them from the action, or conclude their rights as to the subject matter in controversy. *Epperson* v. *Biggs*, 17 Ark. App. 212, 705 S.W.2d 901 (1986). This rule applies to appeals from the Workers' Compensation Commission. *See H.E. McConnell & Son* v. *Sadle*, 248 Ark. 1182, 455 S.W.2d 880 (1970), and *Cooper Industrial Products* v. *Meadows*, 269 Ark. 966, 601 S.W.2d 275 (Ark. App. 1980).

It is the general rule that orders of remand are not final, appealable orders. *Lloyd* v. *Potlatch Corp.*, 19 Ark. App. 335, 721 S.W.2d 670 (1986). In 3 Larson, *Workmen's Compensation Law* § 80.11 (1983), the rule is stated as follows:

> There is in compensation procedure, just as in any other judicial procedure, such a thing as a completely unreview-

> able matter, as in the case of interlocutory decisions that are unreviewable for lack of finality, or incidental decisions that involve details committed to the absolute discretion of the lower tribunal. Ordinarily an order is reviewable only at the point where it awards or denies compensation. Accordingly, review has been denied of an order allowing claimant to amend his claim, denying a motion to receive further evidence, remanding the case for further evidence or findings, directing the claimant to be medically examined, continuing the trial of a claim while a tort action was pending, and granting claimant's petition for interrogatories on the facts surrounding her husband's death. (Footnotes omitted.)

The Commission's remand in the instant case is not a final determination of any issue but merely remands the case for an additional hearing; therefore, it falls within the general rule as set out above and is not a final, appealable order.

Dismissed.

CRACRAFT and COOPER, JJ., agree.

Joe GUINN *v.* STATE of Arkansas

CA CR 87-106 740 S.W.2d 148

Court of Appeals of Arkansas
Division I
Opinion delivered December 2, 1987
[Rehearing denied December 23, 1987.]

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Mark S. Cambiano, for appellant.

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

GEORGE K. CRACRAFT, Judge. Joe Guinn was charged in separate criminal informations with the crimes of conspiring with others to possess controlled substances with the intent to deliver and conspiring with others to commit arson. As it was shown that the agreement to commit both offenses grew out of the same agreement and continuous conspiratorial relationship, the court ordered the case tried as one conspiracy to commit multiple criminal acts as provided in Ark. Stat. Ann. § 41-709 (Repl. 1977). The appellant was found guilty of having conspired to commit both crimes and brings this appeal. We find sufficient merit in one point advanced for reversal to warrant a new trial.

Appellant contends that the trial court erred in not directing a verdict in his favor because there was no substantial evidence on which a verdict of guilty of conspiring to commit either offense could be based. Where the sufficiency of the evidence is challenged on a criminal appeal, we review that issue first before considering elements of trial error because of the constitutional prohibition against a second trial when a conviction is reversed for a lack of evidence. *Harris* v. *State*, 284 Ark.

247, 681 S.W.2d 334 (1984). We conclude that there was substantial evidence of a conspiracy to commit both offenses.

One commits criminal conspiracy if he agrees with one or more other persons that one of them will aid or engage in conduct constituting a criminal offense and one of the conspirators thereafter does an overt act in furtherance of that agreement. Under this section, it is required that the State prove not only that there was an agreement to commit the crime or crimes but also that one of the conspirators did at least a minimal act in furtherance of the agreement.

At common law, the gist of a conspiracy was the unlawful combination or agreement, such that one might be convicted of the crime by simply showing that such a confederation existed. *Powell* v. *State*, 133 Ark. 477, 203 S.W. 25 (1918). Our statutes now require the doing of an overt act as an element of all criminal conspiracies. Here, there was evidence that appellant offered to burn Doyle Hall's residence to enable him to collect fire insurance proceeds. After Hall informed police officers of the offer, Officer Ron Lewis was introduced to the appellant as Hall's son and thereafter participated in the negotiations with appellant. There was substantial evidence that an agreement was entered into under which the appellant would cause Hall's residence to be destroyed by fire. Appellant, in a subsequent meeting, admitted in the presence of the officers that he had obtained "help" to assist in the arson and that he had talked with an attorney to obtain the necessary advice and protection for Hall in the prosecution of his insurance claim and in the event of police investigation. We conclude that appellant's statements regarding his efforts to obtain persons to aid in the arson and to establish counsel in prosecuting the claim for insurance were at least substantial evidence of overt acts in furtherance of the conspiracy to commit arson.

During the course of the conversations, there was also an agreement that the appellant would purchase ten pounds of marijuana from Officer Lewis and another officer for the purpose of resale by him at other locations. There was evidence that pursuant to that agreement the appellant paid the police officers the sum of $2500.00 in order to obtain the marijuana. There was, therefore, substantial evidence of an overt act on the part of the

appellant to set in motion the conspiracy to possess controlled substances.

The appellant further contends that there was no substantial evidence to support the conspiracy because there were no co-conspirators. He argues that, as the police and their agents could not be co-conspirators, and that as one cannot conspire with himself, there was no criminal conspiracy. Arkansas Statutes Annotated § 41-713(2)(b) (Repl. 1977) provides that it is not a defense to prosecution for conspiracy that the person with whom the defendant conspires is immune to prosecution or has feigned agreement. The commentary to that section points out that it is designed to bar a defense based on the fact that other conspirators are not liable for their participation, such as where one of the conspirators is actually working for the police and only pretends to agree to an illegal course of conduct. We find no error.

Although we find no merit in appellant's challenge to the sufficiency of the evidence, we do find a trial error for which the case must be reversed and remanded for a new trial.

The appellant contends that the court erred in ordering the case to trial on an information which did not aver any specific overt acts done in pursuance of the conspiracy. The informations merely averred that "he did thereafter do overt acts in pursuance of said conspiracy." Arkansas Statutes Annotated § 43-2013 (Repl. 1977) provides as follows:

> In trials of indictments for conspiracy, in cases where an overt act is required by law to consummate the offense, *no conviction* shall be had, unless one or more overt acts be expressly *alleged* in the indictment, and *proved* on the trial; but overt acts, other than those alleged in the indictment, may be given in evidence on the part of the prosecution.

(Emphasis added).

At the time that section was originally enacted there were conspiracies which did not require proof of overt acts. *See Powell* v. *State, supra.* It therefore applied only to those statutory enactments in which overt acts were required in order to consummate the offense. Arkansas Statutes Annotated § 41-707 (Repl. 1977) now requires proof of an overt act as an element of every

criminal conspiracy, and therefore § 43-2013 applies to all cases involving allegations of criminal conspiracy. Under these two sections, it is required that the State both allege and prove a specific overt act evidencing that the conspiracy has been put in motion, and, provided the issue is properly raised, the failure to both allege and prove such an act is fatal to a conviction. Here, although appellant did not specifically move to quash the information, he did, both before and during trial, seek an order requiring the State to amend its information so as to allege specific overt acts done in furtherance of the conspiracy. The court overruled both motions and appellant was forced to go to trial without that knowledge.

The State argues that the appellant knew well in advance of trial the overt acts upon which the State would rely. Appellee argues that any statement made or action taken by any of the conspirators was to be considered an overt act and that the prosecutor had followed his "open file" policy by permitting the appellant to examine everything in it. We cannot conclude that this would meet the requirements of § 43-2013. We conclude that this failure on the part of the State warrants the ordering of a new trial at which the State has in advance specifically alleged overt acts done in furtherance of the conspiracy.

Appellant next argues that State Exhibit No. 1, purportedly the marijuana he attempted to purchase in this case, should not have been admitted into evidence because it was not properly authenticated. He argues that the evidence should have been excluded absent expert testimony that the substance was indeed marijuana. Although we have already found error requiring a new trial, we address this argument because of the likelihood that it will again be made an issue on retrial.

To prove the existence of a conspiracy the State was required to show that appellant agreed with another to commit the crime and that one of them performed an overt act in furtherance of that agreement. We have concluded that there was substantial evidence of an agreement and that appellant paid the officers $2500.00 in order to obtain what he thought was marijuana. It was unnecessary for the State to have to prove that the substance was in fact marijuana, as proof of the elements of the offense that is the object of the conspiracy is not required in

order to prove the conspiracy. *See Savannah* v. *State*, 7 Ark. App. 161, 645 S.W.2d 694 (1983).

The appellant also argues that other procedural errors were committed during the trial. As he has failed to abstract for us the evidence on which these arguments are based and has failed to abstract for us both the instructions and the court's rulings on those instructions he contends were erroneously rejected, we do not address them.

Reversed and remanded.

COOPER and COULSON, JJ., agree.

Arlie EVANS *v.* NORTHWEST TIRE SERVICE and Tri-State Insurance Company

CA 87-171 740 S.W.2d 151

Court of Appeals of Arkansas
En Banc
Opinion delivered December 2, 1987
[Rehearing denied January 13, 1988.*]

*Corbin, C.J., would grant rehearing.

Jay N. Talley, for appellant.

Mashburn & Taylor, by: *Michael H. Mashburn*, for appellees.

JOHN E. JENNINGS, Judge. Arlie Evans sustained a compensable shoulder injury in 1976 while working for Northwest Tire Service. He was awarded permanent partial disability and received his last benefit payment on February 14, 1980. Since then the employer has paid bills for doctor visits and prescription drug refills. Evans's condition deteriorated in 1985, and he was hospitalized. He filed a claim for additional benefits, alleging that he had become permanently and totally disabled on April 23, 1985.

The issue is whether the claim is barred by the statute of limitations. The Commission held that the claim was barred, relying on *Mohawk Rubber Co.* v. *Thompson*, 265 Ark. 16, 576 S.W.2d 216 (1979), and distinguishing *Alred* v. *Jackson Atlantic, Inc.*, 268 Ark. 695, 595 S.W.2d 249 (Ark. App. 1980). We disagree and reverse.

The applicable statute is Ark. Stat. Ann. § 81-1318(b) (Repl. 1976), which provides:

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

Since 1980, no uninterrupted one year period has passed without Evans receiving some payments, although from 1983 through 1985, Evans was furnished with replacement medicine only.

Our review of *Mohawk, Alred*, and a third case, *Terminal Van & Storage* v. *Hackler*, 270 Ark. 113, 603 S.W.2d 893 (Ark. App. 1980), indicates that the three cases are reconcilable. We have come to the conclusion that the Commission misinterpreted *Mohawk* and failed to follow our decision in *Alred.*

In *Mohawk*, the claimant sustained a work-related injury to his foot. On August 10, 1973, the claimant was released from treatment by his doctor and furnished a pair of orthopedic shoes. On August 28, 1974, the claimant was furnished with a second pair of orthopedic shoes and in May 1975, he brought a claim for additional benefits. The Commission held that the statute of limitations had been tolled by the furnishing of the second pair of orthopedic shoes and that the claim was not barred.

The court reversed, noting that "there was no interruption of the statute between August 10, 1973 and August 28, 1974. Thus, both the two year statute from the date of the injury and the one year statute from the last payment of compensation had run when the claimant was furnished a second pair of shoes on August 28, 1974."

Noting that the second sentence of § 81-1318(b) was added when the statute was amended in 1968, the court went on to say:

> The manifest purpose of the 1968 amendment was to extend the statute with respect to an employee's right to obtain the *replacement* of medicine, crutches, artificial limbs, and other apparatus that would be *permanently or indefinitely required* as a result of the original compensable injury. This case illustrates the beneficent purpose of the amendment, for without it this claimant would not have been able to obtain a second free pair of orthopedic shoes on August 28, 1974, because both the two-year and the one-year statutes had already run. Thus the new sentence is actually an exception to the basic rule of limitations. The exception cannot fairly be broadened to mean, for example, that simply because a crutch furnished

> by the employer happens to break and needs replacement ten years after the injury, a new period of limitations should begin to run with respect to claims for surgery, permanent partial or total disability, and all the other benefits provided by the act. The scope of a reasonable and logical exception to the rule of limitations should not be extended beyond the defect that it was evidently designed to correct. Even a liberal construction of a statute must still be consistent with its basic intent. (emphasis in original.)

In *Alred* the claimant suffered a compensable injury in 1970. In 1978, the claimant's condition deteriorated and she sought additional benefits. The issue in *Alred* was whether the furnishing of replacement medicine would constitute "payment of compensation" so as to toll the statute of limitations. We followed the rule announced many years ago by the Arkansas Supreme Court that payments for medicine are a part of "compensation" within the meaning of the Workers' Compensation Act, citing *Reynolds Metal Co.* v. *Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956) and *Ragon* v. *Great American Indemnity Co.*, 224 Ark. 387, 273 S.W.2d 524 (1954). We reversed the Commission's decision that the claim was barred by the statute.

In *Terminal Van & Storage* v. *Hackler, supra*, we made the distinction between *Mohawk* and *Alred* clear. In *Terminal Van*, we said:

> The statute does not run against, among other things, replacement medicine; therefore, as the Commission found, Mrs. Hackler can still receive replacement for medicine and drugs if she can establish a connection to the original injury. Nevertheless, payment for replacement medicine does not revive a claim for additional benefits once the statute has run against other types of compensation.

We said that the difference between *Alred* and *Mohawk* was that in *Alred*, "*the statute of limitations never ran long enough to present a bar.*" Finally, we said, "[w]hile claims for replacement medicine may toll the running of the statute of limitations, such claims cannot revive once the statute has run against other forms of compensation."

This is the critical distinction. "Replacement medicine" is certainly "medicine" and therefore, a payment for replacement medicine is "payment of compensation" within the meaning of § 81-1318(b) and the supreme court's decisions in *Reynolds Metal Company* and *Ragon, supra.* Therefore, the furnishing of replacement medicine may toll the running of the statute. On the other hand, if more than one year passes between the furnishing of replacement medicine to the claimant, a claim for additional compensation may well be barred by the statute because such claims are not *revived* once the statute has run.

In its majority opinion the Commission expressed its concern that, if Evans's position was adopted, the statute of limitations would never run on someone who refills his prescription once a year for the rest of his life. It is certainly a proper part of the Commission's business to be concerned about the practical effect of a given construction of the Workers' Compensation Act, but we answered this argument in *Alred*:

> This holding does not mean that a claimant may toll the statute merely by refilling a prescription. The statute specifically says medication which is "reasonably necessary" for the injury suffered. What is considered "reasonably necessary" will depend on the facts and circumstances of each case.

For the reasons stated the decision of the Commission is reversed, and this case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

CORBIN, C.J., dissents.

DONALD L. CORBIN, Chief Judge, dissenting. The majority views the issue in this case as simply whether appellant's claim is barred by the statute of limitations. I disagree. The issue is whether compensation for prescription refills *only*, received during the statutory period set out in Arkansas Statutes Annotated § 81-1318(b) (Repl. 1976), tolls the statute for additional medical benefits.

In this case, the Commission denied appellant's claim for additional medical benefits relating to his 1976 compensable

injury because the statute of limitations had expired. The majority reversed the Commission finding the statutory period had not expired because no uninterrupted one year period had passed without appellant receiving some type of payments. For a two year period immediately preceding his present claim, the majority concedes that appellant received no additional medical treatment incident to his original injury other than prescription refills.

Arkansas Statutes Annotated § 81-1318(b) is clear and unambiguous. Under the statute, a claimant is not eligible to receive compensation for additional medical benefits unless the claim is filed within one year of the date of last payment of compensation or two years from the date of the injury. The statute's 1968 amended sentence goes on to explain that the limitations period for additional benefits *shall not apply* to replacement of medicine, crutches, artificial limbs, etc., required as a result of the compensable injury. In this case, appellant is clearly entitled to receive replacement medicines indefinitely under the express language of the amended sentence of Arkansas Statutes Annotated § 81-1318(b). However, it is also clear that merely receiving replacement medicines without any medical treatment will not operate to toll the statute for additional benefits once the statutory period has run. On October 5, 1983, appellant received medical treatment relating to his compensable injury, and the evidence is uncontradicted that he did not receive any further medical treatment for the next two years other than having his prescriptions refilled. On April 23, 1985, appellant filed for additional medical benefits. The Commission correctly held that appellant was not entitled to compensation for additional benefits because the statute had run since no claim was filed within one year of October 5, 1983.

There are three pertinent cases that interpret Arkansas Statutes Annotated § 81-1318(b): *Mohawk Rubber Company* v. *Thompson*, 265 Ark. 16, 576 S.W.2d 216 (1979); *Terminal Van and Storage* v. *Hackler*, 270 Ark. 113, 603 S.W.2d 893 (Ark. App. 1980); *Alred* v. *Jackson Atlantic, Inc.*, 268 Ark. 695, 595 S.W.2d 249 (Ark. App. 1980). In its opinion, the majority found the three cases reconcilable and concluded that the Commission misinterpreted *Mohawk* and failed to follow *Alred*.

It is my opinion that *Alred* is not controlling because there the court reached its decision based on the facts of that case. The court held that payments for medicine were considered payment of compensation for purposes of tolling the statute of limitations under Arkansas Statutes Annotated § 81-1318(b). To reach this conclusion, the court relied on Arkansas Statutes Annotated § 81-1311 (Supp. 1985) which provides in pertinent part as follows:

> The employer shall promptly provide for an injured employee such medical, surgical, hospital, and nursing services, and *medicine* [crutches, artificial limbs and other apparatus] as may be *reasonably necessary* for the treatment of the injury received by the employee.

Id. at 697, 595 S.W.2d at 250.

In *Alred*, the court stated that what is considered "reasonably necessary" will depend on the facts and circumstances of each case. In making its decision, the *Alred* court considered evidence that the Administrative Law Judge's decision, that was affirmed by the Commission, awarded all "reasonable future medical expenses" to the claimant. The court also stated:

> In the instant case, there is evidence in the record to indicate that claimant may have been receiving medicine during the period in which respondent claims that the one year statute of limitations had run uninterrupted. For instance, a letter dated May 24, 1978, from respondent to Dr. Lohstoeter states:
>
> > Munford, Inc., is continuing under responsibility to provide medical benefits to Dorothy Alred as the result of July 3, 1970 injury. We, as you may know, are continuing to receive various hospital bills and bills from other suppliers for treatment to Mrs. Alred.

Id. at 699, 595 S.W.2d at 251-52.

The *Alred* opinion points out that its decision was based on its facts, and it is my opinion that the factual distinction there turned largely on the above letter. In holding that payments for medicine constitute "payment of compensation" within Arkansas Statutes Annotated § 81-1318(b), the court stated, "The Workers' Compensation Act is highly remedial and is therefore

entitled to a liberal construction. [citations omitted] This holding does not mean that a claimant may toll the statute merely by refilling a prescription." *Id.* at 699, 595 S.W.2d at 252. If merely refilling a prescription will not toll the statute, then in the case at hand, the statute ran against claims for additional benefits because appellant received no benefits other than prescription refills during the statutory period.

Five months after *Alred*, this court again considered a claim for additional benefits in *Terminal*. There the claimant sustained a compensable injury in 1969 and received medical treatments until 1972. The claimant filed no claims for benefits between September 1972 and December 1976; however, evidence indicates that claimant had received replacement medicine during these years. Discussing Arkansas Statutes Annotated § 81-1318(b), the court stated, "The language of the section is clear and unambiguous. A claim for additional compensation is barred if it is not filed with the Commission within either the one-year or two-year limitation periods." *Terminal*, 270 Ark. at 115, 603 S.W.2d at 895. Upon this basis, the court denied the claim for additional medical benefits, but awarded claimant proven medical expenses relating to the compensable injury in 1969, that were not specifically barred by the statute, i.e., replacement medicines, etc. The court held that payment for the replacement medicine does not revive a claim for additional benefits once the statute has run against other types of compensation.

In the present case, the Commission denied appellant additional benefits relying in part on *Mohawk*. As the majority points out, the claimant in *Mohawk* was also denied additional medical benefits because both the one year and two year limitation periods set out in § 81-1318(b) had run; however, the court found that the claimant was still entitled to a second pair of orthopedic shoes under the beneficient purposes of 1968 amendment to that statute.

In this regard, the court in *Mohawk* stated: "The scope of a reasonable and logical exception to the rule of limitations should not be extended beyond the defect that it was evidently designed to correct. Even a liberal construction of a statute must still be consistent with its basic intent. [citation omitted]" *Mohawk*, 265 Ark. at 19, 576 S.W.2d at 218.

I agree that a claimant is entitled to compensation for medical treatment received within the statutory period. I also agree that receipt of medical treatment within the statutory period begins the statutory period anew; however, I strongly disagree that the period also begins anew each time a claimant receives compensation for any type of replacement medicine (prescription refills, crutches, orthopedic shoes, etc.). Because it is outside the statute, a claimant is clearly entitled to compensation for replacement medicine indefinitely if it can be shown to have resulted from the compensable injury. Accepting the majority's position will mean that a claimant can extend his employer's liability until his death by simply having a prescription refilled once a year. In my opinion, this is in direct contravention of the legislative intent of the statute.

The Commission cannot be reversed on appeal unless fair-minded persons, with the same facts before them could not have reached the conclusion arrived at by the Commission. *Marion Hospital Association* v. *Lanphier*, 15 Ark. App. 14, 688 S.W.2d at 322 (1985). While I sympathize with the claimant, I cannot conclude that fair-minded persons could not have reached the Commission's finding, and therefore, feel compelled to affirm their decision under the standards which our precedents require. Furthermore, any expansion of the act should come from the legislature, not the courts.

Bailey Thomas BING *v.* STATE of Arkansas

CA CR 87-96 740 S.W.2d 156

Court of Appeals of Arkansas
Division I
Opinion delivered December 2, 1987

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Robert S. Blatt, for appellant.

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

BETH GLADDEN COULSON, Judge. The appellant was found guilty of sexual abuse and was sentenced to three years imprisonment with two and one-half years suspended. It is argued on appeal that the trial court erred in: (1) allowing the names of potential jurors to be drawn by the bailiff as opposed to the clerk; (2) admitting certain hearsay testimony; (3) not permitting appellant to inform the jury that its recommendation of a suspended sentence was not binding on the court; and (4) not following the jury's recommendation of a suspended sentence. We find appellant's arguments to be without merit and affirm.

Ark. Stat. Ann. § 43-1903 (Repl. 1977) clearly provides that in felony prosecutions, "the clerk . . . shall draw from the jury box the names of the jurors . . . ." While the selection process at issue did not comply with the statute, appellant has failed to demonstrate how he was prejudiced. No longer is it presumed that simply because error is committed it is prejudicial. *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984), *cert. denied*, 470 U.S. 1085 (1985); *Donoho* v. *Donoho*, 22 Ark. App. 150, 737 S.W.2d 170 (1987). To reverse, prejudice must be shown. *Berna, supra.*

Although appellant alludes to the bailiff's role as deputy sheriff, there is no showing that the jurors were unable to fulfill their duties fairly and impartially. Jurors are presumed unbiased and the burden of proving otherwise is upon the complaining party. *Bovee* v. *State*, 19 Ark. App. 268, 720 S.W.2d 322 (1986). We do not approve the procedure used, but in the absence of demonstrated prejudicial error find no grounds for reversal on this point.

At trial, the victim described the circumstances surrounding

the alleged sexual abuse. It was established on cross-examination that the victim had originally given a slightly different account of the incident. Appellant's counsel then sought to show that before trial the victim had frequently conferred with her parents and the prosecuting attorney on the details of the victim's story. This was an attempt to impeach the victim's credibility by casting doubt on the trial version of the incident. Appellant's clear intent was to convince the jury that the trial testimony was a fabrication.

In order to rebut the charge of recent fabrication, the State sought to introduce testimony by the victim's mother of a prior consistent statement by the victim made when she returned home after the alleged abuse. The trial court allowed introduction of the mother's testimony despite appellant's objections on the grounds of hearsay.

Statements by sex offense victims made to third parties shortly after the offense are admissible under any one of three theories. *Urquhart* v. *State*, 273 Ark. 486, 488, 621 S.W.2d 218, 219-20 (1981); 4 J. Wigmore, *Evidence in Trials at Common Law*, §§ 1134-1138 (rev. 1972). First, third parties may testify as to the victim's "complaint of rape" which proves that the victim did not remain silent (details of the offense are not admissible). *Gabbard* v. *State*, 225 Ark. 775, 285 S.W.2d 515 (1956); *Lindsey* v. *State*, 213 Ark. 136, 285 S.W.2d 462 (1948). Next, testimony by third parties may involve an "excited utterance" by the victim. *Jackson* v. *State*, 290 Ark. 375, 720 S.W.2d 282 (1986); *Bryan* v. *State*, 288 Ark. 125, 702 S.W.2d 785 (1986); *Weaver* v. *State*, 271 Ark. 853, 612 S.W.2d 324 (Ark. App.), *cert. denied*, 452 U.S. 963 (1981). Finally, third parties may testify as to a "prior consistent statement" made by the victim so long as the victim is present at trial and subject to cross-examination, the victim's credibility has been impeached, and introduction of the testimony otherwise complies with the applicable rules of evidence. *Urquhart, supra; Pleasant* v. *State*, 15 Ark. 624, 649 (1855). (Rule 803(25)(A) of the Arkansas Rules of Evidence presents a fourth theory.)

As early as the decision in *Pleasant, supra*, which involved a charge of rape, it was recognized under the first and third theories that:

> It was competent for [the third party] to state, on his

> examination in chief, the appearance of [the victim], when she came to the mill, and that she complained that an assault had been made upon her; but the court erred in permitting his (sic) then to state the particular facts which she related to him. *But the particulars of her statement might have been brought out, by way of confirming her testimony, after the attempt made by the prisoner to impeach her credit.* [Emphasis ours.]

Rule 801(d)(1) of the Arkansas Rules of Evidence provides that such testimony "is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (ii) consistent with [the declarant's] testimony and is offered to rebut an express or implied charge against [the declarant] of recent fabrication or improper influence or motive . . . ."

The situation before us is exactly that contemplated by Rule 801. The victim's credibility was impeached by cross-examination designed to show that the trial testimony was a fabrication which resulted from pre-trial meetings between the victim, the prosecuting attorney, and the victim's parents. The fabrication was further supported by cross-examination on the victim's earlier inconsistent statement. It was then permissible for the State to introduce testimony concerning the victim's statement made to the mother after the alleged incident (but prior to the meetings with the prosecutor) which was consistent with the victim's trial testimony. *Todd* v. *State*, 283 Ark. 492, 678 S.W.2d 345 (1984). We find no error on this point.

The appellant contends that the trial court abused its discretion when it permitted appellant to inform the jury that it could recommend a suspended sentence but did not permit appellant to inform the jury that its recommendation was not binding on the court. Appellant points out that the jury assessed punishment at three years imprisonment but recommended that the sentence be suspended. It is suggested that had the jury known its recommendation of a suspended sentence was not binding, it might have sentenced the appellant to a fine only. The argument is without merit for several reasons.

The court's instructions clearly apprised the jury of its option to assess punishment by way of a fine. As such, it is difficult

to see how appellant was prejudiced. Additionally, appellant has not shown that an instruction was proffered on the suspension of sentence. *See Rood* v. *State*, 4 Ark. App. 289, 630 S.W.2d 543 (1982). The matter of suspension of sentence is to be determined by the trial court and lies within its discretion. *Gardner* v. *State*, 263 Ark. 739, 569 S.W.2d 74 (1978), *cert. denied*, 440 U.S. 911 (1979). We cannot conclude that the trial court abused its discretion.

The appellant's final argument is that the court abused its discretion by not following the jury's recommendation of a suspended sentence. We note at the outset that the trial court suspended two and one-half years of the appellant's three year sentence. A criminal defendant has no right to a suspended sentence. The determination is one which is entrusted to the sound discretion of the trial court. *Fisk* v. *State*, 5 Ark. App. 5, 631 S.W.2d 626 (1982). We find nothing which would indicate an abuse of that discretion.

Affirmed.

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

CARP CONSTRUCTION *v.* Dewey STILES, Director of Labor, and Steve Erixson

E 87-32 740 S.W.2d 632

Court of Appeals of Arkansas
Division I
Opinion delivered December 9, 1987

Fred L. Caddell, for appellant.

Allan Pruitt, for appellee.

JAMES R. COOPER, Judge. Steve Erixson, an appellee in this Employment Security Division case, filed a claim for unemployment benefits in November 1986 stating that he quit his job with the appellant, Carp Construction, because the appellant had breached his employment agreement by failing to raise his wage rate to $6.00 per hour after thirty days. The Agency found that Erixson had left his employment with Carp Construction voluntarily and without good cause connected to the work, and denied him benefits. Erixson appealed the Agency determination to the Appeal Tribunal. An appeal hearing was held by telephone on December 11, 1986, in which Erixson testified in his own behalf; Carp Construction did not make an appearance. In a decision dated December 16, 1986, the Appeal Tribunal found that Erixson left his job at Carp Construction voluntarily and without good cause, and denied him benefits. On December 22, 1986, Erixson filed an appeal to the Arkansas Board of Review. Upon a review of the written record and testimony from the telephone hearing, the Board of Review allowed benefits upon a finding that, although Erixson had voluntarily quit his employment with Carp Construction, he did so with good cause connected with the work because the appellant had failed to give Erixson a raise after thirty days, and failed to provide him full-time work. From that decision, comes this appeal.

For reversal, the appellant states that it never received notice of the telephone hearing of December 11, 1986, and learned of that hearing only after it received the decision of the Appeal Tribunal. The appellant contends that it thus did not receive a reasonable opportunity for a fair hearing, and that its asserted inability to present evidence in its own behalf at the telephone hearing made it impossible for the Board of Review to ascertain the substantial rights of the parties as required by Ark. Stat. Ann. § 81-1107(d)(4) (Supp. 1985).

We do not reach the merits of the appellant's contentions because the appellant failed to raise the issue of notice below. In its brief, the appellant concedes that it was

notified that the telephone hearing had occurred prior to the time that the Board of Review proceeding took place. The appellant attempts to justify its failure to present the notice issue to the Board of Review by reference to a letter dated December 31, 1986, in which the Board of Review informed Erixson that his appeal had been placed on the Board's docket, and advised him that, under *Mark Smith* v. *Everett*, 6 Ark. App. 337, 642 S.W.2d 320 (1982), the Board of Review lacked jurisdiction to accept additional evidence in appeals pending before it. The implication is that it would have been pointless for the appellant to have presented the notice issue to the Board of Review, because the Board would have been unable to cure any error caused by the asserted lack of notice due to the jurisdictional limitation with respect to additional evidence set out in *Mark Smith, supra.* We do not agree. It is within the Board's discretion to direct that additional evidence be taken. *Maybelline Co.* v. *Stiles*, 10 Ark. App. 169, 661 S.W.2d 462 (1983); *Jones* v. *Director of Labor*, 8 Ark. App. 169, 650 S.W.2d 601 (1983). Thus, the Board had the power to consider the appellant's assertions concerning lack of notice of the telephone hearing. Because the appellant did not raise the notice question below, we will not consider it on appeal. *City of Fort Smith* v. *Moore*, 269 Ark. 617, 599 S.W.2d 750 (Ark. App. 1980).

Affirmed.

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

Priscilla LINTHICUM *v.* MAR-BAX SHIRT COMPANY

CA 87-226 741 S.W.2d 275

Court of Appeals of Arkansas
Division I
Opinion delivered December 16, 1987
[Rehearing denied January 13, 1988.]

Frederick S. "Rick" Spencer, for appellant.

Mashburn & Taylor, by: *Michael H. Mashburn* and *Jennifer Morris Horan*, for appellee.

JAMES R. COOPER, Judge. In this Workers' Compensation case, the administrative law judge found that the appellant, Priscilla Linthicum, had sustained a compensable injury. After a *de novo* review, the full Commission found that the appellant had not proven that her injury arose out of and in the course of her employment and, therefore, her back injury was not compensable. On appeal, the appellant argues that the Commission's finding is not supported by substantial evidence and that the Commission erred in not taking into account the findings of credibility made by the administrative law judge. The appellant also argues that the Commission erred in relying on a doctor's report because it was hearsay. We find no error and affirm.

In determining the sufficiency of the evidence to sustain the Commission's factual findings, we review the evidence in the light most favorable to those findings, and we must affirm if there is any substantial evidence to support them. *Deboard* v. *Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). In cases where a claim is denied because a claimant fails to show entitlement to compensation by a preponderance of the evidence, the substantial evidence standard of review requires that we affirm if a substantial basis for the denial of relief is displayed by the Commission's opinion. *Williams* v. *Arkansas Oak Flooring Co.*, 267 Ark. 810, 590 S.W.2d 328 (Ark. App. 1979).

The appellant testified that on May 17, 1985, as she was tossing a bundle of shirts into a bin, she felt a sharp pain in her back. She stated further that the pain worsened to the point that she had difficulty getting out of her car after driving home and that the next day she could not get out of bed. She saw her family doctor three days after the injury.

The appellant's neighbor testified that the appellant did indeed have trouble getting out of her car and that the appellant was in a great deal of pain. However, on cross-examination, the neighbor admitted that she only remembered that the incident occurred in the middle of May and that the appellant had told her

the actual date.

Randy McCollough, another employee at Mar-Bax, testified that the appellant did not indicate to him that she had suffered any back pain. Bertha Tolliver, a supervisor at Mar-Bax, stated that she did not notice whether or not the appellant was experiencing any difficulty at work on May 17. She stated further that employees were required to report any injuries and the appellant did not report that she had been injured at work until several weeks later. Mary Cardwell, Bertha Tolliver's assistant, said that the appellant told her that she had an infection or inflammation in her back and that she could tell that the appellant was in pain when the appellant returned to work.

As the administrative law judge stated in his opinion, the issues in this case turned on the credibility of the witnesses. However, the findings of the administrative law judge on issues of credibility are not binding on the Commission. *Roberts* v. *Leo Levi Hospital*, 8 Ark. App. 184, 649 S.W.2d 402 (1983). Furthermore, once the Commission has made its decision on issues of credibility this Court is bound by that decision. *Roberts, supra.*

The appellant argues that the Commission erred because it completely disregarded the fact that the administrative law judge based his decision on the credibility of the appellant and her witnesses. It is the appellant's contention that the administrative law judge is in a better position to judge credibility because the parties are physically present before him while the Commission only reviews a "cold record."

The same argument was rejected by this court in *Dedmon* v. *Dillard Department Stores, Inc.*, 3 Ark. App. 108, 623 S.W.2d 207 (1981). Although the appellant's argument may be logical, our standard of review of Workers' Compensation cases is limited by statute. Arkansas Statutes Annotated § 81-1325(b) (Supp. 1985) provides that findings of fact made by the Commission shall be conclusive and binding upon this court. It is the duty of the Commission to make a finding according to a preponderance of the evidence and not whether there is any substantial evidence to support the finding of the administrative law judge. *Dedmon, supra*; *Arkansas Coal Co.* v. *Steele*, 237 Ark. 727, 375 S.W.2d 673 (1964).

The appellant's second argument concerns a letter introduced into evidence by the appellee that had been written by the appellant's doctor. In that letter the doctor stated that the appellant did not indicate a specific injury or work related accident when he examined her. The doctor's report, which was also entered into evidence, states that the appellant awakened with the pain. It is the appellant's contention that both of these documents are hearsay and are admissible only if verified. We disagree.

The appellant failed to object at the hearing to the introduction of the documents and is precluded from raising this issue on appeal. *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979). Furthermore, the Commission is not bound by technical or statutory rules of evidence. Ark. Stat. Ann. § 81-1327 (Supp. 1985). The Commission has broad discretion with reference to admission of evidence and its decision will not be reversed absent a showing of abuse of discretion. *Southwest Pipe and Supply* v. *Hoover*, 13 Ark. App. 144, 680 S.W.2d 723 (1984). We find no abuse of discretion.

Giving the testimony its strongest probative force in favor of the findings of the Commission, and considering the appellant's failure to report a work related injury to her doctor and her delay in reporting to her employer, we find that there was substantial evidence presented to support the Commission's conclusion.

Affirmed.

CRACRAFT and COULSON, JJ., agree.

Ronnie FLOYD and Jennie Floyd *v.* OTTER CREEK HOMEOWNERS ASSOCIATION

CA 87-208 742 S.W.2d 120

Court of Appeals of Arkansas
Division I
Opinion delivered January 6, 1988

A. Wayne Davis, for appellant.

Wright, Lindsey & Jennings, by: *Steven W. Quattlebaum*, for appellee.

GEORGE K. CRACRAFT, Judge. Ronnie and Jennie Floyd appeal from an order of the Pulaski County Circuit Court

dismissing their action to recover sums paid by them to the Otter Creek Homeowners Association and enjoin collection of additional sums. They contended that the payments were made pursuant to an illegal assessment levied by the board of directors of the association. The issues appealed and the bases for our resolution of them can best be brought into focus by a recitation of the circumstances leading up to this appeal.

Appellants became members of the homeowners association by virtue of their purchase of a residence in the Otter Creek Subdivision. All deeds in Otter Creek contained mutual covenants as to the rights and obligations of homeowners and established a board of directors for the conduct of affairs of the association. Section 1 of the agreement obligated the property owners to pay annual assessments and special assessments as determined in accordance with the remainder of the agreement. In pertinent part, the parties agreed as follows:

> *Section 3. Annual Assessment.* Until January 1 of the year immediately following the conveyance of the first lot to any Owner, the initial annual assessment shall be Two Hundred Forty Dollars ($240.00) per Lot or $240.00 per dwelling unit whichever is greater.
>
> * * *
>
> (a) From and after January 1 of the year immediately following the conveyance of the first Lot to an Owner, the initial annual assessment may be increased each year not more than ten per cent (10%) above the assessment for the previous year *without a vote of the membership.*
>
> (b) From and after January 1 of the year immediately following the conveyance of the first lot to an Owner, the initial annual assessment may be increased above ten per cent (10%) by a vote of two-thirds (⅔) of the votes cast by all members who are voting in person or by proxy, at a meeting duly called for this purpose.
>
> * * *
>
> (c) The board of directors of the Association may set the annual assessment from time to time as they see fit.

Section 4. Special Assessments for Capital Improvements. In addition to the annual assessments authorized above, the Association may levy in any assessment year, a special assessment applicable to that year only for the purpose of defraying, *in whole or in part*, the cost of any construction, reconstruction, repair or replacement of a capital improvement upon the Private Common Areas including fixtures and personal property related thereto, provided that any such assessment shall have the assent of the members entitled to cast 2/3 of all votes of members who are voting in person or by proxy at a meeting duly called for that purpose.

* * *

Section 6. Notice and Quorum for any Action Authorized Under Sections 3 and 4. Written notice of any meeting *called for the purpose of* taking any action authorized under Section 3 or 4 of Article IV shall be sent to all members not less than thirty (30) days nor more than sixty (60) days in advance of the meeting. No quorum shall be required at such meeting, provided, however, those members present in person or proxy must approve the action taken by 2/3 of the votes present in person or proxy. [Emphasis added.]

* * *

In February of 1985, the board of directors, without a vote of the membership, adopted a resolution to increase the annual assessment by less than ten percent for the purpose of maintaining capital improvements located on the grounds owned by the property owners in common. Following Section 3(a) of the covenants, no notice of a meeting was given to property holders. The appellants paid the increased assessment for five months and then brought this action in the municipal court of Little Rock, Arkansas, to recover the sum of $12.50 already paid to the association and enjoin the collection of any future installments of the assessment. Appellants contended that the board of directors had no authority to raise the annual assessment for the purpose of making or maintaining capital improvements without a vote of two-thirds of the members at a meeting called for that purpose.

The municipal court entered judgment in favor of the appellants and an appeal was taken to the circuit court of Pulaski County.

The circuit court held that the pertinent provisions of the declaration were ambiguous and permitted parol evidence to explain the intent of the parties. The court then rejected appellants' contention that Section 4 of the agreement was the exclusive means for raising funds with which to construct or maintain capital improvements, held that such improvements could be financed in whole or in part from funds derived from the annual assessment without notice to or a two-thirds vote of the members of the association, and dismissed the complaint. The appellants contend that the trial court erred in holding that the homeowners association could increase and use annual assessments for maintenance or construction of capital improvements without thirty days notice to and a vote of the homeowners, and that the court erred in allowing parol evidence because that portion of it relied upon by the court in resolving the ambiguity was in fact erroneously admitted in that it permitted the court in its construction of the contract to consider prior negotiations not included in the contract.

We agree that in some circumstances the admission of parol evidence concerning prior negotiations regarding a provision which may have been inadvertently omitted from the final draft would be improper. However, in view of the approach we take of the case, any error that may have been committed was harmless. In reaching our conclusion, we apply three well-established principles of contract law. First, where the terms of a contract are ambiguous and capable of having more than one meaning, extrinsic evidence is permitted to establish the intent of the parties, and the meaning of the contract then becomes a question of fact. *C & A Construction Company, Inc.* v. *Benning Construction Co.*, 256 Ark. 621, 509 S.W.2d 302 (1974); *Don Gilstrap Builders, Inc.* v. *Jackson*, 269 Ark. 876, 601 S.W.2d 270 (Ark. App. 1980). However, when a contract is free of ambiguity, its construction is a matter of law for the court to determine. *West* v. *Todd*, 207 Ark. 341, 180 S.W.2d 522 (1944); *Pittsburg Steel Co.* v. *Wood*, 109 Ark. 537, 160 S.W. 519 (1913); *Geurin Contractors, Inc.* v. *Bituminous Casualty Corp.*, 5 Ark. App. 229, 636 S.W.2d 638 (1982). Finally, different clauses of a contract must be read together and the contract construed so that

all of its parts harmonize, if that is possible. Giving effect to one clause to the exclusion of another on the same subject, where the two are reconcilable, is error. A construction which neutralizes any provision of a contract should never be adopted if the contract can be construed so as to give effect to all its provisions. *Continental Casualty Co.* v. *Davidson*, 250 Ark. 35, 463 S.W.2d 652 (1971). In *Fowler* v. *Unionaid Insurance Co.*, 180 Ark. 140, 144-145, 20 S.W.2d 611, 613 (1929), our supreme court said:

> It is also a well-settled rule in construing a contract that the intention of the parties is to be gathered, not from particular words and phrases, but from the whole context of the agreement. In fact, it may be said to be a settled rule in the construction of contracts that the interpretation must be upon the entire instrument, and not merely on disjointed or particular parts of it. The whole context is to be considered in ascertaining the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause. Every word in the agreement must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument. The contract must be viewed from the beginning to end, and all its terms must pass in review, for one clause may modify, limit or illuminate the other. Taking its words in their ordinary and usual meaning, no substantive clause must be allowed to perish by construction, unless insurmountable obstacles stand in the way of any other course. Seeming contradictions must be harmonized, if that course is reasonably possible. Each of its provisions must be considered in connection with the others, and, if possible, effect must be given to all. A construction which entirely neutralizes one provision should not be adopted if the contract is susceptible of another which gives effect to all of its provisions. [Citation omitted.]

When we apply these rules by considering the language of the entire policy and giving legal effect to all of the language used and the object to be accomplished by the contract, we find no ambiguity.

Section 3(a) provides that the board of directors may declare an increase in annual assessments without a vote of the members of the association provided the increase does not exceed ten percent. Here, the increase was less than ten percent. Section 3(b) permits the board of directors to increase the annual assessment by more than ten percent but only upon a vote of two-thirds of the members of the association who are voting in person or by proxy at a meeting called for that purpose. Section 4 authorizes the board to levy a special assessment to defray, in whole or in part, the cost of construction, reconstruction, repair, or replacement of capital improvements, provided that two-thirds of the members vote in person or by proxy at a meeting called for that purpose. We find nothing in these provisions which would support the construction that the funds raised by assessments under Section 3(a) could not be used for capital improvements or that Section 4 provided the only means by which those funds could be obtained.

Sections 3(a) and (b) place no limitations upon the uses to which funds assessed under those sections can be put. Section 4 provides that, "[i]n addition to" the annual assessments, the association "may" levy special assessments for the purpose of defraying "in whole or in part" the cost of construction of capital improvements. The use of the word "may" indicates an intent that Section 4 provide merely an alternative means of raising funds, and the phrase "in whole or in part" would be meaningless if the construction urged by the appellants was adopted. It is clear that the drafters intended that the cost of a capital improvement might be defrayed entirely by special assessment but not necessarily so. It is clear from the provision that funds raised pursuant to assessments under Section 4 could be used along with other funds where necessary to make the capital improvements. Otherwise, we would have to read out of the provision of Section 4 the words "in whole or *in part*." We conclude that the intent of Section 4 is to provide an alternative and additional means of raising money to pay for all or part of some unusual or special expense, and that it contemplates that funds derived from other sources might be used in part to defray those specific expenses. We can find no manifestation of intent to limit the use of funds raised through a Section 3(a) assessment to any particular purpose or that Section 4 was to provide the exclusive means of raising funds for capital improvements.

Nor can we agree with the appellants that Section 6 requires that all of the members be given written notice of action taken by the board under Section 3(a). Section 3(a) expressly provides that the board may increase the annual assessments by not more than ten percent without a vote of the membership. To require notice of a meeting to act on a matter in which the members had no voice would not only be meaningless but would neutralize Section 3(a). Sections 3(b) and 4 require meetings in order to transact business authorized under those sections. Section 6 requires that members be given notice of any meeting *called* pursuant to Sections 3 and 4, provides the manner in which that notice is to be given, and again declares that the action taken by the board must be approved by a vote of two-thirds of the members present. Here, no meeting was or was required to be called, and, therefore, no notice could logically have been required. When these sections are read together, it is clear that Section 6 has no application to Section 3(a) but simply provides the type of notice required for those meetings called for the purposes set forth in Sections 3(b) and 4, which require approval of the membership.

Although the trial court erred in finding this contract to be ambiguous and in basing its construction upon oral testimony which therefore should not have been admitted, we conclude that he did declare the proper construction to be given to this contract. Under our established rule that we will not reverse a decision of the trial court if the correct result is reached, even if that decision was based upon the wrong reasoning, we affirm. *Worthen Bank & Trust Co.* v. *Adair*, 15 Ark. App. 144, 690 S.W.2d 727 (1985).

Affirmed.

COULSON and COOPER, JJ., agree.

Luther SHAMLIN *v.* STATE of Arkansas

CA CR 86-166 743 S.W.2d 1

Court of Appeals of Arkansas
Division II
Opinion delivered January 6, 1988
[Supplemental Opinion on Denial of Rehearing
February 10, 1988.]

[redacted]

[redacted]

John Wesley Hall, Jr., for appellant.

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

JOHN E. JENNINGS, Judge. A jury found appellant, Luther Shamlin, guilty of arson and conspiracy to commit theft by deception. The State charged that Shamlin conspired with Judge John Purtle and Linda Nooner to burn Purtle's 1980 Ford

Thunderbird and Nooner's home in Little Rock in order to collect the insurance proceeds. The State also charged that Shamlin committed arson by burning Nooner's home at Malcolm Cove in Little Rock on May 5, 1985. Appellant's case was severed and he was tried separately. The trial court sentenced him to 15 years for arson and 10 years for conspiracy, and ran the sentences consecutively.

On appeal Shamlin raises 12 points for reversal. Jurisdiction is in this court under Arkansas Supreme Court Rule 29(1). We affirm.

There was evidence presented at trial that Luther Shamlin and Judge Purtle had been close friends for many years. Ms. Nooner was both Judge Purtle's secretary and his personal friend. She had also known Shamlin for a number of years. There was evidence that Nooner was in financial difficulty early in 1985, and was unable to make her monthly house payments.

The State's primary witness was Homer Alexander. Alexander said that he had been with Shamlin a day or two before the fire when they bought seven quarts of lighter fluid at a Handy Dan store. Alexander testified that on the night before the fire at Malcolm Cove, he helped Shamlin move furniture out of Nooner's house to Shamlin's house in Shannon Hills. He said that he helped Shamlin move "junk" furniture from a storage building behind Shamlin's house into Nooner's house on Malcolm Cove. He testified that Shamlin told him he was planning on burning Nooner's house, but that he did not believe him. Alexander also testified that on the date after the fire Shamlin called him and said he had burned the house. Later that day appellant told Alexander that he had agreed with Nooner and Purtle to burn the house in exchange for $2,500.00 and the furniture.

At trial appellant argued that Homer Alexander's testimony was not credible, and the argument is repeated here. Appellant points out that Alexander is married to his ex-wife, Maxine, with whom Shamlin was engaged in an ongoing custody dispute. Appellant also points out various discrepancies between Alexander's testimony and the testimony of other witnesses. While these matters surely bear on Alexander's credibility, the credibility of witnesses and the resolution of conflicts in the evidence are matters for the jury to determine. *Wilson* v. *State*,

277 Ark. 43, 639 S.W.2d 45 (1982); AMCI 104.

Specific items of furniture reported by Nooner as lost in the fire were later found safe in Shamlin's house. The appellant's son, Bradley, testified that Ms. Nooner told his father to move the furniture out at night. Some of the furniture partly destroyed by the fire at Malcolm Cove belonged to a Mrs. Mullinax, who had had it stored in a small building behind Shamlin's house in Shannon Hills.

There was evidence that, when some of the furniture was moved, Shamlin received an envelope containing money from Linda Nooner. A bank employee testified about a $1,000.00 check on Ms. Nooner's account, payable to Shamlin. Tape recordings, made by Shamlin, were introduced which contained conversations between Shamlin and Purtle, and Shamlin and Nooner, about the Malcolm Cove fire and its subsequent investigation. Gary Jones, an inspector with the Little Rock Fire Department, testified that, in his opinion, the house at Malcolm Cove had been purposely set on fire with an accelerant. Another fire inspector, Lane Kinder, testified that an inflammable liquid was found in a can in the house at Malcolm Cove. Tommy Evans, a volunteer fireman, testified for the defense that he examined both Judge Purtle's car and Ms. Nooner's home and that both fires were caused by electrical problems.

The State presented evidence that Judge Purtle's 1980 Ford Thunderbird burned on April 26, nine days before the house at Malcolm Cove burned. The named insured was Freida Holiday, who lived with Ms. Nooner. Judge Purtle reported to the insurance company that Mr. Shamlin was driving the car on the night it burned to investigate some type of electrical problem in the dash. Police officers found the car abandoned and burned on the side of the road. Richard Walls, a fire investigator, testified that the vehicle was purposely set on fire.

SEARCH AND SEIZURE ARGUMENTS

Based primarily on the sworn recorded testimony of Homer Alexander, a search warrant was issued authorizing the search of Shamlin's home for tape recordings of telephone conversations between the alleged co-conspirators and for specific items of furniture reported lost in the fire at Nooner's house. Tapes and

some items of furniture were found. At a hearing on appellant's motion to suppress this evidence, Monty Vickers, a Little Rock police officer, testified that he had been involved in the search. He said that the officers had been in the house for about five minutes when the appellant drove up. Appellant was advised of his rights and given a copy of the search warrant. Vickers testified that he told Shamlin that they were going to search his house thoroughly for tapes. The appellant said he had some tapes in the living room but that he also had some tapes out in his truck that he wanted the officers to hear. According to Vickers, appellant said, "I'll go get them for you." Vickers asked the appellant to wait and wrote out a consent to search form. He testified that although appellant refused to sign the form, he insisted on going out to his truck and getting the tapes, which he handed to Vickers. The testimony of Lewis Jackson, another police officer, was essentially the same.

Alexander testified that Shamlin had told him that he had gotten a tape of him (Shamlin), Linda Nooner, and Judge Purtle talking about the fire. Alexander said Shamlin told him that he sent the tape to Judge Purtle. Alexander testified that "he did not tell me that he kept a copy. I just assumed he would keep a copy."

The trial court held that Alexander's assumption that Shamlin would keep a copy of the tape was not enough to justify the search of Shamlin's house for tapes, but that the search warrant was valid as to the furniture. The tapes found in Shamlin's house were suppressed. The court also held that Shamlin freely and voluntarily consented to a search of his truck.

Appellant argues that the tapes which he retrieved from his truck and gave to the police must be suppressed as "fruit of the poisonous tree" and that his consent was invalid under *Bumper* v. *North Carolina*, 391 U.S. 543 (1968). In *Bumper* the defendant lived with his grandmother, a 66-year-old widow, in an isolated rural area. The officers arrived at the door and announced that they had a search warrant. The grandmother responded "go ahead." Incriminating evidence was found, but the search warrant was later held to be invalid. The United States Supreme Court held that the search could not be justified on the basis of consent. The Court said:

> When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of

> proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all.
>
> When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.

391 U.S. at 548-50.

In *Byars* v. *State*, 259 Ark. 158, 533 S.W.2d 175 (1976), the Arkansas Supreme Court distinguished *Bumper*. The court said:

> We think the key statement is, "This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority," *i.e.*, we do not take *Bumper* to mean that an accused can never be deemed to have consented to a search, if a search warrant had been obtained and the accused was aware of that fact. Rather, we consider that this question is determined by the particular facts present when the consent is purportedly given.

259 Ark. at 167, 533 S.W.2d at 180.

There are a number of differences between *Bumper* and the case at bar. Here, the court found that the warrant was valid, in part, and therefore the initial intrusion into Shamlin's home was lawful. According to testimony at the suppression hearing, appellant was told that the officers had no warrant to search his truck. The testimony also indicates that appellant's subsequent insistence that the officers take the tapes and listen to them was more than mere passive acquiescence.

The burden rests upon the state to prove that consent is freely and voluntarily given. *Rodriquez* v. *State*, 262 Ark. 659,

559 S.W.2d 925 (1978). On appeal we make an independent determination considering the totality of the circumstances. *Smith* v. *State*, 265 Ark. 104, 576 S.W.2d 957 (1979). Our standard of review is whether the trial court's decision was clearly erroneous. *Pollard* v. *State*, 264 Ark. 753, 574 S.W.2d 656 (1978). In this case we cannot say that it was.

Nor do we think the trial court was required to exclude the tapes obtained under the "fruit of the poisonous tree" doctrine. The concept originated in *Wong Sun* v. *United States*, 371 U.S. 471 (1963). This doctrine requires the exclusion from evidence of both the direct and indirect products of an unlawful search. *Walton* v. *State*, 245 Ark. 84, 431 S.W.2d 462 (1968), *cert. denied, Fuller* v. *Arkansas*, 396 U.S. 930 (1969). Here the search for furniture was lawful—the search for tapes in Shamlin's house was unlawful. Appellant's insistence that the officers take the tapes, despite their advice that they had no warrant to search his truck "purges" this evidence of any taint of illegality arising from the partial invalidity of the search warrant. *See Walton*, 245 Ark. at 92, 431 S.W.2d at 467.

Appellant contends that the trial court was required to suppress the furniture taken from appellant's house, citing *Franks* v. *Delaware*, 438 U.S. 154 (1978). *Franks* held that if a defendant shows that statements contained in an affidavit for a search warrant are deliberately false or made with reckless disregard for the truth, then those statements should be stricken from the affidavit. If the remainder of the affidavit is insufficient to establish probable cause, the warrant is invalid and the property obtained in the search must be suppressed.

As required by *Franks*, the appellant was provided a hearing on the issue. Appellant argued to the trial court, as he does here, that Lane Kinder, a fire marshal, made knowingly false statements about his investigation of the fire. The trial court expressly found otherwise, and that finding of fact is not clearly erroneous. Appellant also argues that because there are some conflicts between Alexander's testimony at the pretrial hearing and evidence which subsequently developed at trial, we must find that Alexander was not telling the truth, invalidate the warrant, and suppress the furniture found in his house. This is not the procedure required by *Franks*.

He also argues that the warrant must be declared invalid because of the State's failure to advise the magistrate that Homer Alexander's wife was involved in a custody dispute with the appellant. Appellant cites cases from other jurisdictions which hold that a material omission may invalidate a warrant. If appellant's position on the law is correct (and *Franks* did not so hold), there was substantial evidence presented at the pretrial hearing that the State was unaware of this information. Again, the trial court's ruling was not clearly erroneous.

MOTIONS FOR DIRECTED VERDICT

Appellant argues that the trial court should have granted a directed verdict because there was no proof of an agreement between the alleged co-conspirators. A motion for a directed verdict is a challenge to the sufficiency of the evidence. On appeal, in determining the sufficiency of the evidence, we are obliged to view it in the light most favorable to the State. *Phillips* v. *State*, 17 Ark. App. 86, 703 S.W.2d 471 (1986). The statute defining conspiracy, Ark. Stat. Ann. § 41-707 (Repl. 1976), provides:

> A person conspires to commit an offense if with the purpose of promoting or facilitating the commission of any criminal offense he: (1) agrees with another person or other persons: (a) that one or more of them will engage in conduct that constitutes that offense; or (b) that he will aid in the planning or commission of that criminal offense; and (2) he or another person with whom he conspires does any overt act in pursuance of the conspiracy.

Because the prosecution is seldom able to present direct evidence of the agreement, it is well established that the state may rely on inferences drawn from the course of conduct of the alleged conspirators. *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939); W. LaFave and A. Scott, Jr., *Criminal Law* § 61, at 461 (1972). Here, Alexander's testimony provided direct proof of an express agreement between the alleged co-conspirators. While it is true that there was no direct evidence of an express agreement as to the alleged ultimate object of the conspiracy, *i.e.*, to commit theft by deception, there was sufficient circumstantial evidence to permit the jury to infer that the

purpose of setting fire to Nooner's home at Malcolm Cove was to collect the insurance proceeds.

Appellant also moved for a directed verdict on the arson count on the basis that Homer Alexander's testimony had not been corroborated. The court denied the motion. When the State's case is based primarily on the testimony of an accomplice, the issue of the sufficiency of the corroborating evidence is frequently one of fact for the jury. *Maynard* v. *State*, 21 Ark. App. 20, 727 S.W.2d 858 (1987); AMCI 402. When the status of a witness as an accomplice presents an issue of fact, that question too should be submitted to the jury. *Jackson* v. *State*, 193 Ark. 776, 102 S.W.2d 546 (1937); AMCI 403. Neither AMCI 402 nor AMCI 403 was requested. Here it appears that whether Alexander was an accomplice was a question of fact. If Alexander was an accomplice as a matter of law, our inquiry is whether there was substantial evidence, apart from Alexander's testimony, tending to connect Shamlin with the commission of the offense. *King* v. *State*, 254 Ark. 509, 494 S.W.2d 476 (1973). The expert testimony that the house at Malcolm Cove had been deliberately burned and the independent evidence about the switching of furniture was sufficient to withstand a motion for directed verdict.

Appellant further argues that the trial court erred in not granting a directed verdict on the arson count because the common law presumption against arson had not been overcome, citing *Boden* v. *State*, 270 Ark. 614, 605 S.W.2d 429 (1980). The court in *Boden* cited *Johnson* v. *State*, 198 Ark. 871, 131 S.W.2d 934 (1939). The facts in *Boden* were quite similar to those in *Johnson*. In each case the defendant was charged with arson and had signed a confession. Each case turned on the rule that a confession, unless made in open court, will not sustain a conviction unless accompanied by proof that such an offense was committed. In neither *Boden* nor *Johnson* was there any testimony that the fire was intentionally set. In each case the only evidence connecting the defendant to the fire was that he was seen in the vicinity of the building that burned. In the case at bar there was evidence that the fire was intentionally set and that appellant was the one who set it. The trial court correctly denied the motion for directed verdict.

Appellant then argues that the court erred in not

granting a directed verdict on "submitting the alleged overt act of the car fire to the jury." As already noted, our conspiracy statute requires proof of an overt act done in pursuance of the conspiracy. Ark. Stat. Ann. § 41-707(2). Ark. Stat. Ann. § 43-2013 (Repl. 1977) provides:

> In trials of indictments for conspiracy, in cases where an overt act is required by law to consummate the offense, no conviction shall be had, unless one or more overt acts be expressly alleged in the indictment, and proved on the trial; but overt acts other than those alleged in the indictment, may be given in evidence on the part of the prosecution.

See also *Guinn* v. *State*, 23 Ark. App. 5, 740 S.W.2d 148 (1987).

We have a number of difficulties with this argument. First, we have been unable to find, in the record, where such a motion for directed verdict was made, although there were a number of motions for mistrial made which related to this issue. Secondly, it was not the "car fire" which was alleged by the State to have been an overt act, but rather the collection of the insurance proceeds on the car. Finally, no objection was made to the court's instruction which told the jury of the State's charge, including the alleged overt acts, nor did appellant offer an instruction omitting any reference to the "car fire," which he now claims the trial court should have given.

EVIDENCE OF THE CAR FIRE

Appellant argues that the trial court erred in "permitting the State to alternatively pursue the car fire as a prior bad act under A.R.E. 404(b)." That rule provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

It is true that the State argued that the circumstances surrounding the car fire were relevant under either of two theories: first, that they related to an alleged overt act, and second, that they were admissible under Rule 404(b). We know of

no rule which prohibits a proponent of evidence from advancing more than one theory of admissibility. The trial judge stated that he thought the evidence was admissible under either theory and offered to give a limiting instruction.

The State argues that the evidence was admissible under 404(b), relying in large part on *Casteel* v. *State*, 205 Ark. 82, 167 S.W.2d 634 (1943). The State argues that the theory of the defense was that both fires were accidents and of electrical origin, that there was evidence that both were deliberately set, that there was circumstantial evidence that Shamlin burned the car only a few days before he burned the house at Malcolm Cove, and that insurance proceeds were collected in both cases. Thus, the argument goes, the evidence of Shamlin's relationship to the car fire indicates that the fire at Malcolm Cove was not accidental.

We decline to reach this argument because in our view the evidence was logically relevant to an alleged overt act and was therefore admissible.

In essence, the appellant argues that the inclusion of this particular overt act in the information was merely a ruse to enable the State to offer otherwise inadmissible evidence to the jury. We do not agree. The State's theory obviously was that the burning of the car and the burning of the house were two parts of one conspiracy. While the evidence connecting the two events is circumstantial, it is not so tenuous as to persuade us that the State alleged the overt act of collecting insurance proceeds on the car merely to introduce otherwise inadmissible testimony.

OBJECTIONS TO THE TESTIMONY OF BRADLEY SHAMLIN

Appellant's twelve-year-old son, Bradley, was called as a witness by the State. He testified that he was with his father at Ms. Nooner's house on Malcolm Cove when furniture was being moved out. He also testified that he heard Ms. Nooner say the furniture should be moved out in the nighttime. Appellant made a general objection, which was overruled, and the child completed his direct testimony.

At the next recess, appellant moved for a mistrial on the basis that this was a statement of an alleged co-conspirator

that had not been disclosed to the defense, in violation of A.R.Cr.P. Rule 17.1(a). That rule provides that the prosecuting attorney shall disclose to defense counsel the substance of any oral statements made by a co-defendant.

As best we can tell from the record, the prosecutor learned of this statement during the morning of the day the child testified. The court noted that, according to the child's testimony, the appellant was present when the statement was made, and denied the motion for a mistrial. There was no request for a continuance and no motion to strike.

The State argues that appellant's motion for a mistrial was untimely, but we believe that, under the circumstances, it was timely. We also agree with the appellant that the substance of Ms. Nooner's oral statement should have been disclosed to the defense before Bradley Shamlin testified. It does not follow, however, that the trial court erred in refusing to grant a mistrial. A mistrial is the most extreme recourse available to the court for a violation of discovery and is to be avoided except where the fundamental fairness of the trial itself is at stake. *Snell* v. *State*, 290 Ark. 503, 721 S.W.2d 628 (1986), *cert. denied* ___ U.S. ___, 108 S.Ct. 202 (1987). We have said that, under similar circumstances, the appellant must demonstrate prejudice. *Smith* v. *State*, 10 Ark. App. 390, 664 S.W.2d 505 (1984). The prejudice which must be demonstrated is not that the evidence is bad for the defendant's case, but rather that he has been harmed in some way by the State's failure to disclose it. Here, the appellant was aware that the child would testify and had a copy of the witness statement taken from him by the State. Taking into consideration the nature of the discovery violation, the nature of the testimony considered in the context of the other evidence in the case, and the availability of other sanctions, such as the granting of a continuance, we cannot say the court erred in refusing to grant a mistrial. *See Snell, supra.*

Appellant also argues that the trial court erred in not recognizing a "parent-child privilege" asserted to bar testimony of communications between appellant and his son. Appellant recognizes that such a privilege is not provided for in our rules of evidence but urges us to adopt it, nonetheless. We need not decide, however, whether we should or could adopt such a

privilege as a matter of common law, because none of Bradley Shamlin's testimony related to discussions or communications between his father and him.

JUROR MISCONDUCT

After the State had rested, two of the prosecutor's secretaries happened to be seated at lunch near three of the jurors. They overheard one, Juror Stewart, tell the others that the State had not proven conspiracy and that the trial was being held for political reasons. They reported the matter to the prosecutor, who in turn reported it to the court. The court held an in camera hearing and heard from both secretaries and all three jurors. Although the testimony of the witnesses varied, Stewart admitted that he had told the other two that the trial "was more political than anything else." One of the other jurors testified that he had cautioned Stewart not to talk about the case. All three jurors said they could fairly decide the case and had not been influenced.

The court excused Juror Stewart and seated the one available alternate juror. The court admonished the other two jurors involved not to discuss the incident.

Appellant argues that the court erred in excusing the juror. In *Capps* v. *State*, 109 Ark. 193, 159 S.W. 193 (1913), the court held that it was always improper for jurors to discuss a case among themselves prior to submission. Here, by his own admission, Juror Stewart had violated the court's repeated admonition not to discuss the case. The trial court has considerable discretion in such matters and we will not disturb its finding absent a manifest abuse of that discretion. *See McFarland* v. *State*, 284 Ark. 533, 684 S.W.2d 233 (1985); *Rice* v. *State*, 216 Ark. 817, 228 S.W.2d 43 (1950). The procedure followed by the trial court here is precisely that which was recommended in *United States* v. *Dean*, 667 F.2d 729 (8th Cir. 1982), *on reh'g* 667 F.2d 729, *cert. denied*, 456 U.S. 1006 (1982). We find no abuse of discretion in the court's excusing Juror Stewart.

Appellant next argues that, if Stewart was to be excused, the trial court was obliged to excuse the other two jurors. This argument is inconsistent with appellant's position on Juror Stewart. It also would have necessitated a mistrial. Based on the in camera hearing, the court could have determined that the other

two jurors had not violated the court's admonition and could remain as impartial jurors. A result identical to that reached by the trial court was approved in *United States* v. *Clapps*, 732 F.2d 1148 (3rd Cir. 1984), *cert. denied* 469 U.S. 1085 (1984). Again, we find no abuse of discretion.

Appellant argues that the court should not have admonished the other two jurors not to consider or discuss the in camera proceedings, but the defense agreed to this admonition.

ARSON AS A LESSER INCLUDED OFFENSE

Appellant next contends that arson is a lesser included offense of conspiracy to commit theft by deception. Arson is defined in Ark. Stat. Ann. § 41-1902 as starting a fire with the purpose of destroying or damaging an occupiable structure that is the property of another person. Ark. Stat. Ann. § 41-105(1)(b) provides that a defendant may not be convicted of both offenses where one offense consists merely of a conspiracy to commit the other. Thus, appellant could not have been convicted both of conspiracy to commit theft by deception and of theft.

In *Thompson* v. *State*, 284 Ark. 403, 682 S.W.2d 742 (1985), the supreme court drew a distinction between "element included offenses" and "lesser included offenses." The court said:

> Element included offenses are defined in Ark. Stat. Ann. § 41-105(1)(a) (Repl. 1977). They arise when one criminal offense, by statutory definition, cannot be committed without the commission of another underlying offense, and, by the language of the statute, although a defendant can be prosecuted for both offenses, a conviction cannot be had for both. . . .
>
> However, an offense is not a lesser included offense solely because a greater offense includes all of the elements of an underlying offense. The lesser included offense doctrine additionally requires that the two crimes be of the same generic class and that the differences between the offenses be based upon the degree of risk or risk of injury to person or property or else upon grades of intent or degrees of culpability.

284 Ark. at 407-408, 682 S.W.2d at 744-45.

The court in *Thompson* held that theft is not a lesser included offense of robbery, because the offenses are of a different nature and are not of the same generic class. 284 Ark. at 408, 682 S.W.2d at 745.

It is clear that the offenses of arson and conspiracy to commit theft by deception are of a different nature. As the court said in *Thompson*, they are not of the same generic class, and consequently arson is not a lesser offense included within conspiracy to commit theft by deception. It is equally clear that arson is not an "element included offense" of conspiracy to commit theft by deception. The statutory definition of conspiracy does not require proof of arson, and under the specific facts of this case, the jury could have found appellant guilty of conspiracy to commit theft by deception without necessarily finding that he committed arson in the burning of Nooner's house. The fact that one of the overt acts alleged by the State, setting fire to Nooner's house, is equivalent to one of the elements of the offense of arson does not render arson a lesser included, or element included, offense of conspiracy.

ACQUITTAL OF ALLEGED CO-CONSPIRATOR

Appellant finally argues that since Judge Purtle was subsequently acquitted of conspiracy, appellant's conviction is a "legal impossibility" and constitutes a denial of due process. We have already answered this argument in *Shamlin* v. *State*, 19 Ark. App. 165, 718 S.W.2d 462 (1986). We noted that under Ark. Stat. Ann. § 41-713(2)(c) (Repl. 1977) it is not a defense to a prosecution for conspiracy that the person with whom the defendant is alleged to have conspired has been acquitted of an offense based upon the conduct alleged. We held that appellant's argument was without merit. Our holding there has not been affected by the supreme court's recent decision in *Yedrysek* v. *State*, 293 Ark. 541, 739 S.W.2d 672 (1987), on a related issue. Appellant's contention that the issue is a constitutional one, involving the due process clause, is supported by neither persuasive argument nor convincing authority.

Affirmed.

 [redacted]

CRACRAFT and COULSON, JJ., agree.

Supplemental Opinion on Denial of Rehearing
February 10, 1988

744 S.W.2d 405

[redacted]

PER CURIAM. [redacted] This petition for rehearing is denied because it is merely repetitious of those arguments presented to and decided by the court in its original opinion. Petitions for rehearing are not intended to present arguments which are merely repetitious of those already considered by the court, and such petitions that do so are ordinarily denied without written comment. Ark. R. Sup. Ct. 20(g).

However, we feel compelled to comment on one argument in appellant's petition for an entirely different consideration, i.e., because it is based on matters which we have previously expressly ruled were not, and could not be made, a part of the record in this case. We are troubled by the persistence of counsel in failing to honor our ruling, in pursuing the matter despite that ruling, and particularly in his stated justification for doing so.

Appellant was charged, with Linda Nooner and John I. Purtle, with conspiring to commit theft by deception. They were granted separate trials. The appellant was tried first and convicted, Purtle was then tried and acquitted, and Nooner was subsequently tried and convicted. After Purtle's acquittal, the appellant filed a petition in this court seeking a writ of error *coram nobis*, basing his petition in part on Purtle's acquittal. Attached to that petition was a certified copy of the verdict and

docket sheet in that case. In *Shamlin* v. *State*, 19 Ark. App. 165, 718 S.W.2d 462 (1986), we denied the petition and rejected the argument that Purtle's acquittal mandated reversal. We correctly held that under Ark. Stat. Ann. § 41-713(2)(c) (Repl. 1977) it is not a defense to a prosecution for conspiracy to commit an offense that the person with whom the defendant is alleged to have conspired has not been charged, prosecuted, or convicted, or has been acquitted of an offense based upon the conduct alleged. The supreme court subsequently cited with approval that statute, the rationale for it, and our application of it to the facts in *Shamlin*, holding that the statute applies except in those cases where all alleged co-conspirators are tried jointly and all but one are acquitted. *Yedrysek* v. *State*, 293 Ark. 541, 739 S.W.2d 672 (1987).

At about the same time the appellant filed the petition for a writ of error *coram nobis*, he filed a motion to supplement the record in this appeal by attaching a certified copy of the docket sheet and verdict of acquittal in the Purtle case. We correctly denied that motion because, having not been presented to the trial court, it could not be part of this record and was immaterial to the issues presented here in any event.

Notwithstanding our ruling, counsel argued from that verdict in his brief and reply brief. In a parenthetical attempt to justify his position, he argues that, as a copy of the verdict was attached to both the petition for writ of error *coram nobis* and his motion to make that document a part of the record, the attachment was part of the record despite our ruling that it was not and could not be. This persistence was discussed in our decision conference, along with the possibility of admonishing counsel that this action was looked on with disfavor. However, as the argument was wholly without merit, the court determined to address the issue without admonition.

As this is the fourth time that this court has been called on to address this single issue, we are constrained to now express our displeasure.

John Andrew GRIFFITH *v.* INTERNATIONAL CATTLE EMBRYO, INC.

87-266 742 S.W.2d 124

Court of Appeals of Arkansas
Division I
Opinion delivered January 13, 1988

Ralph Theodor Stricker, for appellant.

Hardin, Jesson & Dawson, for appellee International Cattle Embryo, Inc.

Covington & Younes, P.A., for appellees Dr. Robert Morris, Dr. Robert Miller, and Dr. Victor Rozeboom.

JAMES R. COOPER, Judge. In this Workers' Compensation Case, the appellant, John Andrew Griffith, alleged that he suffered a heart attack in the scope of his employment. The appellees controverted the claim alleging that the appellant was an agricultural farm laborer and excluded from Workers' Compensation coverage pursuant to Ark. Stat. Ann. § 81-1302(c)(1) (Repl. 1976). The administrative law judge found that the appellant was injured in the course of his employment and that the appellant was not engaged in agriculture. Upon review, the Commission found that the appellant was in fact engaged in agricultural labor and therefore, was not covered by the Workers' Compensation Act. On appeal, the appellant argues four points for reversal. However, because we are affirming the Commission's findings, we only need to address the issue of whether the appellant was an agricultural laborer.

The appellee is engaged in a specialized area of the cattle business. To increase the productivity of cows, they super-ovulate high quality, high genetic animals, flush the embryos, and either freeze them or implant them in a recipient cow. The farm manager, William Kissell, testified that all operations on the farm either directly or indirectly supported the cattle embryo program.

The appellant's job was to clear the 900 acres the farm was located on so that it could be used for pasture or planting hay. The appellant used a bulldozer in his line of work and occasionally performed minor repairs on the bulldozer. He suffered his heart attack while attempting to loosen a belly pan bolt under the bulldozer. He stated that, as he was straining to loosen the bolt, he felt he had torn something in his chest.

In determining whether an employment is excluded, Arkansas courts have historically placed greater emphasis on the nature and character of the employer's business rather than the character of the particular task being performed by the claimant when the injury occurred. *Dockery* v. *Thomas*, 226 Ark. 946, 295

S.W.2d 319 (1956); *Great American Indemnity Co.* v. *Bailey*, 221 Ark. 469, 254 S.W.2d 322 (1953); *Gwin* v. *J.W. Vestal and Sons*, 205 Ark. 742, 170 S.W.2d 598 (1943). The question of whether the appellant was engaged in an "employment" in "agricultural farm labor" is one of law. *Franklin* v. *McCoy*, 234 Ark. 558, 353 S.W.2d 166 (1952); *Gwin, supra.* The exception of agricultural farm labor is broader than the mere cultivation of the soil; however, it does not cover a farm when it is operated as a mere sideline to a commercial business. *Great American Indemnity, supra.*

Black's Law Dictionary 63 (5th ed. 1979) states:

> "Agricultural labor . . . is a broad term and includes farming in all its incidents, such as gardening, horticulture, viticulture, dairying, poultry, bee raising, and ranching, and refers to the field or farm with all its wants, appointments and products.

In *Franklin, supra*, the Arkansas Supreme Court decided that a "chicken raiser" was a farmer and, therefore, an injured employee was precluded from claiming compensation. In its opinion the Court considered the fact that Webster's Third International Dictionary included in its definition of agriculture the raising of animals useful to man and the disposition of same for market.

We see no reason to find that the appellees were not engaged in agricultural farm labor merely because they used highly specialized and scientific methods. Nor do we agree with the appellant's argument that the appellee's business was more like a veterinarian service than a farming operation. Even though they did perform the service on cattle that did not belong to them, the record reflects that the procedure was also performed on cattle in which they had an ownership interest.

Affirmed.

CRACRAFT and COULSON, JJ., agree.

Roy Charles RUSH, Shirley Ann Rush, and Arkansas Department of Human Services *v.* Patricia Marie (Bishop) WALLACE and Evin Wallace

CA 87-345 742 S.W.2d 952

Court of Appeals of Arkansas
En Banc
Opinion delivered January 13, 1988

Harrison & Hewett, by: *Mark Hewett*, for appellants Roy Charles Rush and Shirley Ann Rush.

Debby Thetford Nye, General Counsel, *Breck G. Hopkins*, Deputy General Counsel, for appellant Arkansas Department of Human Services.

Parker Law Firm, by: *Douglas W. Parker* and *Kyle D. Parker*, for appellees.

JAMES R. COOPER, Judge. In this custody case, the appellants Roy and Shirley Rush are the maternal grandparents of Jennifer Bishop and the parents of the appellee Patricia Marie (Bishop) Wallace, and the appellant Arkansas Department of Human Services (ADHS) is an intervenor. The appellee, Evin Wallace, is the husband of Patricia and is Jennifer Bishop's stepfather.

This is the second appeal involving custody of Jennifer. In 1984, while Jennifer was residing with the appellees, the Rushes

sought custody of Jennifer. After several hearings, the chancellor awarded permanent custody of the child to her natural father, Danny Bishop (who is not a party to the appeal of the case at bar). Shortly thereafter, however, Bishop delivered Jennifer to the Rushes. Patricia, in 1985, petitioned the court to change custody. The court granted the petition and established visitation rights for the Rushes. Mr. Bishop did not appeal, but the Rushes appealed to this Court, and we affirmed the chancellor's decision in an unpublished opinion on September 17, 1986.

On October 1, 1986, the Rushes petitioned the court to award custody of Jennifer to ADHS; to require that the attorney *ad litem* appointed for Jennifer continue to serve; and to hold the Wallaces in contempt. The trial court granted a motion by ADHS to intervene and, after a hearing in December 1986, left custody of Jennifer in the natural mother, Patricia Wallace; terminated the grandparents' visitation rights; denied the petition for contempt and change of custody; dismissed ADHS from the suit; assessed $750.00 attorney's fees and costs against the Rushes; and dismissed the attorney *ad litem* from the case. From that decision, comes this appeal.

On appeal, the appellants, Roy and Shirley Rush, argue four points for reversal, and the appellant, ADHS, argues three. We address the arguments separately, but we will combine the arguments of the appellants where they are similar. For their first argument, both the Rushes and the ADHS address the issue of pretrial discovery. ADHS argues that it was error for the trial court to refuse to compel discovery, and the Rushes argue that it was error for the trial court to deny their motions for a continuance, to compel discovery, and for sanctions and expenses. We find no error on these points because of the unique facts involved in this case.

In 1984 the Rushes accused their son-in-law of sexually molesting Jennifer. After numerous hearings, the court found the accusations to be unfounded and in October 1985 ordered that custody of the child be returned to Patricia Wallace. However, before the child could be returned to the mother, Mrs. Rush left Arkansas with Jennifer. After her return in January 1986 the court issued an order allowing the Rushes to take Jennifer to school every day and permitting them visitation rights to begin in

April 1986.

In March 1986 the Wallaces left the state, taking Jennifer with them. When the Rushes discovered that the Wallaces had left the state, they filed a petition on April 10, 1986, requesting that the Wallaces be held in contempt for leaving the jurisdiction of the court and for denying them their visitation rights. However, because the case was still on appeal to this Court, the chancellor held the prior order in abeyance with the exception of the requirement that the child remain within the jurisdiction of the court. That part of the order was rescinded after the chancellor found that the Rushes had been harassing the Wallaces. The chancellor refused to hold the Wallaces in contempt of court.

As noted earlier, after this Court's decision on September 17, 1986, affirming the chancellor's order, the Rushes again petitioned the trial court requesting that the Wallaces be held in contempt, and seeking a change in custody of Jennifer to ADHS.

Prior to trial, the parties reached an agreement through their attorneys under which the Wallaces were to appear at a deposition in Kansas City on November 11, 1986, to answer questions concerning the welfare of Jennifer. According to the Wallaces, the agreement provided that they would not disclose the location of Jennifer's residence. They also agreed that the only parties to be present at the deposition would be the attorney for the Rushes, the court reporter and the Wallaces. The appellees stated that their attorney would not be present because they could not afford for him to attend.

At the deposition, both Evin and Patricia Wallace answered almost every question put to them by the Rushes' attorney with the phrase, "next question." They absolutely refused to answer any questions put to them by the attorney for ADHS because they had not agreed for him to be present.

On December 1, 1986, a motion for a continuance was filed requesting that the hearing be postponed because discovery had not been completed. The Rushes also requested that the appellees be compelled to comply with discovery and they requested sanctions and expenses. The trial court refused their request for a hearing on the motions, stating that the motions would be heard on the day of the hearing on the petition, and the court further

refused to grant a continuance. At the close of the hearing on December 5, 1986, the trial court refused either to compel discovery, to impose sanctions on the appellees, or to charge them with the costs. The chancellor specifically found that the appellees had been truthful and honest in their testimony regarding the welfare of Jennifer and that there was no need for any further discovery. The chancellor also found that the Rushes had been harassing the appellees.

The trial court has a wide latitude of discretion in matters pertaining to discovery, and the appellate court will not reverse the chancellor's exercise of discretion in the absence of an abuse of discretion that is prejudicial to the appealing party. *Marrow* v. *State Farm Insurance Co.*, 264 Ark. 227, 570 S.W.2d 607 (1978). The goal of all discovery is to permit a litigant to obtain whatever information he may need to prepare adequately for issues that may develop without imposing an onerous burden on his adversary. *Marrow, supra.* Furthermore, the trial court has a duty in lengthy and complex cases where the possibility of abuse is present to protect parties and witnesses from annoyance, excessive expense, and harassment. *Dolgow* v. *Anderson*, 53 F.D.R. 661 (E.D.N.Y. 1971); *Balistrieri* v. *Holtzman*, 52 F.R.D. 23 (E.D. Wis. 1971).

The parties in the case at bar had been involved in litigation since 1981; the appellant Mrs. Rush left the state and concealed the child after being ordered to return Jennifer to the Wallaces; the Rushes have requested the police to accompany them when exercising their visitation rights; and they have filed numerous petitions in this matter. We simply cannot say that the chancellor manifestly abused her discretion when she refused to subject the appellees to further court action. *See Smith* v. *Smith*, 272 Ark. 199, 612 S.W.2d 736 (1981). Furthermore, we do not find that the appellants were prejudiced by the court's rulings. It was the appellant's attorney who breached the agreement regarding the subject of deposition. Even though he had agreed not to question the appellees about their whereabouts, the second question he asked concerned their present address, and he continued to question them about where they had been, where they had attended church, and whether Patricia Wallace had been in Texas.

For their next point, the Rushes argue that it was error for the judge to deny their motion filed December 2, 1986, alleging bias on the part of the chancellor and asking her to recuse. We disagree.

On the day of the trial, the chancellor permitted the Rushes to put on extensive evidence concerning the chancellor's alleged bias. Mr. Rush testified that when his wife left the state with Jennifer, after the court had ordered that custody of the child be returned to Patricia Wallace, the chancellor held him in contempt of court and ordered him jailed. However, the Rushes point out that when Patricia Wallace left the state with Jennifer, the chancellor refused to hold her in contempt of court and retroactively rescinded that portion of the decree which ordered that the child remain in the jurisdiction of the court. Furthermore, the Rushes stated that they were going to call the chancellor as a witness on the recusal issue. However, the record reflects that while a *subpoena duces tecum* was served requesting that the court produce her private files in the case, the chancellor was not called as a witness.

In the case of *White* v. *Taylor*, 19 Ark. App. 104, 717 S.W.2d 497 (1986), we followed the standard of review discussed by the Arkansas Supreme Court in *Matthews* v. *Rodgers*, 279 Ark. 328, 651 S.W.2d 453 (1983), which states:

> The fact that a judge may have, or develop during the trial, an opinion, or a bias or prejudice does not make the trial judge so biased and prejudiced as to require his disqualification in further proceedings. *Walker* v. *State*, 241 Ark. 300, 408 S.W.2d 905 (1968). Whether a judge has become biased to the point that he should disqualify himself is a matter to be confined to the conscience of the judge. *Narisi* v. *Narisi*, 229 Ark. 1059, 320 S.W.2d 757 (1959). The reason is that bias is a subjective matter peculiarly within the knowledge of the trial judge. We find no Arkansas case where a trial judge has stated that he was without prejudice and could hear a case and without more, we reversed that decision. Thus absent some objective demonstration of prejudice, it is a communication of bias which will cause us to reverse a judge's decision on disqualification.

White at 107, 717 S.W.2d at 498.

The Rushes list in their brief eight instances which they allege demonstrate bias on the part of the trial court, three of which concern the motion for continuance which we have already discussed. The remaining five are: (1) that the trial court held Mr. Rush in contempt of court but refused to do so with Patricia Wallace; (2) that the trial court attempted to elicit testimony from Mrs. Rush concerning where she had been when she left the jurisdiction of the court; (3) that the judge had written a letter to the prosecuting attorney alleging that Mrs. Rush had kidnapped the child and that Mr. Rush knew where she was, even though Mr. Rush denied any knowledge of his wife's and Jennifer's whereabouts; (4) that the court maintained a confidential file regarding the case; and, (5) that the judge was going to testify on the recusal motion.

After examining the facts surrounding the allegations of judicial bias, we find no objective demonstration of prejudice; to the contrary, we think that the chancellor has shown great restraint in dealing with the Rushes. The court took no action against the Rushes when they violated her order not to speak to the press. Moreover, there was a firm basis for treating Patricia Wallace and Mrs. Rush differently, although both left the state with the child: Patricia Wallace did so as the custodial parent, and her action was excused by the chancellor upon a specific finding that the Rushes had been harassing the Wallace family. In contrast, when Mrs. Rush took Jennifer out-of-state, she was not the child's custodian and had been ordered to return the child to Patricia Wallace.

As for the chancellor's questioning of Mrs. Rush concerning her residence when she left Arkansas with the child, it must be noted that the court was frustrated at the fact that Mrs. Rush left the state with Jennifer and the chancellor was concerned about where the child had been. When Mrs. Rush refused to answer, the court continued to inquire as to her whereabouts. When it was made clear to the court that Mrs. Rush was pleading the fifth amendment because of possible pending criminal charges, the court allowed Mrs. Rush to remain silent on the issue.

In their third point, the Rushes point out that the court had refused to believe that Mr. Rush did not know the whereabouts of

his wife and Jennifer. However, the court had a reasonable basis for believing that Mr. Rush was not being completely honest. On the day that Mrs. Rush left with Jennifer, Mr. Rush had withdrawn $800.00 from his bank. When the chancellor indicated to the prosecuting attorney that the child had been kidnapped, she also informed the prosecutor that the child had been taken by the grandmother. Because the grandmother had no custodial rights to the child, and because the grandmother had violated the court's order to return the child to its mother, it is understandable that the chancellor was concerned and was attempting to discover under what conditions the child had been living.

The Rushes also attempt to demonstrate prejudice by the fact that the court kept a private file on the case. This file contained newspaper clipping of articles that had been written concerning the case. Most of this publicity, incidentally, had been generated by the Rushes. We see no error in the chancellor taking an interest in what is printed in the newspaper about developments in a case she is handling. The only other thing in the file was a petition, signed by persons at a local mall, that had been mailed to the chancellor concerning the case.

The Rushes' last point concerning recusal, that the trial court should have recused because she was to be called to testify, is no more than an attempt to accomplish indirectly that which they could not accomplish directly. While it is true that a trial judge should recuse whenever it becomes necessary for him to testify, *see Elmore* v. *State*, 13 Ark. App. 221, 682 S.W.2d 758 (1985), a judge's refusal to disqualify himself cannot be circumvented by a claim that he will be needed to testify during the recusal motion. The chancellor explained to the parties that she was not prejudiced or biased and that she felt it would be detrimental to the parties to have to start the case all over again. This case had been in her court since 1981, there had been various hearings, and she was familiar with the issues and the parties. We simply cannot say that the chancellor erred in refusing to recuse.

Both the Rushes and ADHS argue that the trial court erred in refusing to make a record of Jennifer's testimony. During the hearing, the chancellor took the child and the attorneys for all parties into chambers and interviewed Jennifer. The attorneys

were permitted to question Jennifer and observe the questioning by the court and other attorneys. After court reconvened, the trial court refused to allow a record to be made of the interview with the child, and, on appeal, the appellants argue that the chancellor erred.

We will not address the merits of this issue because the appellants have failed to preserve any error which may have occurred for appellate review. There is no indication in the record that any objection was made to the procedure used by the chancellor until the interview was over. The time to object was when counsel first knew that the child's statements would not be recorded. Therefore, the objection was untimely. *See Callaway* v. *Callaway*, 8 Ark. App. 129, 648 S.W.2d 520 (1983). Moreover, there has been no attempt to comply with Rule 6(d), Rules of Appellate Procedure, which provides a means for constructing a record in those cases where no record has been made. If the trial court had continued to refuse to permit a record to be made, relief could have been sought from the Arkansas Supreme Court. When no attempt is made to make a record in compliance with the rule, it is presumed that the matters presented in the unrecorded hearing support the trial court's findings. *Wagh* v. *Wagh*, 8 Ark. App. 122, 644 S.W.2d 630 (1983).

The Rushes' last assignment of error alleges that the chancellor did not have sufficient evidence to determine the best interests of the child. Because the trial court had already decided the issue of custody and returned Jennifer to her mother in 1985, the issue at the 1986 hearing was whether there had been a change of circumstances sufficient to warrant a change in custody. The chancellor's findings in a child custody case will not be reversed unless they are clearly against the preponderance of the evidence. *Ketron* v. *Ketron*, 15 Ark. App. 325, 692 S.W.2d 261 (1985). Since the question of the preponderance of the evidence turns largely on the credibility of the witnesses, the appellate court defers to the superior position of the chancellor, especially so in those cases involving child custody. *Anderson* v. *Anderson*, 18 Ark. App. 284, 715 S.W.2d 218 (1986). The general rule is that as between parent and grandparent or anyone else, the law prefers the parent, unless the parent is incompetent or unfit. *Perkins* v. *Perkins*, 266 Ark. 957, 589 S.W.2d 588 (1979).

Patricia Wallace testified that at the time of the 1986 hearing Jennifer was six years old and was not yet required to attend school. Mrs. Wallace stated that she worked with Jennifer at home and that the child knew her alphabet; could count to 100 by ones, tens, and fives; could do simple addition and subtraction on her fingers; knew how to spell simple one-syllable words and practiced her handwriting. Mrs. Wallace estimated that she worked on education about two hours a day with Jennifer. The rest of the day Jennifer helped with household chores, worked around the farm with Mrs. Wallace, and played with her newborn younger sister, Erin. Mrs. Wallace testified in detail about the type of meals she prepared for the family, which consisted of eggs, meat, vegetables, fruit, and dairy products.

At the time of the hearing the family lived in a rural area in the state of Ohio; however, Mr. Wallace was unsure if they would return to Ohio because he feared continued harassment now that the Rushes knew where they lived. Immediately after leaving Arkansas they visited Mr. Wallace's family in Missouri and planned another visit after the hearing. The family had also traveled to Pennsylvania for a short visit, but Mrs. Wallace assured the court that, once Jennifer was enrolled in school, such visits would only take place on school holidays.

On cross-examination, Mrs. Wallace admitted that when they first moved to Ohio the family lived for several weeks in a garage that had been converted into a living quarters. Bob Markee, the Wallace's landlord, had provided the space until their present home was ready for occupation. The garage had a concrete floor, wood burning heater and electricity. They were allowed to shower at Mr. Markee's residence, several hundred feet away, and used a portable toilet.

At the time of the trial, the family lived in a two-bedroom mobile home that had indoor plumbing, a bathroom, electricity, a wringer washer, and was heated with a wood burning stove. Mrs. Wallace testified that Jennifer had toys and adequate clothing. Because the newborn child, Erin, was still being breast-fed, she still slept with the parents, but when she was a little older, Mrs. Wallace planned to have her share the other bedroom with Jennifer.

Mr. Wallace testified that he worked on Mr. Markee's farm

in exchange for their living in the trailer and that the agreement included Mr. Markee paying utilities. He also did independent contracting work and sold some vegetables that he had raised. The family had, at times, used savings and income derived from the sale of personal belongings for living expenses. The home is located several miles from a major highway, and, although the family owns only one car, Mrs. Wallace assured the court that they had friends close by who would provide transportation if an emergency arose and Mr. Wallace was away with the car.

Financial ability is but one criteria to judge the right of a parent to the custody and control of his children. *Jones* v. *Jones*, 13 Ark. App. 102, 680 S.W.2d 118 (1984). The polestar consideration is the best interests and welfare of the children. *Id.* The court's preference for parents is based on the presumption that they will take care of their children, bring them up properly and treat them with kindness and affection, and when that presumption has been dissipated, chancery will interfere and place the child where those parental duties will be discharged by another. *Id.; State* v. *Grisby*, 38 Ark. 406 (1882). After hearing all the testimony and interviewing Jennifer, the chancellor found that the minor child had been "properly nurtured, loved and trained by her present custodians," and that the Rushes had "in a persistent, continuous manner utilized and used the legal system" in an attempt to remove the child from the mother with "unfounded cause." In the present case, the evidence supports the chancellor's conclusion that the Wallaces have discharged their parental obligations with love and concern despite their precarious financial situation. We cannot say that the chancellor erred in continuing custody with the natural mother, Patricia Wallace.

Finally, ADHS argues that the trial court erred in dismissing them from this case. It is their contention that the trial court should have allowed them to conduct a home study as it had previously ordered. However, ADHS does not cite any authority in support of this proposition. Assignments of error unsupported by convincing arguments or authority will not be considered on appeal unless it is apparent, without further research, that the assignment of error is well taken. *Western Auto Supply Co.* v. *Bank of Imboden*, 17 Ark. App. 4, 701 S.W.2d 394 (1985). Further, because the chancellor found that the Wallaces were properly nurturing Jennifer, it was within the chancellor's discre-

tion to dismiss ADHS from the case.

After carefully reviewing the record in this case, we find that the chancellor did not abuse her discretion in any respect, nor were her findings clearly erroneous or against the preponderance of the evidence.

Affirmed.

MAYFIELD, J., not participating.

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST *v.* ARKANSAS PUBLIC SERVICE COMMISSION

CA 86-212 744 S.W.2d 392

Court of Appeals of Arkansas
En Banc
Opinion delivered January 20, 1988
[Rehearing denied February 17, 1988.]

[redacted]

William G. Mundy and *William H. Ballard*; and *Mitchell, Williams, Selig, Jackson & Tucker*, by: *Kent Foster* and *Michael O'Malley*, for appellant.

Ivester, Henry, Skinner & Camp, A Professional Association, by: *Herman Ivester*, amici curiae for Alltel Arkansas, Inc., and Southwestern Bell Telephone Co.

Art Stuenkel and *Gilbert L. Glover*, for appellee.

GEORGE K. CRACRAFT, Judge. This case was commenced by General Telephone Company of the Southwest in May of 1985 before the Arkansas Public Service Commission seeking $4,600,000.00 to $6,410,615.00 in additional revenues, which would increase basic local rates by 39% to 56%. The Company requested that the appellee authorize rates sufficient to achieve a return on equity of 16.25% and an overall rate of return on rate base of 11.37%. In March of 1986, following hearings on the merits, the appellee by its Order No. 10 authorized appellant to collect $809,001.00 of the requested additional revenues and allowed a return on equity of 12.13% with a return on rate base of

8.78%. One month later, the appellee's staff moved for rehearing on certain issues and, after rehearing, the appellee entered Order No. 18 on October 28, 1986, and revised Order No. 10 downward to reflect a revenue deficiency of $159,165.00.

The original award of $809,001.00 had been appealed to this court and, after the modification in October, 1986, the issues involved in rehearing were appealed. Because the record was voluminous and related to both the original orders and those orders which resulted from rehearing, the second appeal was consolidated with the first, and the entire case is now before this court.

The issues raised by appellant on appeal are as follows:

1. Without substantial evidence in the record, and by Orders No. 10 and 11, the Arkansas Public Service Commission arbitrarily and capriciously and without notice used the modified balance sheet approach to find the cash working capital component of rate base and a cost free component of capital structure, resulting in a confiscation of property and return on investment.

2. The overall rate of return of 8.78% and the return on equity of 12.13% constitute the unlawful taking and confiscation of property, are not supported by substantial evidence, and double leverage as applied fails to take into account financial risk.

3. The finding of Order No. 18 that the third quarter 1985 Arkansas intralata toll pool rate of return of 11.3889% was appropriate for General Telephone Company of the Southwest's toll revenue requirement is not supported by substantial evidence and the method by which the 11.3889% was calculated is contrary to established ratemaking principles; and has the effect of overstating toll revenues for the test period.

4. The Arkansas Public Service Commission by Order No. 9 arbitrarily and capriciously overruled General Telephone Company of the Southwest's motion to extend the final order deadline, and denied General Telephone Company of the Southwest the opportunity to present the latest and best toll pool results occurring within the

adjusted test year.

5. The accounting adjustment finding contained in Order No. 18 as appropriate for cost savings projects arbitrarily and capriciously included adjustments taking place, if at all, after the close of the adjusted test year; and has the effect of understating reasonable and necessary expenses for the test period.

6. The Arkansas Public Service Commission arbitrarily and capriciously granted a rehearing to the staff of the Arkansas Public Service Commission by Order No. 13 because the staff is not a statutory or procedural party who can petition for rehearing; and arbitrarily and capriciously overruled General Telephone Company of the Southwest's motion to dismiss the rehearing by Order No. 15.

We find no error and affirm the orders of the appellee.

Our standard of review of appeals from the Public Service Commission is limited by the provisions of Ark. Stat. Ann. Section 73-229.1 (Supp. 1985), which defines our scope of review as a determination of whether (1) the Commission's findings of fact are supported by substantial evidence; (2) the Commission has regularly pursued its authority; and, (3) the order under review violated any right of appellant under the laws or Constitution of the State of Arkansas or the United States. In reviewing such cases, we must give due regard to the expertise of the Commission, which derives its ratemaking authority from the general assembly.

Although we do not judge the wisdom of the decisions of the Commission, our review is not a mere formality but seeks to determine whether the findings are properly supported and that there has been no abuse of discretion. We do not advise the Commission how to discharge its function of arriving at findings of fact or the exercise of its discretion. The question of reasonableness of the action of the Commission relates only to its findings of fact and whether it has acted arbitrarily. *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission*, 18 Ark. App. 260, 715 S.W.2d 45 (1986).

The Commission has broad discretion in choosing its approach to rate regulation and is free within its statutory

authority to make the pragmatic adjustments which may be called for under particular circumstances. The appellate court is generally not concerned with the methodology used by the Commission in reaching its result, so long as its findings are based on substantial evidence and are not arbitrary. In these cases, it is the result reached, not the method employed, which controls; and judicial inquiry is concluded if the decision is supported by substantial evidence and the total effect of the order is not unjust, unreasonable, unlawful or discriminatory. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *General Telephone Co.* v. *Arkansas Public Service Commission*, 272 Ark. 440, 616 S.W.2d 1 (1981); *Southwestern Bell Telephone, supra*. It is not the theory, but the impact of the rate order that counts in determining whether rates are just, reasonable and nondiscriminatory, and if the total effect of the rate order cannot be said to be unjust, unreasonable, or discriminatory, judicial inquiry is concluded and infirmities in the method employed are deemed unimportant. *Southwestern Bell Telephone Co., supra; Walnut Hill Telephone Co.* v. *Arkansas Public Service Commission*, 17 Ark. App. 259, 709 S.W.2d 96 (1986). Guided by these observations as to our standard of review, we address the issues presented by appellant on appeal.

Appellant first questions the validity of a methodology known as the "modified balance sheet approach" to determine appellant's working capital requirements. Appellee's staff witness Rodney Merritt described this methodology as follows:

> The basic theory behind [the Modified Balance Sheet] approach is simply that assets which are necessary to provide utility service, which are not considered elsewhere in rate base, and which are not interest bearing, should be included in rate base, thereby allowing the Company to earn a return on these assets. Additionally, current, accrued, and other liabilities are considered to be a source of funds used to finance the assets of the Company and are placed in the capital structure at their respective costs.

(R. 497). Working capital is the cash and other non-plant investment in assets a utility must maintain in order to meet its current financial obligations and provide utility service to its customers in an economical and efficient manner. Since at least

part of working capital represents a contribution from investors, an amount is generally included in the calculation of a utility's rate base upon which a return is allowed.

The appellee has in previous rate cases utilized what is known as a "lead/lag study" for determination of the working capital requirement of a utility. Appellant described a lead/lag study in its brief at page 5 as follows:

> A lead/lag study measures the cash working capital requirement as net lag days between the time utility service is rendered to a customer and the time customers pay for that service reduced by the offsetting leads between the time goods and services are rendered to the utility and the time the utility pays for goods and services. The investor in the utility supplies the capital for the net lag from the time costs are incurred until payment is received.

A lead/lag study generally will result in a ratio of lead or lag days to the total number of days in a year, and that ratio is then applied to various components on the company's income statement to yield the working capital requirement. As is pointed out in the briefs, the appellee's own filing requirements require a utility to file a rate request to calculate leads and lags. The modified balance sheet approach (MBSA) was adopted as a check on lead/lag studies in a previous Commission docket,[1] wherein the appellee directed appellee's staff to check the results of any lead/lag studies by comparison with a calculation accomplished through the modified balance sheet approach. According to staff witness Merritt, a lead/lag study is the generally accepted measure for determining working capital. He testified:

> Staff accepts a properly prepared lead/lag study and proves the results of that study by comparing it to the results of the modified balance sheet approach. In the absence of a properly prepared lead/lag study, Staff will calculate the working capital requirement using the modified balance sheet approach.

(R. 496-97).

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[1] *Re Arkansas Power & Light Co.*, 66 PUR4th 167 (1985).

Merritt testified that the appellee's staff rejected appellant's lead/lag study here because it contained deficiencies which resulted in calculations which were unverifiable or errors which were uncorrectable. While Merritt testified that, although some alleged deficiencies in the lead/lag study could be corrected by appellee's staff, certain problems could not be corrected and cited as an example the inclusion of expenses in the study which were not those of the test year utilized in the rate case. Merritt testified that this deficiency was serious because:

> The expense inputs to the study must be functionalized and properly measured to arrive at individual lead days. Those individual lead days and expenses are combined to determine composite lead days and dollar days for functional categories.
>
> The $100,000,000 discrepancy [an error found by Staff] impacts at least four (4) functional categories and the lead days for those categories. Correcting errors of this magnitude would involve a great deal of analytical work on individual expense inputs and recalculation of lead days and dollar days.

(R. 495-96).

Because of the deficiencies Merritt testified he found with appellant's lead/lag study, he proceeded to determine appellant's working capital requirement by the use of the modified balance sheet approach. Merritt testified in some detail as to which asset accounts were included or excluded in rate base and articulated in detail his reasons for those actions. He also explained why current, accrued, and other liabilities were placed in appellant's capital structure. Merritt explained his treatment of liabilities as follows:

> The rationale for placing liabilities in the capital structure is simply that *all* liabilities are a source of funds used to finance the assets of a company. Moreover, the distinction cannot be made as to which asset each liability is funding, i.e., liabilities are fungible. This has long been recognized for the largest liability on the balance sheet, long-term debt. If this were not the case, one could identify specific debt funding non-utility investments and simply exclude

> the interest expense associated with that debt and accordingly, include in the cost of service the interest expense associated with debt financing utility property only. However, since that distinction cannot be made, long-term debt is placed in the capital structure and the weighted cost applied to the rate base.
>
> If we are to determine the total cost of funds to a company, current, accrued, and other liabilities cannot be ignored, nor can they be netted against working capital assets and placed in the rate base. To do so would violate the concept of fungibility for these liabilities while accepting it for others. This would be both inconsistent and theoretically incorrect.

(R. 501-02). (Emphasis in original). Essentially, then, the modified balance sheet approach proceeds on the notion that all liabilities are representative of funding sources and that these funds cannot be traced to any particular rate base asset; therefore, all funding sources are accounted for on the liability side of the balance sheet at their respective costs.

In our view, near the heart of appellant's and the appellee's disagreement is the contention that liabilities are "fungible." The parties do not quarrel that at least one funding source is "fungible": long-term debt. Appellant claims, however, that the other funding sources *can* be traced to particular assets, whereas the appellee contends that it is inconsistent to treat one source of funding as fungible and other sources as not fungible.

Arkansas Statutes Annotated Section 73-237 (Repl. 1979) puts the burden of justifying any proposed change in rates upon appellant. There was evidence that appellant's lead/lag study contained errors and problems which could cause reasonable persons to doubt its reliability. For example, an auditor found a $100,000,000 expense error in the original lead/lag study. Although corrections were apparently attempted, the appellee's staff was unable to verify the corrections or reconcile the results to the modified balance sheet approach. While appellant argues that an error of $100,000,000 was relatively insignificant because the net revenue effect was under $30,000, we are not so much concerned with the relative magnitude of any error as we are with the appellee's finding that the lead/lag study was not reliable.

Whether the lead/lag study should be accepted is a matter for the trier of fact, and, on the record before us, we cannot say the appellee's rejection thereof is not based on substantial evidence.

■ In this case, the appellee did not accept appellant's evidence as to working capital based on a lead/lag study but, instead, accepted the appellee's staff's evidence as to the working capital requirement resulting from calculations utilizing the modified balance sheet approach. A working capital allowance represents only a portion of the utility's rate base upon which it is allowed to earn a return. It is apparent that no particular methodology is precise and that a determination of working capital is in many respects an exercise of discretion as to what particular method yields the most fair and equitable result in each case. Without question, the particular amount of working capital allowance, along with the particular methodology used to derive that amount, is a matter of educated opinion, expertise, and informed judgment of the Commission and not one of mathematically demonstrable fact.

■ As the trier of fact in rate cases, it is within the province of the appellee to decide on the credibility of the witnesses, the reliability of their opinions, and the weight to be given their evidence. The appellee is never compelled to accept the opinion of any witness on any issue before it. The appellee is not bound to accept one or the other of any conflicting views, opinions, or methodologies. *Arkansas Public Service Commission* v. *Continental Telephone Co.*, 262 Ark. 821, 561 S.W.2d 645 (1978).

■ The evidence also sharply conflicted as to whether "return on return" is allowable in calculating rates. The parties seem to agree that, during the time the utility renders service to the customer until the time the company receives payment from the customer for that service, the utility theoretically advances to the customer some amount of money, which is includable as working capital in the rate base. Whether the company advances the "cost" as opposed to the "price" of the service to the customer is the point at which the witnesses diverge. Appellant contends that the utility advances both the expenses incurred in connection with rendition of utility service along with the return (or profit) the utility will earn as a result of rendering service. Therefore, according to appellant, appellant advances the "price" of the

service to the customer. The opposing view proceeds from the posture that the ratepayer pays the return or profit and that the only advance by appellant is the cost it actually incurs in providing the service. The appellee found and concluded that the utility only advances the "cost" of service and not the "price" (*i.e.*, cost plus profit or return) to the customer and that allowing the application of net lag days to revenues is improper because it allows appellant to earn a return on top of a return. The appellee argues that acceptance of appellant's position on this issue results in a portion of profit being placed in rate base and another profit allowed thereon, which it contends overcompensates the utility at the expense of the ratepayer. From our review of the record, we cannot conclude that the finding of the Commission is not supported by substantial evidence.

The appellant's argument that use of the modified balance sheet approach to determine cash working capital was contrary to the appellee's Rules of Practice and Procedure is without merit. As stated in Rule 9.01 of the Rules, the purpose of the appellee's filing requirements is to define the information desired by the appellee from a utility when a rate application is filed and not to establish particular ratemaking principles. The appellee's rules as to filing requirements merely provide a starting point from which the appellee may proceed to discharge its obligation to investigate the reasonableness of any rate application. We cannot conclude that the use of certain forms and the requirement of particular data with a rate application establishes intractably the methodology or means by which the appellee is to pursue the exercise of the authority delegated it by the legislature.

The appellant's argument that the modified balance sheet approach was utilized in its rate case without sufficient notice is likewise without merit. The record reflects that the appellee's staff used the modified balance sheet approach as a check on appellant's lead/lag study and, when irreconcilable discrepancies resulted, sought to recalculate appellant's working capital allowance. The record reflects that the appellee's staff's use of the modified balance sheet approach and the staff's problems with appellant's lead/lag study were manifested more than a month prior to hearing when the appellee's staff filed its testimony. Appellant had ample opportunity to dispute the

appellee's staff's position and in fact cross-examined the staff extensively on the modified balance sheet approach.

The appellee adopted the appellee's staff's recommendation as to appellant's rate of return. Appellant sought a return on equity of 16.25% and an overall rate of return of 11.37%. The staff recommended a return on equity of 12.13% and an overall rate of return on rate base of 8.78%, using what is known as "double leverage." Appellant claims that these figures are not supported by substantial evidence, primarily because they do not take into account appellant's financial risk.

Appellant is a wholly-owned subsidiary of General Telephone and Electric (GTE), a fact which makes calculation of the required return on equity for the subsidiary more difficult because there exists no public market for its stock. A commonly-used and widely recognized principle known as "double leverage" is used in situations such as this to determine the cost of a subsidiary corporation's equity. This theory holds that the cost of capital for a parent corporation equals the cost of equity for its subsidiary. Appellee's staff witness Kilburn and Attorney General witness Wilson used the double leverage approach, and the appellee argues that, without recognizing double leverage, appellant's equity return would be 19.8%.

The first step in using double leverage is to calculate the parent corporation's cost of capital. Staff witness Kilburn used the discounted cash flow method (DCF)[2] to obtain GTE's cost of equity. Kilburn followed tried and true methods of applying the DCF method, utilizing market-specific information as to GTE within the DCF formula to determine GTE's cost of equity. Kilburn also used a comparative sample of nine major independent telephone companies and again estimated the proper return on equity according to the DCF model. Kilburn found the cost of

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[2] We described this method in *Southwestern Bell Telephone Company* v. *Arkansas Public Service Commission*, 18 Ark. App. 260, 267, 715 S.W.2d 451 (1986) as follows: "[t]his mathematical formula takes into account dividends per share, market price per share, and the expected growth rate in dividends per share. The result is a percentage figure representing the required return on equity for the particular utility under consideration. The DCF formula is designed to derive an allowable return on equity based upon an estimate of investors' expectations.

equity for GTE (the parent corporation) to fall within the range of 13.10% to 14.14%, with a midpoint of 13.62%. To this was added a flotation cost of .03%[3] from which she arrived at a cost of equity for GTE of 13.65%. In determining the weighted cost of capital for GTE, Kilburn arrived at 12.13%, which cost was imputed to appellant as its cost of capital under the double leverage theory.

The concept of double leverage has been recognized by the Arkansas Supreme Court on several occasions. *General Telephone Co.* v. *Arkansas Public Service Commission*, 272 Ark. 440, 616 S.W.2d 1 (1981); *Arkansas Public Service Commission* v. *Lincoln-Desha Telephone Co.*, 271 Ark. 346, 609 S.W.2d 20 (1980); *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission*, 267 Ark. 550, 593 S.W.2d 434 (1980). In *Arkansas Public Service Commission* v. *Lincoln-Desha Telephone Co., supra*, the Arkansas Supreme Court said:

> Corporations are usually financed partly with debt capital and partly with equity capital. "Leverage" is a financial term used to describe the situation in which a corporation is funded by debt in addition to the equity supplied by the stockholders. A corporation is said to be "leveraged" to the extent that debt is included in its capital structure. The leverage arises from the advantage gained by equity holders through the rental of capital at a lower rate than the return they receive on their equity. Thus, we see that by use of leverage the equity owners are able to earn an overall rate of return in excess of the cost of capital. The added earnings above the cost inure to the benefit of the stockholders as they then receive a higher rate of return than if the institution had been financed entirely by equity.

271 Ark. at 348-49, 609 S.W.2d at 22. In that same case, our supreme court stated that "double leverage is merely an extension of the concept of leverage to a parent-subsidiary corporate relationship." *Id.* at 348, 609 S.W.2d at 22, citing *New England Telephone and Telegraph Co.* v. *Public Utilities Commission*, 390 A.2d 8 (Me. 1978).

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[3] "Flotation cost" is an additive which attempts to account for the costs a company incurs in handling its equity and matters related thereto.

As earlier noted, appellant claims that the use of double leverage does not properly account for the financial risk inherent in appellant. Risk is not particularly quantifiable, but rather is a matter of discretion on the part of the appellee in the application of its expertise. The evaluation of financial risk and what constitutes a "fair return" is a judgment call involving a good bit of educated speculation at best, in light of the evidence from expert witnesses. While appellant makes some appealing arguments relative to the DCF calculations made by staff witness Kilburn, we cannot say that the appellee's finding that the market place accounts for all risk at the parent corporation level is not supported by substantial evidence. Simply put, the appellee chose the testimony of one witness over that of another as to the rate of return in this case.

Before proceeding with the remaining issues, we address the last issue raised by appellant in its supplemental brief, which pertains to whether the appellee's staff may properly seek rehearing before the appellee. Arkansas Statutes Annotated Section 73-229.1 (Supp. 1985) provides that "[a]ny party to a proceeding before the Commission aggrieved by an order issued by the Commission may apply for a rehearing within thirty (30) days after the service of such order." Appellant argues that the appellee erred in granting a rehearing to the appellee's staff because, under Section 73-229.1, the appellee's staff is not and cannot be an "aggrieved" party. The applicable statutes do not spell out whether the appellee's staff may be treated as a party for purposes of such rehearings. The appellee, however, through its Rules of Practice and Procedure, has required that the staff be bound by and conform to the appellee's rules as a party in proceedings before the appellee.

An agency's or department's interpretation of its own rules and regulations is not binding upon the courts but is nevertheless highly persuasive; the agency's interpretation of its own rules is controlling unless plainly erroneous or inconsistent. *Boone County* v. *Apex of Arkansas, Inc.*, 288 Ark. 152, 155, 702 S.W.2d 795 (1986); *Clinton* v. *Rehab Hospital Services Corp.*, 285 Ark. 393, 688 S.W.2d 272 (1985). In addition, appellant did not question the status of the appellee's staff as a party to the proceedings until after an order granting the staff's petition for rehearing had been entered.

Appellant is a member of what is known as the Arkansas IntraLata Toll Pool (AITP). The toll pool serves as a clearing house for revenues generated in the form of charges for toll telephone service, which is primarily long distance. The pool divides up revenues it collects periodically among the various telephone companies which are its members, including an amount of money representative of a rate of return earned by the pool. Depending upon the rate of return the toll pool earns, the member companies receive a share of the pool's profits which come into play "above the line" in the revenue requirement calculation. The intralata toll pool rate of return is important because it results in the inclusion of a particular dollar figure in appellant's revenue requirement which can serve to offset the revenue requirement which must be recovered from ratepayers in their basic rates. The lower the toll pool rate of return, the more revenues that must be recouped from basic rates; the higher the toll pool rate of return, the lower the amounts that must be recovered in basic rates.

In its original order, the appellee adopted an intralata toll pool rate of return (10.08%) it had established in a previous docket as the proper target toll pool rate of return for appellant, which results in revenues of $11,503,710.00 being imputed into appellant's revenue requirement calculation. Appellant had originally requested a 5.21% toll pool rate of return and subsequently amended that figure upward to 9.5%. Upon rehearing, the realized toll pool rate of return for the third quarter of 1985 was introduced, which showed that the actual rate of return for the third three-month period of 1985 was 11.3889%. After rehearing, that figure was adopted, and the original order was modified to reflect the 11.3889% figure instead of 10.08% as the estimated intralata toll pool revenue requirement to be applied in calculating rates for appellant as a result of their rate application.

Appellant does not argue here about 10.08% being an inappropriate target rate of return. Appellant complains, however, that the appellee's adoption of a higher target rate of return upon rehearing, based upon the actual performance of the toll pool during the third quarter of 1985 is not supported by substantial evidence. The effect of the appellee's revision of the target toll pool rate of return from 10.08% to 11.3889% results in more money being imputed from the toll pool to appellant's

revenue requirement, thereby lowering the revenue requirement which must be recovered from ratepayers in the form of basic rates. Since witnesses for *both* sides below testified that actual results for the third quarter of 1985 would be the only rate of return data which would not be estimates and would be desirable from an accuracy standpoint, we cannot say the appellee's adoption of third quarter results is arbitrary or not supported by substantial evidence.

In this case, appellant sought an extension of the statutory deadline in order to allow it to gather fourth quarter 1985 intralata toll pool rate of return information. There is a ten-month statutory deadline established by the General Assembly within which rate cases must be decided. Both parties argue that resolution of the issue as to whether the appellee should have extended the statutory deadline to allow introduction of fourth quarter 1985 toll pool results would turn on an inquiry as to whether the appellee abused its discretion in extending the statutory deadline or in refusing to do so.

Arkansas Statutes Annotated Section 73-217 (Supp. 1985) provides that the appellee must act within ten months of the filing of the rate application. The legislature enacted this limitation to reduce regulatory delay and to induce some certainty into the ratemaking process. We do not agree, however, that the statutory deadlines provided in Ark. Stat. Ann. Section 73-217 may be waived. In *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission*, 267 Ark. 550, 559, 593 S.W.2d 434, 440 (1980), our supreme court said:

> The time limit was imposed by the General Assembly. It must be remembered that the PSC is a creature of the legislature and that, in rate-making, it is performing a legislative function, which has been delegated to it. *City of Ft. Smith* v. *Department of Public Utilities*, 195 Ark. 513, 113 S.W.2d 100; *Arkansas Power & Light Co.* v. *Arkansas Public Service Com'n.*, 226 Ark. 225, 289 S.W.2d 668. The commission was created to act for the General Assembly and it has the same power that body would have when acting within the powers conferred upon it by legislative act. *Department of Public Utilities* v. *Arkansas Louisiana Gas Co.*, 200 Ark. 983, 142 S.W.2d 213. The

> General Assembly certainly has not surrendered the power to fix time limitations on the actions of its own agency.

We hold this language applicable in this case. The Arkansas General Assembly has not surrendered to the appellee the power to fix time limitations in rate cases, and, consequently, the time limitation provisions of Section 73-217 may not be waived or disregarded by any party or by the appellee itself. We cannot conclude that the action of the Commission was arbitrary.

Finally, appellant contends that giving effect to certain cost-saving projects[4] was improper in light of Section 73-217.5 because no savings would be realized from those projects during the *pro forma* year, i.e., the twelve months following the close of the rate case test year. Arkansas Statutes Annotated Section 73-217.5 (Supp. 1985) reads in full as follows:

> For the purpose of justifying the reasonableness of the proposed new rate schedule or rate schedules, a utility may utilize either a historical test period of 12 consecutive calendar months, or a forward looking test period of 12 consecutive calendar months consisting of 6 months of projected data which together shall be the period or test year upon which fair and reasonable rates shall be determined by the Commission. Provided, however, that the Commission shall also permit adjustments to any test year so utilized to reflect the effects on an annualized basis of any and all changes in circumstances which may occur within 12 months after the end of such test year where such changes are both reasonably known and measurable.

The test year ended December 31, 1984, and the record shows (and the appellee found) that several of appellant's witnesses testified that the savings projects would be implemented during the *pro forma* year. The appellee's staff, using data supplied by appellant, annualized the savings to account for those which could be realized from the projects during the *pro forma* year. Appellant contends that, even though the projects may have been implemented during the *pro forma* year, savings realized there-

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[4] SORCES (Service Order Record and Computer Entry System), 4-TEL (Line Routing and Testing), and CAROT (Centralized Automatic Report on Trunks).

from are not reasonably known and measurable. We cannot quarrel with the appellee's finding of fact based upon evidence presented by appellee's staff which was based upon data supplied by appellant. We cannot conclude that it was arbitrary or not supported by substantial evidence.

The decision of the appellee is affirmed in all respects.

Earnest MILLER *v.* CITY OF LITTLE ROCK

CA 87-110 743 S.W.2d 9

Court of Appeals of Arkansas
Division II
Opinion delivered January 20, 1988

Herby Branscum, Jr., for appellant.

Mark Stodola, City Att'y, by: *Edward G. Adcock*, Asst. City Att'y, for appellee.

JOHN E. JENNINGS, Judge. Earnest Miller was a fireman for the City of Little Rock. In June of 1985, the Arkansas State Police obtained a warrant to search Miller's house in Perry County and found marijuana. Miller was arrested and charged with the manufacture and possession of a controlled substance with intent to deliver.

Shortly after Miller's arrest, the fire chief notified him in writing that a pretermination hearing would be held in four days. During the course of that hearing, Miller asked for a continuance on the ground that his attorney was unable to be present. This request was denied, and the fire chief terminated Miller's employment with the fire department. He appealed to the Little Rock Civil Service Commission. After a full evidentiary hearing in which Miller was represented by counsel, the Commission voted to uphold his dismissal. Miller appealed the Commission's decision to the Pulaski County Circuit Court. Before that appeal was heard, a pre-trial hearing was held on the criminal charges in the Perry County Circuit Court. That court found the search warrant invalid and suppressed all evidence obtained as a result of the search. The criminal charges against Miller were subsequently dismissed.

In December of 1986, the Pulaski County Circuit Court affirmed the decision of the Little Rock Civil Service Commission. In doing so, the court specifically considered evidence of Miller's possession of marijuana, despite the fact that this evidence had been suppressed in the Perry County criminal proceedings. Miller now appeals the decision of the Pulaski County Circuit Court upholding his termination. We affirm.

Appellant's first argument is that the circuit court erred in not holding that he was denied due process of law by the refusal to grant him a continuance at the pretermination hearing. It is true that an employee who has a constitutionally protected property interest in his employment has certain due process rights in connection with discharge proceedings. *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985). These rights are not nearly so extensive as those afforded to defendants in criminal cases. Generally, "some kind of a hearing" is required prior to

discharge. *Loudermill*, 470 U.S. at 542. The court in *Loudermill* held that a full evidentiary hearing was not required prior to termination of employment and that the essential requirements are notice of the charges and an opportunity to respond. These essential requirements were met in this case. Appellant had no constitutional right to a continuance in the middle of the pretermination hearing. Even in a criminal proceeding, where much more due process is due, the granting or denial of a continuance is a matter entrusted to the discretion of the trial judge. *Hunter* v. *State*, 8 Ark. App. 283, 653 S.W.2d 159 (1983). Finally, we note that a second pretermination hearing was offered to Miller, in order to permit him to have his attorney present.

Appellant's second argument is that the circuit court erred in considering evidence of Miller's possession of marijuana when that evidence had been excluded in the Perry County criminal case against him. The history of the exclusionary rule is not obscure. In *Weeks* v. *United States*, 232 U.S. 383 (1914), the Supreme Court held that illegally obtained evidence is inadmissible in criminal proceedings brought in federal courts. In *Wolf* v. *Colorado*, 338 U.S. 25 (1949), the Court held that the Fourth Amendment right to freedom from unlawful searches was made applicable to the states through the due process clause of the Fourteenth Amendment, but the Court expressly declined to hold that due process required state courts to exclude evidence obtained by an unlawful search. In *Mapp* v. *Ohio*, 367 U.S. 643 (1961), the Court held that due process required state courts to exclude such evidence in a criminal case.

Before *Weeks*, the exclusionary rule was not the law in this state. *Starchman* v. *State*, 62 Ark. 538, 36 S.W. 940 (1896). The Arkansas Supreme Court continued to follow its earlier precedents after the *Weeks* decision. *See e.g. Benson* v. *State*, 149 Ark. 633, 233 S.W. 758 (1921). In *Clubb* v. *State*, 230 Ark. 688, 326 S.W.2d 816 (1959), the supreme court announced its intention to re-examine its earlier holdings. In *Gerard* v. *State*, 237 Ark. 287, 372 S.W.2d 635 (1963), the court, while recognizing the decision in *Mapp*, continued to decline to overrule the earlier cases. By the time of the decision in *Perez* v. *State*, 249 Ark. 1111, 463 S.W.2d 394 (1971), it was clear that the Arkansas Supreme Court would not return to the theory that illegally seized evidence is admissible in criminal proceedings.

The idea that the exclusionary rule might be applicable in proceedings other than a direct criminal prosecution is comparatively recent. In *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965), the Supreme Court held that the exclusionary rule was applicable in forfeiture proceedings. The reason for the holding was that suits for forfeitures incurred by the commission of a criminal offense, while technically civil proceedings, are brought by the prosecuting attorney and are criminal proceedings in substance and effect. In *United States* v. *Calandra*, 414 U.S. 338 (1974), the Court held that the exclusionary rule is not applicable in grand jury proceedings. In *United States* v. *Janis*, 428 U.S. 433 (1976), the Court held that evidence unlawfully seized by state law enforcement officers was admissible in a federal tax assessment proceeding. And in *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984), the Court held that the exclusionary rule does not apply in civil deportation proceedings. In that case the Court said:

> In *United States* v. *Janis*, this Court set forth a framework for deciding in what types of proceeding application of the exclusionary rule is appropriate. Imprecise as the exercise may be, the court recognized in *Janis* that there is no choice but to weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs. On the benefit side of the balance the prime purpose of the exclusionary rule, if not the sole one, is to deter future unlawful police conduct. On the cost side there is the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs. [Citations, brackets, and quotation marks omitted.]

468 U.S. at 1041.

In *Schneider* v. *State*, 269 Ark. 245, 599 S.W.2d 730 (1980), our supreme court noted the disinclination on the part of the United States Supreme Court to extend the impact of the exclusionary rule, citing *Janis* and *Calandra*.

In *Tirado* v. *C.I.R.*, 689 F.2d 307 (2d Cir. 1982), the court followed *Janis* and held that the exclusionary rule is not applicable in a civil federal tax proceeding. The court in *Garrett* v. *Lehman*, 751 F.2d 997 (9th Cir. 1985), also applied the *Janis*

analysis and held that the exclusionary rule was not applicable to military administrative discharge proceedings. The rule in *Janis* was summarized by the court in *United States* v. *Fitzgerald*, 724 F.2d 633, 636 (8th Cir. 1983):

> In deciding whether particular evidence should be suppressed in any given case, then, courts properly weigh the deterrent effect of the suppression against its societal cost. Where little or no deterrence will result from suppression, suppression is inappropriate, for where the reason for the rule ceases, its application also must cease.

We believe that this is an appropriate approach to follow. In the case at bar we think it unlikely that the state police officers would have had a significant interest in these administrative discharge proceedings. We do not think that to apply the exclusionary rule in these proceedings would be likely to have a significant additional deterrent effect. *See Tirado, supra.*

The appellant relies primarily on *Rinderknecht* v. *Maricopa County Employees Merit System*, 21 Ariz. App. 419, 520 P.2d 332 (1974), *Powell* v. *Zuckert*, 366 F.2d 634 (1966), and *Turner* v. *City of Lawton*, 733 P.2d 375 (Okla. 1986). The decision of the Arizona Court of Appeals in *Rinderknecht* is not precedent; it was vacated on petition for review to the Arizona Supreme Court. *See Rinderknecht* v. *Maricopa County Employees Merit System*, 111 Ariz. 174, 526 P.2d 713 (1974). The court in *Powell* held that the exclusionary rule did apply in military discharge proceedings, but that case was decided ten years before the Supreme Court's decision in *Janis.*

In *Turner*, the Oklahoma Supreme Court held that the exclusionary rule was applicable to a state administrative discharge proceeding involving a fireman. The facts in *Turner* are virtually identical to those in the case at bar, but the court's decision was expressly based upon the constitution of the State of Oklahoma. The court in *Turner* also noted that the exclusionary rule for criminal proceedings had been adopted by the Oklahoma Supreme Court in 1921, forty years before *Mapp* v. *Ohio.* Therefore, despite its factual similarities, *Turner* is not persuasive precedent for us.

The exclusionary rule provides no remedy for completed

wrongs. *INS Lopez-Mendoza*, 468 U.S. at 1046. The purpose of the rule is not to redress the injury to the privacy of the search victim. *United States* v. *Calandra*, 414 U.S. at 347. The ruptured privacy of the victim's home and effects cannot be restored. *Linkletter* v. *Walker*, 381 U.S. 618 (1965). The rule is calculated to prevent, not to repair. *Elkins* v. *United States*, 364 U.S. 206 (1960). Federal statute law provides a compensatory remedy. 42 U.S.C.A. § 1983 (West 1981).

We hold that the trial court did not err in declining to apply the exclusionary rule in the case at bar.

Affirmed.

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

John EDWARDS *v.* Dewey STILES, Director of Labor, and PAPCO Corporation

E 86-174 743 S.W.2d 12

Court of Appeals of Arkansas
Division I
Opinion delivered January 20, 1988

J. Vernon Walker, Central Arkansas Legal Services, for appellant.

Allan Pruitt, for appellee.

BETH GLADDEN COULSON, Judge. Appellant raises two points for reversal in this Employment Security appeal from a decision by the Board of Review. Under our standard of review, we can find no error and therefore affirm.

On May 27, 1986, appellant, John Edwards, filed a claim for unemployment benefits noting that his last date of employment with his last employer, appellee PAPCO Corporation, was May 16, 1986. He indicated on the form that he had been discharged from his job and was given "no reason." On July 22, 1986, his claim for benefits was denied by an initial determination of the Arkansas Employment Security Division, under Section 5(b) of the Arkansas Employment Security Law, for misconduct in connection with work.

Appellant filed an appeal with the Appeal Tribunal, which conducted a hearing on August 21, 1986. Appellant appeared *pro se*, but appellee PAPCO was not present. The Appeal Tribunal reversed the initial agency determination on the grounds that PAPCO had "altered the hiring agreement by altering the hours of work assigned to the claimant" and that appellant was therefore not discharged for misconduct within the meaning of Section 5(b) and consequently was entitled to benefits.

In a letter dated September 10, 1986, appellee PAPCO's assistant manager, Max Manasco, explained that he did not attend the hearing because he remained in his office waiting for what he believed was to be a conference call. Manasco stated that "We disagree with your decision that this employee is entitled to benefits. His foreman instructed him to do work for which he was hired and he refused to take these orders." On September 12, 1986, the Board of Review remanded the case to the Appeal Tribunal for further testimony "from all interested parties."

Another hearing was held before the Appeal Tribunal on October 8, 1986, at which appellant again appeared *pro se* and appellee was represented by Manasco and general manager Jim Martin. On November 5, 1986, the Board of Review reversed the decision of the Appeal Tribunal, concluding that appellant was

discharged for misconduct and was not entitled to benefits. From that decision this appeal arises.

In his first argument for reversal, appellant contends that the Board of Review abused its discretion by remanding the case to the Appeal Tribunal for the submission of additional testimony from representatives from appellee PAPCO. As appellant points out, the standard notice from the Appeal Tribunal states that:

> In the event you have new evidence to present, you must set out this evidence in a written statement. YOU MUST STATE WHY THE EVIDENCE WAS NOT PRESENTED AT THE APPEAL TRIBUNAL HEARING AND HOW IT RELATES TO YOUR CASE.

Appellant insists that appellee PAPCO failed to set out any additional evidence in a statement as required and that the Board of Review therefore abused its discretion in ignoring the requirements for appeal. However, the letter dated September 10, 1986, in which appellee PAPCO's assistant manager, Max Manasco, explained the reason for his absence from the Appeal Tribunal's hearing, was not in any sense a proffer of new evidence. Instead, Manasco stated appellee's disagreement with the Tribunal's decision. The Board of Review, in remanding the case, was merely acting within the bounds of its discretion to obtain testimony it considered necessary for a complete development of the record and an informed decision on the part of the Appeal Tribunal.

The discretion allowed the Board is articulated in Ark. Stat. Ann. § 81-1107(d)(3) (Supp. 1985): "Upon review on its own motion or upon appeal, the Board, on the basis of evidence previously submitted in such case, or upon the basis of such additional evidence as it may direct be taken, may affirm, modify or reverse the findings and conclusions of the appeal tribunal or may remand the case." This statutory language clearly provides the basis for the Board's action in the present case. We can find no evidence of an abuse of discretion.

Appellant's second point for reversal is that there was no substantial evidence that appellant was discharged for misconduct in connection with his work. In an appeal of an employment security case, findings of fact by the Board of Review are deemed

conclusive if they are supported by substantial evidence. Ark. Stat. Ann. § 81-1107(d)(7) (Supp. 1985); *Terry Dairy Products Co., Inc.* v. *Cash*, 224 Ark. 576, 275 S.W.2d 12 (1955). Substantial evidence is valid, legal, and persuasive evidence, *i.e.*, such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Victor Industries Corp.* v. *Daniels*, 1 Ark. App. 6, 611 S.W.2d 794 (1981). Whether the findings of the Board of Review are supported by substantial evidence is a question of law, and, on appeal, we may reverse a finding of the Board of Review which is not supported by substantial evidence. *St. Vincent Infirmary* v. *Arkansas Employment Security Division*, 271 Ark. 654, 609 S.W.2d 675 (Ark. App. 1980).

Appellant asserts that the only evidence in the record to support the Board's decision is hearsay testimony by Max Manasco. Neither the Appeal Tribunal nor the Board of Review, however, are bound by common law or statutory rules of evidence. Ark. Stat. Ann. § 81-1107(d)(4) (Supp. 1985); *Bockman* v. *Arkansas State Medical Board*, 229 Ark. 143, 313 S.W.2d 826 (1958). Hearsay evidence can constitute substantial evidence in unemployment compensation cases, but the claimant must be given the opportunity to subpoena and cross-examine adverse witnesses at some stage of the proceedings. *Haynes* v. *Director of Labor*, 19 Ark. App. 71, 719 S.W.2d 437 (1986). When the claimant does not request another hearing in order to cross-examine witnesses whose hearsay statements have been received in evidence, he effectively waives his right of cross-examination, and due process requirements are not violated. *Id.; Farmer* v. *Everett*, 8 Ark. App. 23, 648 S.W.2d 513 (1983).

The record reveals that Manasco, testifying at the hearing on behalf of appellee PAPCO, stated that on the day appellant was discharged, appellant was cleaning up storage shacks. The foreman, Ervin Smith, had an inadequate supply of water on the water truck, and Manasco instructed him to have appellant assist him on the water truck to get more water. When Smith ordered appellant to help him on the water truck, Manasco said, appellant replied that he would not work on the water truck unless he had somebody to help him clean the shacks. Smith again said that he needed appellant on the water truck, and, according to Manasco's testimony, appellant refused to work on the water truck and

walked off and resumed cleaning the shacks. Smith reported the incident to Manasco, who terminated appellant.

Appellant was allowed the opportunity to cross-examine Manasco; indeed, he corrected the witness's account, noting that another employee, Eddie Sledge, was delegated the task of informing appellant that he was fired and of escorting him to the plant gate. Appellant also had the opportunity to give his version of the events that led to his termination. According to appellant's testimony, he was fired because his transportation schedule would not permit him to work an extra half-hour in the morning and an extra half-hour in the evening loading the water trucks. The Board of Review had before it testimony from both appellant and appellee on the cause of dismissal. The hearsay testimony offered by Max Manasco was subject to appellant's cross-examination. We are limited, in reviewing an employment security case, to determining whether the Board could reasonably reach its results upon the evidence before it, even when there is evidence upon which we might have reached a different conclusion had we made the original determination upon the same evidence considered by the Board. *Harris* v. *Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978). We find, upon reviewing the record, that the Board was reasonably able to reach its results from the evidence presented to it. Although appellant attempted to portray the exchange between Smith and himself as a misunderstanding, we believe that the Board could reasonably conclude that appellant's refusal to work on the water truck when ordered constituted "misconduct in connection with the work" under Ark. Stat. Ann. § 81-1106(b)(1) (Supp. 1985).

The term "misconduct in connection with the work," though not statutorily defined, was discussed at length in *Nibco, Inc.* v. *Metcalf*, 1 Ark. App. 114, 613 S.W.2d 612 (1981), where we observed that in the Arkansas cases "misconduct" involves:

> (1) disregard of the employer's interests, (2) violation of the employer's rules, (3) disregard of the standards of behavior which the employer has a right to expect of his employees, and (4) disregard of the employee's duties and obligations to his employer.

1 Ark. App. at 118, 613 S.W.2d at 614. The Board, which found appellant disqualified for unemployment benefits because he

refused to follow his employer's orders to work on the water truck, could reasonably have applied any of the four criteria of misconduct to appellant's actions.

Affirmed.

CRACRAFT and MAYFIELD, JJ., agree.

Carl L. and Terry K. BAUMEISTER *v.* CITY OF FORT SMITH

CA 87-261 743 S.W.2d 396

Court of Appeals of Arkansas
Division II
Opinion delivered January 27, 1988

Joel W. Price, for appellant.

Daily, West, Core, Coffman & Canfield, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Sebastian County Circuit Court, Fort Smith District. Appellants, Carl and Terry Baumeister appeal from a judgment dated September 22, 1986, awarding them $63,500 as just compensation for property taken by appellee in eminent domain. We affirm.

Appellee, City of Fort Smith, was involved in a project of constructing a municipal parking facility. For the project, appellee purchased by agreement certain properties in the 700 block of Garrison Avenue from the appellants. The purchases by agreement did not include the tract which is the subject of this litigation. After negotiations for the subject property failed,

appellee filed an application for condemnation and the action was tried before a jury. The jury returned a verdict in the amount of $63,500 as just compensation for the appropriation of appellants' property. From the judgment comes this appeal.

For reversal, appellants raise the following two points as error: (1) Where landowners, in an arms-length transaction, paid $75,000 for property four months prior to "taking" and where a note and mortgage given the bank to secure landowners' $75,000 purchase money loan remain outstanding at the time of taking, the jury verdict of $63,500 for city's taking of landowners' property is contrary to the evidence and inconsistent with the basic principle of "indemnity" inherent and embodied in the just compensation clause(s); (2) where the trial court had previously entered an order requiring the parties to disclose the names of experts at least thirty days prior to trial, which order landowners fully complied with and relied upon, the court's ruling on the morning of trial permitting the city to call an undisclosed appraisal expert was a clear abuse of discretion which resulted in a denial of due process, prevented a fair trial, and was a cause of juror error denying just compensation. We address their points in order.

First, appellants argue that the jury verdict is contrary to the evidence presented at trial and insufficient to indemnify them. We disagree.

■ Private property shall not be taken, appropriated or damaged for public use without just compensation therefor. Ark. Const. art. 2, § 22. In reviewing a jury verdict where the sole issue is one as to value, nothing but an extreme case would justify our interference. *Arkansas State Highway Commission* v. *Southern Development Corp.*, 250 Ark. 1016, 469 S.W.2d 102 (1971).

Appellants contend that because a $75,000 purchase money loan remained outstanding at the time of condemnation, that amount is the minimum which would justly compensate them. Such an interpretation could cause the burden of a bad bargain or a decline in the market to rest with the condemnor. Such a shift in the burden would be contrary to the purpose for which eminent domain was created, that being for the benefit of the public as a whole. In *Southern Development* we stated:

> "The owner in parting with his property to the State is entitled to receive just such an amount as he could obtain if he were to go upon the market and offer the property for sale. To give him more than this would be to give him more than the market value and to give him less would not be full compensation."

Id. at 1019, 469 S.W.2d at 104-05.

Appellants cite *United States* v. *Cors*, 337 U.S. 325 (1949) for the proposition that market value is merely one means by which just compensation is measured "since [market value] may not be the best measure of value in some cases." *Id.* at 332. While we agree that this is a correct statement of the law, it must be noted that the jury, in instruction No. 6, was instructed that "the compensation to which the landowners are entitled in this cause is the fair market value of the land taken as of the date of the taking." Appellants neither objected to the giving of this instruction nor offered instructions as to any other basis for measuring just compensation. An issue not raised at the trial court level cannot be raised on appeal. *Jones* v. *State*, 270 Ark. 328, 605 S.W.2d 7 (1980).

The jury was instructed that they were to determine the fair market value of the property at the time of taking based upon the evidence presented. The appellants called four expert witnesses who each testified as to their opinion of the fair market value at the date of the taking. Those opinions ranged from $93,750 to $120,000. Mr. Baumeister testified that in his opinion the fair market value at the date of taking was $125,000. Appellee also called two experts who testified that their opinions of the value at the date of the taking were $47,500 and $55,800 respectively. The jury is the sole judge of the weight of the evidence and the credibility of the witnesses. *Lindsey* v. *Watts*, 273 Ark. 478, 621 S.W.2d 679 (1981). They also heard testimony as to what appellants paid for the property and that the bank held a mortgage on the property. The jury had all of the evidence before it and determined the fair market value of the property to be $63,500. We have repeatedly held that an appellate court will not disturb the jury's findings of fact on conflicting evidence if there is any substantial evidence to support the verdict. *Norman* v. *Gray*, 238 Ark. 617, 383 S.W.2d 489 (1964). The verdict was

well with the range of testimony presented and was submitted to the jury on instructions and guidelines unquestioned by the appellants. A verdict need not correspond in amount to the proof adduced by either party. *Garrison Properties, Inc.* v. *Branton Construction Co.*, 253 Ark. 441, 486 S.W.2d 672 (1972). Therefore, we find that there was substantial evidence to support the verdict.

As part of their argument on this point, appellants object to the court's refusal to permit the introduction of the mortgage instrument, a rejected offer made by appellants in purchasing the property and a "plat". The trial judge has discretion in deciding evidentiary issues and his decision will not be reversed on appeal unless he has abused his discretion. *Hoback* v. *State*, 286 Ark. 153, 689 S.W.2d 569 (1985).

Appellants were allowed to testify that they paid $75,000 for the subject property, and an officer of First National Bank, in giving his opinion as to fair market value, testified that the bank took a mortgage from appellants when they purchased the property. The trial judge ruled that the document itself and the amount of the purchase which was financed, was not relevant since financial solvency is not probative of just compensation. We cannot say that the trial court's failure to allow introduction of the mortgage document was an abuse of discretion.

Appellants also argue that they should have been permitted to testify that they first offered $65,000 to purchase the subject property but their offer was refused. The law is clear that evidence of an unaccepted offer to purchase real property is not admissible to show market value of that property. *Arkansas State Highway Commission* v. *McKown*, 253 Ark. 419, 486 S.W.2d 525 (1972). *See also, Arkansas State Highway Commission* v. *First Pyramid Life Insurance Co. of America*, 269 Ark. 278, 602 S.W.2d 609 (1980). We cannot say that the trial court abused its discretion in excluding evidence of the offer.

The final matter alleged error under this point is refusal to allow introduction of a plat into evidence. The only reference to introduction of the "plat" was made in a pre-trial hearing at which time appellee moved that the appellants not be allowed to introduce future plans and plats. However, the trial judge stated that although it appeared speculative, he would permit appellants

to proceed to see if they could get the plat in under a plausible theory at trial. Upon review of the abstracted record, appellants never attempted to introduce the plat. Where the trial judge made no ruling adverse to appellants, we have nothing to review.

In their second point for reversal, appellants argue that the trial court erred in permitting the appellee to call Calvin Moye, a belatedly disclosed expert witness. As part of their argument, appellants attack the substance of Moye's testimony and assert prejudice is not being prepared for vigorous cross-examination.

Although appellants assert in their point for reversal that they fully complied with the disclosure order, it is undisputed that neither party complied with the trial court's order that the identity of witnesses be supplied thirty days before trial. Appellants contend that the parties agreed upon August 26th as the final date on which witnesses could be added. Appellee contends that the final date was to be the date on which Mr. Baumeister was deposed, originally August 26 but rescheduled to September 15. Prior to the taking of Mr. Baumeister's deposition on the morning of the 15th, appellee informed appellants that they intended to call Calvin Moye as an expert witness. By letter dated September 19, appellants objected to appellee's use of Moye as a witness. At the hearing immediately preceding the trial, the court overruled appellants' objection and stated that Moye would be allowed to testify, because appellants failed to demonstrate prejudice.

The admission or exclusion of testimony is a matter best left to the sound discretion of the trial judge. *Clawson* v. *Rye*, 281 Ark. 8, 661 S.W.2d 354 (1983). We will not reverse the action of the trial court unless that discretion has been abused. *Hoback*, 286 Ark. at 153, 689 S.W.2d at 569.

The record reflects that appellee disclosed its intention to use Calvin Moye as an expert one week prior to trial. On that date, depositions had been scheduled for Mr. Baumeister and Bill Harding, a witness for the appellee. Appellants discontinued the request to depose Harding. Appellee offered to make Moye available for deposition at appellants' request or at the time already set aside for the cancelled Harding deposition.

Had appellants chosen to depose Moye, any weaknesses in

the factual underpinning of his opinion could have been discovered and effectively brought out on cross-examination. The trial judge is in a superior position to balance any prejudicial effect which the admission of the testimony might have had against its probative value. *See Caldwell* v. *State*, 267 Ark. 1053, 594 S.W.2d 24 (Ark. App. 1980). We cannot say that the trial court abused its discretion in allowing Moye to testify.

Affirmed.

COOPER and JENNINGS, JJ., agree.

David BIGHAM *v.* STATE of Arkansas

CA CR 87-138 743 S.W.2d 405

Court of Appeals of Arkansas
Division I
Opinion delivered January 27, 1988

Jeff Duty, for appellant.

Steve Clark, Att'y Gen., by: *Joseph V. Svoboda*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Judge. David Bigham appeals from his conviction of driving while intoxicated, second offense. On appeal, he concedes that the evidence was sufficient to sustain a conviction of the charge and argues only that the trial court erred in denying his motion to quash the charge as having been improperly filed. We find no error and affirm.

The appellant was stopped by a police officer and issued a citation charging him with driving while intoxicated, second offense. The citation specified the time and place at which the offense occurred, and directed him to appear before the municipal court on a specific date to answer the charge. The citation was delivered to the clerk of the court who inadvertently entered on the docket that the charge was DWI, first offense. The city attorney then filed an information in his capacity as city attorney charging the appellant with controlling a vehicle while under the influence of intoxicating liquor after having been previously convicted of driving while intoxicated on March 8, 1984. On the day of trial, the appellant moved to quash the information.

Relying on *State* v. *Eason*, 200 Ark. 1112, 143 S.W.2d 22 (1940), the appellant argues that the information filed by the city attorney in his own name and not in the name of the prosecuting attorney was void as the city attorney had no authority to issue the information except in the name of the prosecuting attorney. The State argues that the rule announced in *Eason* was abrogated by the enactment of Ark. Stat. Ann. § 24-122.1 (Supp. 1985), which allows the prosecuting attorney to authorize the city attorney to file in the name of the State in the municipal courts, and by Ark. R. Crim. P. 1.6(b) and (d), which redefine "prosecuting attorney" to include a city attorney. The appellant argues that these sections are constitutionally infirm as improper delegations of the authority of a constitutional officer.

■ Because of the view we take of the matter, it is unnecessary for us to address those issues. Arkansas Statutes Annotated § 75-2508 (Supp. 1985) authorizes an arresting officer to charge a person with misdemeanor DWI by issuing a citation

and filing it with the clerk. *Brewer* v. *State*, 286 Ark. 1, 688 S.W.2d 736 (1985). It is not unconstitutional for this act to authorize a police officer, rather than the prosecuting attorney or grand jury, to file the misdemeanor charge. *Girder* v. *State*, 285 Ark. 70, 684 S.W.2d 808 (1985); *Southern* v. *State*, 284 Ark. 572, 683 S.W.2d 933 (1985); *Lovell* v. *State*, 283 Ark. 425, 678 S.W.2d 318 (1984). Appellant does not question the validity of the citation issued by the police officer. The citation clearly charged the appellant with the offense for which he was tried, DWI, second offense, and stated the time and place at which the offense occurred. There is no allegation that the citation was insufficient to fully apprise the appellant of the nature of the charge against him or that he was unable due to the manner in which he was charged to properly prepare his defense.

Furthermore, even if the information filed by the city attorney was in fact void, the charging instrument issued by the officer remained in force. As the citation issued by the officer was sufficient to charge the appellant with the violation, a subsequent attempt by the city attorney to duplicate that charge could not destroy the citation's effectiveness.

Affirmed.

COULSON and MAYFIELD, JJ., agree.

MARSHALL TRUCKING COMPANY *v.* STATE of Arkansas

CA CR 87-51 743 S.W.2d 16

Court of Appeals of Arkansas
Division I
Opinion delivered January 27, 1988

Angela Yvette Baxter, for appellant.

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

GEORGE K. CRACRAFT, Judge. Marshall Trucking Company appeals from its conviction of operating an overweight vehicle on the highways of this state in violation of Ark. Stat. Ann. § 75-817 (Supp. 1985). We find no error and affirm.

Officer Harold Spraggins of the Arkansas State Highway Police testified that he stopped appellant's truck on June 13, 1985, because it appeared to be overweight. The officer testified that in weighing the truck he followed the method prescribed by the state police in weighing each axle separately and adding them together to arrive at total weight. He found that the truck weighed 80,700 pounds, which was in excess of the maximum allowed for a vehicle of that type and load, and issued a citation for violation of the statute. He stated that there was no indication that his scales were not working properly or that his addition was faulty. On cross-examination, he testified that it was customary to have the scales tested every six months at the Arkansas Highway Department facility in Little Rock but that his scales had not been tested within six months prior to the issuance of the citation. He did state, however, that his scales were tested one month after writing this citation and that that testing showed his scales to have a maximum variance of one hundred pounds.

The appellant first argues that Officer Spraggins' computation of the maximum permissible weight of the truck was in error and not as prescribed in the statute. Arkansas Statutes Annotated § 75-817 prescribes those maximum gross weights which will be permitted for various types of vehicles and the method for calculating those maximum weights, and provides for variations and tolerances for some types of loads. The statute is clear, however, that in no event shall the gross allowable weight for any vehicle, including all allowable tolerances or variances, exceed 80,000 pounds.

Appellant argues that the only proper means of determining the weight of its truck was through employment of the mathematical formula found in Ark. Stat. Ann. § 75-817(e), and that it was therefore error to have arrived at that determination

by utilizing the method employed by Officer Spraggins. It argues that, had this formula been used, it would have proven that the true weight of the truck was not in excess of that allowed. We can only conclude that appellant has misinterpreted the purpose of this formula, for it is clear that it is merely a method by which to determine the maximum weight a given truck *can* carry legally and not a method by which to determine how much a given truck *is* carrying at a particular time.

The appellant next argues that the officer's scales were not properly certified, that they therefore could not form the basis for reliable evidence as to the actual weight of the appellant's vehicle at the time the citation was issued and the trial court should not have considered that evidence. Appellant cites us no statutory provision which would require that the scales be tested at any particular interval or that, as a consequence of a failure to do so, the evidence obtained from their use be excluded. In the absence of such a statutory declaration or prohibition, the fact that a scale has not been tested within six months prior to the arrest would merely go to the weight to be afforded the evidence rather than its admissibility.

On appellate review of criminal cases, we view the evidence in the light most favorable to the trial court's findings and will affirm those findings if supported by substantial evidence. *Biniores* v. *State*, 16 Ark. App. 275, 701 S.W.2d 385 (1985). The officer testified that he conducted the test in the manner usually employed by his department, that he detected nothing wrong with his scales at the time they were employed, and that his calculations as to the weight carried by the truck at the time were correct. The credibility of the officer and the weight to be given his testimony are matters for the trial court to determine. From our review of the record, we conclude that the trial court's finding that appellant's truck was operated on the highway in violation of Ark. Stat. Ann. § 75-817 is supported by substantial evidence.

Chester Marshall, president of the appellant firm, testified that his company operated a number of trucks hauling wood chips and timber products. He testified that each truck is weighed upon arrival at the Georgia Pacific mill and again after being emptied. The driver is then furnished duplicate copies of the weight ticket.

One copy of the ticket is sent to the mill the following Monday for payment and the duplicate retained in the company file. He then offered into evidence a copy of a ticket from his file said to have been furnished his driver on the date the citation was issued and which showed the gross weight of the truck upon its arrival to be 80,060 pounds. In response to the State's objection, appellant's counsel stated that the exhibit was intended to prove the true weight of the vehicle, that the police officer's scales were inaccurate, and that the truck was not as overweight as the officer testified.

Appellant contends that the trial court erred in not admitting the ticket as an exception to the hearsay rule under A.R.E. Rule 803(6), which provides that records made in the regular course of business pursuant to a regular practice to make such entries, as shown by a custodian of the records or other competent witness, may be admitted as business records, unless the source of information, or method or circumstances of preparation indicate a lack of trustworthiness. In *Cates* v. *State*, 267 Ark. 726, 589 S.W.2d 598 (Ark. App. 1979), the court listed seven factors which must be present before a document may qualify as a business record. In *Wildwood Contractors* v. *Thompson-Holloway Real Estate Agency*, 17 Ark. App. 169, 705 S.W.2d 897 (1986), the court held that only those documents meeting those criteria and which are also found to be trustworthy are admissible under the rule, and that the trial court has wide discretion in making that initial determination of fact.

Although the proffered document was found in appellant's company files and did meet some of the criteria set out in *Cates*, our problem arises because here appellant is attempting to qualify a memorandum made and furnished by Georgia Pacific. Although there is no prohibition against one company integrating records made by another into its own business records, the party offering the record must still establish by a competent witness that its content is worthy of belief. The mere fact that the memorandum is retained in appellant's files does not supply the required foundation for admission. *United States* v. *Davis*, 571 F.2d 1354 (5th Cir. 1978).

In denying admission of the record, the trial court noted that no one had testified as to the accuracy of Georgia Pacific's

scales, the qualifications of the operator to weigh the truck and make the record entry, or any of the other circumstances under which the record was made. Without discussing all of the circumstances bearing on the trustworthiness of the record, we conclude that the trial court did not abuse its discretion in holding that the record was not competent to prove the truth of the matters asserted in it, was not worthy of belief, and should be excluded.

Affirmed.

MAYFIELD and COULSON, JJ., agree.

William LAMB *v.* STATE of Arkansas

CA CR 87-55 743 S.W.2d 399

Court of Appeals of Arkansas
Division II
Opinion delivered January 27, 1988
[Rehearing denied March 2, 1988.]

Achor & Rosenzweig, by: *John W. Achor*, 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 first-degree murder, second-degree battery, and aggravated assault. After a jury trial, he was convicted of first-degree murder and sentenced to twenty-seven years in the Arkansas Department of Correction. He was also convicted of third-degree battery which, as a misdemeanor, was merged with the murder conviction, and the trial judge set aside the aggravated assault conviction on double jeopardy grounds. From those convictions, comes this appeal.

For reversal, the appellant contends that the trial court erred in refusing to suppress evidence obtained as a result of the execution of an illegal arrest warrant, and that the court erred in refusing to reduce the murder charge from first to second degree. We find the appellant's first point to be meritorious, and we reverse.

The evidence shows that a number of shots were fired into a residence at 4300 West 24th Street in Little Rock on March 17, 1986, and that one person was killed and another wounded. Officer Michael Strack of the Little Rock Police Department obtained information that suspects in the shooting were driving a red and white older model vehicle. Officer Strack stopped a vehicle meeting this description and ordered the driver and passenger to get out and place their hands on the roof of the car. They did so momentarily, and then broke and ran. Officer Strack, after an unsuccessful pursuit, returned to their car and found a shotgun on the back seat.

Through a photo lineup conducted several hours later, Officer Strack identified the appellant as the passenger of the vehicle. The vehicle, which belonged to the appellant, was impounded. On the strength of this evidence, detectives of the Little Rock Police Department obtained a warrant for the

appellant's arrest from Susan Skipper, Deputy Clerk of the Little Rock Municipal Court. At an omnibus hearing held on November 17, 1986, Ms. Skipper stated that she issued the warrant herself, without communicating with Municipal Judge Allan Dishongh, and without any indication from the officers or the documents that the judge had any knowledge of the facts alleged. She further stated that she did not read the factual allegations of the affidavit before signing the warrant; that she only checked for the prosecutor's signature, the charge, and the statute number; and that she issues warrants under these circumstances routinely, as a matter of policy.

The warrant issued by Ms. Skipper was executed the same day at the appellant's residence by Detective Keathley and Officer Smith. Officer Smith testified that Detective Keathley's knock on the appellant's door was answered by Brenda Riddle. Asked if the appellant was in, Ms. Riddle said that he was, and she called him to the door. When the appellant appeared, the police officers identified themselves, stated that they had a warrant for the appellant's arrest, and advised him of his rights. The policemen then stepped into the residence, and allowed the appellant to go to his bedroom to dress. While Detective Keathley and the appellant were in the bedroom, Officer Smith noticed a .357 revolver and ammunition on the living room floor. Officer Smith stated that he was standing in the bedroom door to ensure Keathley's safety when he discovered the weapon and bullets. These items were introduced into evidence at trial, as were ballistic tests identifying the revolver as the murder weapon. The appellant's motion to suppress this evidence was denied.

The appellant argues that the trial court erred in refusing to suppress evidence stemming from the appellant's arrest, contending that the arrest was invalid under A.R.Cr.P. Rule 7.1(c), and that the discovery of the revolver and ammunition in the appellant's residence thus did not constitute a search incident to a valid arrest. We agree. Arkansas Rules of Criminal Procedure 7.1(c) provides that the clerk of a court or his deputy may, when so authorized by the judge of that court, issue an arrest warrant upon the filing of an information or upon an affidavit approved by the prosecuting attorney. However, the authority vested in court clerks under this rule does not dispense with the requirement that warrants must be issued by a detached, neutral

magistrate who makes an independent determination of probable cause. *Davis* v. *State*, 293 Ark. 472, 739 S.W.2d 150 (1987). Here, the warrant was issued without either the approval of a judicial officer or an independent determination of probable cause, and we hold that the warrant requirements were not met.

Moreover, the introduction of the disputed evidence cannot be justified on the ground that it was seized incident to a valid warrantless arrest. Even where probable cause is present, a warrantless entry of a residence is unreasonable in the absence of exigent circumstances. *Payton* v. *New York*, 445 U.S. 573 (1980). We have held that this rule is applicable where the arrest is accomplished without an entry by police officers who knock on a person's door and ask him to step outside, *Schrader* v. *State*, 13 Ark. App. 17, 678 S.W.2d 777 (1984), and we hold that it is likewise applicable under the circumstances presented in the case at bar. Any evidence seized pursuant to the appellant's arrest is thus subject to exclusion unless the warrantless entry was justified by exigent circumstances. *See id.* "Exigent circumstances" permitting warrantless entry of a dwelling are circumstances requiring immediate aid or action, including the risk of removal or destruction of evidence, danger to the lives of police officers or others, and hot pursuit of a suspect. *Mitchell* v. *State*, 294 Ark. 264, 742 S.W.2d 895 (1988). That such exigent circumstances were lacking in the case at bar is demonstrated by the fact that the police officers actually had sufficient time to procure a warrant for the appellant's arrest: all that was lacking was communication with the municipal judge in order for the probable cause determination to be made and the requisite approval given. Finally, the Arkansas Supreme Court has held that the good-faith exception to the exclusionary rule does not apply where the police officers executing the warrant knew that no reasonable cause determination had been made by a judicial officer. *Stewart* v. *State*, 289 Ark. 272, 711 S.W.2d 787 (1986). The record shows that the warrant was obtained from Ms. Skipper, at her home after midnight, by Detective Keathley. In light of Ms. Skipper's testimony that she issued the warrant in the presence of Detective Keathley, and that she made no attempt to communicate with Judge Dishongh, we hold that the good-faith exception is inapplicable. In the absence of a valid warrant or a warrantless entry supported by exigent circumstances, and where

the good-faith exception to the exclusionary rule is inapplicable, we hold that the trial court erred in denying the appellant's motion to suppress the evidence obtained by virtue of the illegal arrest, and we therefore reverse and remand.

We address the appellant's second point for reversal because the issue might arise in a new trial. The appellant contends that his first-degree murder conviction under the felony murder formulation found in Ark. Stat. Ann. § 41-1502(a) (Repl. 1977) constituted double jeopardy because the underlying felony upon which that conviction was based, aggravated assault, was not merely an element of the greater offense, but rather was an "inchoate version" of the first-degree murder charge because the essential element of both offenses involved the same conduct: shooting a firearm at the time and place in question. The appellant cites no authority to support his argument that the charge should have been reduced to second-degree murder on double jeopardy grounds, and we find it to be unconvincing. Although Ark. Stat. Ann. § 41-105 (Repl. 1977) prohibits the entry of judgments of conviction on both felony murder and the underlying specified felony, *see Singleton* v. *State*, 274 Ark. 126, 623 S.W.2d 180 (1981), the trial court in the case at bar did not enter judgments of conviction on the felony murder count and the aggravated assault charge, but instead set aside the aggravated assault conviction. Under these circumstances, we hold that the trial court did not err in refusing to reduce the charge to second-degree murder on double jeopardy grounds.

Reversed and remanded.

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

Fred WILLIAMS *v.* STATE of Arkansas

CA CR 87-125 743 S.W.2d 402

Court of Appeals of Arkansas
Division I
Opinion delivered January 27, 1988

William D. McArthur, for appellant.

Steve Clark, Att'y Gen., by: *Frank J. Wills III*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with possession of marijuana, possession of methamphetamine, and public servant bribery. After a jury trial, he was convicted of those charges, sentenced to terms of imprisonment totalling six and one-half years in the Arkansas Department of Correction, and assessed fines amounting to $7,500.00. From those convictions, comes this appeal.

The appellant contends that the evidence was insufficient to support his conviction for possession of controlled substances, that the trial court erred in denying his motion to suppress evidence; in admitting into evidence bags of marijuana and methamphetamine; and in refusing to reduce the possession of methamphetamine charge to a misdemeanor.

Corporal John McCord of the Arkansas State Police testi-

fied at trial, and stated that he stopped a car the appellant was driving because the vehicle lacked a license plate. After he had been stopped, the appellant produced a driver's license which had been expired for several months. He also produced a Mississippi open title to the vehicle, and stated that he was considering purchasing the car and was test driving it. Corporal McCord stated that the appellant was reluctant to tell him from whom he had obtained the vehicle, but that he eventually informed the officer that he had obtained the car from Lyle Bitner of DeWitt, Arkansas. A NCIC check run by Corporal McCord indicated that the vehicle had not been reported stolen. He still suspected that the car might be stolen, however, and decided to arrest the appellant, who was taken into custody on an expired driver's license charge. A search of the appellant's person incident to the arrest revealed two plastic bags; at trial, there was evidence that the bags contained marijuana and methamphetamine. A plastic bag containing a large sum of money, found in the appellant's hip pocket, was also confiscated. Corporal McCord stated that the appellant then offered to let him keep all of the money if he would let the appellant get back in the car and drive away.

We find no merit in the appellant's contention that there was insufficient evidence to support his conviction for public servant bribery, an offense which is committed when a person offers, confers, or agrees to confer any benefit upon a public servant in exchange for any exercise of the public servant's discretion. Ark. Stat. Ann. § 41-2703 (Repl. 1977). In reviewing the sufficiency of the evidence to support a criminal conviction, we view the evidence in the light most favorable to the appellee and affirm the judgment if the verdict is supported by substantial evidence. *Lair* v. *State*, 19 Ark. App. 172, 718 S.W.2d 467 (1986). To be substantial, the evidence must be of sufficient force and character to compel a conclusion one way or the other with reasonable certainty; it must induce the mind to go beyond mere suspicion or conjecture. *Id.* In the case at bar, there was evidence that the appellant told Corporal McCord that he could have the money if he would let the appellant get in the car and drive away. Although the appellant denied having any intent to bribe the officer, we think that the jury could properly have concluded from Corporal McCord's testimony that the requisite intent was present. We therefore hold that the conviction for public servant

bribery was supported by substantial evidence and we affirm that conviction.

With respect to his convictions for possession of marijuana and possession of methamphetamine, the appellant contends that the trial court erred in denying his motion to suppress the evidence. He argues that the only reason that he was taken into custody was that the arresting officer suspected that the car was stolen, that the custodial arrest on an expired driver's license charge was thus pretextual, and that the fruits of the search made incident to the pretextual arrest should thus have been excluded. We do not agree. Although no distinct rules for defining a pretextual arrest have been articulated, it is clear that pretext is a matter of the arresting officer's intent, which must be determined by the circumstances of the arrest. *Richardson* v. *State*, 288 Ark. 407, 706 S.W.2d 363 (1986). In *Richardson*, the Arkansas Supreme Court reversed the conviction of an appellant who, while under suspicion of murder and arson, was arrested for public intoxication. After Richardson was in custody, police officers seized his clothing and sent it to the crime laboratory, a search which would be justified in a murder investigation but unreasonable if the actual purpose of the arrest was merely public intoxication. *Id.*, 288 Ark. at 410-11. Facially valid searches may be disallowed where they are conducted incident to arrests that have been made solely as a pretext to conduct a search:

> In these cases, the search is the real purpose of the police and the arrest, usually on a minor offense or traffic violation, is merely a subterfuge to obtain the search authority ancillary to arrest.

Richardson, 288 Ark. at 411. Although there was evidence in the case at bar that Corporal McCord would not have arrested the appellant had he not suspected that the car was stolen, there is no indication that he believed that the appellant was in possession of contraband, or that the arrest was made in order to obtain the authority to search the appellant's person as an incident of the arrest. Moreover, it is a violation of Ark. Stat. Ann. § 75-307(a) (Repl. 1977) to operate a motor vehicle without a valid license, and a law enforcement officer may make a warrantless arrest when he has reasonable cause to believe that the person arrested has committed a violation of law in the arresting officer's

presence. In the absence of any indication that the arrest was a pretext for the subsequent search, we hold that the trial court did not err in denying the appellant's motion to suppress.

Next, the appellant argues that the trial court erred in admitting the bags of marijuana and methamphetamine into evidence. The record shows that the arresting officer described the items seized as one bag containing vegetable matter, and another bag containing a white powder and a red capsule. After the arrest, Corporal McCord placed this evidence in a safe in his home, and later transferred it to the State Crime Laboratory. At trial, the State did not call the laboratory employee who took possession of the evidence to testify, and offered into evidence one bag containing vegetable matter, and another containing white powder and a red, sticky substance. The appellant asserts that the presence of the red substance in place of the red capsule constitutes an alteration so dramatic that the State should have been required to prove a complete chain of custody. We do not agree. In cases where an objection to the introduction of evidence based on chain of custody is at issue, the question for the appellate court is whether the trial court abused its discretion in determining that in reasonable probability the integrity of the evidence was not impaired, and that it had not been tampered with. *Meador* v. *State*, 10 Ark. App. 325, 664 S.W.2d 878 (1980). In the case at bar, Corporal McCord stated that his initials appeared on the seals securing the bags, that he did not remove anything from the bags while they were in his possession, and that he took them to the laboratory where they were sealed with evidence tape. He also testified that the red capsule appeared to have melted during the time that the evidence was kept in his home safe. Under these circumstances, we think that the fact that the evidence was not in the officer's custody at all times goes to the weight of the evidence rather than its admissibility, and hold that the trial court did not abuse its discretion in admitting the bags into evidence. *See Meador, supra.*

Finally, the appellant contends that the trial court erroneously failed to reduce the possession of methamphetamine charge to a misdemeanor. Arkansas Statutes Annotated § 82-2617(c) (Supp. 1985) provides that possession of a controlled substance is, for first offenders, a Class A Misdemeanor, unless the controlled substance is listed under Schedule I or Schedule II,

in which case the offense constitutes a Class C Felony. The essence of the appellant's argument is that the State was required to present evidence that methamphetamine is a Schedule II substance. We do not agree. The trial court properly took judicial notice of the fact that methamphetamine is a Schedule II controlled substance, and it was unnecessary to introduce evidence of state health department regulations. *See Johnson* v. *State*, 6 Ark. App. 78, 638 S.W.2d 686 (1982).

Affirmed.

CRACRAFT and COULSON, JJ., agree.

James SITZ *v.* STATE of Arkansas

CA CR 87-88 743 S.W.2d 18

Court of Appeals of Arkansas
Division II
Opinion delivered January 27, 1988

Michael Everett, for appellant.

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

JOHN E. JENNINGS, Judge. After a jury trial, James Sitz was convicted of driving while intoxicated. The State's only witness was James Walker, the Tyronza Chief of Police.

On cross-examination, appellant's counsel sought to ask Walker about the circumstances surrounding his leaving his position as the Chief of Police for the City of Harrisburg. The trial court sustained the State's objection to the question, and defense counsel sought to make his record. The trial court ruled that the record could be made at the first recess. Apparently the case was submitted to the jury before the court went into recess. At that time defense counsel made his record, explaining that he was seeking to show that Walker had embezzled funds from the City of Harrisburg. The trial court declined to change his mind.

Rule 608(b) of the Arkansas Rules of Evidence provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness. . . .

Appellant first argues that the court, in effect, denied him the opportunity to make a proffer. We do not agree. We recently held that it is generally error for the trial court to refuse counsel the opportunity to proffer evidence which has been excluded by a ruling of the court. *Jones* v. *Jones*, 22 Ark. App. 267, 739 S.W.2d 171 (1987). The primary reason that a proffer is required is so that the appellate court will have a record upon which to determine the admissibility of the evidence. But while the trial court has very limited discretion to refuse to permit counsel to proffer evidence, it has great discretion in controlling the form of the proffer and the time at which it is to be made. Rule 103(b) of the Arkansas Rules of Evidence provides that the court may direct that an offer of proof be made in question and answer form. Rule 103(c) generally requires that proffers be made outside the hearing of the jury. We find no abuse of discretion in the procedure followed by the trial judge.

Appellant's second argument is that the evidence he sought to elicit was relevant and it was error to exclude it. In *Gustafson* v. *State*, 267 Ark. 278, 590 S.W.2d 853 (1979), the supreme court held that theft was probative of untruthfulness and therefore could be inquired about on cross under Rule 608(b). *Gustafson* was overruled in *Rhodes* v. *State*, 276 Ark. 203, 634 S.W.2d 107 (1982), in which the court held that, although theft is probative of dishonesty, it is not probative of untruthfulness and therefore cannot be inquired about on cross under Rule 608(b). Although *Gustafson* involved theft by receiving and *Rhodes* involved shoplifting, we do not believe that either decision turned on the particular type of theft offense involved. Appellant relies primarily on the dissenting opinion in *Rhodes*. While we might agree with appellant that the dissent is well reasoned we are not at liberty to follow it.

Embezzlement was not an offense at common law. It has been defined as common-law larceny extended by statute to cover cases where the stolen property comes originally into the possession of the defendant without a trespass. *Moody* v. *People*, 65 Colo. 339, 176 P. 476 (1918). It was made a separate offense by statute in this state until the adoption of the Arkansas Criminal Code in 1975, at which time it was consolidated with other theft offenses. Arkansas Statutes Annotated § 41-2202 (Repl. 1977). There is dicta in at least two federal cases stating that inquiry into specific acts which would have constituted embezzlement is permissible under Rule 608(b) of the Federal Rules of Evidence. *United States* v. *Amahia*, 825 F.2d 177 (8th Cir. 1987); *United States* v. *Leake*, 642 F.2d 715 (4th Cir. 1981). These statements appear to be derived from an article by Dean Ladd, *Credibility Tests-Current Trends*, 89 U. Pa. L. Rev. 166, 180 (1940). But Dean Ladd also argued that robbery, larceny, and burglary might be probative of untruthfulness.

Our conclusion is that this case is controlled by the supreme court's holding in *Rhodes*. We do not think a meaningful distinction can be drawn, for purposes of Rule 608(b), between embezzlement and other forms of theft.

We hold that the trial court did not err in excluding this evidence.

Affirmed.

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

The FIRST NATIONAL BANK OF WYNNE *v.* Bobby HESS

CA 87-276 743 S.W.2d 825

Court of Appeals of Arkansas
Division I
Opinion delivered February 3, 1988
[Rehearing denied March 2, 1988.]

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

Killough, Ford & Hunter, by: *Robert M. Ford*, for appellee.

BETH GLADDEN COULSON, Judge. Appellant raises five points for reversal in this appeal. We find none of the arguments persuasive, and we accordingly affirm the judgment of the trial court.

On October 17, 1984, appellant, the First National Bank of Wynne, loaned $45,006 to JART Enterprises, Inc., a business entity consisting of Jim Foley and Theresa Foley. Appellant required for the loan the personal guaranty of appellee, Bobby Hess, who executed a guaranty agreement on the date of the loan.

The money loaned to JART Enterprises was used to operate a convenience store through a sublease from Mid-South Sales

Company. Appellant, in a security agreement filed on October 24, 1984, with the Secretary of State, acquired a security interest in the inventory, valued by appellant at $22,000, and the furniture and fixtures valued at $16,800. Subsequently, JART Enterprises became delinquent on the note and filed for a Chapter 11 bankruptcy on June 3, 1985.

The Bankruptcy Court terminated JART Enterprises' leasehold interest in the store building and awarded possession of the premises, including inventory, furniture, and fixtures, to Mid-South Sales, subject to appellant's security interest. Pursuant to an agreement with appellant, Mid-South Sales went into possession of the building on October 9, 1985, and began operating the store, selling the inventory. On January 2, 1986, Mid-South purchased the inventory, furniture, and fixtures for $15,000. Appellant applied the proceeds to the debt and sought to hold appellee liable for a deficiency of $30,009.

At trial, appellant moved for summary judgment, arguing that appellee was unconditionally liable on the basis of the independent Guaranty Agreement. The trial court denied the motion. Appellee defended on the grounds of improper notice and commercial unreasonableness under Ark. Stat. Ann. § 85-9-504(3) (Supp. 1985). The trial judge determined that the issues properly before the court were whether a guarantor was a "debtor" within the meaning of Ark. Stat. Ann. § 85-9-504(3) and whether appellant had complied with the requirements of notice and commercial reasonableness. At the end of its case, appellant moved for a directed verdict, contending that a guarantor is not a debtor and that the section dealing with the disposition of collateral in a commercially reasonable manner does not apply. The motion was denied, and the jury returned a verdict in favor of appellee. From that judgment, this appeal arises.

In its first point for reversal, appellant argues that the trial court erred in denying the motions for summary judgment, directed verdict, and judgment notwithstanding the verdict. This argument, the keystone of appellant's case, both at trial and on appeal, focuses on the issues highlighted by the trial court: the status of the guarantor under Ark. Stat. Ann. § 85-9-504(3) and the question of commercial reasonableness.

Ark. Stat. Ann. § 85-9-504(3) (Supp. 1985) provides that:

> Disposition of the collateral may be by public or private proceedings, and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms, but every aspect of the disposition including the method, manner, time, place, and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods, no other notification need be sent. In other cases, notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations, he may buy at private sale.

Appellant contends that appellee, having voluntarily signed the Guaranty Agreement on October 17, 1984, unconditionally guaranteed to pay the amount due on the obligation of JART Enterprises upon default. According to appellant, by the terms of the Guaranty Agreement, appellee waived any notice requirements. Hence, appellant says, the provisions of the Uniform Commercial Code governing commercially reasonable transactions are inapplicable.

Appellee responds that a proper reading of the statutes indicates that a guarantor is a "debtor" under the Uniform Commercial Code, and that the appropriate provisions automatically come into play. A "debtor" in a secured transaction is defined at Ark. Stat. Ann. § 85-9-105 (Supp. 1985) as:

> The person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel

> paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the Article [chapter] dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires.

A guarantor is clearly one who "owes payment or other performance of the obligation secured." Under the terms of the Guaranty Agreement in the present case, appellee, who was not the "owner of the collateral," was certainly the "obligor in any provision dealing with the obligation." Although the Guaranty Agreement contained a boilerplate clause waiving "any and all notice of nonpayment and dishonor, demand, notice, protest and notice of protest, and . . . notice of the acceptance of this guaranty," the obligations outlined in the instrument place appellee in the position of a debtor for purposes of the notice requirement.

In *Hallmark Cards, Inc.* v. *Peevy*, 293 Ark. 594, 598, 739 S.W.2d 691, 693 (1987), the Arkansas Supreme Court held, in an appeal involving a guarantor, that "simple fairness requires that the term 'debtor' to whom notice is required include one who is responsible for payment upon default of the principal obligor." This policy, endorsed in other jurisdictions, *see* Annot., 5 A.L.R. 4th 1291 (1981), was set forth by the Supreme Court in an earlier Uniform Commercial Code case, *Norton* v. *National Bank of Commerce of Pine Bluff*, 240 Ark. 143, 398 S.W.2d 538 (1966). In *Norton*, an automobile dealer, after selling a used car, sold the purchaser's note and conditional sales contract to a bank and agreed to repurchase the contract for the amount due in the event of the purchaser's default. The Supreme Court held that he was a "debtor" within the meaning of Ark. Stat. Ann. § 85-9-504(3) and was therefore entitled to notice, after the bank had repossessed the automobile, of the bank's proposed private sale of the vehicle. Discussing *Norton* in *Hallmark Cards, Inc.* v. *Peevy, supra*, the court noted that "Although the dealer was not a party to an agreement specifically called a 'guaranty agreement' in the *Norton* case, his obligation pursuant to the assignment agreement with the bank was like that of a guarantor, and we see little distinction between that situation and the one before us now." 293 Ark. at 597-598, 739 S.W.2d at 693.

Indeed, there is little to distinguish between the situation in the *Peevy* case and the one before this court. The appellant there, Hallmark Cards, Inc., sued the appellee, Edward H. Peevy, who had guaranteed an obligation owed the appellant by Garry Peevy. The appellee contended that the amount due was disputed and that, because the appellant had sold the property pledged by Garry Peevy as security for the obligation without notifying the guarantor, the appellant was not entitled to a deficiency judgment. The Supreme Court concluded that notice to a guarantor of the sale of collateral was a necessary prerequisite to seeking a deficiency judgment against the guarantor because, as noted above, a guarantor is a debtor for purposes of the notice requirement of Ark. Stat. Ann. § 85-9-504(3).

The Arkansas Supreme Court stated in *First State Bank of Morrilton* v. *Hallett*, 291 Ark. 37, 41, 722 S.W.2d 555, 557 (1986), that "When the code provisions have delineated the guidelines and procedures governing statutorily created liability, then those requirements must be consistently adhered to when that liability is determined." In other words, as the court put it in quoting *Atlas Thrift Co.* v. *Horan*, 27 Cal. App. 3d 999, 104 Cal. Rptr. 315 (1972), "If the secured creditor wishes a deficiency judgment he must obey the law. If he does not obey the law, he may not have his deficiency judgment." 291 Ark. at 41, 722 S.W.2d at 557. Thus, failure to comply with Code provisions concerning notice to debtors and disposition of collateral results in a bar to recovery of a deficiency judgment.

At trial, appellee testified that Mid-South Sales took possession of the premises of the convenience store on October 9, 1985. He added that he received no notice that JART Enterprises was in default on the note until November 4, 1985. The notice, however, did not include information that Mid-South Sales was in possession of the premises and operating the store using secured inventory. Appellee testified that he did not learn that Mid-South Sales was in possession of the store until a meeting held on November 25, 1985. Written notice was sent by appellant's attorney on December 24, 1985, over two months after Mid-South Sales went into possession of the collateral.

Appellant's disposition of the collateral does not satisfy the requirement of Ark. Stat. Ann. § 85-9-504(3) (Supp. 1985)

that "every aspect of the disposition including the method, manner, time, place, and terms must be commercially reasonable." The inventory of the collateral was taken by three representatives of Mid-South Sales in November, 1985, over a month after the company took possession. There was no arrangement between appellant and Mid-South Sales to account for the collateral sold, a circumstance resulting in impairment of the collateral. No effort was made on appellant's part to investigate an offer made by a former owner of the store to purchase the collateral for $30,000. Appellant never advertised the collateral for sale. The record reveals that the collateral was valued at $38,000 for loan purposes, yet was sold for $15,000 when the inventory alone was valued at $16,000. Such recklessness cannot be termed "commercially reasonable."

Summary judgment is an extreme remedy and will be granted only when there is no genuine issue of material fact before the court. *Township Builders, Inc.* v. *Kraus Construction Co.*, 286 Ark. 487, 696 S.W.2d 308 (1985). The burden of proving that there is no genuine issue of material fact is upon the moving party. All proof submitted must be viewed in the light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Leigh Winham, Inc.* v. *Reynolds Insurance Agency*, 279 Ark. 317, 651 S.W.2d 74 (1983). The record in the present case indicates the existence of a genuine issue of material fact, and the trial court ruled correctly in denying appellant's motion.

A trial court has a duty, when requested to render a directed verdict, to consider whether the evidence against the party toward whom the verdict is directed, when given its strongest probative force, presents a *prima facie* case; only if the evidence viewed in that light would require the setting aside of a jury verdict should a trial court grant a directed verdict. *Camp* v. *First Federal Savings & Loan*, 122 Ark. App. 150, 671 S.W.2d 213 (1984). The facts set forth in the record do not establish a *prima facie* case against appellee; therefore, we find that the trial court ruled correctly in denying appellant's motion.

As for appellant's contention that the court should have entered a judgment notwithstanding the verdict, it is well settled that a trial court may enter a judgment *non obstante veredicto*

only if there was no substantial evidence to support the jury verdict. *Crail* v. *Northwestern National Insurance Co.*, 282 Ark. 175, 666 S.W.2d 706 (1984). We believe the record indicates substantial evidence to support the verdict.

Appellant argues, in its second point for reversal, that the trial court erred in refusing to admit a United States Bankruptcy Court order dated October 8, 1985, and signed November 12, 1985, into evidence. The order gave possession of the business operated by JART Enterprises to Mid-South Sales, subject to appellant's interest in the inventory, fixtures, and furniture. Appellant contends that the order had a direct bearing on the bank's right to the property and was admissible under Rules 901(b)(7) and 1005 of the Arkansas Uniform Rules of Evidence.

Because notice was an issue at trial, reference was made by appellee's attorney to the date on the order in order to refresh a witness's memory regarding the date on which Mid-South Sales assumed possession of the collateral. No other questions relating to the content of the document were raised. Because the content of the order had been discussed in testimony, there was no need to admit a redundant document into evidence. Moreover, the probative value of the order to the issue at trial would have been substantially outweighed by the confusion of issues which would have resulted from its introduction. Arkansas Uniform Rules of Evidence, Rules 401 and 403.

Appellant's third point for reversal is that the trial court erred in refusing to give seven of its proposed jury instructions. These instructions were based on appellant's trial strategy that attempted to hold appellee absolutely liable on the Guaranty Agreement with no reference to the provisions of the Uniform Commercial Code. Our holding that appellee was a debtor within the meaning of the Code disposes of this issue.

Similarly, appellant's fourth point, alleging error in the trial court's decision to give appellee's instructions based on the argument that a guarantor is a debtor, is also decided in favor of appellee on the basis of our earlier holding that the Uniform Commercial Code definitions apply in the present case.

Finally, appellant argues, in its fifth point for reversal, that appellee was negligent and responsible for his own loss in having

failed to inquire into the financial health of the business he was insuring. This argument, however, amounts to nothing more than editorializing. The issue is not framed in terms to which this court can respond, as it does not address itself to any ruling by the trial court for which there exists an appellate remedy.

Affirmed.

CRACRAFT and MAYFIELD, JJ., agree.

James F. LOOSEY *v.* OSMOSE WOOD PRESERVING COMPANY, and Insurance Company of North America

CA 87-135 744 S.W.2d 402

Court of Appeals of Arkansas
Division II
Opinion delivered February 10, 1988
[Rehearing denied March 2, 1988.]

Frederick S. "Rick" Spencer, for appellant.

Bassett Law Firm, by: *Tod C. Bassett*, for appellee.

MELVIN MAYFIELD, Judge. Claimant, James F. Loosey,

appeals a decision of the Workers' Compensation Commission dismissing his claim with prejudice for failure to answer interrogatories.

The record discloses that on February 13, 1986, after the claimant had propounded interrogatories to his employer, the employer and its insurance carrier propounded interrogatories to the employee. Then, on April 1, 1986, the administrative law judge issued an order setting the matter for hearing on June 24, 1986. The order also stated:

> All discovery shall be completed and any motions filed by May 15th, 1986. Failure to do so shall subject the offending party to sanctions.

On May 15, 1986, when the February 13 interrogatories had not been answered by the claimant, the employer's counsel wrote a letter to the administrative law judge calling attention to the fact that the deadline set for completing discovery had passed and requesting that sanctions be imposed.

On May 30, 1986, the administrative law judge dismissed appellant's claim with prejudice. However, on appeal to the full Commission, the order was vacated and the matter was remanded to the law judge for a ruling on a petition for recusal filed by claimant. This petition was filed by letter dated May 22, 1986, but had not been ruled on when the May 30 order of dismissal was issued. After remand, the claimant's petition for recusal was denied, and on July 9, 1986, the law judge again dismissed the claim with prejudice, although claimant had filed the answers to the interrogatories on June 13, 1986. On appeal from the law judge's order of dismissal, the full Commission affirmed, relying on Commission Rule 16 and ARCP Rule 37(d).

On appeal to this court, the appellant first contends the Commission did not have the authority to dismiss the claim with prejudice. He cites Ark. Stat. Ann. § 81-1331 (Repl. 1976), which requires, in order to punish for contempt committed before the Commission, that the Commission must certify the facts to circuit court and the circuit court shall assess punishment to the extent it would have if the contempt had been committed before the court. We do not, however, agree that the dismissal of appellant's claim is the same as holding him, or his attorney, in

contempt.

The Commission has the authority, under Ark. Stat. Ann. § 81-1342(f) (Repl. 1976), to make such rules and regulations as may be found necessary to administer the provisions of the Workers' Compensation Law. Under this authority, the Commission has promulgated its Rule 16, which provides:

> Depositions may be taken and discovery had by any party after the claim has been controverted in accordance with the statutory provisions and rule of civil procedure relating to civil actions in the Chancery and Circuit Courts of this State, unless the parties agree otherwise.
>
> Prior to the time a case has been controverted, for good cause and upon application of either party, the Commission may order the depositions of any party or witness to be taken and any other discovery procedure.
>
> The Commission may, at any time after a case has been heard by an Administrative Law Judge or the Commission, order the taking of evidence by deposition or otherwise, especially when this procedure will expedite the submission of the case for decision by the Commission. (Effective March 1, 1982).

Rule 37(d) of the Arkansas Rules of Civil Procedure provides that, when a party fails to answer interrogatories, the court may, among other things, take any action authorized under paragraphs (A), (B) and (C) of subdivision (b)(2) of Rule 37. These actions include an order deeming matters admitted, prohibiting the introduction of evidence, striking out pleadings, dismissing the claim of the offending party or rendering judgment by default against the disobedient party. Appellant argues, however, that the Commission had no power to exercise these sanctions in this case. He cites Commission Rule 16 and says the order issued by the law judge extending the time for completion of discovery from the 30 days allowed by ARCP Rule 33 to 45 days after the issuance of the order, was not requested by either party and the Commission could not issue the order on its own volition.

It is true that Commission Rule 16 provides depositions may be taken and discovery had by any party, after the claim has been controverted, in accordance with the statutory provisions

and rules of civil procedure relating to civil matters in the Chancery and Circuit Courts of the State but, prior to the time a matter has been controverted, the Commission must order the deposition or discovery for good cause upon application of a party. This matter was thoroughly discussed at oral argument and we are convinced that the record shows that the claimant's claim was controverted before the law judge issued his order setting this matter for a hearing and directing that all discovery be completed by a certain date.

Therefore, since the claim was controverted, the discovery started by the parties before the claim was set for hearing was authorized by the Commission's Rule 16 and this authorized the law judge to make proper orders pertaining to that discovery. ARCP Rule 37(b) provides that sanctions may be imposed against a party who is disobedient to those orders, and dismissal of an action is one of the sanctions authorized. The Commission must, of course, administer its rules subject to basic rules of fair play, *Brewer* v. *Tyson Foods, Inc.*, 10 Ark. App. 88, 661 S.W.2d 423 (1983), and the appellant argues that his failure to answer the interrogatories within the time ordered by the law judge was not willful and did not justify the harsh sanction of dismissal of his claim. The full Commission recognized this point but found that the sanction imposed by the law judge was supported by the record. We must affirm the Commission's factual determinations if supported by substantial evidence, *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979), and great weight must be accorded the Commission's findings with reference to compliance with its rules and regulations. *Mohawk Rubber Company* v. *Buford*, 259 Ark. 614, 535 S.W.2d 819 (1976). Under ARCP Rule 33(a), the appellant was required to answer the interrogatories propounded to him on February 13, 1986, within 30 days of that date. However, the effect of the law judge's order of April 1, 1986, extended the time to answer until May 15, 1986. When the appellant had not answered by May 30, 1986, the law judge dismissed the appellant's claim. That action was subsequently affirmed by the Commission, and we cannot say the Commission's order is not supported by the record.

Finally, appellant argues that the dismissal without a hearing was an unconstitutional deprivation of his right to due

process of law. However, when counsel for appellant was served with interrogatories on February 13, 1986, he was aware, or should have been aware, that ARCP Rule 33, as applied to Workers' Compensation cases through Commission Rule 16, gave the appellant 30 days in which to either answer the interrogatories or file objections to them. The administrative law judge's order of April 1 specifically warned the parties that failure to complete discovery by May 15 would "subject the offending party to sanctions." In *Mann* v. *Ray Lee Supply*, 259 Ark. 565, 535 S.W.2d 65 (1976), the Arkansas Supreme Court considered the propriety of a default judgment entered against appellant for failure to answer interrogatories. The court said:

> A party who has been warned of the consequences of default is not entitled to a second notice that would add nothing to the first, else the progression of notices would never end. For instance, when a defendant is served with a summons warning him to answer within a specified time, under the penalty of the complaint's being taken as confessed, his failure to answer entitles the plaintiff to judgment. [Citations omitted.]

We do not find that the appellant in the present case was deprived of due process of law in the dismissal of his claim under the facts of this case.

Affirmed.

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

Eva Mae YOUNG *v.* STATE of Arkansas

CA CR 87-254 743 S.W.2d 829

Court of Appeals of Arkansas
Opinion delivered February 10, 1988

Henry & Mooney, by: *John R. Henry*, for appellant.

No response.

PER CURIAM. The appellant's brief in this case was due on January 30, 1988. On January 22, appellant's counsel filed a motion asking that the time for filing his brief in this case be extended to March 30, 1988. An examination of our records discloses that appellant's counsel has been counsel in six other appeals to this court during the past seven months and has made a similar request in all of them at least twice. In CACR 87-71, counsel requested and obtained an extension of eighty-five days, in CACR 87-86 forty-two days, in CACR 87-163 forty-two days, in CACR 87-181 sixty-five days, in CACR 87-194 fifty-five days, and in CACR 87-203 forty-three days.

The court will grant an extension of time for the filing of appellant's brief for a period of thirty days from this date. Counsel is admonished, however, that a request for further extension of time in this case will be looked on with extreme disfavor. Counsel's attention should also be called to the provisions of Rule 7(f) of the Rules of the Supreme Court and the Court of Appeals, which provides that counsel who delay the filing of a motion for extension of time until it is too late for the brief to be filed if the motion is denied, do so at their own risk.

Jimmy BARRETT *v.* STATE of Arkansas

CA CR 87-144 744 S.W.2d 741

Court of Appeals of Arkansas
Division II
Opinion delivered February 17, 1988

Hankins & Childers, for appellant.

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

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Clark County Circuit Court. Appellant, Jimmy Barrett, appeals from his conviction of rape and the sentence imposed therefor. We affirm.

On January 26, 1987, an information was filed charging appellant with rape by engaging in sexual intercourse or deviate sexual activity with a person who is less than eleven years old from April 1, 1986 through November 8, 1986, a violation of Arkansas Statutes Annotated § 41-1803(1)(c) (Repl. 1977).[1] On April 17, 1987, a jury found appellant guilty as charged and sentenced him to twenty-five years in the Arkansas Department of Correction. From the judgment and sentence comes this appeal.

For reversal, appellant argues that: (1) the trial court erred in swearing the witness Toby Markham before conducting an inquiry into the witness' competence to understand and appreciate his obligation to tell the truth; (2) the trial court erred in

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[1] The statute was amended in 1985 to change the statutory age from eleven to fourteen. Although the information filed was technically incorrect, it does not affect its validity nor our decision. *See*, Ark. Stat. Ann. § 41-1803(1)(c) (Supp. 1985).

refusing to excuse the jury during defense counsel's voir dire of Toby Markham; and (3) the trial court erred in allowing the witness Toby Markham to testify. We address his points in order.

Appellant first argues that reversible error was committed in swearing a child witness prior to establishing his competence to understand and appreciate his obligation to tell the truth. Appellant essentially contends that swearing the child witness despite objection, "[left] the jury with the impression that the witness' competence was stamped with the judicial seal of approval" and thereby deprived him of a fair trial. We disagree.

The fallacy of appellant's argument is apparent. Because the competence of a witness is to be determined by the trial court and not the jury, A.R.E. Rule 104(a), all witnesses found competent to testify necessarily have their competence stamped with the "judicial seal of approval." Without such approval a challenged witness could not testify. Furthermore, we fail to see how administering the oath to the child as part of a group creates a stamp of approval since it would not prevent the court from later declaring the witness incompetent to testify.

The taking of the oath goes to a witness's competence and reflects only incidentally on credibility. Competence is a matter within the sound discretion of the court. *Jackson* v. *State*, 290 Ark. 375, 720 S.W.2d 282 (1986). Because the jury is not involved in determining competency of witnesses, any impression left on the jury with relation to competence is of no consequence. Appellant has failed to show how he was prejudiced by the giving of the oath prior to establishing competency and we will not reverse unless such prejudice affirmatively appears. *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984), *cert. denied*, 470 U.S. 1085 (1985).

Next, appellant argues that the trial court erred in refusing to excuse the jury during defense counsel's voir dire of Toby Markham. While we recognize that a judge should grant counsel permission to voir dire a witness outside the presence of the jury unless the request is unreasonable, trial courts are granted a wide latitude of discretion in ruling on matters occurring during the trial and decisions of the trial courts will not be reversed in the absence of an abuse of discretion. *Lasley* v. *State*, 274 Ark. 352, 625 S.W.2d 466 (1981). Even if failing to

excuse the jury was error and an abuse of discretion, we do not reverse for nonprejudicial error. *Hughes* v. *State*, 17 Ark. App. 34, 702 S.W.2d 817 (1986).

A review of the record reflects that appellant's counsel was able to thoroughly question the child with regard to his ability to understand and appreciate his obligation to tell the truth. Appellant offers no explanation as to what other questions he might have posed in the jury's absence nor does he cite any authority for his position.

In the case at bar, not only does no prejudice affirmatively appear, but appellant may have benefitted by conducting the voir dire in the jury's presence. During voir dire, the witness contradicted himself as to how he knew he would be punished if he didn't tell the truth. He first responded that he was told that at Sunday School, then stated that Mr. Arnold, the prosecutor, told him. He also stated during voir dire that he had not talked to anyone about what he was going to say and had never told the story to anyone. These statements reflected adversely on his credibility. Although a witness's statements during voir dire are to be considered only with respect to his qualifications to testify, neither party requested a cautionary instruction to that effect. The jury was therefore free to use the child's statements during voir dire to evaluate his credibility. Although we can certainly envision cases where failure to excuse the jury would constitute reversible error, no such prejudice is shown in the case at bar.

Finally, appellant argues that the trial court erred in allowing the witness Toby Markham to testify. The trial court has broad discretion in determining the competency of young witnesses and exercise of that discretion will not be disturbed on appeal absent clear abuse or manifest error. *Chappell* v. *State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986). A witness is competent if able to understand the obligation to tell the truth and the consequences of false swearing and is capable of receiving and retaining accurate impressions and communicating a reasonable statement of what has been seen, felt or heard. *Id.*

The record reveals that Toby Markham testified that he understood the difference between telling the truth and telling a lie and that he understood that it was wrong to tell a lie and that God would punish him if he told a lie. His testimony with regard

to the offense which was committed supports the conclusion that he was capable of receiving and retaining accurate impressions and that he could transmit those impressions effectively. We cannot say that the trial court erred in allowing Toby Markham to testify.

Affirmed.

CRACRAFT and MAYFIELD, JJ., agree.

Bill GARDNER *v.* HKT REALTY CORPORATION
and Albert Holliday

CA 87-354 744 S.W.2d 735

Court of Appeals of Arkansas
Division II
Opinion delivered February 17, 1988

Wilson & Associates, P.A., by: *Olan W. Reeves* and *William T. Finnegan*, for appellant.

Daggett, Van Dover, Donovan & Cahoon, by: *Albert Holliday* and *Jimason J. Daggett*, for appellees.

GEORGE K. CRACRAFT, Judge. Bill Gardner appeals from an order of the chancery court dismissing his complaint. The appellant brought this action against HKT Realty Corporation (HKT) and its president, Albert Holliday, seeking an order declaring that the term of a lease under which HKT claimed a right to possession of certain real property had terminated by its own terms and directing HKT to relinquish possession. The complaint alleged that the initial term of the lease had expired and HKT had failed to give the required notice of election to exercise its option to renew for an extended term. Appellees answered the allegations of the claim, asserting that if the notice was not given, the relief prayed for by the appellant would be "inequitable and contrary to the rules of equity and fair play."

The chancellor found that the appellant had failed to prove facts which would justify forfeiture of appellees' rights under the lease and dismissed the complaint. This appeal follows, with the appellant contending that the trial court erred in its ruling. We find no error and affirm.

The facts leading up to the expiration of the existing term of the lease are not in serious dispute. In 1966, appellee HKT entered into a lease agreement with Allen R. and Ernestine Owen under which the Owens leased to HKT a vacant square footage in an area then being developed as a shopping mall. The initial term of the lease was for twelve years at a rental of $150.00 per month, with the option of renewing for an additional eight years and two ten-year terms thereafter at increasing rentals. The lease also provided that, in the event any of the options for renewal were to be exercised, written notice should be given more than ninety days before the expiration of the term then running. By the terms of the agreement, HKT was to erect a building of specified dimensions and provide a hardtop parking area for the use of that building and the use of all other customers of the mall. It further provided that the lease would not be extended beyond forty years and that at the termination of the lease the premises would be vacated and all improvements erected on the property would become the property of the lessor. The agreement recited that it was the intention of the parties that HKT would utilize the area for a discount retail store, that the lessor would not lease any premises to a competing business, and provided for liquidated damages in the event he did so. It also provided that, at any time the lessor elected to sell the property, the lessee was granted the option of first refusal to purchase on the same terms and conditions as the offer received. The landlord was obligated to execute a mortgage on the leased property to secure the tenants' construction money loans and made provisions for division of the proceeds of insurance in case of loss by casualty and of any compensation awarded if portions of the leased property were taken by right of eminent domain.

Pursuant to the agreement, HKT erected a building and a parking lot on the leasehold at an expense in excess of $250,000.00. It subleased the building to a Gibson's Discount Store which remained on the premises until 1984. At the expiration of the initial term, HKT exercised its option to renew

for an additional term of eight years, which would expire on December 31, 1986. In December of 1984, in violation of the provisions of the lease, Owen sold his interest in the property to James L. Gardner without notifying HKT or extending to it the right of first refusal. HKT then brought an action against Owen and Gardner for specific performance of that agreement and filed a *lis pendens*. After the *lis pendens* was filed, in further violation of the lease, James L. Gardner sold the property to his brother, the appellant Bill Gardner, who was made a party to that action. In 1985, there was a further violation of the agreement in that the lessor leased a building in the mall to a discount store in violation of the non-competition agreement.

During most of 1986, negotiations were undertaken seeking settlements of the specific performance suit and the action brought on the breach of the non-competitive agreement. While these negotiations were still continuing, the deadline for giving notice of renewal for an additional ten-year term expired, and the appellant declared the lease terminated. It was HKT's position that the notice was not given because of the nature of the good-faith negotiations that were going on at the time and a belief that a renewal of the breached contract would prejudice its future rights. It contended that the acts of the appellant in terminating the lease under those circumstances were done in bad faith. The appellant denied that he had any part in any negotiations and insisted that the lease be terminated. The chancellor found that the circumstances under which the termination was declared amounted to a forfeiture, and that under the circumstances of the case it would be inequitable to enforce it. The complaint was dismissed and this appeal followed.

Appellant contends that the trial court erred in dismissing his complaint because the lease was not one for forty years but one providing for optional renewal periods, which options were not exercised. He argues that the issue is not whether a forfeiture was declared but whether a lapse had occurred because of failure to perform a condition precedent to renewal. *Uebe* v. *Bowman*, 243 Ark. 531, 420 S.W.2d 889 (1967). We agree that this is the general rule. Ordinarily the provisions for notice of intent to renew the term of a lease are not covenants to renew but establish conditions precedent to renewal and, where the notice is not given as provided in the instrument and there is no

evidence from which waiver might be found, the failure to give notice results in a lapse of the lease. *See id.*; *Synergy Gas Corp.* v. *H. M. Orsburn & Son*, 15 Ark. App. 128, 689 S.W.2d 594 (1985).

■■ However, we agree with the chancellor that there are circumstances where equity may grant relief from a delay or failure to give notice of the option to renew a lease. It is a generally accepted rule that the failure of such notice may be excused or relieved against in equity if fraud, accident, surprise, or mistake are shown to have caused the delay or there are other special circumstances warranting the relief. Under this rule, relief is warranted where on the one hand it is shown that the lessor has not changed his position or otherwise been prejudiced by the delay, and on the other that the enforcement of the covenant will result in undue and inequitable hardship to the tenant. *See, e.g., Wharf Restaurant, Inc.* v. *Port of Seattle*, 24 Wash. App. 601, 605 P.2d 334 (1979); 1 A. Corbin, *Corbin on Contracts* § 35 (1963); 1 W. Jaeger, *Williston on Contracts* § 76 n. 4 (3d ed. 1957); Annot., 27 A.L.R.4th 266 (1984); 50 Am. Jur. 2d *Landlord and Tenant* § 1187 (1970). Many of the cases recognizing this discretionary power of equity are collected in an exhaustive annotation at 27 A.L.R.4th 266 (1984), which discusses those circumstances which will, either by themselves or in combination, invoke the aid of a court of equity. Among those factors are the cause and length of the delay, the length of the duration of the lease as contemplated by the parties, and the financial consequences of enforcement to both parties. The fact that the tenant was obligated under the lease to make valuable improvements which would become the property of the landlord at the termination of the lease was one of the factors given consideration in *Linn Corp.* v. *LaSalle National Bank*, 98 Ill. App. 3d 480, 424 N.E.2d 676 (1981); *Sosanie* v. *Pernetti Holding Corp.*, 115 N.J. Super. 409, 279 A.2d 904 (1971); *J.N.A. Realty Corp.* v. *Cross Bay Chelsea, Inc.*, 42 N.Y.2d 392, 366 N.E.2d 1313, 397 N.Y.S.2d 958 (1977); and *Wharf Restaurant, Inc.* v. *Port of Seattle, supra. See also* 50 Am. Jur. 2d *Landlord and Tenant* § 1188 (1970). In all of these cases, however, the determination of the court turns not on a single factor but on the balancing of the equities between the parties, i.e., the extent to which the lessor has changed his position or otherwise been damaged, and the extent to which enforcement of

the covenant would be an unconscionable hardship on the tenant.

Here, the witnesses for both sides agreed that leases requiring the tenant to erect costly improvements must of necessity be long-term ones because of the investment required and inability to obtain financing for construction on property leased for shorter terms. For over twenty years, HKT had faithfully performed all of the obligations of the agreement and paid in excess of $42,000.00 in rentals, $250,000.00 in initial construction costs, and $40,000.00 in additional repairs to the building. There was no evidence that the landlord had changed his position in any way because of the failure to give notice of renewal or that any harm would result to him if the lease was continued. There was evidence that the appellees had never intended for the lease to lapse, and had in fact expended large sums in obtaining architectural plans for costly improvements to the property which would make it more profitable during the latter years of the extended terms of the lease. These plans had been discussed with appellant's agent, and, according to appellee Holliday, they had entered into the negotiations for settlement of the specific enforcement action. There was undisputed evidence that the appellant and his predecessors had breached the covenants of this lease in three material respects, forcing HKT to seek redress in the courts. There was no evidence that HKT was grossly negligent in failing to give the notice but rather that it had withheld notice in the good-faith belief that, while it was negotiating settlement of the lawsuits with the appellant, a renewal of the lease upon the same terms and conditions would renew it subject to those breaches and otherwise prejudice its rights in the future. There was also evidence of less than good faith on the part of appellant.

We conclude that a chancery court does have power in the exercise of its equitable discretion to relieve a tenant from the consequences of failure to give notice, where a failure to grant such relief would result in an unconscionable hardship to a tenant with no corresponding harm to the landlord. The chancellor found that it would be inequitable to enforce the provision under the peculiar and special circumstances of this case. From our review of the record, we cannot conclude that that finding is clearly erroneous.

We do not mean to imply and do not hold that any single

factor or combination of factors is controlling in bringing this equitable relief into action. We hold only that under the particular facts and circumstances of this case, when viewed as a whole, the chancellor's determination to excuse strict compliance with the notice requirement was not clearly erroneous or an abuse of his discretion.

Affirmed.

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

Edward Leon TEAS *v.* STATE of Arkansas

CA CR 87-62 744 S.W.2d 739

Court of Appeals of Arkansas
Division II
Opinion delivered February 17, 1988
[Rehearing denied March 23, 1988.]

A. Wayne Davis, for appellant.

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

GEORGE K. CRACRAFT, Judge. Edward Leon Teas appeals from his conviction of the crime of sexual abuse in the first degree for which he was sentenced to a term of eight years in the Arkansas Department of Correction. He contends that the evidence was insufficient as a matter of law to support the conviction, and that the trial court erred in refusing to permit evidence for the purposes of impeachment of hearsay statements and in denying the appellant the opportunity to establish bias on the part of a witness. We find no error and affirm.

As required by *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), this court will review a challenge to the sufficiency of the evidence prior to considering any other alleged trial errors. In deciding that issue, we review the evidence presented at trial in the light most favorable to the State and will reverse only if the verdict is not supported by substantial evidence.

Arkansas Statutes Annotated § 41-1808 (Repl. 1977) defines sexual abuse in pertinent part as a person being eighteen years or older engaging in sexual contact with a person not his spouse who is less than fourteen years of age. Sexual contact is defined as any act of sexual gratification involving the touching, directly or through the clothing, of the sex organs, buttocks, anus of a person, or the breast of a female. Ark. Stat. Ann. § 41-1801(8) (Supp. 1985).

The evidence viewed in the light most favorable to the State would establish that the victim was an eleven-year-old female and

the appellant was a forty-one-year-old male. The victim testified that the appellant was her mother's boyfriend and from time to time lived in the same dwelling with them. The minor was alone with him many times when her mother was at work. She stated that he had on a number of occasions taken off her clothes and tried to insert his penis into her vagina. She denied that he had ever penetrated her but stated that on many occasions he had gotten on top of her when neither had on any clothes and pushed on her vagina with his penis. She stated that he had also touched and squeezed her breasts. We conclude that this is substantial evidence to support a finding that for the purpose of sexual gratification appellant had touched this victim's sexual organs and breasts as prohibited by § 41-1808.

The victim testified that the acts of sexual abuse occurred on those occasions when appellant was babysitting her while her mother was at work. On cross-examination, she was asked if the appellant ever brought other women to the apartment when her mother was away and forced the victim to watch him engage in sexual acts with them. She denied that he did or that she had ever stated to anyone that he did so. Without objection, the appellant called the victim's mother and elicited from her that the child had made such a statement to her on a previous occasion. The social worker was also called to testify that the the victim's mother had stated to her that the child had made such a statement. For the purpose of eliciting testimony that the events mentioned in the child's prior statement had never occurred, the appellant then attempted to call to the stand the woman alleged to have been mentioned and identified in the prior statement as the person observed in the apartment. The appellant contends the trial court erred in excluding that testimony as further impeachment of the victim's credibility. We do not agree.

Our rules of evidence provide the methods by which the credibility of a witness may be impeached. Rule 608 provides that one may be impeached by opinion or reputation evidence as to character for truthfulness or cross-examined about specific instances of conduct which bear on that issue. Rule 609 permits impeachment by evidence of prior convictions of a felony or other crimes involving dishonesty. Rule 613 provides the conditions under which extrinsic evidence of prior inconsistent statements of a witness may be introduced for purposes of impeachment. Rule

806 governs impeachment of the credibility of the declarant of an out-of-court statement which is admitted through another witness as an exception to the hearsay rule.

None of these rules, however, permit impeachment by extrinsic evidence on a collateral matter. It is well settled that, when a witness is cross-examined on a matter collateral to the issue being tried, his answer cannot be contradicted by the party putting the question. This rule applies only to questions put on cross-examination and does not apply to answers to questions asked on direct examination. The test in determining whether the issue is a collateral one is whether the cross-examining party is entitled to prove the issue as part of his case. *Garst* v. *Cullum*, 291 Ark. 512, 726 S.W.2d 271 (1987); *James* v. *State*, 11 Ark. App. 1, 665 S.W.2d 883 (1984); *Vanderpool* v. *State*, 4 Ark. App. 93, 628 S.W.2d 576 (1982). The issue here was whether the appellant had sexually abused the victim by sexual contact as defined in our statutes. Whether he forced this child to watch him participate in other illicit acts is entirely collateral to the issues of this case.

Appellant presents the novel argument that, since he elicited the testimony of the victim's mother concerning the victim's prior inconsistent statement on direct examination, the rule cited in *Garst* has no application. He contends that he should have been allowed under Rule 806 to prove that the victim's prior statement was false. Rule 806 provides as follows:

> Attacking and supporting credibility of declarant.—If a *hearsay statement*, or a statement defined in Rule 801(2)(iii), (iv), or (v), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination. [Emphasis added.]

While we do not agree that this rule has any application

to this case for several reasons, we think it sufficient to say that the rule provides for attacking the credibility of a declarant only where hearsay statements are admitted under exceptions to the hearsay rule. "Hearsay" is defined as a statement, other than one made by the declarant while testifying at trial, offered to prove the truth of the matter asserted. Ark. R. Evid. 801(c). The question put to the victim's mother was not intended to prove the truth of the child's prior assertion but only that the prior statement had in fact been made. It was not a hearsay statement and Rule 806 could have no application.

During the direct examination of a defense witness, counsel asked the witness if he had ever seen the victim's mother angry at the appellant. The witness answered that he had. He was then asked, "What was she wanting to do to Leon?" The court excluded the testimony on the State's hearsay objection. The appellant argues that the trial court erred because he was not offering the statement to prove the truth of the matter asserted but to prove bias on the part of the victim's mother.

Our courts have stressed the importance of allowing wide latitude with respect to the admission of evidence relevant to the bias of the witness. *See Simpson* v. *State*, 274 Ark. 188, 623 S.W.2d 200 (1981). Here, however, the appellant stated only that he was offering the evidence to prove bias and made no proffer of any evidence or other statement to indicate what he expected the witness to state. Where an appealing party asserts as error the refusal of the court to hear testimony of a witness, the record must disclose the substance of the offered testimony so the court may determine whether or not its rejection was prejudicial. The failure to proffer evidence so that the appellate court can make that determination precludes review of the issue on appeal. *Jackson* v. *State*, 284 Ark. 478, 683 S.W.2d 606 (1985); *Willett* v. *State*, 18 Ark. App. 125, 712 S.W.2d 925 (1986); Ark. R. Evid. 103(a)(2).

Affirmed.

CORBIN and MAYFIELD, JJ., agree.

William CALDWELL *v.* THE BLYTHEVILLE, ARKANSAS SCHOOL DISTRICT, NUMBER FIVE

CA 87-186 746 S.W.2d 381

Court of Appeals of Arkansas
Division II
Opinion delivered February 17, 1988
[Supplemental Opinion on Denial of Rehearing
March 23, 1988.]

John W. Walker, P.A., by: *John W. Walker* and *Lazar M. Palnick; Mitchell & Roachell*, by: *Richard Roachell*, of counsel: *J. LeVonne Chambers* and *Gail Wright*, for appellant.

Gardner and Steinsiek, for appellee.

JAMES R. COOPER, Judge. The appellant, William Caldwell, was a non-probationary teacher employed by the appellee school district. In April 1986, the appellant was notified that the superintendent was recommending that his contract not be renewed. The appellant requested a hearing before the school board which was held on May 26, 1986. At the close of the hearing, the board voted to uphold the superintendent's recommendation of non-renewal. The appellant appealed the decision to the circuit court. The circuit court found that the appellee had complied with the Teacher Fair Dismissal Act and afforded the appellant full due process, and that the board did not act arbitrarily, capriciously or discriminatorily. The circuit court dismissed the appeal. The appellant now argues four points before this court: that the school board's decision violated his first amendment right to freedom of speech; that the school board's decision was arbitrary and capricious; that the school board violated section 80-1266.6 of the Arkansas Teacher Fair Dismissal Act; and that the school board erred in failing to make particularized findings on the evidence presented against him. We affirm.

The record reveals that on December 10, 1985, the principal of West Jr. High School, Idell Jenkins, presented a new grading policy to the teachers at a faculty meeting. The appellant objected to this policy, and began discussing it with Mr. Jenkins. Mr. Jenkins characterized the appellant's attitude as "belligerent." The assistant principal, Paul Stubblefield, and another teacher, Zeak Lacy, also testified that the appellant was belligerent and quite upset. At one point the appellant stood up and pointed his finger at the principal. When the principal attempted to move on to other matters, the appellant attempted to return the discussion to the grading policy. The appellant admitted that he had objected loudly to the new policy.

The next day, Mr. Jenkins left a memo in the appellant's box

that indicated he did not approve of the appellant's conduct in the faculty meeting. The appellant then requested a conference with Mr. Jenkins and the assistant superintendent for instruction, D.B. Meador. At that conference the appellant again became upset and accused Meador and Jenkins of conspiring to have him fired and he called Jenkins a liar four times. On December 17, 1985, Dr. Frank Ladd, the superintendent, wrote a letter to the appellant reprimanding him for his behavior in both the conference and the faculty meeting and warned the appellant that any further such conduct would result in the appellant's suspension and dismissal. Dr. Ladd also warned the appellant that his conduct would be considered when the decision was made whether to recommend renewal or non-renewal of his contract.

On February 28, 1986, Jenkins attempted to hold a conference with the appellant concerning some complaints he said he received about the appellant's using class time to discuss the lack of black cheerleaders at the school. According to Jenkins, the appellant was not responsive; he asked several times if Jenkins was through yet and eventually walked out of the conference. On April 18, 1986, Ladd sent a certified letter to the appellant informing him that he was recommending to the board that the appellant's contract not be renewed. The letter listed the four following reasons for non-renewal:

1. Your conduct at the faculty meeting of December 10, 1985, where the teachers of your school were instructed relative to grading practices, and at which meeting you became disrespectful of your principal over the instructions that were being given.

2. The conference of December 11, 1985, between yourself and your principal wherein you became belligerent with the principal, raised your voice and called him a liar on more than one occasion.

3. The conference of February 28, 1986, between yourself and your principal regarding complaints from your students relative to your comments made during classroom hours. At this conference,

again you became belligerent and accused your principal of attempting to have you fired.

4. The continuing problem with your principal and attitude toward him for the past several years as reflected by report of such conferences, copies of which have been furnished to you.

As noted earlier, a hearing was held before the board, which voted not to renew the appellant's contract, adopting the superintendent's reasons as the basis for its action. On appeal to the circuit court, no additional evidence was taken, but the case was submitted on the written record of the hearing before the board, a copy of the Teacher Fair Dismissal Act together with the minutes of the school board meeting whereby the Act was adopted as the policy of the board, and the appellant's answers to interrogatories.

The appellant first argues that the board violated his right to freedom of speech. It is the appellant's contention that the statements he made at the December faculty meeting and the comments he made in class concerning the lack of black cheerleaders was constitutionally protected and the board's action in dismissing him for making the statements violated his right to make the statements. However, this issue was not presented to either the board or the circuit court. We cannot find any mention of this argument in either the record or the abstract. We have consistently held that we will not consider issues raised for the first time on appeal and that this rule applies equally to constitutional issues which are not raised in the court below. *Ferguson* v. *City of Mountain Pine*, 278 Ark. 575, 647 S.W.2d 460 (1983). Therefore, we do not reach the merits of the appellant's first point.

The appellant next argues that the board's decision was arbitrary and capricious. We disagree. Any certified teacher who has been employed continuously by a school district for three years or more 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 reasonable rules and regulations promulgated by the school board. Ark. Stat. Ann. § 80-1266.9(b) (Supp. 1985). The determination not to renew a teacher's contract is a matter within

the discretion of the school board, and the reviewing court cannot substitute its opinion for that of the board in the absence of an abuse of that discretion. *Leola School District* v. *McMahan*, 289 Ark. 496, 712 S.W.2d 903 (1986). In our judicial review of the trial court's decision, we affirm unless the court's findings were clearly erroneous. *Moffit* v. *Batesville School District*, 278 Ark. 77, 643 S.W.2d 557 (1982). It is not our function to substitute our judgment for the circuit court's or the school board's. *Green Forest Public Schools* v. *Herrington*, 287 Ark. 43, 696 S.W.2d 714 (1985).

The question before the trial court was whether the school board refused to renew the appellant's contract for reasons permitted by the Teacher Fair Dismissal Act. *Leola, supra.* A school board's action in this regard is arbitrary and capricious only if the board's decision is not supportable on any rational basis. *Leola, supra; Lee* v. *Big Flat Public Schools*, 280 Ark. 377, 658 S.W.2d 389 (1983).

Jenkins and Meador both testified that they felt the conduct exhibited by the appellant was disrespectful and insubordinate. Although they agreed that the appellant eventually complied with directives, they also indicated that every conference they had with him ended up in a verbal fight. Ladd testified that the decision not to renew was a culmination of several years of this type of conduct. The appellant testified that he had a personality conflict with Jenkins; that Jenkins was jealous of him; that Stubblefield was jealous of him because he was popular with the students; that Meador was insecure; and that Ladd was confused. In *King* v. *Elkins*, 22 Ark. App. 52, 733 S.W.2d 417 (1987), we refused to adopt a definition of insubordination that required a showing of willful disobedience. In the case at bar, the appellant eventually did comply with the directives of his supervisors, but only after verbal outbursts. It is not irrational for a principal to expect his teachers to not only comply with his directives, but to also act in a respectful, courteous and professional manner. This is not to say that a teacher may not disagree with school policy; however, a teacher should not expect to be able to shout at his supervisors, call them liars, accuse them of conspiring against him, and walk out on conferences without action being justified by the board.

The appellant next argues that the board dismissed him in violation of Ark. Stat. Ann. § 80-1266.6. That statute provides:

> Whenever a superintendent or other school administrator charged with the supervision of a teacher believes or has reason to believe that a teacher is having difficulties or problems meeting the expectations of the district or its administration and the administrator believes or has reason to believe the problems could lead to termination or nonrenewal of contract, the administrator shall bring the problems and difficulties to the attention of the teacher involved in writing and shall document the efforts which have been undertaken to assist the teacher to correct whatever appears to be the cause for potential termination or nonrenewal.

It is appellant's contention that the district failed to give him notice of his problems and that he was dismissed before he had an opportunity to remedy them. We disagree.

The statute relied upon by the appellant is part of the Teacher Fair Dismissal Act. It is sufficient if the board has acted in substantial compliance with the Act. *Lee, supra.* Superintendent Ladd addressed a letter to the appellant on December 17, 1985, which specifically stated that the appellant's behavior was unprofessional and insubordinate and that such behavior would not be tolerated. The appellant was warned that any further such behavior would result in his immediate termination and suspension. In his brief the appellant alleges that this letter was not mailed to him, but placed in his personnel file and he did not see it until April. However, the record reveals that the appellant was testifying about four written documents at the time, and he alleged that he did not see two of them. It is impossible to tell from the record to which documents he is referring. Furthermore, the appellant did receive a copy of a memo from his principal the day after the faculty meeting which stated that the appellant's conduct was "asinine and unprofessional" and that he would no longer "get into a running dialogue with any teacher in a faculty meeting concerning any issue while the rest of the faculty sit there and suffer." Lastly, the appellant admitted that, beginning in 1980, he had received letters which resulted from conferences on his failure to follow directions. These actions prior to 1985 will not

be considered as evidence of the appellant's conduct because the letters were not made part of the record and there is no evidence that they were in compliance with § 80-1266.6. However, the appellant's admissions are clearly persuasive of whether or not he had notice of his difficulties. We find that while it is unclear in the record as to whether the board strictly complied with § 80-1266.6, it is clear that there was substantial compliance and that the appellant had written notice of his objectionable conduct which occurred in the 1985-86 school year. *Murray* v. *Altheimer-Sherrill Public Schools*, 294 Ark. 403, 743 S.W.2d 789 (1988).

The appellant's last argument also concerns the Teacher Fair Dismissal Act. At the close of the school board meeting, and after the board had voted not to renew the appellant's contract, there was discussion about the fact that the statute requires a finding by the board as to correctness or incorrectness of the reasons for nonrenewal. The board then decided to vote on the issues right away. Using the four reasons Ladd had written in his letter to the appellant, the board voted that each of the four reasons was true. The Act requires that subsequent to any hearing granted a teacher the school board shall, by majority vote, make specific written conclusions with regard to the truth of each reason given the teacher in support of the recommended termination or nonrenewal. Ark. Stat. Ann. § 80-1266.9(c) (Supp. 1985). It is the appellant's argument that the board's adoption of the superintendent's reasons for dismissal falls short of the statutory requirements. The appellant then cites cases which were decided under the Administrative Procedure Act and points out that this Court has not hesitated to reverse an agency decision when it is not explicitly backed by specific findings of fact.

The Teacher Fair Dismissal Act does not require that the board make specific findings of fact, only that it make specific written conclusions with regard to the truthfulness of the reasons for dismissal. As stated above, this Court will not reverse if the board has substantially complied with the Act. *Lee, supra.* The conclusions set out by Ladd were clear, specifically identified objectionable conduct exhibited by the appellant, and specifically pointed out the occasions when the conduct occurred. The board heard extensive testimony about the appellant's conduct and about the occasions when it occurred. We cannot say that it was error for the board to vote to adopt the reasons given by the

superintendent and to vote on whether or not they found them to be true.

Because the board substantially complied with the Teacher Fair Dismissal Act and because the board's actions were not arbitrary, capricious, or discriminatory, we cannot say that the trial court's dismissal was clearly erroneous, and we affirm.

Affirmed.

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

Supplemental Opinion on Denial of Rehearing
March 23, 1988

JAMES R. COOPER, Judge. The appellant has filed a petition for rehearing requesting that we consider the appellant's argument that the school board's decision not to renew the appellant's teaching contract violated his first amendment right to free speech. We have agreed to consider the appellant's argument.

A court deciding a claim by a public employee that his or her first amendment rights have been violated must engage in a three-step analysis. *Bowman* v. *Pulaski County Special School District*, 723 F.2d 640 (8th Cir. 1983). The court must determine

(1) whether the employee has carried the burden of demonstrating that he engaged in protected activity, *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); (2) whether the protected activity was a substantial or motivating factor in the actions taken against the employee, *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 287 (1977); and (3) whether the employer has defeated the employee's claim by demonstrating that the same action would have been taken in the absence of the protected activity, *Givhan* v. *Western Lines Consolidated School District*, 439 U.S. 410 (1979).

In this case the appellant argues that his discussion with his class concerning the number of black cheerleaders was protected speech. Even if we were to agree with the appellant that this was constitutionally protected speech, the appellant has not demonstrated that he was dismissed because of the speech. Thus the appellant has not met the second requirement of the test stated in *Bowman*. The district made it clear that the appellant's contract was not being renewed because of his insubordination and not because of his speaking to his class about the cheerleader situation or because he disagreed with a new grading policy. These facts have been adequately discussed in our previous opinion and need not be restated here. Because the appellant has not demonstrated that the claimed protected activity was the motivating factor behind the board's actions, we deny the petition for rehearing.

Roger SHUFFIELD *v.* STATE of Arkansas

CA CR 87-85 745 S.W.2d 630

Court of Appeals of Arkansas
Division II
Opinion delivered February 24, 1988
[Rehearing denied March 23, 1988.]

Wilson, Engstrom, Corum & Dudley, by: *Wm. R. Wilson, Jr.*, and *Timothy O. Dudley*, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with aggravated robbery and kidnapping. After a jury trial, he was convicted of those charges and sentenced to ten years in the Arkansas Department of Correction for aggravated robbery and twenty years for kidnapping, to be served consecutively. From those convictions, comes this appeal.

For reversal, the appellant contends that the trial court erred in refusing to exclude evidence on the ground that the State failed to comply with discovery rules and orders, and in allowing a witness to identify the appellant at trial in the absence of a finding that the State proved the witness's in-court identification was untainted by a pretrial photographic lineup. We find the appellant's first point to be meritorious, and we reverse.

The record contains evidence to show that a robbery took place on July 5, 1982. Three men gained admittance to the residence of James D. Sherman by claiming to be police officers. Once inside, one of the robbers placed a gun to Sherman's head, told him to lay down on the floor, and took the money from his billfold. Jacqueline Clark, who had been visiting Sherman, was taken to the living room at gunpoint. Sherman's sister, Montana Murry, returned to the residence from a party and was likewise forced to remain in the living room. Sherman's niece, also returning from the party, turned and ran from the gunmen and escaped. The robbers told Sherman that they were taking him to the police station, and compelled him to get into a car with them. Sherman testified that he, the three men who had entered the house, and a woman who had waited in the car drove off. A controversy arose between his abductors over whether they should kill Sherman; after the woman and one of the men refused to have any part in a killing, the car was stopped and Sherman was released. At trial, Mr. Sherman, Ms. Clark, and Ms. Murry identified the appellant as one of the gunmen.

Sherry Crawleigh also testified at trial, stating that she was

the woman who waited in the car during the robbery. She testified that her identification of the appellant as one of the gunmen was based on a period of association of approximately four hours, beginning on the afternoon of July 4, 1982, when the appellant sold a handgun to Robert Overton at her apartment. At 11:00 p.m. the same day she saw the appellant, accompanied by Robert Overton and Tommy Denton, in a store. She joined the group, which went to Overton's residence around midnight. She stated that they smoked marijuana at Overton's house and that, in the course of the evening, she also smoked hashish, drank whiskey and beer, took diet pills and several varieties of "speed," and used cocaine. Ms. Crawleigh could not recall whether or not she had also taken LSD. She stated that she told Denton, Overton, and the appellant that she had bought some hashish from James Sherman; the men decided that Sherman had cheated her and that they would go to Sherman's residence to get her money back. She testified that the appellant left and returned with a badge and a pistol, that Denton armed himself with a shotgun, and that Overton armed himself with a knife. They then drove to Sherman's house, where the three men forced their way inside while she waited in the car. Finally, Ms. Crawleigh testified that the men returned to the car with Sherman, and that Sherman was released after she opposed the appellant's suggestion that they kill him. On cross-examination, Ms. Crawleigh conceded that she identified one of the robbers as "Jim" in her statement to the police, and stated that she had since decided that the man she identified as "Jim" was the appellant, Roger Shuffield.

The record also shows that the appellant's attorney received neither a witness list nor information regarding any possible criminal history of James Sherman, although these items were requested in the appellant's discovery motion and the trial court entered two separate orders requiring the State to comply with the discovery motion. At a hearing on the appellant's motion for a new trial, the appellant's attorney stated that the only information obtained in response to his discovery motion was essentially a copy of the police file, containing the names of the people who testified at trial but also containing the names of several dozen other people who did not testify. Officer R.D. Branch, a policeman involved in the investigation of this case, testified at trial that

he believed that certain reports and files compiled by the police were not properly delivered to the Hot Spring County Prosecutor.

As his first point for reversal, the appellant contends that the trial court erred in refusing to exclude evidence on the ground that the State failed to comply with discovery rules and orders. Specifically, the appellant argues that it was error to permit Montana Murry to testify because the State did not provide a witness list naming her as a witness. Ms. Murry was allowed to testify at trial over the appellant's objection; in addition to identifying the appellant, she testified that she had given a statement to police officers after the robbery and abduction.

The State is required, upon timely request, to disclose the names and addresses of persons the prosecuting attorney intends to call as witness at any hearing or trial. A.R.Cr.P. Rule 17.1. The State does not contend that Ms. Murry was properly listed as a witness in the case at bar, but argues that Ms. Murry presented herself to the prosecution on the day before trial, that the State did not previously intend to call her as a witness, and that any prejudice resulting from the failure to timely notify the appellant that she would testify was cured because the defense attorney was permitted a brief interview with Ms. Murry prior to trial. We do not agree. Information held by the police is imputed to the prosecution's office. *Lewis* v. *State*, 286 Ark. 372, 691 S.W.2d 864 (1985). In the case at bar, Ms. Murry stated at trial that, after the robbery and kidnapping, she gave a statement to a police officer indicating that she was present when the events in question occurred and that she could identify the criminals. Ms. Murry also stated that she provided the police officer with her name and address. In *Lewis*, the Supreme Court held that Rule 17.1 was not complied with where the prosecution had no knowledge of a witness until the morning of trial, but that witness had given crucial information to the police which was imputed to the office of the prosecution. *Lewis* v. *State, supra.* In the case at bar, Ms. Murry's testimony regarding her statement to the police is uncontradicted, and there is evidence that all of the information available to the police was not properly delivered to the prosecutor's office. Under these circumstances, we think that *Lewis* v. *State, supra*, is controlling, and hold that the State did not

comply with A.R.Cr.P. Rule 17.1.

Nor do we think that the brief interview with Ms. Murry afforded to defense counsel was sufficient to cure the error. It is apparent that the appellant's defense was based on the theory of misidentification, and that one of the persons who identified him at trial was neither in full possession of her faculties during the events in question nor able to correctly identify the appellant by name. The appearance, on the day before trial, of a new witness capable of identifying the appellant as one of the gunmen was thus prejudicial to the appellant's case. In cases where prejudice will result from the State's failure to comply with pretrial discovery rules, the trial court must take appropriate action to remove that prejudice by excluding the evidence, ordering discovery, granting a continuance, or entering another order appropriate under the circumstances. *Nelson* v. *State*, 274 Ark. 113, 622 S.W.2d 188 (1981). Under the circumstances presented in the case at bar, we think that the prejudice could have been cured only through exclusion or continuance, and hold that the trial court erred in failing to so act. *See Lewis* v. *State, supra*. We therefore reverse and remand for a new trial.

We address the remaining issues advanced by the appellant because they might arise again in a new trial. He argues that the trial court erred in permitting Mr. Sherman to identify the appellant at trial because the State did not disclose that Sherman had identified the appellant in a pre-trial lineup, but instead responded to the appellant's discovery motion by providing information indicating that Sherman had been unable to identify the appellant. The appellant contends that the State deliberately withheld information concerning Sherman's pre-trial identification of the appellant. The State asserts that it had no knowledge of any pre-trial identification of the appellant by Sherman, and suggests that no such identification had occurred.

We cannot say, on the basis of the record before us, that the State suppressed information concerning a pre-trial identification of the appellant by Sherman. Although Sherman testified that he identified the appellant at a lineup, Officer Branch stated that Sherman did not identify the appellant when shown a

photographic lineup which included the appellant's photograph. Moreover, the discovery information which assertedly misled defense counsel has not been included in the record. Finally, the appellant cites no authority to support the proposition that the State is required to disclose that a victim had identified the defendant in a pre-trial lineup. Rule 17.1(a)(i), A.R.Cr.P., requires only that the names and addresses of witnesses be disclosed by the prosecuting attorney. Although a witness's statement relating to pre-trial identification would be subject to inspection upon the defendant's motion after that witness had testified at trial, *see* Ark. Stat. Ann. § 43-2011.3 (Repl. 1977), no such motion was made in the case at bar. Instead, the appellant made a pre-trial motion to exclude the witness's testimony on the ground that he had not been informed through discovery that Sherman had identified him in a lineup. Because the information requested by the appellant was not subject to discovery until after Sherman testified, Ark. Stat. Ann. § 43-2011.3(a) (Repl. 1977), we hold that the trial court did not err in denying the motion to exclude Sherman's in-court identification.

Next, the appellant argues that the trial court erred in failing to remove the prejudice resulting from the State's failure to furnish the appellant a record of prior criminal convictions of persons the prosecuting attorney called as witnesses at trial. We agree. Such disclosure is required by A.R.Cr.P. Rule 17.1(a)(vi), and we think that the appellant's motion required a direct response, either listing the potential witnesses' criminal convictions or stating that no record of convictions had been found after diligent, good-faith efforts by the prosecuting attorney to obtain such information from other government personnel. A.R.Cr.P. Rule 17.3(a); *see Dever* v. *State*, 14 Ark. App. 107, 685 S.W.2d 518 (1985). There was testimony at trial to show that Sherman had sold hashish to Ms. Crawleigh on numerous occasions, and, at a hearing on a motion for a new trial, the appellant's trial attorney testified that officers of the Hot Spring County Sheriff's Department had informed him that James Sherman had a criminal history. We find that the appellant was prejudiced by the State's failure to properly respond to his discovery request for the criminal records of potential witnesses, and hold that the trial court erred in failing to take appropriate steps to remove that

prejudice. *Nelson* v. *State, supra.*

Finally, the appellant contends that the trial court erred in denying his motion to suppress Ms. Crawleigh's anticipated in-court identification of the appellant. The motion to suppress alleged that Ms. Crawleigh had identified the appellant after viewing a photograph provided by police officers; that no live or photographic lineup was conducted; and that the identification procedure was so impermissibly suggestive that it gave rise to a very substantial likelihood of irreparable misidentification, thus depriving the appellant of due process of law.

Where an out-of-court identification is so unnecessarily suggestive that there is a substantial likelihood of mistaken identification, due process is denied in violation of the Fourteenth Amendment to the United States Constitution. *Stovall* v. *Denno*, 388 U.S. 293 (1967); *Williams* v. *State*, 5 Ark. App. 20, 632 S.W.2d 235 (1982). If the identification procedure is found to be impermissibly suggestive, the court must determine whether, under the totality of the circumstances, the identification was nevertheless reliable. *Neil* v. *Biggers*, 409 U.S. 188 (1972). Reliability is the linchpin in determining the admissibility of identification testimony in a criminal trial, *Manson* v. *Brathwaite*, 432 U.S. 98 (1977), and reliable identification testimony is admissible despite an unnecessarily suggestive identification procedure. *Id.; Jones* v. *State*, 15 Ark. App. 283, 692 S.W.2d 775 (1985). The inquiry thus has two branches: first, the defendant must show that the pretrial identification procedure was so suggestive as to taint subsequent identifications. *Neil* v. *Biggers, supra; United States* v. *Briggs*, 700 F.2d 408 (7th Cir.), *cert. denied*, 462 U.S. 1110 (1983); *Jones* v. *State, supra.* If suggestiveness is established, the State bears the burden of proving that the subsequent identification was reliable. *Jones* v. *State, supra; see Sims* v. *State*, 258 Ark. 940, 530 S.W.2d 182 (1975); *see generally* N. Sobel, *Eyewitness Identification* (2d ed. 1987).

A pretrial hearing was conducted on the motion to suppress Ms. Crawleigh's identification of the appellant. Officer Branch testified that he interviewed Ms. Crawleigh in the course of his investigation of the robbery and kidnapping. During the inter-

view, Ms. Crawleigh referred to one of the participants in the crime as "Jim," and she identified the appellant, Roger Shuffield, as the man she had referred to as "Jim" after she had been shown the appellant's photograph. Officer Branch stated that he was present when Ms. Crawleigh identified the appellant from the photograph, but he could not recall showing it to her. He admitted that, although standard police procedure requires that the showing of a photographic display be noted on the police report of an interview, no such notation appeared in the police report he completed after interviewing Ms. Crawleigh. Instead, the report reflected only that she had been shown "a photograph." Officer Branch had in his possession a display consisting of six photographs, including one of the appellant, which he had prepared, but he could not recall how, or even if, the display was presented to Ms. Crawleigh. The display was not offered into evidence. Ms. Crawleigh also testified at the hearing, stating that she was shown more than three photographs, and that from these she identified the appellant, Denton, and Overton. She could not recall the precise number of photographs shown her, nor could she recall whether she was shown one photographic display or several. She further stated that she could identify the appellant as one of the men she accompanied on the night of the crime regardless of the photograph. The trial court found that there was no evidence to show that the photographic display tainted her ability to identify the appellant, and denied the motion to suppress.

Citing *Sims* v. *State*, 258 Ark. 940, 530 S.W.2d 182 (1975), the appellant contends that the court erred in requiring him to bear the burden of proving that the witness's identification was tainted by suggestive identification procedures. We note that *Sims* was based upon the sixth amendment right to counsel that attaches when physical lineups are conducted, and is thus not directly on point in the case at bar, where a due process violation was alleged. *See Williams* v. *State*, 5 Ark. App. 20, 632 S.W.2d 235, 237 (1982). Moreover, as we have noted, the State's burden of proving the reliability of the subsequent identification arises only after the defendant has made an initial showing that the pretrial identification procedure was impermissibly suggestive. Although it may be true that a defendant's burden of showing suggestiveness may be impossible to meet when the photographic

display is unavailable and evidence of the display's composition is inadequate for purposes of determining its propriety or suggestiveness, we hold that the trial court reached the correct result. In ruling on the admissibility of the subsequent identification, he stated that neither the photographic display nor the interview with police officers "tainted *her ability to identify*" the appellant. We think that this statement clearly implies that the trial judge found that Ms. Crawleigh's identification was based upon an independent source, and that such a finding was supported by Ms. Crawleigh's testimony that she knew the appellant as the man who was with her on the night in question, regardless of the lineup.

Reversed and remanded.

CORBIN, C.J., agrees; JENNINGS, J., concurs.

Robert L. TIPP and Agnes B. Tipp *v.* UNITED BANK OF DURANGO, COLORADO

CA 87-296 745 S.W.2d 141

Court of Appeals of Arkansas
Division I
Opinion delivered February 24, 1988

James W. Haddock, for appellant.

Hani W. Hashem, for appellee.

JAMES R. COOPER, Judge. The appellee in this civil case, United Bank of Durango, brought an action to set aside a conveyance of real property from Robert Duffy and Roberta Duffy to the appellants, Robert L. Tipp and Agnes B. Tipp. The chancellor found that the conveyance from the Duffys to the Tipps was a fraudulent conveyance made to hinder and delay the United Bank of Durango in its attempts to collect an obligation owed to it by the Duffys, and set the conveyance aside. From that decision, comes this appeal.

For reversal, the appellants contend that the chancellor erred in finding that the transfer of property was a fraudulent conveyance. We affirm.

The record shows that the appellants entered into a contract with the Duffys on January 5, 1984, whereby they agreed to purchase certain real property in Chicot County, Arkansas. The contract provided for a total purchase price of $66,000.00, and acknowledged the receipt of an initial payment of $13,200.00. It further provided that the appellants were to pay the Duffys the balance of $52,800.00, plus interest at the rate of ten percent per annum, in ten annual installments of $5,280.00 plus interest, with the first installment being due on January 5, 1985. On January 4, 1985, the appellants paid the Duffys $5,808.00. On March 22, 1985, the appellants made a final payment of $40,000.00 by a check made payable to the Duffys and Ted Gunderson. Although the total amount paid by the appellants was less than the amount they owed under the terms of the contract, the Duffys executed a deed conveying the property to the appellants. The deed was filed for record on April 1, 1985.

On November 5, 1984, the Bank of Durango obtained a default judgment against the Duffys in the District Court of La Plata County, Colorado, for an amount in excess of $20,000.00. On February 19, 1985, the Bank filed a petition in the Circuit Court of Chicot County, Arkansas, to register the Colorado judgment. That judgment was entered and enrolled in Chicot County on May 23, 1985. On February 6, 1986, the appellee filed this action to set aside the conveyance from the Duffys to the appellants. The chancellor found that the Duffys, who did not appear or defend, were in default, and that their insolvency was

established by the appellee's undenied allegation of insolvency; that the appellee had obtained a judgment against the Duffys in the amount of $19,176.94 plus interest, costs, and attorney's fees; that Robert L. Tipp was, in February 1985, aware that there was pending litigation that would affect the property, and that the appellants subsequently purchased the property for a price that was approximately $17,500.00 less than the amount still owed on the contract; that the transaction was a hurried one involving no title work or title insurance; and that the conveyance was fraudulent. Although the conveyance was set aside, the appellants were found to have a first and paramount equitable lien on the property in the amount of $19,008.00, reflecting payments of $13,200.00 and $5,808.00 made before the appellants learned of the Duffys' financial difficulties.

The appellants contend that the evidence does not support a finding of fraudulent intent on their part, and that the chancellor erred in finding the transaction to be a fraudulent conveyance. Arkansas Statutes Annotated § 68-1302 (Repl. 1979) provides that:

> Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods and chattels, or things in action, or of any rents issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents and profits thereof, and every bond, suit, judgment, decree or execution, made or contrived with the intent to hinder, delay or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts or demands, as against creditors and purchasers prior and subsequent, shall be void.

Fraudulent intent is necessary to bring a conveyance within the purview of § 68-1302, *Ralston Purina Co.* v. *Davis*, 256 Ark. 972, 511 S.W.2d 482 (1974), and both the vendor and the vendee must act with fraudulent intent before the conveyance will be regarded as fraudulent. *Hemingway* v. *Glasper*, 291 Ark. 172, 722 S.W.2d 866 (1987). The party who alleges and relies upon fraud bears the burden of proving fraud by a preponderance of the evidence, *Ouachita Electric Cooperative Corp.* v. *Evans-St. Clair*, 12 Ark. App. 171, 672 S.W.2d 660 (1984); fraud may be established by circumstantial evidence where the circum-

stances are so clear and well-connected as to clearly show fraud. *Id.* Badges of fraud, i.e., circumstances that are recognized as indicia of fraudulent intent, include insolvency or indebtedness of the transferor, inadequate or fictitious consideration, retention of property by the debtor, the pendency or threat of litigation, secrecy or concealment, and the employment of unusual business practices in the disputed transaction. *Id.; Bank of Sun Prairie* v. *Hovig*, 218 F. Supp. 769 (W.D. Ark. 1963).

The appellants argue that the land-sale contract between themselves and the Duffys had the effect of taking the transaction out of the purview of fraudulent conveyance law, because the contract was entered into before the alleged fraudulent intent arose, and because the lien on the foreign judgment did not attach until after the conveyance had occurred. We do not agree. Although it is true that a judgment lien attaches only to a judgment debtor's interest in the land, and that the lien ceases to exist when the debtor's interest in the land is eliminated, *Snow Brothers Hardware Co.* v. *Ellis*, 180 Ark. 238, 21 S.W.2d 162 (1929), this rule is for the protection of junior creditors and innocent purchasers, and does not prevent a creditor of the grantor from electing to treat a fraudulent conveyance of the debtor's property as void, and instituting legal process to subject the property to his debt. *Ward* v. *Sturdivant*, 81 Ark. 73, 98 S.W. 690 (1906). The appellants' argument must therefore fail unless the chancellor erred in finding that their intent was fraudulent.

The appellants assert that they should be treated as good-faith purchasers because there is no evidence that they had notice of the Duffys' financial difficulties or the pendency of litigation at the time that they entered into the land-sale contract. We disagree. The rule is that the purchaser's good faith must exist both at the time of the purchase and at the time the consideration is paid. *Massie* v. *Enyart*, 32 Ark. 251 (1877). The reasoning underlying this rule is explained in 1 G. Glenn, *Fraudulent Conveyances and Preferences* § 244 (1940), in a section entitled, "Part Payment by Grantee before Notice of Debtor's Intent":

> If [a man who buys property subject to outstanding equities] knows of the equity or has notice of it before he buys, he should not buy. If he learns of it after he has signed

> a contract, he should go no further with performance; but he is protected to the extent of payments that were made before knowledge came.
>
> The same rule applies here. The creditor, of course, holds no equity in his debtor's property . . . but he does have a statutory right to avoid the transfer. Faced with this right of the creditor, the grantee's duty is to stop short just so soon as he learns that the debtor's purpose has been fraudulent. This can not harm the grantee, because he will be accorded a lien on the property to the extent of the payments he has made while in a state of innocence. Such is the rule of sound equity that applies to all such cases, and to all sorts of property, real and personal.

(Footnotes omitted). *See also* 37 Am. Jur. 2d *Fraudulent Conveyances* § 123 (1968).

The question which presents itself under the above-cited authorities is whether the chancellor erred in finding that the appellants acted with fraudulent intent at the time that the final consideration was paid. Although chancery cases are tried *de novo* on appeal, the chancellor's findings of fact will not be reversed unless they are clearly against the preponderance of the evidence, giving due regard to the chancellor's superior opportunity to assess the credibility of the witnesses. *Cox* v. *Cox*, 17 Ark. App. 93, 704 S.W.2d 171 (1986). The appellant, Robert L. Tipp, admitted at trial that, after paying the down payment and the initial installment on the contract, he learned in February 1985 that the appellee was pursuing a judgment against the Duffys, and that he then borrowed from his family to secure funds to close the transaction; that no abstract was prepared and no title insurance was secured with respect to the conveyance; and that Mr. Duffy had, prior to closing, informed him that there were "problems with the property." Bill Holloway, the attorney secured by the appellee to register the Colorado judgment in Arkansas, testified that he spoke to Mr. Tipp after the petition to register the judgment was filed, that Mr. Tipp was aware that steps were being taken to register the judgment against Mr. Duffy, that Mr. Tipp informed him that he had a contract to purchase the land and requested information about the status of the foreign judgment, and that Holloway informed Tipp that he

could try to purchase the property from the appellee. There was also evidence that the price that the appellants paid for the property was substantially less than the price originally specified in the land-sale agreement. Under these circumstances, we cannot say that the chancellor clearly erred in finding the conveyance to be fraudulent, and we affirm.

Affirmed.

JENNINGS and COULSON, JJ., agree.

George PULTS, et al. *v.* CITY OF SPRINGDALE

CA 87-298 745 S.W.2d 144

Court of Appeals of Arkansas
Division I
Opinion delivered February 24, 1988
[Rehearing denied March 23, 1988.]

Evans & Evans, by: *James E. Evans, Jr.*, for appellant.

Stanley, Harrington & Watson, P.A., by: *Michele A. Harrington*, for appellee.

JOHN E. JENNINGS, Judge. In 1965, the City of Springdale entered into a lease agreement with Airways Flying Service, Inc., in which the city agreed to lease to Airways an airplane hangar area of the city airport. The hangars were already built and Airways agreed to keep them in good repair during the term of the lease. The lease was for a one year period but gave Airways an option to renew "for successive terms of one year." In 1970, Airways assigned its interest under the lease to George Pults, the

appellant.

In the early 1980's, the city began planning for the expansion of the airport. Part of the plan was to use the portion of the property leased to Pults as a parking lot. In 1984, the city notified Pults that his lease would not be renewed, and Pults sued the city for breach of contract. The circuit court granted the city's motion for summary judgment, ruling that the lease violated the rule against perpetuities, or, in the alternative, the lease should be construed to provide for only a single renewal.

Although the lease does not violate the rule against perpetuities, the trial court correctly construed the lease contract to provide for only a single renewal, and we therefore affirm.

It was proper for the circuit judge to decide this case by summary judgment because no material facts were in genuine dispute. A.R.C.P. Rule 56. *Childs* v. *Berry*, 268 Ark. 970, 597 S.W.2d 134 (Ark. App. 1980). The construction and legal effect of a written contract are to be determined by the court as a question of law, except where the meaning of the language depends on disputed extrinsic evidence. *Arkansas Rock & Gravel Co.* v. *Chris-T-Emulsion Co., Inc.*, 259 Ark. 807, 536 S.W.2d 724 (1976).

The lease agreement between the original parties provided:

> [T]he following described tract of land lying adjacent . . . to the Springdale Municipal Airport has been set aside for the erection of hangars for the housing and storage of planes by private individuals: [Legal description omitted.]
>
> For and in consideration of the sum of $16.00 and other good and valuable considerations, the receipt of which is hereby acknowledged, the Lessor agrees to lease and deliver possession to the Lessee, and the Lessee agrees to accept a row of hangars on the South side of the above described lands consisting of eight (8) spaces and office space.
>
> Easements are established and reserved as follows: In favor of the hangars erected on the above described tract, and common to each of said hangars for the purpose of the mutual, reciprocal and interdependent use of the same by

the owners of said hangars for any part of the projected area for the purpose of entrance and exit taxi ways over and across the said area and to and from the said Municipal Airport.

. . . .

The Lessee hereby agrees that he will not construct any new hangar in the space herein let, without the written consent of the Lessor.

Lessee further agrees that the hangars now erected on the space hereinabove referred to shall never be used for any purpose other than the storage of aircraft.

Lessee further agrees to keep the space hereinabove referred to and the hangars erected thereon in good repair and in neat and orderly appearance.

That Lessee hereby agrees that no change or alteration will be made to the hangars erected on the space hereinabove let without the consent of the Lessor, and that possession of said tract will be returned to the Lessor upon the termination of this lease unless sublet by the Lessee herein by the consent of the Lessor.

Both parties agree that his lease shall be effective from the 1st day of June, 1965 for a one year period ending on the 31st day of May, 1966, and should Lessee well and faithfully perform the covenants and conditions contained herein, said Lessee is hereby given an option to renew this lease for successive terms of one year each, commencing immediately upon the termination of the preceding period and upon the same terms and conditions as are herein contained by giving written notice to Lessor of his intent to exercise said option or options in writing by certified mail, addressed to Lessor. Notice of intent to exercise the option for the first successive year may be given any time during the primary term of this lease, and notice to exercise option for the second and successive year or years may be given any time during the extended term thereof.

It is further agreed by and between the parties hereto, that should the Federal Aviation Agency at some future date

> during the term of this Lease Agreement or any extension thereof, require the removal of said hangars from their present location, that the Lessee herein agrees to removal of said hangars at his sole cost and expense.
>
> Witness our hands this the 1st day of June, 1965, binding ourselves, our heirs, successors and assigns.

The right to perpetual renewal of a lease is not forbidden by law, either upon the ground that it creates a perpetuity or a restraint on alienation, or upon any other ground, and such provisions, when properly entered into, will be enforced. *Lonergan* v. *Connecticut Food Store, Inc.*, 168 Conn. 122, 357 A.2d 910 (1975), citing *Nakdimen* v. *Atkinson Improvement Co.*, 149 Ark. 448, 233 S.W. 694 (1921); *see also* 61 Am. Jur. 2d *Perpetuities and Restraints on Alienation* § 52 (1981); *Rutland Amusement Company, Inc.* v. *Seward*, 127 Vt. 324, 248 A.2d 731 (1968). However, agreements for perpetual renewal of leasehold interests are not favored in the law. *See Nakdimen, Lonergan,* and *Rutland Amusement Company*; *McLean* v. *United States*, 316 F. Supp. 827 (E.D. Va. 1970). A provision in a lease will not be construed as conferring a right to a perpetual renewal unless the language is so plain as to admit of no doubt of the purpose to provide for perpetual renewal. *Lonergan; McLean; see also* 50 Am. Jur. 2d *Landlord and Tenant* § 1171 (1970). A perpetuity will not be regarded as created from an ordinary covenant to renew. *McLean.* There must be some peculiar and plain language before it will be assumed that the parties intended to create it. *Winslow* v. *B & O R. Co.*, 188 U.S. 646 (1903).

The general rule is that where the lease provides in general terms for a renewal, the lessee is only entitled to a single renewal. *Nakdimen*, cited above. Leases which may have been intended to be renewable in perpetuity will nevertheless be construed as importing but one renewal if there is any uncertainty in that regard. *McLean, supra*, citing 50 Am. Jur. 2d *Landlord and Tenant* § 1171, at 56.

In construing any contract the court seeks to ascertain the intent of the parties. *See Schnitt* v. *McKellar*, 244 Ark. 377, 427 S.W.2d 202 (1968). In determining whether or not the parties intended to create a perpetual lease, courts have considered, among other factors, whether the lease contains:

1. words customarily used to create a perpetual lease, such as "forever," "for all time," or "in perpetuity." *Lonergan; McLean; Kilbourne* v. *Forester*, 464 S.W.2d 770 (Mo. App. 1971).

2. an "escalation clause," *i.e.*, a clause providing for increased rentals through the years. *Lonergan; Vokins* v. *McGaughey*, 206 Ky. 42, 266 S.W. 907 (1924); *Tipton* v. *North*, 185 Okl. 365, 92 P.2d 364 (1939).

3. restrictions on use and subletting. *McLean; Rutland Amusement Company, supra.*

The lease in question provided for rental at a nominal sum and there was no provision for the possibility of increased rent in the future. There is no peculiar language indicating that a perpetual lease was intended. There are significant restrictions on use. The lease also contemplates that the Federal Aviation Agency (FAA) might require removal of the hangars. These factors indicate that the parties did not intend to create a perpetual lease. The specific language of the renewal clause in this lease does not require the opposite conclusion.

> The employment in leases of such terms as "successively," "every succeeding term," or other language of similar import, does not necessarily imply a covenant for perpetual renewals, especially when such terms, when considered with the context of the lease and the acts of, and circumstances surrounding, the parties, indicate a contrary intention.

50 Am. Jur. 2d § 1171, at 57.

In *Lonergan*, the lease provided that it "shall automatically be extended for a period of one year and thence from year to year." In *McLean*, the lease provided that it might, "at the option of the lessee, be renewed from year to year." In *Geyer* v. *Lietzan*, 230 Ind. 404, 103 N.E.2d 199 (1952), the lease was for a two year period but gave the lessee the option "of renewing this lease with and under all the terms and conditions thereof, successively" upon giving written notice 30 days "before the expiration of any two year period of this lease." In each case the court construed the lease to give the lessee the right to renew only once.

We conclude that the trial court's interpretation of the lease agreement was correct.

Affirmed.

COOPER and COULSON, JJ., agree.

Emma SAVAGE *v.* GENERAL INDUSTRIES

CA 87-277 745 S.W.2d 644

Court of Appeals of Arkansas
Division II
Opinion delivered March 2, 1988

Youngdahl & Youngdahl, P.A., by: *Thomas H. McGowan*, for appellant.

Friday, Eldredge & Clark, by: *Frederick S. Ursery*, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Workers' Compensation Commission. Appellant, Emma Savage, appeals from an order of the full Commission refusing to declare that appellant was not personally responsible for payment of medical treatment found to be unreasonable or unnecessary under Arkansas Statutes Annotated § 81-1311 (Supp. 1985). We affirm.

Appellant sustained a compensable injury on August 26, 1983, while employed by appellee, General Industries. Appellee authorized appellant to be treated by her chiropractor, Dr. William Traylor, for her work-related injury. Dr. Traylor began the authorized treatments in March 1985 and discontinued them at appellant's request in July 1985 after she was notified by appellee that the chiropractic bills were excessive. Dr. Traylor invoiced appellee in the amount of $1,955 for appellant's treatments. Appellee paid $1,010 of the invoice and contended that the remainder was unreasonable. Dr. Traylor then invoiced appellant for the unpaid balance, and appellant requested a hearing before the ALJ to determine the necessity and reasonableness of the chiropractic services of Dr. Traylor. Following a hearing on the issue, the ALJ found $1,110 of Dr. Traylor's charges were reasonable and necessary without addressing whether appellant was responsible for paying the $845 balance on the doctor's invoice. Appellant appealed to the full Commission seeking a declaration that she was not personally responsible for the unpaid portion of the chiropractic bill found to be unreasonable. The Commission declined to do so on the basis that it lacked authority. Appellant appeals to this court from the decision of the Commission and argues the following point for reversal: 1) The Workers' Compensation Commission erred in refusing to hold that the appellant was not personally responsible for payment of the medical treatment found to be unreasonable or unnecessary under Arkansas Statutes Annotated § 81-1311.

The statute provides, in pertinent part, as follows:

> Medical and Hospital Services and Supplies. The employer shall promptly provide for an injured employee such medical, surgical, hospital, and nursing service, and

> medicine, crutches, artificial limbs and other apparatus as may be reasonably necessary for the treatment of the injury received by the employee. If the employer fails to provide the services or things mentioned in the foregoing sentence within a reasonable time after knowledge of the injury, the Commission may direct that the injured employee obtain such service or thing at the expense of the employer, and any emergency treatment afforded the injured employee shall be at the expense of the employer.
>
> All persons who render services or provide things mentioned herein shall submit the reasonableness of the charges to the Commission for its approval, and when so approved, shall be enforceable by the Commission in the same manner as is provided for the enforcement of compensation payments . . . .

Appellant concedes that *Hulvey* v. *Kellwood Co.*, 262 Ark. 564, 559 S.W.2d 153 (1977) gives the Commission the authority to determine the reasonableness of medical charges. In *Hulvey*, the Arkansas Supreme Court affirmed the Commission's finding that there had been "an over utilization of services and excessive charges" in chiropractic treatment and that the bill should be reduced by forty percent (40%), and held the Commission had the "undeniable authority" to determine whether the charges were reasonable. In the case at bar, appellant also recognizes that the determination of what constitutes reasonable and necessary medical treatment under Arkansas Statutes Annotated § 81-1311 is a fact question for the Commission. *Wright Contracting Co.* v. *Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

However, on appeal appellant does not question the Commission's ruling that only $1,110 of Dr. Traylor's bill was reasonable and necessary. Instead, appellant argues that although it has never been done, this court can confer upon the Commission the authority to interpret Arkansas Statutes Annotated § 81-1311 to hold that a worker who sustains a compensable injury will not be personally responsible for payment of medical expenses found to be unreasonable or unnecessary. Appellant argues that because this court found in *Sloat Chiropractic Clinic* v. *Steve Evans Datsun*, 17 Ark. App. 161, 706 S.W.2d 181 (1986) that physicians have derivative rights to recover fees in compen-

sable injury cases, it follows that health care providers are prohibited from collecting an amount greater than that approved by the Commission. To support this argument, appellant cites 2 A. Larson, *The Law of Workmen's Compensation*, § 61.12(k) (1983) which states that "the normal rule is that the obligation to pay medical bills runs from the employer to the physician or hospital. It follows that a hospital or doctor may not collect fees from the employee over and above the amount paid by the employer." This statement of workers' compensation law relies on the following three cases: *Bell* v. *Samaritan Medical Clinic, Inc.*, 60 Cal. App. 3d 486, 131 Cal. Rptr. 582 (1976); *Queen* v. *Agger*, 287 Md. App. 342, 412 A.2d 733 (1980); *Intermountain Health Care, Inc.* v. *Indus. Comm'n*, 657 P.2d 1289 (Utah 1982). Appellant cites *Queen* and *Bell* in support of her contention; however, an examination of the cases reveals that they are distinguishable from the present case. In both cases each state had an express statute prohibiting collection of medical fees greater than the amount approved as reasonable by the Commission. Arkansas law has no such express statutory language.

In *Bell*, the Workers' Compensation Appeal Board brought its own action to enjoin the practice of hospitals and doctors charging industrially injured employees for the difference between their fee amount and the amount paid by the employee's workers' compensation insurer. The California Court of Appeals affirmed an order granting a preliminary injunction because under the compensation laws of that state, the appeals board had exclusive jurisdiction to determine the reasonableness of legal or medical services, and no agreement is enforceable, valid, or binding in excess of the reasonable amount established by the appeals board. There the court noted that care providers should seek their own relief from the Board if dissatisfied with the amount paid under workers' compensation.

In *Queen*, a psychotherapist sued a claimant on an oral contract for $2,000 which represented the amount not approved by the Commission. The court declared the alleged oral contract unenforceable because the state of Maryland has a statute which expressly provides that health care providers rendering services which employers are required to provide for injured employees are prohibited from charging or collecting an amount greater than that approved by the Commission.

Appellant failed to cite *Intermountain*, which is consistent with Arkansas Workers' Compensation Law. There the Supreme Court of Utah reversed a district court judgment and held, in pertinent part, that hospitals could hold industrially injured patients personally responsible for any amounts for hospital care not paid by the Commission. The court noted that the reasonable value of services determined by the Commission measures the amount which the employer must pay to the employee for hospital care, but the hospital is not bound by such determination when it proceeds to collect from its patient. Holding that the Workers' Compensation Act is binding upon employers and employees but not upon others, the court stated that the Commission's power to disallow unjust and unreasonable charges was not meant to interfere with the normal hospital-patient relationship. Like Utah, Arkansas Workers' Compensation Law does not give the Commission any express or implied power to relieve an injured claimant of any medical charges found to be unreasonable.

The Commission in the present case pointed out that appellant did not contend that the ALJ erred but instead requested that the Commission render a declaration that appellant not be held personally liable for the portion of the chiropractic charges not approved. The Commission stated that it did not have the power through precedent or statute to render a declaratory judgment or to settle disputes between debtors and creditors. We find no provision within the Workers' Compensation Act which confers upon the Commission the power to grant the declaration sought by appellant. Had the legislature intended to grant the Commission the authority to grant the relief sought by appellant, it could have done so in clear and definite language in the statutes. This was not done. The only statutory power of the Commission is to order payment of those medical charges it finds to be reasonably necessary.

While we are sympathetic to appellant's request, the remedy to this situation lies with the legislature not the judiciary. It will be necessary for the Arkansas General Assembly to make a determination that the Commission has the authority to hold injured workers not personally liable for the medical charges found by it to be injust or unreasonable. *See Ark. Sec'y of State* v. *Guffey*, 291 Ark. 624, 727 S.W.2d 826 (1987). Before this court

may reverse a decision of the Commission, it must be convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Howard* v. *Ark. Power & Light Co.*, 20 Ark. App. 98, 724 S.W.2d 193 (1987). Therefore, we affirm the Commission's decision.

Affirmed.

CRACRAFT and MAYFIELD, JJ., agree.

PRIER BRASS *v.* Prentice WELLER and Second Injury Fund

CA 87-300 745 S.W.2d 647

Court of Appeals of Arkansas
Division I
Opinion delivered March 2, 1988

Barrett, Wheatley, Smith & Deacon, for appellant.

Branch, Thompson & Philhours, A Professional Association, for appellee and cross-appellant Prentice Weller.

E. Diane Graham, for appellee Second Injury Fund.

GEORGE K. CRACRAFT, Judge. Prier Brass appeals from an award of attorney's fees and fifteen percent safety-violation penalty assessed against it by the Arkansas Workers' Compensation Commission, contending that both awards were erroneously computed. The claimant, Prentice Weller, cross-appeals contending that the separate attorney's fee awarded for prosecution of the safety-violation claim was inadequate. We agree with the appellant and reverse and remand the matter for further proceedings.

Prentice Weller sustained a compensable injury while employed by Prier Brass on July 9, 1984. His attending physician assigned him an anatomical rating of five-percent disability to the body as a whole. The employer accepted the claim and paid all benefits due under the act for such a disability. Sometime later, subsequent examinations assigned disability ratings of ten percent to the body as a whole. The appellant, while apparently willing to accept the additional rating, failed to pay compensation for the additional five-percent disability and several medical bills submitted to it by the claimant. This caused the claimant to employ counsel who subsequently pressed the claim before the Commission and impleaded the Second Injury Fund. Although the record does not disclose the cause or nature of the appellee's

prior impairment, it was stipulated that he was permanently and totally disabled, that the Second Injury Fund was liable for ninety percent of the total disability, and that appellant was liable only for the remaining ten percent.

The administrative law judge then scheduled a hearing to determine the issues of controversion, allowance of attorney's fees, and the assessment of a penalty against the employer for safety violations pursuant to Ark. Stat. Ann. § 81-1310(d) (Supp. 1985). That section provides that, where an injury is caused in substantial part by the failure of the employer to comply with Arkansas statutes or regulations pertaining to the safety of its employees, the compensation provided for shall be increased by fifteen percent and that the increase shall be paid into the Second Injury Fund, less any attorney's fees attributable to it.[1]

The administrative law judge found that there had been a violation of safety regulations within the meaning of that section and assessed the fifteen-percent statutory penalty against Prier Brass, but restricted its computation to that compensation payable for the ten-percent of disability attributable to the employer. The administrative law judge also determined that the employer had controverted only five percent of appellee's claim and allowed his attorney a maximum fee to be calculated on the amount of compensation payable for the five percent controverted. On appeal, the Commission modified the administrative law judge's ruling limiting the computation of attorney's fees and ordered the appellant to pay the maximum attorney's fees allowable based on ninety-five percent of the amount of compensation payable for total disability, including the ninety percent for which the Second Injury Fund had accepted liability. It also ordered that the fifteen percent safety-violation penalty be computed on the total award. We agree with the employer that the Commission erred in these conclusions and reverse and remand the matter for further proceedings not inconsistent with this opinion.

■ In imposing liability for attorney's fees based on the

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[1] This section was amended effective July 1, 1986, and now provides for a penalty of twenty-five percent to be paid to the claimant instead of the Second Injury Fund. *See* Ark. Code Ann. § 11-9-503 (1987).

entire compensation payable for total permanent disability, the Commission relied almost entirely on our decision in *Hot Spring County Bicentennial Park* v. *Walker*, 271 Ark. 688, 610 S.W.2d 268 (Ark. App. 1981). We conclude that this reliance was misplaced because *Walker* is distinguishable on its facts in several material aspects. In *Walker*, the employer controverted all disability in excess of fifty percent to the body as a whole. The Commission found that as a result of his injuries, which aggravated a preexisting condition, the worker had suffered total disability. It correctly concluded that when an accidental injury aggravates a prior one, the one in whose employ the precipitating injury occurs is liable for all the consequences naturally flowing from that incident. *Bearden Lumber Co.* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). In *Walker*, the Commission rejected the employer's claim that his attorney's fee liability should be computed on fifty percent of the first $50,000.00 he would be obligated to pay under Ark. Stat. Ann. § 81-1310(c)(2) (Repl. 1976) and not on the additional sums payable for a total disability which would under that section be payable from the death and total disability fund. In *Walker*, as the employer was deemed to have *caused* and been responsible for the entire resulting disability for which compensation was ordered to be paid, we held that it was not error for the Commission to compute attorney's fees on the entire amount of compensation payable to the employee as a result of its actions instead of limiting that obligation to that portion of the responsibility for which the employer was required to respond in compensation payments.

Here, the employer did not cause the entire disability suffered by the claimant. The employment caused only ten percent of that disability, and the employer controverted only five percent. It was stipulated, and the Commission found, that there was Second Injury Fund liability for the remaining ninety percent of the claimant's present disability. That ninety percent was not *caused* or contributed to by the claimant's employment with Prier Brass. It was caused by a prior impairment which, by definition, was manifested and actually causing disability to that extent at the time of the injury and which continued to be the cause of it thereafter. *Osage Oil Co.* v. *Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985).

Nor can we agree with the Commission that "[t]he fact that

Prier Brass shifted liability for ninety percent of the award to the Fund does not change the fact that it controverted the entire award in excess of five percent." Such reasoning completely loses sight of the fact that on such a stipulation the obligation of that liability shifted to the Fund by the express wording of Ark. Stat. Ann. § 81-1313(i)(1) Supp. 1985), which insures to the employer of an impaired worker that he shall be liable to a worker who suffers injury on the job for no greater disability than that resulting from the injuries sustained while the worker is in his employ. The very purpose of the Second Injury Fund was to provide relief to an employer who hires a person with prior impairment so that the employer is not to be held responsible for more disability than that caused by that work place. Second Injury Fund liability is premised on the fact that the prior disability is *in esse* at the time of employment and is neither caused or contributed to by the employment. *Osage Oil Co.* v. *Rogers, supra.*

One of the purposes of Ark. Stat. Ann. § 81-1332 (Supp. 1985) is to place the burden of litigation expense on the party which makes litigation necessary by controverting the claim. Placing this responsibility on the employer is intended to encourage prompt and honest settlements and to compensate an employee for delay. *Aluminum Company of America* v. *Henning*, 260 Ark. 699, 543 S.W.2d 480 (1976); *Hot Spring Bicentennial Park* v. *Walker, supra.* It is not the purpose of that section to compel an employer to make settlement of a claim for which he has no responsibility and is not liable, or to compensate an employee for delay in collecting funds from the Second Injury Fund for which that employer is likewise not liable. Section 81-1332 makes express provision for the allowance of fees on amounts of compensation controverted by and awarded from the Second Injury Fund. They are to be paid by the Fund. Where an employer can successfully show that a portion of a worker's present disability was caused by a "prior impairment" within the meaning of our Second Injury Fund legislation, it cannot be held liable for that disability attributable to the prior impairment. Rather, the employer's liability in such a case is limited to that which results from injuries sustained while in the employment. It must necessarily follow that the employer should not be punished by asserting those rights which are so clearly set forth in the act.

For the same reason, we conclude that the Commission erred in ordering that the fifteen percent safety-violation penalty be computed on the basis of total disability rather than the ten percent caused by the injury suffered while working for the appellant. Arkansas Statutes Annotated § 81-1310(d) (Supp. 1985) provides as follows:

> Where established by clear and convincing evidence that an injury or death is *caused* in substantial part by the failure of an employer to comply with any Arkansas statute or official regulation pertaining to the health or safety of employees, compensation or death benefits provided for by this Act shall be increased by fifteen percent (15%). This fifteen percent (15%) increase shall be paid into the Second Injury Fund, less any attorney's fee attributable to it. [Emphasis added.]

Here, the accidental injury *caused* no more than ten-percent disability. The remaining ninety percent had been caused by a prior impairment which was causing disability to that extent at the time of the claimant's second injury.

We also conclude that the Commission erred in its award of a separate $500.00 attorney's fee to be paid out of the fifteen-percent statutory penalty. The manner in which attorney's fees are determined and the maximum fees allowable are provided in § 81-1332. Section 81-1310(d) provides that, in cases where safety violations are established, the compensation payable for the injury caused by the violation "shall be increased by fifteen percent." Neither of these sections makes any provision for assessment of a separate fee based on the amount of the penalty. The attorney's fee allowable in this case should be computed on the amount of compensation controverted and awarded, "increased by fifteen percent." Then, pursuant to § 81-1310(d), the fifteen-percent penalty, minus that portion of the attorney's fee attributable to the penalty, is to be paid to the Fund. The view we take of this issue makes it unnecessary for us to address the claimant's argument on cross-appeal that the additional $500.00 fee was inadequate.

This case is reversed and remanded for further proceedings and entry of an order allowing a safety-violation penalty and attorney's fee not inconsistent with this opinion.

COULSON and MAYFIELD, JJ., agree.

Hale Thomas JOHNSON *v.* STATE of Arkansas

CA CR 87-157 745 S.W.2d 651

Court of Appeals of Arkansas
Division I
Opinion delivered March 2, 1988

William R. Simpson, Jr., Public Defender, *Jerry Sallings*, Deputy Public Defender, by: *Llewellyn J. Marczuk*, Deputy Public Defender, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with possession of a controlled substance with intent to deliver, a violation of Ark. Stat. Ann. § 82-2617 (Supp. 1985) [Ark. Code Ann. § 5-64-401 (1987)]. After a jury trial, he was convicted of that charge and sentenced as an habitual offender to twenty-one years in the Arkansas Department of Correction. From that conviction, comes this appeal.

For reversal, the appellant argues that the quantity of the controlled substance he possessed was insufficient to sustain the verdict, and that the trial court thus erred in denying his motion for a directed verdict. We affirm.

The record shows that Officers Hensley and Whitehead of the Little Rock Police Department were assigned to undercover work in the street crimes unit in August 1985. On the night in question, the appellant approached the undercover officers and offered to sell them marijuana or cocaine. The appellant suggested that the officers pay him for the drugs "up front." The officers refused to pay him before seeing the drugs, however, and the appellant got in the officers' van, directing them to several different locations before telling them to stop at a house on Wolfe Street. The appellant told the officers that he was going to buy cocaine, and entered the house. He returned shortly thereafter with a packet containing white powder. The appellant told the officers that the packet contained "D's," a street term for Dilaudid, and that the price was $25.00. Hensley then identified himself as a police officer. As the appellant was being placed under arrest, he dropped four packets, which Officer Whitehead retrieved. An analysis performed by the Arkansas State Crime Laboratory showed that the packets contained .095 grams of a substance made up of both cocaine and Carisoprodal, the latter being a non-controlled muscle relaxant. No evidence was presented at trial to show the proportionate amounts of cocaine and Carisoprodal present in the powder.

The appellant asserts that, because he presented the substance for sale as Dilaudid, he did not knowingly deliver cocaine to the officers. The issue raised bears on the appellant's intent, a state of mind which necessarily must be inferred, *Walker* v. *State*, 10 Ark. App. 189, 662 S.W.2d 196 (1983), and the real question is whether the State produced sufficient evidence to

present a fact question to the jury. *Id.* There was evidence that the appellant initially asked the officers if they wanted to buy marijuana or cocaine, that the officers answered affirmatively, that the purpose of directing the officers on a journey ending at the house on Wolfe Street was to purchase cocaine, and that the appellant stated upon arriving at the house that he was going inside to get cocaine. We hold that there was sufficient evidence of the appellant's intent to submit the issue to the jury, and that the conflicts in the evidence were for the jury to resolve. *See Walker* v. *State, supra.*

Next, the appellant contends that the amount of cocaine present in the substance was insufficient to be applied to the use commonly made of cocaine, and that possession of the substance with intent to deliver therefore did not constitute an offense. We do no agree. The Arkansas Supreme Court dealt with the question of possession of small quantities of controlled substance in *Berry v. State*, 263 Ark. 446, 565 S.W.2d 418 (1978), where it was held that a conviction for possession of heroin with intent to deliver could not be sustained when the only heroin in the appellant's possession consisted of trace amounts found in a bottle cap. The *Berry* Court noted that the State must show that the accused possessed a specified quantity of a particular drug with the intent to deliver that drug, and reasoned that proof of intent to deliver was lacking in that case because it could not be argued that the appellant therein intended to recover and sell the minute amount of heroin in the bottle cap. *Berry*, 263 Ark. at 449-50. *Id.* at 450. We think that the facts of *Berry* are distinguishable from those presented in the case at bar because here there was evidence that the appellant had procured the substance with the intent of selling it to the undercover officers, and had in fact already stated the price at the time he was arrested. Under these circumstances, we think that the quantity of cocaine possessed by the appellant was sufficient to support his conviction for possession of cocaine with intent to deliver, and we affirm.

Affirmed.

COULSON and JENNINGS, JJ., agree.

Mary R. LOFTON *v.* Floyd J. LOFTON

CA 87-242 745 S.W.2d 635

Court of Appeals of Arkansas
En Banc
Opinion delivered March 2, 1988

Jerry Cavaneau, for appellant.

House, Wallace & Jewell, P.A., by: *Philip E. Dixon* and

Mark F. Hampton, for appellee.

MELVIN MAYFIELD, Judge. Appellant, Mary Lofton, was awarded an uncontested divorce from appellee, Floyd Lofton. She appeals the chancellor's decision regarding the division of certain personal property and his failure to award alimony.

The parties were married in Texas in 1960. At the time of the divorce, they had been married twenty-four years and had two grown daughters. Appellant was a school teacher and had worked during the marriage for all but about six years when the children were small. The appellee attended law school at night during the marriage and at the present time is a circuit judge.

In support of the argument that she deserved an award of alimony, appellant cites *Boyles* v. *Boyles*, 268 Ark. 120, 594 S.W.2d 17 (1980), in which the Arkansas Supreme Court stated certain factors to be considered when setting alimony. The appellant applies these factors to her case and concludes the chancellor erred in failing to award alimony.

The award of alimony in a divorce action is not mandatory, but is a question which addresses itself to the sound discretion of the chancellor, *Bohannon* v. *Bohannon*, 12 Ark. App. 296, 675 S.W.2d 850 (1984), and the chancellor's decision will not be disturbed absent a clear abuse of that discretion, *Neal* v. *Neal*, 258 Ark. 338, 524 S.W.2d 460 (1975); *Weathers* v. *Weathers*, 9 Ark. App. 300, 658 S.W.2d 427 (1983). Without any discussion of the details of the evidence, we simply state that we do not find the chancellor's decision with respect to alimony to be a clear abuse of his discretion.

Appellant also argues that the chancellor erred in holding that a portion of the funds evidenced by two jointly held certificates of deposit was the separate property of appellee. As a result of his father's death, appellee and his brother each inherited one-half interest in a house. Appellee bought his brother's interest with approximately $5,000.00 in marital funds. Subsequently, appellee sold the house for $25,000.00, added another $5,000.00 in marital funds to that amount and purchased two $15,000.00 certificates of deposit in the names of Floyd and Mary Lofton. The interest earned by one of the certificates of deposit went into a joint checking account and the interest of the

other went into a joint savings account.

The chancellor held that because marital funds had been used to purchase the brother's half interest in the house, $12,500.00 of the proceeds of the sale of the house was marital property. However, he held the other $12,500.00 to be appellee's separate property by inheritance. Appellant contends that the appellee, by placing the proceeds from the sale of the house into certificates of deposit bearing both her name and appellee's name, converted the property to a tenancy by the entirety and that, under Ark. Stat. Ann. § 34-1215 (Supp. 1985), it must be divided equally. The appellee, however, says that the principal amounts of the certificates of deposit were never utilized by either party during the marriage and argues that he did not intend to make a gift of the inherited funds to his wife.

In *Ramsey* v. *Ramsey*, 259 Ark. 16, 531 S.W.2d 28 (1975), the Arkansas Supreme Court discussed tenancy by the entirety property as follows:

> We have long recognized that there may be a tenancy by the entirety in personal property, including choses in action. . . .
>
> The acquisition of property, whether realty or personalty, by persons who are husband and wife by an instrument running to them conjunctively, without specification of the manner in which they take, usually results in a tenancy by the entirety. . . . There is at least a presumption that the taking in such circumstances is by the entirety. . . . The fact that the consideration given for the property taken in the two names belonged to the husband only is of little, if any, significance where he is responsible for the property being taken in both names as the presumption is that there was a gift of an interest by the husband to the wife, even though the wife may have no knowledge of the transaction . . . .
>
> . . . .
>
> The presumption is strong, and it can be overcome only by clear, positive, unequivocal, unmistakable, strong, and convincing evidence, partially because the alternative is a resulting trust the establishment of which, under such

> circumstances, requires that degree of proof. . . . [Citations omitted.]

259 Ark. at 19-20.

We pause at this point to note that the words "positive," "unequivocal," and "unmistakable" were used in *Ramsey* to describe the standard of evidence which had to be met in order to overcome the rebuttable presumption that arises when property is taken in the names of both husband and wife. We also note, however, that these words were taken from cases in other states. The Arkansas cases cited in *Ramsey* express the standard in terms of evidence that is "clear and convincing," *Simpson* v. *Thayer*, 214 Ark. 566, 217 S.W.2d 354 (1949), citing *Parks* v. *Parks*, 207 Ark. 720, 182 S.W.2d 470 (1944), and evidence that is "clear, satisfactory and convincing," *Hubbard* v. *McMahon*, 117 Ark. 563, 576, 176 S.W. 122 (1915). And in a case decided after *Ramsey*, the court said that clear and convincing evidence is evidence by a credible witness whose memory of the facts about which he testifies is distinct, whose narration of the details thereof is exact and in due order, and whose testimony is so clear, direct, weighty, and convincing as to enable the fact finder to come to a clear conviction, without hesitance, of the truth of the facts related; the court concluded: "It is simply that degree of proof which will produce in the trier of fact a firm conviction as to the allegation sought to be established." *Kelly* v. *Kelly*, 264 Ark. 865, 870, 575 S.W.2d 672 (1979). *See also Glasgow* v. *Greenfield*, 9 Ark. App. 224, 228, 657 S.W.2d 578 (1983). It is, therefore, our opinion that the addition of the other adjectives in *Ramsey* does not raise the required quantum of proof beyond that set out in *Kelly* and *Glasgow*.

We relied upon *Ramsey* and its presumption in *Warren* v. *Warren*, 11 Ark. App. 58, 665 S.W.2d 909 (1984), in holding that real property purchased as husband and wife was tenancy-by-the-entirety property and had to be dissolved according to Ark. Stat. Ann. § 34-1215 (Supp. 1983). We again relied on *Ramsey* and the presumption in *Lyle* v. *Lyle*, 15 Ark. App. 202, 691 S.W.2d 188 (1985), when we held that the chancellor erred in crediting each spouse with that portion of nonmarital funds contributed by each toward the down payment on forty acres deeded to them as tenants by the entirety. We stated: "In such a

situation, there arises a presumption of a gift from the party furnishing the consideration. . . . Although this presumption is rebuttable, it is a strong one." 15 Ark. App. at 204. It is also clear that an estate by the entirety may be created in personal property. *Ramsey, supra; Black* v. *Black*, 199 Ark. 609, 135 S.W.2d 837 (1940); *Union & Mercantile Trust Co.* v. *Hudson*, 147 Ark. 7, 227 S.W. 1 (1921).

One of the questions involved in *Black* v. *Black, supra*, was whether Mr. Black, by changing a bank checking account from his individual name to the names of "Mr. and Mrs. W. G. Black," had created an estate by the entirety in the bank deposit. The appellate court said the question depended upon Mr. Black's intention in opening and carrying his checking account in the names of himself and his wife and affirmed the trial court's holding that an estate by the entirety had been created. The court also said that this estate would have continued only in so much of the account as had not been withdrawn by one spouse or the other. However, the court relied upon *Dickson* v. *Jonesboro Trust Co.*, 154 Ark. 155, 242 S.W. 57 (1922), for this statement, and in discussing *Dickson*, the court in *Black* said that the husband in *Dickson* had withdrawn portions of the deposit "with the wife's consent." We think that *Black* and *McEntire* v. *McEntire*, 267 Ark. 169, 590 S.W.2d 241 (1979), both stand for the proposition that neither spouse can destroy the estate by the entirety without the other's consent, although as far as the bank is concerned payment to either relieves the bank of liability. *See also Union & Mercantile Trust Co.* v. *Hudson, supra*, for the rule that withdrawal of the funds by one tenant does not mean that tenant thereby acquires sole ownership as against the other.

While the withdrawal of the funds by one spouse without the consent of the other is not involved in the present case, we think it important to note that the winner of the race to the bank does not determine ownership of the money withdrawn except in so far as the bank's liability is concerned. This is made clear by *McGuire* v. *Benton*, 232 Ark. 1008, 342 S.W.2d 77 (1961), where the trial court held that all the money originally in a joint savings account was estate-by-the-entirety property even though the wife had withdrawn most of it by the time of the final hearing in the case. As stated, this issue is not before us in the present case but we do have to decide whether the trial court was correct in holding that

$12,500.00 of the money represented by the certificates of deposit belonged to the appellee as his separate property.

The ownership of property obviously depends upon the facts in each case. The rationale involved has not always been the same but a careful reading of our cases discloses that under the facts they have been decided correctly and in accordance with the above case law. For example, in *Hayse* v. *Hayse*, 4 Ark. App. 160-B, 630 S.W.2d 48 (1982), we held that the chancellor correctly found that the wife had not destroyed the nonmarital status of her inheritance. In that case she had purchased a money-market certificate in both her name and that of her husband "so if he ever needed to borrow money he would have collateral." However, when the certificate matured, and before any marital difficulties arose, she transferred the funds to another account held in her name and that of her daughter. At trial her husband testified that he was aware of his wife's inheritance and that they had discussed the purchase of the money-market certificate. However, he said he never saw the certificate and that he never claimed any ownership in it until the time of the divorce. In *McDonald* v. *McDonald*, 19 Ark. App. 75, 716 S.W.2d 788 (1986), we said Ark. Stat. Ann. § 67-552(C) (Supp. 1985) provides that "if a certificate of deposit is in the names of persons who denominate themselves to the banking institution as husband and wife, then such certificate of deposit and all additions thereto shall be the property of such persons as tenants by the entirety." There was, however, no evidence mentioned that could have overcome the presumption that the certificate issued in both names created a tenancy by the entirety, and the statute, as we have already pointed out, was enacted for the protection of the bank in which the deposit was made and governs only the bank's relationship with its depositor. Thus, the result in *McDonald* does not conflict with the presumption relied upon in *Ramsey*.

The basic point involved is whether the spouse claiming the money must prove that separate property placed in the spouses' joint names constitutes a gift or whether there is a presumption that the property is owned by them as tenants by the entirety.

In this regard, the case of *McEntire* v. *McEntire, supra*, may appear to conflict with *Ramsey*. That case was decided by a court with two special judges and a majority of the regular members of

the court dissented or did not participate. Moreover, we think later cases decided by the Arkansas Supreme Court are more compatible with the presumption rule of *Ramsey* than with the decision in *McEntire*. See, for example, the case of *Canady* v. *Canady*, 290 Ark. 551, 721 S.W.2d 650 (1986), where the court stated:

> As to the 20-acre tract, it was purchased during the marriage with Connie's premarital funds, but the deed conveyed the property to James and Connie as husband and wife. We have held that our marital-property law does not apply to tenancies by the entirety. *Warren* v. *Warren*, 273 Ark. 528, 623 S.W.2d 813 (1981).

290 Ark. at 553. Furthermore, *McEntire* relies upon *Porterfield* v. *Porterfield*, 253 Ark. 1073, 491 S.W.2d 48 (1973), and *Coristo* v. *Twin City Bank*, 257 Ark. 554, 520 S.W.2d 218 (1975), but neither of those cases involved the issue of whether an account or certificate of deposit in the names of a husband and wife created a presumption of tenancy by the entirety. Those cases were concerned with accounts or certificates in the names of persons who were not husband and wife. The presumption of tenancy by the entirety only applies where the account or certificate is in the names of a husband and wife.

A dissenting opinion in the present case takes the view that a presumption of gift properly arises when one spouse causes a deed to land to be made in the names of both spouses and that this presumption was reasonably extended to apply to promissory notes in *Ramsey* but should not arise when one spouse deposits separate funds in a joint bank account. We perceive no valid reason for singling out joint bank accounts for a different rule of law. To the contrary, what is needed is a constant rule to be applied to all these cases. Experience teaches us that when parties become involved in a divorce suit the division of their property becomes a major issue. The presumption rule set out in *Ramsey* seems to us to be a helpful and proper starting place in these cases where the intent of the parties must be determined from evidence given after the marriage has failed and intent is being retroactively determined.

In summary, we hold that once property, whether personal or real, is placed in the names of persons who are

husband and wife, without specifying the manner in which they take, there is a presumption that they own the property as tenants by the entirety and it takes clear and convincing evidence to overcome that presumption. In the present case, both marital funds and the appellee's separate funds were used to purchase two certificates of deposit which were taken in the names of both parties. The interest earned on the certificates was deposited in the parties' joint checking and joint savings accounts. The only evidence that any of the funds evidenced by the certificates were intended to be the appellee's separate property was his statement that he did not concede that the certificates were marital property. We hold there is no clear and convincing evidence to overcome the presumption that the certificates were owned by the parties as tenants by the entirety. Therefore, the chancellor's finding that $12,500.00 of the funds evidenced by the certificates belongs to appellee as his separate property is clearly erroneous and the judgment is modified to reflect that the certificates of deposit are owned by the parties as tenants by the entirety and are to be divided equally.

Affirmed as modified.

CORBIN, C.J., concurs.

JENNINGS, J., dissents.

COULSON, J., not participating.

DONALD L. CORBIN, Chief Judge, concurring. I am sympathetic to Judge John Jennings' dissent, as I believe it is more reflective of how the general public would view such situations. While I don't have any reliable statistics available, my own best guess would be that 99% of our Arkansas citizens would favor Judge Jennings' position. I suspect that in all but a few cases there is no intent to make an absolute gift of one-half interest where one spouse deposits inherited funds into a joint account. It is typically done as a matter of convenience with the only legal consideration being the avoidance of probate. I find it hard to believe that the donor, and for that matter, the donee, ever consider the ownership as being anything other than in the spouse who inherited the money in the first place. However, I am constrained to follow the majority as I believe it is the more correct of the two positions under prior cases.

I write separately only to point out that despite the somewhat confusing manner in which past cases have been decided, our decision in the present case expressly recognizes the viability of the rebuttable presumption doctrine as it relates to property held in the names of husband and wife. We also recognize that the standard required to rebut the presumption is quite burdensome. For this reason, I feel that the majority opinion clearly charges a spouse, who causes non-marital property to be taken in the joint names of the spouses, with constructive knowledge that upon divorce such property will be divided equally pursuant to Arkansas Statutes Annotated § 34-1215 (Supp. 1985). The only exceptions to such division exist where the donor spouse produces evidence which is so clear, direct, weighty and convincing that the chancellor, without hesitation, can determine that no gift to the donee spouse was intended or that the donor spouse was fraudulently induced to cause the property to be taken in joint names. I note that the majority opinion effectively overrules the language in *Hayse* v. *Hayse*, 4 Ark. App. 160-B, 630 S.W.2d 48 (1982) derived from the supreme court decision of *McEntire* v. *Estate of McEntire*, 267 Ark. 169, 590 S.W.2d 241 (1979), placing the burden on the donee to prove that a gift was made.

I am convinced that the presumption applies equally to real and personal property. Because the standard to rebut is so burdensome, I am of the opinion that the clearest and most convincing evidence that can be presented in rebuttal of the presumption may be antecedent or contemporaneous declarations tending to prove that the intention was not to make a gift. *See Hubbard* v. *McMahon*, 117 Ark. 563, 176 S.W. 122 (1915).

Because of the confusion generated by the prior decisions in this area, I would also invite the supreme court to review our decision in an effort to clarify the state of the law.

JOHN E. JENNINGS, Judge, dissenting. I respectfully dissent. The view I take of the case necessarily requires statutory interpretation, which would suggest that this case should perhaps have been certified to the supreme court. I am persuaded that chancery courts in this state have always had the power to equitably divide the joint bank accounts of spouses in divorce and that Ark. Stat. Ann. § 34-1215 was not intended to restrict this power. The statute was enacted as Act 340 of 1947:

> Courts of equity, designated Chancery Courts within the State of Arkansas, shall have the power to dissolve estates by the entirety or survivorship, in real or personal property, upon the rendition of a final decree of divorcement, and in the division and partition of said property, so held by said parties, shall treat the parties as tenants in common.

The statute was amended by Act 457 of 1975 to provide that dissolution was automatic if the divorce decree was silent.

The reason for the statute was that the supreme court had held in a line of cases beginning with *Roulston* v. *Hall*, 66 Ark. 305, 50 S.W. 690 (1899), that chancery courts had no power to dissolve an estate by the entireties in a divorce. *Warren* v. *Warren*, 273 Ark. 528, 623 S.W.2d 813 (1981); *Jenkins* v. *Jenkins*, 219 Ark. 219, 242 S.W.2d 124 (1951); *James* v. *James*, 215 Ark. 509, 221 S.W.2d 766 (1949); *Ward* v. *Ward*, 186 Ark. 196, 53 S.W.2d 8 (1932); *Heinrich* v. *Heinrich*, 177 Ark. 250, 6 S.W.2d 21 (1928); *Davies* v. *Johnson*, 124 Ark. 390, 187 S.W. 323 (1916). Chief Justice McCulloch stated the reason for the rule in *Davies* v. *Johnson, supra*:

> In *Branch* v. *Pope*, 61 Ark. 388, the rule was laid down that under a deed to husband and wife "the entire estate is vested in each of the tenants by the entireties, for they hold, not by moities, but by entireties" that, in fact, conforms precisely to the common law definition of an estate by the entirety. If the entire estate is vested at the time of the conveyance in each of the tenants, how could it be divested merely by the granting of a divorce in the absence of a statute authorizing it to be done? Suppose one of the parties executes a deed to a third party during the coverture, purporting to convey the whole estate, the deed would convey all of the vested interest of the grantor, including the rights resulting from survivorship, and it would be an anomalous situation to hold that such a vested interest could be divested by divorce of the parties.

124 Ark. at 393, 187 S.W. at 324.

The *Davies* court also relied on *Roulston*:

> Where land is conveyed to husband and wife, they do not take by moities, but both are seized of the entirety—the

> whole in contradistinction to a moiety or part only. . . . Neither tenant by entirety can convey his or her interest so as to affect the right of survivorship in the other. [Citations omitted.]

124 Ark. at 394, 187 S.W. at 324.

In *Heinrich, supra*, the court said:

> An estate by entirety, either legal or equitable, cannot be divested out of the husband and invested in the wife, or vice versa, by the courts. The right to the whole estate by the survivor prevents this. [Citing *Roulston.*]

In *Jenkins* v. *Jenkins*, 219 Ark. 219, 242 S.W.2d 124 (1951), the court recognized that a majority of jurisdictions hold that divorce dissolves the entirety estate but that its holding to the contrary had become a rule of property in this state. This principle, *i.e.*, that a common law tenancy by the entirety cannot be affected by a decree of a court of equity, apart from specific statutory authorization, remains the law in this state and is still recognized as a rule of property. *Warren* v. *Warren*, 273 Ark. 528, 623 S.W.2d 813 (1981).

It was against this background that the general assembly enacted § 34-1215. The emergency clause of the original act (Act 340 of 1947) provided:

> The General Assembly of the State of Arkansas finds and declares that numerous injustices have been done because *Courts of Equity* within the State of Arkansas *have lacked the power* heretofore, upon dissolutionment of the marital status, *to dissolve estates in property created by the marital status*; and that, accordingly, an emergency is hereby declared to exist. . . . [Emphasis added.]

It seems clear then that the rule holding that chancery lacked authority to dissolve a tenancy by the entirety derives from the perceived nature of that tenancy at common law. Essential to that nature is the concept that neither tenant can convey his or her interest so as to affect the right of survivorship in the other. *Roulston, supra.* As the *Davies* court said, this is a "vested interest" and therefore cannot be divested by the court.

This rule, however, has no application to a tenancy by the

entirety in a bank account or certificate of deposit. The majority is quite correct that an estate by the entirety may be created in personal property in this state. *Jordan* v. *Jordan*, 217 Ark. 30, 228 S.W.2d 636 (1950); *Union & Mercantile Trust Co.* v. *Hudson*, 147 Ark. 7, 227 S.W. 1 (1921). It has also been specifically held that a husband and wife may hold title to bank deposits as tenants by the entirety. *Black* v. *Black*, 199 Ark. 609, 135 S.W.2d 837 (1940). This is a matter of common law—it is not the result of statutes governing the relationship between the bank and its depositors, such as Ark. Stat. Ann. § 67-552 (Supp. 1985). *Ratliff* v. *Ratliff, Adm'x*, 237 Ark. 191, 372 S.W.2d 216 (1963); *Black* v. *Black, supra; Hayse* v. *Hayse*, 4 Ark. App. 160-B, 630 S.W.2d 48 (1982).

Although spouses may hold title to funds in a bank account as tenants by the entirety for some purposes, this is not a true common law tenancy by the entirety. The distinction was explained in *McGuire* v. *Benton State Bank*, 232 Ark. 1008, 342 S.W.2d 77 (1961):

> A joint bank account such as this one has been held to constitute an estate by the entirety in the sense that upon the death of either spouse the title passes to the survivor. . . . But while both spouses are alive the estate is not a true common-law tenancy by the entirety, for, as we observed in the cases cited, either of the owners may extinguish the joint estate as to any part of the money that is withdrawn from the account and reduced to separate possession. Hence in a case like this one the intention of the parties and all other pertinent circumstances must be considered in determining the question of ownership.

See also Black v. *Black, supra; Dixon* v. *Jonesboro Trust Co.*, 154 Ark. 155, 242 S.W. 57 (1922).

In *Davis* v. *Jackson*, 232 Ark. 953, 341 S.W.2d 62 (1961), Mr. Davis, a widower, deposited $10,000.00 in a savings and loan and received a certificate of deposit issued in his name "or" his granddaughter's. After he remarried he had the certificate changed to remove his granddaughter's name and to insert his new wife's name. The court held that the granddaughter had no vested interest in the property. Although this was a joint tenancy rather than a tenancy by the entirety, the principle is the same.

Because tenancies by the entirety in bank deposits may be destroyed by the unilateral act of either tenant and create no vested interest in the other, equity has always had the power to divide them in divorce, apart from statute. The reasons for the rule announced in *Davies* v. *Johnson* do not exist here. Clearly, in passing Ark. Stat. Ann. § 34-1215, the legislature intended to grant certain powers to chancery courts which had not existed before. Certainly the legislature did not intend to restrict the pre-existing authority of chancery courts. Section 34-1215 was intended to apply only to those true common law tenancies by the entirety and joint tenancies with right of survivorship which the court had previously held chancery was without power to dissolve. It is significant that in the forty years since the passage of § 34-1215, the supreme court has never held it applicable to joint bank accounts.

In deciding *Warren* v. *Warren, supra*, the supreme court gave due consideration to policy:

> There is also an apparent consideration of public policy by the General Assembly, and that is the recognition that there ought to be reckonability in the law. When a husband and wife cause a marital survivorship instrument to be created they ought to know that if they remain married the survivor will own the property, and they ought to know that if they divorce the property will be divided equally, and they ought to know that they will not be subjected to the eight variables of the 1979 act.

273 Ark. at 533, 623 S.W.2d at 816.

These policy considerations are quite valid if we are discussing the preparation of a marital survivorship instrument such as a deed. They are considerably less relevant to the situation where one spouse deposits separate funds in a joint account. It follows that such accounts are divisible by chancery courts in divorce under the provisions of Ark. Stat. Ann. § 34-1214, our divorce property division statute.

We are also faced with the question of whether the establishment of a bank account in both spouses' names creates a presumption of gift when the account is funded, in whole or in part, with one spouse's separate funds. In *Ramsey* v. *Ramsey*, 259

Ark. 16, 531 S.W.2d 28 (1975), the husband sold cattle and equipment and in return took promissory notes payable to the husband and wife. In divorce, he contended that the cattle and equipment had been his separate property and that the note had been made payable to both spouses by mistake. The *Ramsey* court said that when real or personal property is acquired by husband and wife, by an instrument running to them conjunctively, a presumption arises that the taking is as tenants by the entirety, and that if the property is acquired by one party's separate funds there is a presumption of gift. The court in *Ramsey* held that the parties held the note as tenants by the entirety and also that it was subject to division under Ark. Stat. Ann. § 34-1215.

The decision in *Ramsey* was based, at least in part, on earlier supreme court cases involving a deed to land. For instance, in *Harrison* v. *Knott*, 219 Ark. 565, 243 S.W.2d 642 (1951), cited in *Ramsey*, the court held that where a husband purchases land and procures the deed to be made to his wife, the presumption is that he intended it as a gift, and a trust does not result in his favor. *See also Carpenter* v. *Gibson*, 104 Ark. 32, 148 S.W. 508 (1912). The presumption of gift arising when one spouse causes a deed to land to be made out in the names of both spouses is grounded in both reason and policy. Perhaps it is probable that ordinarily a gift is intended, and there are strong policy considerations favoring relative certainty in the law of title to real estate. This rule was reasonably extended in *Ramsey* to apply to a promissory note, taken in the names of both spouses. But neither reason nor policy support the application of such a presumption when one spouse deposits separate funds in a joint account. Such deposits may be made for many reasons. The joint account may be intended to serve as a will substitute. *See, e.g., Ratliff* v. *Ratliff*, 237 Ark. at 195, 372 S.W.2d at 218. The purpose may be merely to accommodate the other spouse in some way, for instance, to permit him to use the funds as collateral for a loan. *See, e.g., Hayse* v. *Hayse*, 4 Ark. App. 160-B, 630 S.W.2d 48 (1982). A gift may be intended, or the deposit may be made because there is no other account available.

The supreme court held, in effect, that such a presumption of gift did not apply to the establishment of a bank account in both spouses' names in *McEntire* v. *McEntire*, 267 Ark. 169, 590

S.W.2d 241 (1979). In that case Mr. McEntire established a joint account with his wife and both parties withdrew funds from the account from time to time. Two years later McEntire had a new signature card issued, withdrawing Mrs. McEntire's authority to draw on the account. At his death she argued that funds were hers as the surviving tenant by the entirety. The court affirmed the trial court's grant of summary judgment, stating:

> An estate by the entireties in a bank account differs in one significant aspect from an estate in real property in that the estate exists in the account only until one of the tenants withdraws such funds or dies leaving a balance in the account. Funds withdrawn or otherwise diverted from the account by one of the tenants and reduced to that tenant's separate possession ceases to be a part of the estate by the entireties.

A dissenting opinion in *McEntire* argued that *Ramsey* v. *Ramsey* controlled. It argued that there was a presumption that the parties held as tenants by the entirety and that there was a presumption of gift. This argument was impliedly rejected by a majority of the court.

We relied on *McEntire* in *Hayse* v. *Hayse, supra.* There the wife had inherited money from her father and bought a certificate of deposit in the name of husband or wife. She testified that she had taken the certificate out in both names so if her husband needed to borrow money he would have collateral. The husband contributed nothing to the purchase money and never made any claim to it during the marriage. She retained possession of the certificate. The trial court awarded the certificate of deposit to the wife upon divorce, and the husband appealed. We held that the wife's inheritance would not be subject to equal division in the divorce unless by some action she had destroyed its status as non-marital property by creating an interest therein in her husband. We held that the burden was upon the husband to prove a gift and that, on the facts presented, the chancellor was not wrong in finding that a gift had not been intended. We recognized that the property was divisible under Ark. Stat. Ann. § 34-1214 and made no mention of § 34-1215.

Ramsey was decided before *Potter* v. *Potter*, 280 Ark. 38, 655 S.W.2d 382 (1983). In that case the court said that separate

funds remain separate unless it became impossible to trace the source of the funds. "This is true even if separate funds were commingled with other funds in a common account." 280 Ark. at 46, 655 S.W.2d at 387. The court also said that property acquired for a consideration paid in part out of community funds and in part out of separate funds of one of the spouses is in part community and in part separate property.

In *Gorchik* v. *Gorchik*, 10 Ark. App. 331, 663 S.W.2d 941 (1984), we followed *Hayse*, but in *Gorchik* we held that the husband had destroyed the status of his separate property because both spouses had utilized his inherited funds, deposited in a joint account, during the course of their marriage. In other words, the parties had treated the property as marital property.

In *McDonald* v. *McDonald*, 19 Ark. App. 75, 716 S.W.2d 788 (1986), we held that a certificate of deposit titled in the name of husband or wife was tenancy by the entirety property and was required to be divided under Ark. Stat. Ann. § 34-1215. We did not mention *Hayse* v. *Hayse* or *Gorchik* v. *Gorchik*. We thought *Warren* v. *Warren* controlled. I would overrule *McDonald*.

To summarize, it is my view that money held by spouses in a joint account is subject to division in divorce under Ark. Stat. Ann. § 34-1214. If the account contains what were the separate funds of one spouse and the amount of the separate funds can be ascertained, this money may be returned, in equity, to the spouse who contributed it. If the other spouse claims that a gift has been made, he has the burden of proving it. This is largely a matter of intent. *McGuire* v. *Benton State Bank*, 232 Ark. 1008, 342 S.W.2d 77 (1961); *Neal* v. *Neal*, 194 Ark. 226, 106 S.W.2d 595 (1937). We have said his burden of proof is by clear and convincing evidence. *Hayse* v. *Hayse, supra*. This measure of proof lies somewhere between a preponderance of the evidence and proof beyond a reasonable doubt. *Kelly* v. *Kelly*, 264 Ark. 865, 575 S.W.2d 672 (1979).

Here, the certificate of deposit was purchased in part from marital funds and in part from separate funds. The fact that appellee had the certificate made out in both names is some evidence of a gift. The marital relation, in itself, is a factor which makes a gift more likely. However appellee testified that he claimed the inherited funds as separate property and there was no

testimony that a gift was intended. The fact that the appellant did not make use of the principal funds held on deposit is relevant. *See Hayse* v. *Hayse* and *Gorchik* v. *Gorchik*. The money was recently inherited and clearly traceable. The chancellor's implied finding that no gift was intended is not clearly erroneous.

Lonnie KEYS *v.* STATE of Arkansas

CA CR 87-139 745 S.W.2d 628

Court of Appeals of Arkansas
Division I
Opinion delivered March 2, 1988

Clark & Adkisson, by: *John J. Clark*, for appellant.

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

BETH GLADDEN COULSON, Judge. A jury convicted appellant, Lonnie Keys, of two counts of sexual abuse and he was sentenced to six years in prison for each offense to be served consecutively. On appeal, he argues that his case should have been dismissed for lack of a speedy trial. We find his arguments unpersuasive and affirm.

On January 26, 1984, appellant was a guest in the home of a couple who had two boys, ages five and eight. When the children were ready for bed, appellant said he wanted to tuck them in and spent several minutes alone with them. Three days later the boys told their parents that appellant had had sexual contact with them. They said he had threatened them the night of the incident, and they had been afraid to tell anyone. The boys' stepfather immediately took the children to the Faulkner County Sheriff's Office, where statements were taken from them. The next day the stepfather went to the appellant's residence looking for him, but he was told that appellant had moved. The prosecuting attorney filed felony informations against appellant on March 21, 1984, and a bench warrant was issued for appellant's arrest. He was not located until October 1986, when the victims' mother learned that appellant was working at a mission in Saline County. She contacted the Faulkner County Sheriff's Office, and appellant was arrested on October 15, 1986. He was tried on March 30, 1987—three years and nine days after charges were filed against him and five and one-half months after his arrest.

In a pretrial hearing, appellant contended that the charges against him should be discharged under Ark. R. Crim. P. Rules 27-30 because he was not brought to trial within eighteen months from the date charges were filed against him. Appellant contended he had never been "on the run" from authorities and that the sheriff's office had failed to diligently try to locate him and he gave an account of his whereabouts. The day after the incident, he had gone to the state hospital at Benton, then been transferred to the Fort Roots Veterans Administration Hospital at North Little

Rock where he was treated for alcohol abuse. On release, he spent time at a halfway house, then underwent eye surgery at the Veterans Administration Hospital. Following that, he lived at the Union Rescue Mission in Little Rock until June 1985, when he went to the Evangel Community Church in Little Rock as superintendent. In August 1985, appellant started a weekly radio ministry which eventually was picked up by a large Little Rock radio station, and used his own name over the airways. At this point, appellant left Little Rock to work as superintendent of the New Pathway Mission in Benton. Advertisements for the mission were run in the local newspaper, some using appellant's photograph for promotion. For the state, deputies testified that they had tried to locate appellant and expected him to "surface" eventually in Faulkner County. They did not question his former wife because they did not know she was living in the county. The prosecutor argued that even if the 18-month rule applied, Ark. R. Crim. P. Rule 28.3 excludes from the calculations the time when a defendant's whereabouts are unknown. The circuit judge denied appellant's motion for absolute discharge of the charges against him. From that decision, this appeal arises.

Appellant argues he was denied his right to a speedy trial on the charges of sexual abuse. On October 1, 1987, certain changes became effective concerning the rules on speedy trials. *In the Matter of Amendment of Arkansas Rules of Criminal Procedure*, 293 Ark. 612. Those changes, however, do not affect this appeal. Speedy trial rules are procedural, so those in effect at the time of appellant's trial will apply. *See Jennings* v. *State*, 276 Ark. 217, 633 S.W.2d 273 (1982). In appellant's case, Rule 28.1(c) provides that a defendant charged in circuit court and released must be tried within eighteen months from the time provided in Rule 28.2. The date the charges are filed is the beginning for the calculation of the time for a speedy trial. *Allen* v. *State*, 294 Ark. 209, 742 S.W.2d 886 (1988). Once the accused has shown that the trial was held after the speedy trial period expired, the burden rests upon the state to show the delay was legally justified. *Allen, supra.* Ark. R. Crim. P. Rule 28.3 provides:

> The following periods shall be excluded in computing the time for trial:

> (e) The period of delay resulting from the absence or unavailability of the defendant. A defendant shall be considered absent whenever his whereabouts are unknown. . .

In the present case, we agree with the state that appellant's whereabouts were unknown. Furthermore, we find appellant's arguments unpersuasive that the deputies failed to use due diligence in their investigation. Although it is unclear whether appellant's name was entered in a nationwide law enforcement computer network, the record indicated that standard procedures were followed. As to the public nature of appellant's ministry, it would be unreasonable to require law enforcement officers to monitor all radio programs and publications in the off chance that a missing suspect might be among the hosts of people employing those media. Appellant also cannot rely on *Chandler* v. *State*, 284 Ark. 560, 683 S.W.2d 928 (1985), in which the state failed to make a diligent effort to bring a defendant to trial. Chandler is a decision in which the delay was solely the fault of the state, and the case involved a defendant who had been arrested, released on bond, and whose new address was not properly relayed to circuit court. The present case differs. Appellant's whereabouts could not be determined because he left Faulkner County, was treated at several institutions, and lived at several addresses. He could not be found by either the sheriff's deputies or the family of the victims, but as soon as his whereabouts became known, he was arrested.

For his final point for reversal, appellant contends that since the trial court did not set forth the excluded periods in a written order or docket entry pursuant to Ark. R. Crim. P. 28.3(i), those periods cannot be used against him. We find that argument unconvincing. Appellant relies on *Shaw* v. *State*, 18 Ark. App. 243, 712 S.W.2d 338 (1986). However, since appellant did not raise this issue below, he may not raise it on appeal. *See Dean* v. *State*, 293 Ark. 75, 732 S.W.2d 855 (1987). Accordingly, we affirm the judgment of the circuit court.

Affirmed.

COOPER and JENNINGS, JJ., agree.

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