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Jimmy R. MARRABLE *v.* SOUTHERN LP GAS, INC., et al.

CA 87-308 751 S.W.2d 15

Court of Appeals of Arkansas
En Banc
Opinion delivered June 8, 1988

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

Walter A. Murray, for appellees.

DONALD L. CORBIN, Chief Judge. Appellant, Jimmy R. Marrable, appeals from a decision of the Arkansas Workers' Compensation Commission, which reversed and vacated an opinion of the Administrative Law Judge that awarded appellant permanent total disability benefits and a controverted attorney's

fee thereon. We affirm.

It is undisputed that appellant sustained a compensable injury on June 11, 1977, and was awarded 45% permanent partial disability benefits (25% anatomical and 20% wage loss) on March 30, 1982. In 1986, appellant sought permanent total disability benefits which were granted by the Administrative Law Judge. This award was appealed to the full Commission. The Commission's order dated June 17, 1987, recited its findings and concluded that appellant had not established a sufficient change in physical condition to justify an increase in disability benefits under Ark. Code Ann. § 11-9-713 (1987) (formerly Ark. Stat. Ann. § 81-1326 (Repl. 1976)).

For reversal, appellant argues that the full Commission erred when it overturned the decision of the Administrative Law Judge and held that claimant failed to prove by a preponderance of the evidence that his condition had worsened.

In support of his argument, appellant contends that it was the duty of the Commission to make findings of fact based on the preponderance of the evidence. While the Commission is required to make findings by that standard, on appellate review we seek only to determine whether its findings are supported by substantial evidence. In reviewing the evidence, we give it its strongest probative force in favor of the Commission's findings and will affirm if fair-minded persons with the same set of facts before them could have reached the conclusion reached by the Commission. *Silvicraft, Inc.* v. *Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983). Moreover, the question for the appellate court is not whether the evidence would have supported findings contrary to the ones made by the Commission, but whether the evidence supports the findings made. *Massey Ferguson, Inc.* v. *Flenoy*, 270 Ark. 126, 603 S.W.2d 463 (1980).

Appellant acknowledges that a decision of the Workers' Compensation Commission is entitled to the weight of a jury verdict, *Cooper Industrial Products, Inc.* v. *Worth*, 256 Ark. 394, 508 S.W.2d 59 (1974); however, he argues that like a jury verdict, the decision of the Commission cannot be sustained if based solely upon speculation and conjecture. *Thomas* v. *Southside Contractors, Inc.*, 260 Ark. 694, 543 S.W.2d 917 (1976). Here, appellant first asserts that the Commission's decision is based purely on

speculation and conjecture because the medical evidence was not carefully analyzed.

The medical evidence of record reveals that in 1985, appellant's attorney requested a medical assessment of appellant's disability rating. Pursuant to this request, Dr. W.S. Bundrick, appellant's treating physician, and Dr. John L. Wilson examined appellant in February/March of 1985. Dr. Bundrick opined that appellant's original 25% impairment rating was correct while Dr. Wilson opined that appellant's rating was 40%. Approximately one year later on March 3, 1986, Dr. Bundrick responded to another inquiry from appellant's attorney stating that appellant's rating "could be" increased up to 30-35% due to persistent arachnoiditis with nerve root deficit in the right leg, along with degenerative disc changes.

In making its findings, the Commission pointed out that Dr. Bundrick had the opportunity to observe appellant over a period of years while Dr. Wilson had never seen appellant prior to the 1985 examination. The Commission found both doctors credible but noted that the different degrees of anatomical impairments assessed by each doctor in 1985 represented a difference of medical opinion. The Commission did not accept Dr. Bundrick's 1986 report as persuasive medical evidence of a changed physical condition because appellant's leg injury is a scheduled injury not apportionable to the body as a whole without permanent total disability. Secondly, the Commission stated that the degenerative disc changes discussed in this report are part of the normal aging process and not compensable. The Commission was not persuaded that Dr. Bundrick definitely intended to increase appellant's rating because he used the phrase "could be" increased which the Commission felt was a concession made to placate counsel.

It is well settled that the Commission has the authority to accept or reject medical opinion and the authority to determine its medical soundness and probative force. *Wasson* v. *Losey*, 11 Ark. App. 302, 669 S.W.2d 516 (1984). The testimony of medical experts is an aid to the Commission in its duty to resolve issues of fact. It has a duty to use its experience and expertise in translating that testimony into findings of fact. *Bearden Lumber Co.* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321

(1983). It is the responsibility of the Commission to draw inferences when the testimony is open to more than a single interpretation, whether controverted or uncontroverted; and when it does so, its findings have the force and effect of a jury verdict. *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979). Although the Commission did give consideration to the medical reports, there was other evidence from which it could, and did, find that appellant had not established a change in physical condition sufficient to reopen his claim. In reversing the decision of the ALJ, the Commission stated:

> In addition to the medical evidence, Marrable testified regarding his condition, and it was stipulated that his wife would have corroborated his testimony. Marrable insists that he now feels "worse" in general but admitted that he no longer uses a back brace or TENS units. Although he now undergoes cortisone injections, he has dropped the physical therapy sessions. He takes the same medication that he was taking originally. His testimony about his daily activities indicates that his lifestyle is markedly similar to that described at the 1980 hearing. While there have been some changes, they are either insignificant or due to reasons other than the injury. For example, he no longer helps his children get dressed, but that is because they are now old enough to dress themselves. Since his wife works, he is still the person mainly responsible for preparing breakfast for the children and getting them ready for school. He still helps with the housework. He gave up deer hunting but instituted a walking program. He mainly sits or lies around the house all day now and mainly sat or lay around the house all day in 1980. He says he is in constant pain now, and he was in constant pain then. In short, we are unable to find that Marrable's condition has changed.

Viewing all evidence in the light most favorable to the Commission's findings, we find substantial evidence to support the Commission's conclusion.

Appellant also argues that the Commission did not give him the benefit of the doubt in making factual determinations. We find appellant's argument without merit in light of Act

10 of 1986. The pertinent provisions of the Act state:

> (3) Administrative law judges, the commission, and any reviewing courts shall construe the provisions of this chapter liberally, in accordance with the chapter's remedial purposes.
>
> (4) In determining whether a party has met the burden of proof on an issue, administrative law judges and the commission shall weigh the evidence impartially and without giving the benefit of the doubt to any party.

Act 10 of 1986 (2nd Ex. Sess.) (codified as amended at Ark. Code Ann. § 11-9-704(c)(3), (4) (1987) (formerly Ark. Stat. Ann. § 81-1323(c) (Supp. 1985)).

In the present case, appellant's injury occurred, and his claim was filed, prior to the effective date of the act; however, the decisions in question of the Administrative Law Judge and Commission were rendered after the effective date of the Act. This court recently addressed this issue in *Fowler* v. *McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987). In *Fowler*, the Commission reversed the Administrative Law Judge and held that the claimant's heart attack was not compensable. In reaching its decision, the Commission stated that it "weighed the evidence impartially and without giving the benefit of the doubt to any party in conformity with Act 10 of 1986." This court affirmed the Commission's decision finding that the change brought about by the amendment is fairly characterized as procedural. Further, it was stated that procedural changes are generally held to be immediately applicable to existing causes of action and not only to those which may arise in the future unless a contrary intent is expressed in the statute. The *Fowler* court recognized that prior to 1986, the Commission was obligated to give the claimant the benefit of the doubt in making factual determinations. However, application of the amendment to cases heard after the passage of the act, where the injury occurred prior to passage, was held appropriate. Additionally, it was noted that if the legislature intended that the new rule apply only to cases filed after the effective date, it could have so stated. Applying Act 10 of 1986 and its construction in *Fowler* to the case at bar, we conclude that appellant has failed to demonstrate that the Commission did other than weigh the evidence impartially and without giving the

benefit of the doubt to any party.

Affirmed.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. In *Wright* v. *American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986), this court reversed and remanded a case decided by the Arkansas Workers' Compensation Commission for its failure to make "specific findings upon which it relies to support its decision." In our opinion we relied, in part, upon *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979), in which the Arkansas Supreme Court pointed out that the Commission's findings had to be in sufficient detail that

> [T]he reviewing court may perform its function to determine whether the commission's findings as to the existence or non-existence of the essential facts are or are not supported by the evidence.

265 Ark. at 507.

It therefore follows that the decision of the Commission cannot be affirmed unless its *findings* are supported by substantial evidence. This appears to be the general rule in appeals from administrative agencies.

> An administrative determination, however, may only be sustained on the agency's findings and for the reasons stated by the agency, even where evidence in the record may be sufficient to support the determination for different reasons (see 3 Davis, Administrative Law Treatise [2d ed], § 14:29, p. 128; see, also, 6 N.Y.Jur.2d, Article 78, § 240, p. 132.)

Al-Co Properties, Inc. v. *Department of State of the State of New York*, 452 N.Y.S.2d 947, 951 (N.Y. App. Div. 1982).

In the present case, it is my view that the *findings* of the Commission are not supported by substantial evidence. For example, the Commission stated that one of the reasons it did not find that appellant had established a change in his physical condition sufficient to support an award for additional benefits was because the only two physicians whose opinions were placed

in evidence disagreed as to the *amount* of the increased disability. Another reason for denying appellant's claim was that the increased disability rating given by appellant's primary treating physician was made simply "to placate counsel." This first finding, I submit, is not relevant on the issue involved since *both* doctors stated that appellant had an increased disability even though they did not agree on the amount. The second finding is based on sheer speculation and conjecture; there is no evidence in the record to support it.

It would serve no purpose to make an extended discussion of the evidence; however, I do not believe the *findings* made by the Commission are supported by substantial evidence. Therefore, I would reverse and remand this matter to the Commission for another hearing and for findings based upon the evidence presented.

Dallas HATLEY and Charley Hatley *v.* Ronald L. PAYNE and Aetna Casualty and Surety Company

CA 87-341 751 S.W.2d 20

Court of Appeals of Arkansas
Division II
Opinion delivered June 8, 1988
[Supplemental Opinion on Denial of Rehearing
September 14, 1988.*]

*Mayfield, J., would grant rehearing.

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

Huckabay, Munson, Rowlett and Tilley, P.A., by: *Beverly A. Rowlett*, for appellees.

JAMES R. COOPER, Judge. The appellants, Dallas Hatley and Charley Hatley, appeal an order of the Drew County Chancery Court granting summary judgment to the appellee

Aetna Casualty and Surety Company in the appellants' suit for proceeds of an insurance policy. On appeal, the appellants argue that the trial court erroneously applied Arkansas law. We disagree.

The appellants are the owners of a parcel of improved land in Drew County and entered into an installment contract to convey the land to Ronald Payne in June of 1985. The contract contained the following clause:

> The Buyer shall also carry fire and hazard insurance on the building located on said land in an amount of at least as much as the unpaid principal balance owed hereunder, with a loss payable clause in the policy in favor of the Sellers, showing their interest in said real property.

In July 1985, Payne secured an insurance contract with Aetna for a face amount of $30,000.00. Payne was the only insured listed on the policy and no one was listed under the mortgage section. The appellants' interest in the property was not referred to at any place in the policy. The policy included a standard, or union, mortgage clause which provided as follows:

> 12. Mortgage Clause.
>
> The word "mortgagee" includes trustee.
>
> If a mortgagee is named in this policy, any loss payable under Coverage A or B shall be paid to the mortgagee and you, as interests appear. If more than one mortgagee is named, the order of payment shall be the same as the order or precedence of the mortgages.
>
> If we deny your claim, that denial shall not apply to a valid claim of the mortgagee, if the mortgagee:
>
> > a. notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware;
> >
> > b. pays any premium due under this policy on demand if you have neglected to pay the premium;
> >
> > c. submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so. Policy conditions relating to Appraisal, Suit

> Against Us and Loss Payment apply to the mortgagee.
>
> If the policy is cancelled by us, the mortgagee shall be notified at least 10 days before the date cancellation takes effect.
>
> If we pay the mortgagee for any loss and deny payment to you:
>
> a. We are subrogated to all the rights of the mortgagee granted under the mortgage on the property; or
>
> b. at our option, we may pay to the mortgagee the whole principal on the mortgage plus any accrued interest. In this event, we shall receive a full assignment and transfer of the mortgage and all securities held as collateral to the mortgage debt.
>
> Subrogation shall not impair the right of the mortgagee to recover the full amount of the mortgagee's claim.

The parties to this case stipulated that Payne subsequently burned the dwelling on the land and later pled guilty to arson. The appellants then demanded that the appellee pay them an amount equal to their interest in the property; when the appellee denied their claim, the appellants filed suit and requested that they be declared mortgagees of the property or, alternatively, third-party beneficiaries or equitable lienors under the policy of insurance. They also sued Payne and requested that he be declared to have no interest in the insurance policy proceeds. Personal jurisdiction was never obtained over Payne.

The parties entered into joint stipulations, and both submitted motions for summary judgment. The appellants offered Payne's affidavit in support of their motion, wherein he stated that, when procuring the insurance policy, he intended to designate the appellants as the loss payees in the mortgage clause but had neglected to do so. The trial court granted the appellee's motion for summary judgment.

Summary judgment is granted in accordance with ARCP Rule 56. That rule provides in part that such a judgment may be rendered where the pleadings, depositions, answers to interrogatories and admissions on file, together with the affida-

vits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Summary judgment is an extreme remedy which should be allowed only when it is clear that there is no issue of fact to be litigated. *Johnson* v. *Stuckey & Speer, Inc.*, 11 Ark. App. 33, 665 S.W.2d 904 (1984). This was clearly an appropriate case for summary judgment.

The appellants argue that Payne's destruction of the property could not defeat their claim under the policy because of the wording and effect of the standard mortgage clause. It is generally held that, under a standard or union mortgage clause, the rights of the mortgagee are not affected by any act done by the insured; where the policy is issued in pursuance of a requirement in the mortgage, the mortgagee is entitled to the proceeds, although he was not informed of the issuance of the policy and had no knowledge of it until after the fire. *National Bedding & Furniture Industries, Inc.* v. *Clark*, 252 Ark. 780, 481 S.W.2d 690 (1972).

> Where the policy contains this form of mortgage clause, the mortgagee has an independent contract with the insurer which can not be defeated by improper or negligent acts of the mortgagor. The policy provisions apply to the mortgagee so that acts of the mortgagee which are in contravention with conditions and limitations will bar the mortgagee's recovery. Clearly, both the mortgagor and mortgagee have distinct and dissimilar rights where the policy contains such a standard union mortgage clause.

5 G. Couch, *Cyclopedia of Insurance Law* Section 29:65 (Rev. ed. 1984).

We disagree with the appellants' assertion that the mortgage clause in the policy in question protected them from the consequences of Payne's arson. Here, the appellants were not listed as insureds or as mortgagees in the policy, nor was any reference made to their interest in the property. "[T]here is a presumption that parties contract only for the benefit of themselves, and a contract will not be considered as having been made for the use and benefit of a third party unless it clearly appears that such was the intention of the parties." *Fireman's Fund Insurance Co.* v. *Rogers*, 18 Ark. App. 142, 145, 712 S.W.2d 311

(1986). The wording of the insurance contract in question reveals that its mortgage clause is applicable only "[i]f a mortgagee is named in this policy . . ." By its terms the policy precludes the application of the clause to the appellants.

The appellants argue, however, that the "covenant to insure" doctrine remedies the defect in the appellants' efforts to be recognized under the policy. They argue that, because of the requirement in the installment sale contract that Payne supply insurance on the property for the benefit of the appellants, the appellants have an equitable lien against the proceeds of the policy regardless of whether they were mentioned in it. Where an insurance policy is procured by a mortgagor under an agreement to insure for the mortgagee's benefit, the proceeds *recovered* by the mortgagor are held in trust for the mortgagee. The mortgagee has an equitable lien on the proceeds of the insurance for the satisfaction of his mortgage, regardless of whether the policy is made payable to him. *National Bedding, supra; see also Sharp* v. *Pease*, 193 Ark. 352, 99 S.W.2d 588 (1936).

> It is well settled that if a sales contract contains a covenant or condition that the property shall be kept insured by the conditional purchaser for the benefit, protection, or better security of the conditional seller, and the former breaches the agreement by taking out insurance in his own name without assigning it or making it payable to the conditional seller, the agreement to insure, upon loss, creates an equitable lien on the insurance proceeds in favor of the conditional seller as against the conditional vendee to the extent of the former's interest in the destroyed or damaged property.

44 Am. Jur. 2d *Insurance* Section 1741 (1982).

This equitable doctrine does not, however, provide a basis for recovery for the appellants because, as indicated above, their rights to the proceeds of the policy in question are no greater than Payne's, who, because of his act of arson, could not recover. *See Insurance Co. of North America* v. *Nicholas*, 259 Ark. 390, 533 S.W.2d 204 (1976). Further, the equitable lien theory asserted by the appellants is not supported by the presence of the standard mortgage clause in the policy since, as in *Insurance Co. of North America, supra*, at 392, that clause was never activated,

"because no mortgagee was named in the policy (as the clause required)." We also find the cases cited by the appellants are not persuasive, because none of them apply the "covenant to insure" doctrine in situations where the insured was not entitled to any proceeds of the policy.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
SEPTEMBER 14, 1988

756 S.W.2d 457

PER CURIAM. Petition for rehearing is denied.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. The appellants have filed a petition for rehearing in this case decided by a panel of this court on June 8, 1988. *See Hatley* v. *Payne*, 25 Ark. App. 8, 751 S.W.2d 20 (1988). The full court has today denied the petition, but I do not agree.

In my view, the trial court's granting of appellee's motion for summary judgment should be reversed. My view is adequately explained by the following quotation from the appellants' petition for rehearing:

> Appellants' cause of action is predicated upon the covenant to insure doctrine: "This court is committed to the doctrine that if a mortgagor covenants to protect his mortgagee the latter is thereby clothed with a lien on the *policy* to the extent of the mortgagee's interest, whether the policy carried a loss payable clause or not." (emph. supp.) *National Bedding* v. *Clark*, 252 Ark. 780, 785, 481 S.W.2d 690 (1972).

> The issue here is whether Appellants may invoke the doctrine when their covenanting mortgagor (Payne) is not himself entitled to the policy proceeds. The Court thought not in this case; holding that "this equitable doctrine does not, however, provide a basis for recovery for the appellants because . . . their rights to the proceeds of the policy in question are not greater than Payne's who, because of his act of arson, could not recover."
>
> Yet in this case of first impression, the Court's holding seems to be directly contrary to the basic premise upon which the doctrine is founded, *i.e.* "Equity will treat the policy as having contained such a provision upon the principle that equity treats that as done which should have been done." *Duval County Ranch Co.* v. *Alamo Lumber Co.*, 663 S.W.2d 627, 632 (Tex. Civ. App. 1983). The application of the maxim gives Appellants a right to loss payee status under the policy independent of that of the mortgagor's. It is true that the loss payment clause was not "activated," in the sense that no loss payee was named. But is a loss payment clause ever "activated" in an action brought pursuant to the covenant to insure doctrine? Clearly not; as the remedy exists solely to afford relief when the policy omits loss payees.
>
> The doctrine should not be applied so as to condition Appellants' recovery on the right of Payne to recover. Instead, Appellants stand in the shoes of any loss payee under the policy; which policy specifically recognizes a mortgagee's right to recover despite defenses asserted against a mortgagor's named insured.

I would simply add to the above the following citations of authority taken from appellants' brief and which support appellants' argument in this case. *Wade* v. *Seeburg*, 688 S.W.2d 638 (Tex. Ct. App. 1985); *State Farm Fire and Casualty Co.* v. *Liggett*, 689 P.2d 1187 (Kan. 1984); and *Lititz Mutual Insurance Co.* v. *Miller*, 50 So. 2d 221 (Miss. 1951). In view of the court's opinion of June 8, 1988, recognizing that the policy issued in this case contained a provision that the denial of a claim by the

mortgagor (Payne) would not affect a valid claim of the mortgagee (appellants), it is difficult to understand how the court could deny recovery to appellants under the case law cited by them.

Altha Mae REAVES *v.* CITY OF LITTLE ROCK

CA CR 87-221 751 S.W.2d 18

Court of Appeals of Arkansas
Division I
Opinion delivered June 8, 1988
[Rehearing denied August 10, 1988.]

Larry D. Vaught, for appellant.

Mark Stodola, City Attorney, by: *Thomas M. Carpenter*, for appellee.

JAMES R. COOPER, Judge. The appellant in this criminal case appealed her municipal court conviction of second-offense DWI to the Circuit Court of Pulaski County. After a *de novo* bench trial she was again convicted of that offense. From that conviction, comes this appeal.

For reversal, the appellant contends that the trial court subjected her to double jeopardy by entering a judgment of conviction after finding her not guilty. We agree, and we reverse and dismiss.

The record shows that, at trial on March 20, 1987, the appellant moved to suppress the results of an intoxilyzer breath examination on the ground that she had not been continuously observed for twenty minutes before taking the test. The trial judge took the motion under advisement, the trial continued, and the City concluded its case. After the City rested, the appellant moved for acquittal on several grounds, including the intoxilyzer issue which was the subject of the earlier motion to suppress. The trial judge requested briefs on that issue and ordered a continuance, stating that he would inform the attorneys of his decision by letter, and would notify them if the appellant's presence would be required for further proceedings.

In a letter to counsel dated April 1, 1987, the trial judge granted the motion to suppress. The letter concluded with the following statements:

> I hold the blood test to be inadmissible. In the absence of other evidence justifying finding the defendant guilty, Ms. Reaves is found not guilty.

An entry in the circuit court docket book reflected that the appellant was acquitted on April 1, 1987.

Before a judgment had been signed by the trial judge, the City discovered authority supporting its contention that the intoxilyzer results were in fact admissible, and filed a motion to reconsider the ruling on May 11, 1987, the motion was granted, the appellant rested without presenting additional evidence, and she was found guilty and sentenced.

The appellant contends that the trial court's letter finding her not guilty was an acquittal, and that the subsequent reopening of the case and conviction constituted double jeopardy. The appellee, however, contends that the conclusion expressed in the trial court's letter should not be treated as an acquittal, but rather as a holding based on an evidentiary ruling which the City could have appealed under Ark. R. Crim. P. Rule 36.10(b). Thus, argues the appellee, there was no violation of the prohibition against double jeopardy because "the termination of the proceedings occurred as a result of the defendant's actions on a collateral point not related to the factual determination of guilt or innocence." It is clear that the parties agree that the crucial issue in this case is whether the finding in the trial court's letter was an acquittal for double jeopardy purposes.

In *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977), the United States Supreme Court said:

> Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that "[a] verdict of acquittal. . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution." *United States* v. *Ball*, 163 U.S. 662, 671 (1896) . . . [W]e have emphasized that what constitutes an "acquittal" is not to be controlled by the form of the judge's action. *United States* v. *Sisson, supra*, at 270; cf. *United States* v. *Wilson*, 420 U.S., at 336. Rather, we must determine whether the ruling of the judge, whatever its label, *actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.*

430 U.S. at 571 (emphasis supplied). Our determination of what constitutes an acquittal, for double jeopardy purposes, must be guided by the decisions of the United States Supreme Court. For example, in *Smalis* v. *Pennsylvania*, 476 U.S. 140 (1986), the Court held that the Pennsylvania trial court's grant of a defendant's demurrer at the close of the prosecution's case was an acquittal under the double jeopardy clause of the United States Constitution. The Court rejected the Pennsylvania Supreme Court's holding that a defendant who demurs at this point in the trial "elects to seek dismissal on grounds unrelated to his factual

guilt or innocence," and said that "what the demurring defendant seeks is a ruling that as a matter of law the State's evidence is insufficient to establish his factual guilt." 476 U.S. at 144. The appellant in *Green* v. *United States*, 355 U.S. 184 (1957), was tried for murder in a United States District Court for the District of Columbia. The jury was instructed that it could find him guilty of either first or second degree murder, and its verdict was silent on the charge of first degree murder. This verdict was accepted by the trial judge, the jury was dismissed, and the defendant was sentenced to imprisonment. The defendant's conviction was reversed on appeal and the case was remanded for a new trial. On retrial, the defendant was found guilty of first degree murder. The United States Supreme Court held that his second trial for first degree murder placed him twice in jeopardy for the same offense in violation of the fifth amendment. The Court said:

> In brief, we believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read: "We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree."

355 U.S. at 191.

In the case at bar, we think that the decisions of the United States Supreme Court require us to hold that the trial court's letter finding the appellant not guilty was based upon a factual determination of the insufficiency of the evidence, and therefore constituted an acquittal for double jeopardy purposes. We need not address the correctness of the trial court's initial ruling on the admissibility of the intoxilyzer results, because an acquittal bars further jeopardy even where the acquittal is based on an erroneous legal foundation. *Sanabria* v. *United States*, 437 U.S. 54 (1978).

Reversed and dismissed.

JENNINGS and MAYFIELD, JJ., agree.

ARKANSAS BURIAL ASSOCIATION, Shinn Burial Association and Arkansas Burial Association Board *v.* DIXON FUNERAL HOME, INC.

CA 87-440 751 S.W.2d 356

Court of Appeals of Arkansas
En Banc
Opinion delivered June 8, 1988

Gardner, Gardner & Hardin, by: *Stephen C. Gardner* and *Steve Clark*, Att'y Gen., by: *Arnold Jochums*, for appellants.

Witt Law Firm, P.C., by: *Ernie Witt*, for appellee.

JOHN E. JENNINGS, Judge. Between 1982 and 1985, appellee Dixon Funeral Home, Inc., (Dixon) provided funeral services for 17 people. Ten of them had burial certificates written by Shinn Burial Association (Shinn) and seven had burial certificates written by Arkansas Burial Association (Arkansas Burial). Each certificate provided that the burial association's affiliated funeral home would provide, on the death of the certificate holder, funeral services of a stated value ranging from $200.00 to $500.00.

In each case Dixon took an assignment of the certificate from the family of the deceased and gave credit for the face amount of

the certificate. Dixon then sued Shinn and Arkansas Burial for the face amount of each certificate. It was stipulated at trial that in every instance but one Dixon did not notify the burial association of the member's death prior to the funeral. Notice was given to Arkansas Burial Association of the death of Carmen Nelms. The Arkansas Burial Association Board (the Board) intervened in the lawsuit on the side of Shinn and Arkansas Burial.

The primary issue in the trial court was whether, under the terms of the variously worded certificates, Dixon's failure to give notice of death resulted in a forfeiture of benefits.

The trial court held that the notice provisions contained in the certificates issued by Arkansas Burial were unambiguous; therefore, Dixon had forfeited any rights to benefits under these certificates. The court further found that the notice provisions contained in Shinn's certificates were ambiguous and awarded Dixon judgment against Shinn in the amount of $2,700.00, representing the total of the face amounts of the certificates. Finally, the court awarded Dixon judgment against Arkansas Burial for $500.00, the face amount of the Nelms certificate.

We affirm the trial court's holding as to the Arkansas Burial certificates, including the Nelms certificate, but reverse the decision as to the Shinn certificates.

The history of burial associations was discussed by the supreme court in *Drummond Citizens Ins. Co.* v. *Sergeant*, 266 Ark. 611, 588 S.W.2d 419 (1979):

> Burial associations arose out of the depression years in our country for the mutual benefit of those who desired assurance at a modest price that they would be given a decent and proper burial. . . . The one distinguishing and laudatory characteristic of these burial associations was that a person was guaranteed a complete and respectable funeral. . . . As the cost of funeral services and merchandise increased over the years, the bylaws of the associations were changed so that many associations no longer guaranteed a complete funeral.

266 Ark. at 617-18, 583 S.W.2d at 422.

Appleman says that such associations were often started by enterprising undertakers, who themselves might undertake to provide the necessary burial services. 1 J. Appleman, *Insurance Law and Practice* § 14 (1981). As the court said in *Drummond*, the General Assembly first recognized burial associations in Act 264 of 1933. Act 91 of 1953 created the Arkansas Burial Association Board, redefined burial association, and limited benefits to $500.00.

Burial association certificates are not insurance, *Herndon* v. *Wasson*, 188 Ark. 329, 66 S.W.2d 633 (1933), but are so similar that the rules of construction governing insurance policies are applicable. *Anderson* v. *Frank Reid Burial Association, Inc.*, 218 Ark. 817, 239 S.W.2d 12 (1951).

Ron Oliver, the Executive Secretary of the Board, testified that burial associations cannot exist on their own but must be associated with a funeral home which subsidizes them to a certain extent. He explained that premiums were originally structured to provide a decent burial at the lowest possible cost and that the aim of the burial associations was not to make money but to try to break even. He testified that the average cost of a funeral today is approximately $2,500.00. He said that consistent payment of the full face amount of the certificates would adversely affect the solvency of any burial association. He testified that the Board is mainly but not entirely concerned with the consumer.

Oliver also testified that the reason for the notice provisions in the certificates was to permit the funeral home associated with the burial association to provide services or merchandise in an amount equal to the value of the certificate. Other witnesses testified that it was the custom in the industry for funeral homes to enter into reciprocal agreements to pay each other a percentage of the face value of the certificates in lieu of furnishing goods or services.

We cannot agree with the trial court that the notice provisions in the Shinn certificates were ambiguous. While we do not set aside a trial court's finding of fact unless it is clearly erroneous, Ark. R. Civ. P. 52, the determination of whether a contract is ambiguous is a matter of law. *C. & A. Construction Co.* v. *Benning Construction Co.*, 256 Ark. 621, 509 S.W.2d 302 (1974); *Gilstrap* v. *Jackson*, 269 Ark. 871, 601 S.W.2d 270 (Ark.

App. 1980). The rule of strict construction does not mean that courts may strain the construction of ordinary terms in the contract to create ambiguity where one does not appear. *Services & Exchange Commission* v. *Arkansas Loan & Thrift Corp.*, 297 F. Supp. 73 (W.D. Ark. 1969).

By way of example, the certificate issued by Arkansas Burial for Fowler said:

> Failure to notify the Secretary-Treasurer of the death of a member within the service area of the Association before burial shall relieve the Association of liability under the certificate of such deceased member.

The certificate issued to Donnel by Shinn contained precisely the same language. We cannot agree that one is ambiguous and the other unambiguous.

The certificate issued for Stafford by Arkansas Burial provided:

> Certificate holders shall notify that office of the secretary or the funeral director named on the folded face of this certificate immediately after any death, and failure to do so within 24 hours shall forfeit all right of benefits in relation to said debt.

The certificate issued to Gray by Shinn provided:

> Upon the death of a member of the association, those in charge of the body of the deceased shall notify the president or secretary who shall have the exclusive right to furnish funeral services . . . . Failure to notify the president or secretary of the death of a member before he or she is buried shall forfeit all rights of the deceased to the benefits under his or her certificate of membership.

Again, the certificates are equally clear: benefits are not payable unless notice of death is given.

Dixon relies on *Drummond, supra* and *Gregg Burial Association* v. *Emerson*, 289 Ark. 47, 709 S.W.2d 401 (1986). The certificates in those cases were similar to those we have in the case at bar. In *Drummond*, the certificates seemed to say that the funeral home selected by the burial association had the exclusive

right to furnish the funeral. The burial association there contended that, unless its associated funeral home furnished the funeral, no benefits were payable. The court held that provision to be ambiguous and therefore, the family of the deceased could select which funeral home it wanted to provide the funeral. The court in *Drummond* upheld the trial court's finding that although the burial association was not required to pay cash under the terms of the certificate, having failed to furnish merchandise or services of a value equal to the face amount of the certificate, it was liable in cash for the face amount.

In *Gregg*, the court simply declined to overrule its earlier holding in *Drummond*. In both *Gregg* and *Drummond* it was stipulated that notice of death had been given. Neither case involved the validity of the notice provisions in the certificate and therefore neither case is in point. The certificates in the case at bar may well be ambiguous as to the exclusive right of the associated funeral home to perform the funeral, under the holding in *Drummond*, but that is not the issue here.

Dixon argues that notice should be excused in this case because one of the appellant's witnesses who was an undertaker testified that he thought the certificate gave his funeral home the exclusive right to bury the certificate holder. While Dixon is correct that this position is untenable under the holding of the supreme court in *Drummond* we do not agree that this opinion expressed at trial dispenses with the necessity of notice.

On cross-appeal Dixon argues that the notice provision in the certificates is unconscionable and therefore should not be enforced. At trial, Mr. Dixon testified that the reason he thought the notification requirement was unconscionable was that it was too expensive to draft and mail a letter. There was other testimony, however, that it was the custom in the industry to simply make a telephone call. Article 26 of the Board's bylaws provides that failure to notify the burial association of death, prior to burial, relieves the association of liability. The Board is given the authority to regulate the industry by Ark. Stat. Ann. § 66-1801 *et seq.* (Repl. 1980). Section 66-1823 provides that the regulations promulgated by the Board "shall have the full force and effect of statute." In his application for authority to operate his own burial association, Mr. Dixon expressly agreed to comply

with all regulations of the Board. Oliver testified that notice prior to burial has always been one of the Board's bylaws and regulations. On these facts, we hold that the notice provisions in the various certificates are not unconscionable.

Dixon also argues that the notice provision constitutes an unfair restraint of trade. We cannot consider this argument because it was not raised in the trial court. *McIlroy Bank & Trust* v. *Swen Day Builders of Arkansas, Inc.*, 1 Ark. App. 121, 613 S.W.2d 837 (1981).

Finally, appellants contend that it was error for the court to award Dixon judgment for $500.00, the face value of the Nelms certificate. We disagree. It was stipulated that Arkansas Burial received notice. Mrs. Nelms died in Waveland and the body was taken to Humphrey Funeral Home, which is associated with Arkansas Burial. There, the body was embalmed, at a cost of $260.00, before it was picked up by Dixon Funeral Home and taken back to Danville for the funeral. It is undisputed that Dixon paid Humphrey for the embalming. Under the certificate, and the holdings in *Drummond* and *Gregg*, it was the obligation of the associated funeral home, once notice was given to its burial association, to tender goods or services in an amount equal to the value of the certificate, in this case $500.00. The trial court found that such a tender was not made and that finding is not clearly wrong.

On direct-appeal we affirm the trial court's holding as to the Arkansas Burial certificates and the Nelms certificate and reverse the court's holding as to the Shinn certificates and remand to the circuit court for an entry of an order consistent with this opinion. We affirm on cross-appeal.

Affirmed in part, reversed in part, and remanded on appeal. Affirmed on cross-appeal.

COOPER and MAYFIELD, JJ., agree.

Jody HERNANDEZ *v.* SIMMONS INDUSTRIES and Allen Canning Company

CA 88-31 752 S.W.2d 45

Court of Appeals of Arkansas
En Banc
Opinion delivered June 8, 1988

Jay N. Tolley, for petitioner.

No response filed for the respondent.

PER CURIAM. Jody Hernandez filed her motion in this court to remand this record to the Workers' Compensation Commission because the order appealed from is not a final one. We agree.

Petitioner perfected an appeal to the Workers' Compensation Commission from an order of the administrative law judge denying her claim for benefits against Simmons Industries and Allen Canning Company. Allen Canning Company filed a motion before the Commission praying it be awarded costs against the appellant, as provided in Ark. Code Ann. § 11-9-714 (1987) (formerly Ark. Stat. Ann. § 81-1330 (Repl. 1976)), because the claim against it had been asserted by Hernandez without reasonable grounds. The Commission denied the motion on a finding that reasonable grounds did exist. Allen Canning Company appeals from that ruling. No determination of the merits of Jody

Hernandez' claim against either employer has been made by the Commission.

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. This rule applies equally to appeals from the Workers' Compensation Commission. *H. E. McConnell & Son* v. *Sadle*, 248 Ark. 1182, 455 S.W.2d 880 (1970); *Samuels Hide and Metal Co.* v. *Griffin*, 23 Ark. App. 3, 739 S.W.2d 698 (1987). In *Griffin*, this court cited with approval the rule contained in 3 A. Larson, *The Law of Workmen's Compensation* § 80.11 (1983), which declares that interlocutory decisions and decisions on incidental matters are not reviewable for lack of finality, and that ordinarily an order of the Commission is reviewable only at the point where it awards or denies compensation. The Commission's order appealed from in this case concerned a purely incidental issue and did not dismiss the parties from the court, discharge them from the action, or conclude their rights as to the subject matter in controversy. Therefore, it falls within the general rules as set out above and is not a final appealable order.

This appeal is dismissed without prejudice and the case remanded to the Workers' Compensation Commission for further proceedings.

George MATHEWS *v.* Woodrow GARNER, et al.

CA 88-5 751 S.W.2d 359

Court of Appeals of Arkansas
Division II
Opinion delivered June 15, 1988
[Rehearing denied August 17, 1988.]

Lovell, Arnold & Nalley, by: *John Doyle Nalley*, for appellant.

Baxter, Eisele, Duncan & Jensen, for appellees.

Steve Clark, Att'y Gen., by: *George A. Harper*, Special Asst. Att'y Gen., for appellee Ark. Dep't of Health.

GEORGE K. CRACRAFT, Judge. George Mathews appeals from a summary judgment entered in favor of Woodrow Garner, Earl Kirkpatrick, and Lonie Pettus, as directors of the Sardis Water Association, and the dismissal of his complaint with prejudice. Appellant contends that the chancellor erred in granting summary judgment because there were genuine issues as to material facts to be resolved, and because his ruling was based in part upon consideration of both oral testimony and a brief filed in support of the appellees' motion for summary judgment. We find no error and affirm.

Appellant filed a complaint alleging that he was owner of lands known as Sardis Suburbs Subdivision and that on August 13, 1985, the defendants, as directors of the water improvement district providing water to that area, contracted to supply water service to lots in the subdivision. He further alleged that on July 14, 1986, the appellees adopted a resolution suspending the issuance of all new "tie-ons" to the water district lines, and that, although they had supplied water to other persons, appellees had failed to supply water to appellant or those persons residing in appellant's subdivision. Appellant prayed for an order enjoining the appellees from supplying water to any additional customers until service to the subdivision had been supplied.

The appellees answered, admitting that such a contract had been entered into but stating that they had adopted a resolution stopping extension of water service to the appellant and all other persons because the Arkansas State Department of Health, the governing body of water associations within this state, entered an order directing the appellees not to initiate any new service contracts subsequent to July 23, 1986. Appellees further alleged that neither appellant nor any of the persons purchasing lots from appellant had applied for water service prior to the effective date of the Health Department ban, and they prayed that the complaint be dismissed.

The appellees then filed a motion for summary judgment in which they alleged that judgment should be granted in their favor because it was impossible for them to fulfill the terms of the contract with appellant due to the order issued by the Department

of Health prohibiting new tie-ons to the Sardis Water System. Attached to the motion was the affidavit of Bob Makin, an engineer-supervisor with the Department of Health, which stated that the department imposed a ban on new connections to the Sardis Water System in July of 1986 because of water supply problems the association was experiencing, and that the Sardis Water Association had no choice but to comply with the directive or otherwise be in violation of the law. He further averred that the ban was imposed on July 16, 1986, but provided for a seven-day grace period for the purpose of allowing those persons who had construction underway or who had otherwise committed themselves financially to live in the area an opportunity to be connected to the water system in order to prevent undue hardship to those individuals. He further averred that the ban on new connections was to be absolute with regard to anyone other than those who signed up during the grace period. Also attached were averments that notice of the ban and grace period was published.

The affidavit of Roger Moren, engineer-superintendent of the Sardis Water Association, was also attached to the motion for summary judgment. Mr. Moren averred that the appellant was present at the meeting where the ban and grace period were discussed, and that the water to his subdivision had not been supplied simply because he had not signed up for connection to the system during the grace period. He further averred that the refusal to supply appellant with water was based entirely upon the prohibiting order of the state agency.

Appellant filed a timely response to the motion asserting that there were material issues of fact to be resolved presented by the pleadings, specifically appellant's claim of entitlement to money damages. Contained in the response to the motion for summary judgment was a prayer that the matter be transferred to the Saline Circuit Court as all equitable issues had been resolved and rendered moot. No supporting documents were attached to the response. The court thereafter entered an order reciting that after consideration of the pleadings, the motion for summary judgment, the attached affidavits, the appellees' supporting brief, and the response to the motion, it found that the motion for summary judgment should be granted and entered an order dismissing the complaint with prejudice.

The appellant first contends that the chancellor's ruling was erroneous because there were genuine issues of a material fact to be resolved. We do not agree.

Motions for summary judgment are governed by Rule 56 of the Arkansas Rules of Civil Procedure, which provides that a judgment may be entered if the pleadings, depositions, answers, interrogatories, and admissions on file, in addition to affidavits, if any, show that there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. Summary judgment is an extreme remedy which should be allowed only when it is clear that there is no genuine issue of fact and the moving party is entitled to a judgment as a matter of law. *Johnson* v. *Stuckey & Speer, Inc.*, 11 Ark. App. 33, 665 S.W.2d 904 (1984). Although affidavits and documents in support of motions for summary judgment are construed against the moving party, once a prima facie showing of entitlement to summary judgment is made, the responding party must discard the shielding cloak of formal allegations and meet proof with proof by showing a genuine issue as to a material fact. *Pruitt* v. *Cargill, Inc.*, 284 Ark. 474, 683 S.W.2d 906 (1985); *Hughes Western World, Inc.* v. *Westmoor Manufacturing Co.*, 269 Ark. 300, 601 S.W.2d 826 (1980); *McMullan* v. *Molnaird*, 24 Ark. App. 126, 749 S.W.2d 352 (1988).

Here, the affidavits submitted by appellees constituted proof that the Arkansas Department of Health had imposed an absolute ban against the water association's adding any new customers, that the association could not then provide service to appellant's subdivision without violating that order, and that the ban was the only reason for its refusal to provide that service. Our supreme court has recognized impossibility of performance as an excuse for failure to perform a contract, *see Frigillana* v. *Frigillana*, 266 Ark. 296, 584 S.W.2d 30 (1979), and other jurisdictions have stated sound reasons why the defense should be available where public service contracts are not performed because of valid orders of state or federal regulatory agencies. *See, e.g., Litman* v. *Peoples Natural Gas Co.*, 303 Pa. Super. 345, 449 A.2d 720 (1982). *See also* Restatement (Second) of Contracts § 264 (1979). We conclude that the appellees' proof as to their performance of the contract being impossible made out a prima facie case of their entitlement to judgment. As the

appellant filed no affidavits or submitted any other proof contradicting the averments of appellees' affidavits, he failed to meet proof with proof showing a genuine issue as to a material fact, and we conclude that the entry of summary judgment in favor of the appellees was correct.

Appellant also argues that the chancellor should not have considered the affidavits filed by officials of the water association because they were self-serving. We disagree. Rule 56 does not prohibit or limit the filing of self-serving affidavits, but it does require that affidavits establishing prima facie entitlement to judgment be controverted. *See* Ark. R. Civ. P. 56(e).

The appellant further contends that the court should have transferred the case to circuit court for further proceedings as the issues calling for purely equitable relief had been resolved or rendered moot. Appellant does not point out to us the basis for his assertion that the equitable issues had been resolved. The only issues before the court at any time were equitable ones—praying for injunctive relief. Although the appellant in his motion stated that there remained an issue of money damages, he does not point out or abstract for us any pleading in which money damages were requested. Additionally, a determination of impossibility of performance would negate any issue of damages for the failure to perform.

Appellant next contends that the chancellor erred in basing his decision on appellees' brief. The court recited in its order that it had considered, along with the supporting documents attached to the motion, the appellees' supporting brief. The brief as abstracted contains nothing more than a recitation of the facts set forth in the supporting documents attached to the motion for summary judgment, along with citations of law which appellees felt applicable to those facts. We find nothing in Rule 56 which prohibits a party from submitting his motion on briefs so long as he has submitted the necessary documents to support the materials contained in the brief. A brief containing citations on a complicated issue of law is always helpful to the court. This case is not one in which the trial court relied upon *allegations* in a brief, such as the supreme court spoke out against in *Guthrie* v. *Tyson Foods, Inc.*, 285 Ark. 95, 685 S.W.2d 164 (1985). Here, the judgment was based on facts recited in uncontroverted affidavits.

Moreover, even if the brief was disregarded, we would still conclude that the summary judgment in this case was correct.

Appellant finally contends the chancellor committed reversible error in taking into consideration oral testimony prior to rendering the summary judgment. Rule 56 does not permit supplementation by oral testimony of the pleadings, depositions, answers, interrogatories, admissions on file, and affidavits filed in considering whether summary judgment is appropriate. *Montgomery Ward & Co., Inc.* v. *Credit*, 274 Ark. 66, 621 S.W.2d 855 (1981); *Dixie Furniture Co.* v. *Arkansas Power & Light Co.*, 19 Ark. App. 160, 718 S.W.2d 120 (1986). Here, although the court did take oral testimony on some preliminary matters many months prior to granting summary judgment, no oral testimony was taken at any hearing on the motion. Additionally, the court specifically recited those matters it considered in granting the motion, and "oral testimony" was not included in that recital. Furthermore, as in the two cases just cited, when the oral testimony is disregarded, there remains the uncontradicted affidavits which are sufficient to sustain a finding that there was no material issue of fact to be determined and that appellees were entitled to judgment as a matter of law.

Affirmed.

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

Patrick Joseph QUINN, Jr. *v.* STATE of Arkansas

CA CR 87-201 751 S.W.2d 363

Court of Appeals of Arkansas
En Banc
Opinion delivered June 15, 1988

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

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

JAMES R. COOPER, Judge. The appellant was convicted by a jury of manslaughter and was sentenced to seven years in the Arkansas Department of Correction. On appeal he argues three points: that the trial court failed to exercise its discretion in determining whether the appellant should be sentenced under the Alternative Service Act, Ark. Stat. Ann. § 43-2339 et seq. (Supp. 1977) [Ark. Code Ann. § 16-93-501 et seq. (1987)]; in the alternative, if this Court finds that the trial court did exercise its discretion, the trial court abused its discretion in refusing to sentence the appellant according to the Act; and that this Court should modify the appellant's sentence because the trial court's sentencing procedure was erroneous. We find that the trial court

did err in failing to exercise its discretion.

The appellant was charged with first degree murder after he shot and killed his roommate, Rusty Powell. After a trial on February 25, 1987, the jury returned a verdict of guilty on the lesser included offense of manslaughter. According to the record, at the time of the shooting the appellant was nineteen years old and had no previous criminal convictions.

On March 2, 1987, the appellant's attorney informed the prosecuting attorney that he intended to request sentencing under the Act, and, according to the defense attorney, the prosecutor stated that he had no objections. The appellant's attorney also spoke with the trial court's docket coordinator and informed her that he had several requests concerning sentencing.

The appellant's attorney then tried to get a blank judgment and commitment form so that he could prepare it. After several requests to the prosecutor's office, the appellant's attorney received a blank form on March 31. The appellant's attorney learned the next day that an order had been prepared by the prosecutor and submitted to the trial court. On April 3, 1987, a motion was filed requesting that the appellant be sentenced according to the Act and a hearing was scheduled (apparently by the docket coordinator) for April 17.

On April 10, the appellant's attorney learned that the appellant had been transferred from the Faulkner County Jail to the Arkansas Department of Correction. The record reflects that the judgment and commitment order was filed April 8. The appellant's attorney then filed a motion on April 16, requesting that the appellant be present for the hearing on April 17.

At the hearing, the trial court stated that it had continued the hearing because the prosecutor had not yet responded to the motion filed the previous day. Later, the appellant's attorney asked about a new hearing date. In response the trial court stated that he thought he had lost jurisdiction of the case and any relief would have to come from the Arkansas Department of Correction.

It is the appellant's contention that Ark. Stat. Ann. § 43-2342 (Repl. 1977) [Ark. Code Ann. § 16-93-507 (1987)] requires the trial court to exercise its discretion when considering

whether to apply the Act and failure to do so is error. We agree.

We will not disturb a trial court's exercise of discretion unless it is abused, but the statute does contemplate that discretion will actually be exercised. We cannot sustain the sentence until that step has been taken. *Turner* v. *State*, 270 Ark. 969, 606 S.W.2d 762 (1980). We think that it is evident that the trial court did not exercise any discretion in this case because the order was entered prior to the scheduled hearing on the issue.

The State argues the trial court lost jurisdiction of the case once the judgment and commitment order had been entered and the appellant remanded to the custody of the Arkansas Department of Correction. A trial court cannot alter a valid sentence once it has been put into execution, and the issuance of a commitment puts the sentence into execution, *Redding* v. *State*, 293 Ark. 411, 738 S.W.2d 410 (1987). However, we hold that the trial court erred in signing the commitment without exercising its discretion, especially in light of the fact that a hearing had been scheduled on the sentencing issue raised by the appellant.

. We need not consider the appellant's alternative argument that the trial court abused its discretion in declining to sentence under the Act because we have found that the trial court failed to exercise its discretion. Furthermore, we think it would be improper for us to alter the appellant's sentence. The Act plainly states "if it shall appear to the trial court that such person may be an eligible offender . . . ." Clearly, it is the function of the trial court, not the appellate court, to make this determination. We therefore reverse the appellant's sentence and remand for sentencing in accordance with the appropriate statutes.

Reversed and remanded.

JENNINGS, J., concurs.

JOHN E. JENNINGS, Judge, concurring. The Alternative Service Act does not require that a hearing be set when a defendant seeks to be sentenced under the act. *See Barnes* v. *State*, 4 Ark. App. 84, 628 S.W.2d 334 (1982). Nor does the act require the trial judge to explain his reasons for a refusal to sentence under the act, *Barnes, supra*, although it would no doubt be preferable. *Evans* v. *State*, 287 Ark. 136, 697 S.W.2d 879 (1985).

The case must be reversed and remanded only because the record affirmatively suggests a failure to exercise that discretion mandated by the statute. *Turner* v. *State*, 270 Ark. 969, 606 S.W.2d 762 (1980).

James Joseph STANDLEY, Jr. *v.* STATE of Arkansas

CA CR 87-213 751 S.W.2d 364

Court of Appeals of Arkansas
Division I
Opinion delivered June 15, 1988

Billy J. Allred, for appellant.

Steve Clark, Att'y Gen., by: *Olan W. Reeves*, Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. The appellant, James Standley, was found guilty by a jury of the manufacture of a controlled substance (marijuana), possession of a controlled substance (cocaine), possession of a controlled substance with intent to deliver (marijuana), and being a felon in possession of a firearm. The trial court sentenced him to a total of 30 years in prison and fined him a substantial sum. Before trial, appellant filed a motion to suppress evidence. After a hearing, the trial court denied the motion. The sole issue on appeal is whether this was error.

On or about August 26, 1986, Captain Lonnie Nichols, a Carroll County Sheriff's Deputy, received a phone call from a confidential informant telling him that appellant was growing marijuana at his home. On September 2, 1986, Carroll County Sheriff Leroy Shower and two deputies, drove out to appellant's place, in rural Carroll County, in an unmarked pickup truck. They saw that appellant's house was surrounded by a fence and that there were tall weeds growing up in back of the house. They could not see what lay behind the weeds from the road.

The officers decided to park the truck on the road and investigate from behind appellant's east fence. To do so they went through a gate into a field, apparently owned by appellant's neighbor, went over a cross-fence, and entered an area of heavy woods located just to the east of appellant's property. From this

vantage point they could see into a garden area, fenced off with barbed wire and bounded on three sides by tall weeds. The officers could see what appeared to be five foot marijuana plants growing in the garden area (see diagram).

Deputy Behymer estimated that it was about 20 to 30 yards from their vantage point in the woods to the marijuana patch. There was also testimony that the marijuana lay less than 50 feet from the back of appellant's house. In order to get a closer look, the officers crossed Standley's east fence and entered an open area just to the east of the fenced marijuana patch. They did not cross the fence that surrounded the patch.

They then left the area and obtained a search warrant from Municipal Judge Allen Epley. The subsequent search produced marijuana, cocaine, and several firearms.

The question for decision is whether what the officers did, before obtaining the search warrant, constituted an unreasonable search in violation of the Fourth Amendment, as made applicable to the states through the due process clause of the Fourteenth Amendment. We affirm the trial court's decision that it did not.

The substance of appellant's argument is (1) that the fenced marijuana patch was a part of the curtilage of his home and (2) that because the officers had no permission to be in the appellant's neighbor's woods nor to be in the open area on appellant's property behind the marijuana patch, their visual observation into the curtilage constituted an unreasonable search. While we agree with the first proposition we cannot agree with the second.

In *Sanders* v. *State*, 264 Ark. 433, 572 S.W.2d 397 (1978), the defendant had a garden located between 100 and 200 yards behind his house trailer. A fence separated the trailer from the garden. The garden contained vegetables and growing marijuana plants. A water hose ran from the house trailer to the garden. Police officers searched the defendant's house and found the marijuana growing in his garden. On appeal the supreme court held that the garden was part of the curtilage.

In *Gaylord* v. *State*, 1 Ark. App. 106, 613 S.W.2d 409 (1981), we held that the test to be applied in distinguishing an open field from curtilage was whether the marijuana patch lay within the defendant's reasonable expectations of privacy, rely-

ing on *Katz* v. *United States*, 389 U.S. 347 (1967).

In *United States* v. *Dunn*, 480 U.S. ___, 107 S. Ct. 1134 (1987), the court said that the curtilage question should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home; whether the area is included within an enclosure surrounding the home; the nature of the uses to which the area is put; and the steps taken by the resident to protect the area from observation by people passing by. The Court said that these factors were only "useful analytical tools," in determining whether the area in question is so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection. *Dunn* at ___, 107 S. Ct. at 1139. Whether we apply the holding in *Sanders*, the test we used in *Gaylord*, or the factors described in *Dunn*, the appellant's marijuana patch was part of the curtilage.

Our next inquiry is whether the officer's conduct constituted an unreasonable search of appellant's property. *State* v. *Peakes*, 440 A.2d 350 (Me. 1982), is almost in point. There two police officers had received an anonymous tip that the defendant was growing marijuana in a garden behind his house. They drove past his house on a rural road but were unable to see the garden. They obtained permission from the defendant's neighbor to go onto the neighbor's land, walk to the boundary line separating the two tracts, and from there were able to see the growing marijuana plants. They left and obtained a search warrant. The defendant contended that the officers' observation of the plants constituted an unreasonable search of his property, a contention which the Supreme Court of Maine rejected. The court said:

> The defendant correctly notes that his garden was not open or exposed to the public. But the defendant made no attempt to conceal the garden from the view of his neighbors. He cannot be said to have had an actual expectation of privacy in the garden under the circumstances. There was no invasion of his property. The officers observed something which was "open and patent" to the defendant's neighbors and their invitees. [Citations omitted.]

The only real difference between *Peakes* and the case at bar is that here the permission of appellant's neighbor was not

obtained. But in *Oliver* v. *United States*, 466 U.S. 170 (1983), the Court held that the government's intrusion upon an open field does not become a search in the constitutional sense merely because that intrusion is a trespass at common law. In the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment. *Oliver*, 466 U.S. at 184.

Unquestionably, a wooded area may be an open field as that term is used in the context of the Fourth Amendment. *Oliver*, 466 U.S. 170, 180 n.11; *Bedell* v. *State*, 257 Ark. 895, 521 S.W.2d 200 (1975). While this is not an open field search case it is clear that the officers' observations were made from "open fields."

The Court in *Oliver* reversed *State* v. *Thornton*, 453 A.2d 489 (Me. 1982). In *Thornton* an officer received a tip from an unidentified informant that marijuana was growing in a wooded area behind the defendant's mobile home. The officers crossed a fence, entered onto the defendant's property through a footpath and found marijuana growing in two clearings fenced in with chicken wire. The marijuana could not be seen from the public road or from neighboring land. The property was posted with no trespassing signs. The Maine Supreme Court had unanimously held that the officers' conduct constituted an unreasonable search.

In *California* v. *Ciraolo*, 476 U.S. 207 (1985), once again the police had received an anonymous tip that the defendant was growing marijuana in his backyard, which was enclosed by two fences and shielded from view at ground level. The officers hired a private airplane, flew over the defendant's house and identified marijuana plants growing in the yard. These observations provided the basis for a subsequent search warrant.

The United States Supreme Court reversed the California court's holding that the warrantless aerial observation of defendant's yard violated the Fourth Amendment. The *Ciraolo* Court said:

> That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on

> public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observation from a public vantage point where he has a right to be and which renders the activities clearly visible. [Citations omitted.]

In *United States* v. *Dunn*, 480 U.S. ___, 107 S. Ct. 1134 (1987), police officers had information that chemicals which could be used in drug preparation were located in the vicinity of a barn on the defendant's 200 acre ranch. The barn was located about 60 yards from the defendant's house. The ranch had a perimeter fence and several cross fences, including a fence which surrounded the ranchhouse but did not enclose the barn.

Without a warrant and without probable cause the officers crossed the outer fence and entered the ranch. They crossed two more fences to get near the barn where they smelled what they thought were drugs. They approached the barn and although they did not enter it, they shined a flashlight through an opening to observe what they thought to be a drug laboratory. The officers then left and obtained a warrant.

While the Court in *Dunn* expressly held that the barn was not part of the curtilage, it did assume, for purposes of the opinion, that the "barn enjoyed Fourth Amendment protection and could not be entered and its contents seized without a warrant." *Dunn*, 480 U.S. at ___, 107 S. Ct. at 1140. The Court said:

> [T]he officers never entered the barn, nor did they enter any other structure on respondent's premises. Once at their vantage point, they merely stood, outside the curtilage of the house and in the open fields upon which the barn was constructed, and peered into the barn's open front. And, standing as they were in the open fields, the Constitution did not forbid them to observe the phenylacetone laboratory located in respondent's barn. . . .
>
> Under *Oliver* and *Hester*, there is no constitutional difference between police observations conducted while in a public place and while standing in the open fields. Similarly, the fact that the objects observed by the officers lay within an area that we have assumed, but not decided, was

> protected by the Fourth Amendment does not affect our conclusion.

Dunn, 480 U.S. ___, 107 S. Ct. at 1141.

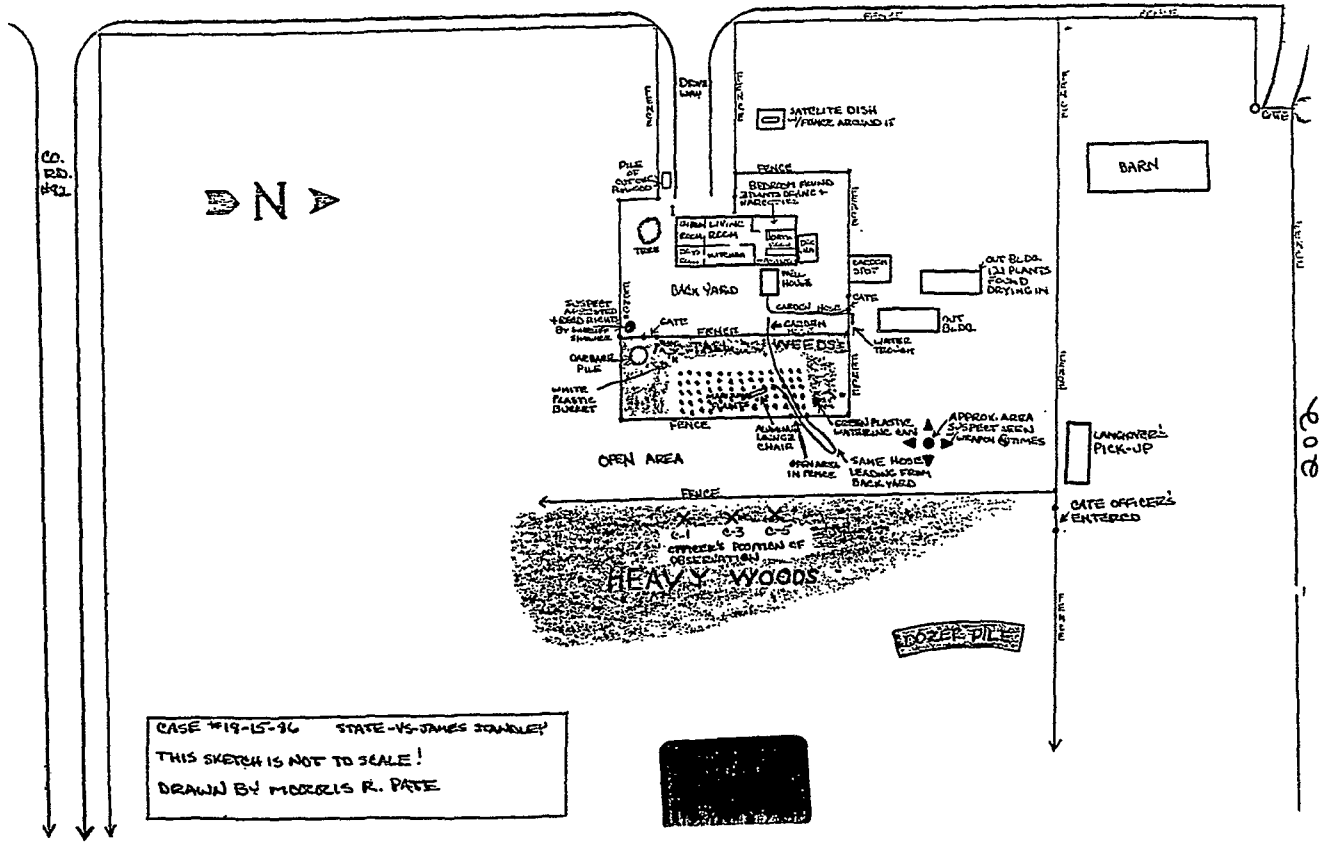
Observations from outside the curtilage of activities within are not generally interdicted by the Constitution. *Fullbright* v. *United States*, 392 F.2d 432 (10th Cir. 1968).

Our conclusion is that under *Oliver, Ciraolo,* and *Dunn*, the warrantless naked-eye observation of the appellant's curtilage from an adjacent open field did not constitute an unreasonable search within the meaning of the Fourth Amendment.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

[redacted]



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James WILSON *v.* STATE of Arkansas

CA CR 87-220 752 S.W.2d 46

Court of Appeals of Arkansas
Division I
Opinion delivered June 22, 1988

Janice Williams Wheeler, for appellant.

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

JAMES R. COOPER, Judge. On June 23, 1986, the appellant entered a guilty plea to a charge of possession of a controlled

substance with intent to deliver and received five years probation. On August 20, 1987, the Pike County Circuit Court granted the State's petition to revoke the appellant's probation and he was sentenced to ten years in the Arkansas Department of Correction. On appeal, the appellant argues four points: that the trial court erred in denying the motion to suppress evidence allegedly obtained as a result of an illegal arrest; that condition seven in the conditions of probation which requires the appellant to subject himself to a search at any time is unconstitutional; that evidence used to revoke his probation was seized during an illegal search; and that the court erred in allowing a crime laboratory report to be introduced into evidence. We disagree with the appellant's arguments and affirm.

The record reveals that on February 11, 1987, Sheriff George Riley went to the appellant's residence because he "understood" that the appellant had controlled substances in his home and he wanted to search for them. Sheriff Riley was accompanied by Officer Dickie Branch and Jim O'Neil, a member of the county quorum court. When they arrived at the appellant's house, Sheriff Riley began talking with the appellant who was in his yard splitting wood. According to Sheriff Riley, when he told the appellant that they were there to search for drugs, the appellant ran toward the door of his trailer. Sheriff Riley testified that they followed the appellant and that he could see green vegetable matter on the living room table when the appellant opened the front door. The officers entered the trailer, scuffled with the appellant, and, after subduing and handcuffing him, searched the trailer. Besides the green matter, which was later tested and found to be marijuana, three guns were found.

The appellant testified that when he was told that his home was to be searched, he asked the Sheriff to wait outside while he got a shirt. The three men followed him onto the porch, according to the appellant, and after he had entered the trailer and latched the door, the officers forced their way in and searched the home. Officer Riley stated that he believed he had the authority to search the appellant's home without a search warrant pursuant to condition seven of the appellant's written conditions of probation which provides:

7. The defendant shall, during the period of probation

> submit his person, place of residence or vehicle to search and seizure at any time of the day or night, with or without a search warrant, whenever requested to do so by the probation officer or any law enforcement officer.

The appellant first argues that he was arrested illegally because the officers did not have reasonable cause to arrest him. Arkansas Statutes Annotated § 41-1208(2) (Repl. 1977) [Ark. Code Ann. § 5-4-309 (1987)] provides:

> (2) At any time before the expiration of a period of suspension or probation, any law enforcement officer may arrest a defendant without a warrant if the officer has reasonable cause to believe that [the] defendant has *failed to comply with a condition of his suspension or probation.*

(Emphasis added). We disagree with the appellant's contention that the officers did not have "reasonable cause" to believe that he had violated a condition of his suspension of probation.

The appellant testified that he did not consent to the search and that he tried to prevent the officers from searching without a warrant. Because one of the conditions of the probation was that the appellant subject himself and his home to being searched, the appellant's refusal gave the officers "reasonable cause to believe that the appellant had failed to comply with a condition of his probation." We therefore find that the actual arrest, occurring a few minutes later, was not illegal.

The appellant argues next that condition seven is unconstitutional. However, the appellant does not cite any convincing authority for this proposition; he vaguely alludes to various constitutional and statutory provisions which are only tangentially related to the issues. Assignments of error, unsupported by convincing argument or authority, will not be considered on appeal unless it is apparent without further research that they are well taken. *Reynolds* v. *State*, 18 Ark. App. 193, 712 S.W.2d 329 (1986).

The appellant argues in his third point that the trial court should have suppressed the evidence seized in his home because the search was unlawful. It is the appellant's contention that the officers needed a search warrant to conduct the search of his home.

The appellant and the State both cite the case of *Griffin* v. *Wisconsin*, 483 U.S. ___, 107 S.Ct. 3164 (1987). In that case the United States Supreme Court upheld the warrantless search by probation officers of a probationer's home. In its opinion, the Court pointed out the difference between a search conducted by a probation officer, who is concerned with both public interests and the welfare of the probationer, and a search conducted by a police officer. However, *Griffin* was not a revocation case; the evidence gathered by the probation officer was used to convict the probationer of a state weapons offense. Therefore, we do not find *Griffin* to be controlling.

We have said many times that the exclusionary rule does not apply to revocation proceedings, at least where there has been a good faith effort to comply with the law. *Carson* v. *State*, 21 Ark. App. 249, 731 S.W.2d 237 (1987); *Harris* v. *State*, 270 Ark. 634, 606 S.W.2d 93 (Ark. App. 1980). However, an analysis of "good faith" is not required here because the officers had the authority to search the appellant's home pursuant to the conditions of probation. We find that the trial court was correct in its refusal to grant the appellant's motion to suppress.

The appellant's last argument concerns a report prepared by the Arkansas State Crime Laboratory which indicated that the green vegetable matter seized from the appellant's home was marijuana. The appellant contends that because the report was hearsay and violated the best evidence rule, it was error to allow the State to introduce it into evidence. The appellant's argument has no merit because the Rules of Evidence are not applicable in revocation proceedings. *Felix* v. *State*, 20 Ark. App. 44, 723 S.W.2d 839 (1987).

We find that the trial court did not err in refusing to suppress the evidence found in the appellant's home or in allowing the crime laboratory report to be introduced into evidence and, accordingly, we affirm the revocation of the appellant's probation.

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

GENERAL WATERWORKS COMPANY of Pine Bluff *v.* ARKANSAS PUBLIC SERVICE COMMISSION

CA 87-52 752 S.W.2d 52

Court of Appeals of Arkansas
En Banc
Opinion delivered June 22, 1988
[Rehearing denied August 10, 1988.]

Walton F. Hill and *House, Wallace & Jewell, P.A.*, by: *E.B. Dillon, Jr.*, for appellant.

George C. Vena, for appellee.

JOHN E. JENNINGS, Judge. General Waterworks Company of Pine Bluff (GWPB) applied to the Arkansas Public Service Commission for a rate increase to produce additional revenues of $726,230.00, which would represent an increase of about 17.98%. The PSC granted appellant an increase of $255,627.00. Both of appellant's points for reversal relate to the appellee's treatment of the financial relationship between appellant and its parent corporation, General Waterworks Corporation (GWC), a holding company whose assets consist of General Waterworks Company of Pine Bluff and other utility and business operations nationwide. We affirm the decision of the Arkansas Public Service Commission.

Arkansas Code Annotated Section 23-2-423(c)(3), (4), and (5) (1987) defines and limits our scope of review:

(3) The finding of the commission as to the facts, if supported by substantial evidence, shall be conclusive.

(4) The review shall not be extended further than to determine whether the commission's findings are supported by substantial evidence and whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violated any right of the petitioner under the laws or Constitution of the United States or of the State of Arkansas.

(5) All evidence before the commission shall be considered by the court regardless of any technical rule which might have rendered the evidence inadmissible if originally offered in the trial of any action at law or in equity.

And our Supreme Court recently stated:

> While we would reverse a decision where confiscatory rate making was evident, *Public Service Comm'n* v. *Continental Tel. Co.*, 262 Ark. 821, 561 S.W.2d 645 (1978); *Chicago M. St. P. Ry. Co.* v. *Minnesota ex rel. Railroad & Warehouse Comm.*, 134 U.S. 418 (1890), we are not concerned with the method the commission used, and the court of appeals approved, to determine the rate needed to supply the company adequately with working capital. *General Tel. Co.* v. *Arkansas Public Service Comm'n*, 272 Ark. 440, 616 S.W.2d 1 (1981).
>
> * * * *
>
> As long as the decision falls within the "zone of reasonableness" we cannot find it was confiscatory. *Public Service Comm'n* v. *Continental Tel. Co., supra.*

General Telephone Co. of the Southwest v. *Arkansas Public Service Comm'n*, 295 Ark. 595, 599-600, 751 S.W.2d 1 (1988).

The appellant calculated its adjusted test year rate of return on its rate base to be 8.41%. After hearings on the application, the Commission calculated the test year return to be 7.34%

instead of 8.41 % and increased the allowed rate to 8.58 %. In this appeal, appellant seeks relief which would increase its allowed return on rate base to 9.09 % and give it additional revenue of about $75,000.00.

Because appellant is a wholly-owned subsidiary of GWC, its stock is not publicly traded. Therefore, the calculation of an allowable fair return on GWPB's stockholder's equity is accomplished through the use of "double leverage." Double leverage means that the overall cost of capital for the parent corporation is the cost of equity to be allowed the subsidiary company in calculating the rates the subsidiary may charge its consumers. Double leverage carries with it an implicit recognition of the concept of fungibility of funds, in the sense that all the shareholder's equity and all the various liabilities of the parent company are not identifiable or traceable and aggregately fund the assets of the subsidiary. The validity of the concept of double leverage has been recognized in several cases and is not in question here. *General Telephone Co. of the Southwest* v. *Arkansas Public Service Comm'n*, 23 Ark. App. 73, 744 S.W.2d 392 (1988), *aff'd*, 295 Ark. 595, 751 S.W.2d 1 (1988); *see also General Telephone Co.* v. *Arkansas Public Service Comm'n*, 272 Ark. 440, 616 S.W.2d 1 (1981); *Arkansas Public Service Comm'n* v. *Lincoln-Desha Telephone Co.*, 271 Ark. 346, 609 S.W.2d 20 (1980).

In applying the principle of double leverage, it is first necessary to derive the parent corporation's overall cost of capital, which is then imputed to the subsidiary as its cost of shareholder's equity. Two items involved in that calculation, Accumulated Deferred Income Taxes (ADIT) and deferred income items relating to income to be realized in the future from installment sales of corporate property, are at issue here. The appellant also disagrees with the classification of these items on the liabilities side of GWC's balance sheet, from which appellant's cost of equity is derived.

ADIT is an item recognized on a company's books to provide funds to meet contingent tax liabilities in the event that proceeds from sales of property are not reinvested in such a manner as to avoid tax liability. The Commission accepted the recommendation of the PSC Staff that ADIT and deferred income items

booked by the parent corporation (GWC) as liabilities be included in the cost of capital calculation as cost-free. Appellant contends that ADIT may not be considered a cost-free source of capital because the amounts booked are, in reality, part of the capital gain realized on the sale of property and, as such, should be considered as an asset despite the fact that they appear on the liability side of the balance sheet. Further, appellant contends that, even if GWC's ADIT is included in its cost of capital calculation, it would carry a potential cost consisting of interest payable to the Internal Revenue Service if the tax liability is not avoided by qualified reinvestment. Appellant also argues that the balances of the deferred income accounts on GWC's books, likewise booked as liabilities, should not be included as zero-cost sources of capital at all or, alternatively, should carry a cost equivalent to the return on equity the PSC allowed the shareholder (GWC) in this case, which is 11.77%.

The appellee essentially contends that inclusion of ADIT and deferred income balances in the parent corporation's cost of capital calculation is proper on the basis that, if something is booked as a liability, then it is a liability, and all liabilities represent funding sources available to fund various corporate assets, one of which in this case is GWPB. This concept that the right side of the balance sheet (liabilities) fund the left side (assets) is one of the bases of a working capital methodology known as the "Modified Balance Sheet Approach" (MBSA). The use of the MBSA to determine the working capital requirement of a utility has been discussed in previous decisions of this Court and our Supreme Court. *General Telephone Co. of the Southwest* v. *Arkansas Public Service Comm'n*, 23 Ark. App. 73, 744 S.W.2d 392 (1988), *aff'd*, 295 Ark. 595, 751 S.W.2d 1 (1988). While the MBSA was not applied to determine GWC's working capital here as it was in those cases (although the MBSA apparently was applied to appellant, GWPB, for that purpose) its basic premise, that all liabilities are to be treated alike, controlled the PSC's treatment of GWC's funding sources in this case. The Commission found that the appellant's position as to these liabilities on its parent corporation's books would require tracing of specific items of capital funding sources which would, of course, be inconsistent with the concept of fungibility of funds.

We do not accept the company's position that the ADIT bear

interest which must be paid to the IRS. Because ADIT represent only a contingent liability, the cost associated with that liability cannot be determined unless and until a taxable event occurs.

Although the appellee was presented with expert testimony by the appellant in support of its position in this case, there was also testimony from expert witnesses which supports the result reached by the Commission. From our review of the record, we cannot say that the PSC's findings as to nature and cost of ADIT and deferred income accounts were not supported by substantial evidence. On review, our inquiry is concluded if the factual determinations of the Commission are supported by substantial evidence and are not confiscatory. *General Telephone, supra.* Because the result reached in this case cannot be said to be confiscatory and the findings of the Commission are supported by substantial evidence, we affirm.

Affirmed.

S. Blaine McCALEB, III *v.* NATIONAL BANK OF COMMERCE of Pine Bluff

CA 87-347 752 S.W.2d 54

Court of Appeals of Arkansas
Division I
Opinion delivered June 22, 1988

McKenzie & Specht, by: *James W. McKenzie, Jr.*; and *Ramsay, Cox, Bridgforth, Gilbert, Harrelson & Starling*, by: *Rosalind R. McClanahan*, for appellants.

Bridges, Young, Matthews, Holmes & Drake, by: *David L. Sims*, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a summary judgment awarded appellee, National Bank of Commerce of Pine Bluff (NBC), on a guaranty agreement. From the matters included in the record on appeal, it is undisputed that appellants were stockholders in McCauley Aviation, Inc., an Arkansas corporation with its principal place of business in Pine Bluff. In order to obtain a $180,000.00 line of credit with NBC, the appellants, on February 22, 1982, executed a guaranty agreement which provided in pertinent part as follows:

> For value received and in consideration of advances made or to be made, or credit given or to be given, or other financial accommodation from time to time afforded or to be afforded to *McCauley Aviation, Inc.* (hereinafter designated as "Debtor"), by NATIONAL BANK OF COMMERCE OF PINE BLUFF, . . . the undersigned hereby jointly and severally guarantee the full and prompt payment to said Bank at maturity and at all times thereafter of any and all indebtedness, obligations and liabilities of every kind and nature of said Debtor to said Bank (including liabilities of partnerships created or arising while the Debtor may have been or may be a member thereof), howsoever evidenced, whether now existing or hereafter created or arising, whether direct or indirect, absolute or contingent, or joint or several, and howsoever owned, held or acquired, whether through discount, overdraft, purchase, direct loan or as collateral, or otherwise; and the undersigned further agree to pay all expenses, legal and/or otherwise (including court costs and attorney's fees, paid or incurred by said Bank in endeavoring to collect such indebtedness, obligations and liabilities, or any part thereof, and in enforcing this guaranty). The right of recovery, however, against the undersigned is limited to ___ DOLLARS ($ ___) plus interest on all loans and/or advances hereunder and all expenses hereinbefore mentioned.

The space for a dollar limitation on the guaranty was left blank.

McCauley Aviation, Inc. had several other loans with appellee which were secured by collateral, financing statements, and security agreements. In 1985 McCauley Aviation went into bankruptcy. Appellee was apparently paid in full on all of McCauley Aviation's promissory notes except one for $98,456.39 secured by an airplane. After receiving authorization from the bankruptcy court, appellee repossessed the airplane, sold it, relying on the guaranty agreement, and then, sued appellants for the deficiency. Summary judgment was granted appellee for $52,593.61 principal, plus interest, and attorney fees.

On appeal, appellants first argue that the guaranty is too ambiguous to be enforceable because a material term, the limit of the sum guaranteed, was omitted. On the other hand, appellee contends that the guaranty agreement is complete without the insertion of a limitation on the amount guaranteed; that a limitation is not an essential term of a guaranty agreement unless the parties specifically agree to a limitation; and that as executed the guaranty is an unconditional, unlimited guaranty, securing *all* McCauley Aviation's debts to NBC.

In *National Bank of Eastern Arkansas* v. *Collins*, 236 Ark. 822, 370 S.W.2d 91 (1963), the court said that a guaranty has been defined as a collateral undertaking by one person to answer for payment of a debt of another; that a guarantor is entitled to a strict construction of his undertaking and cannot be held liable beyond the strict terms of his contract; and that a guarantor, like a surety, is a favorite of the law and his liability is not to be extended by implication beyond the express limits or terms of the instrument, or its plain intent. *See also, Lee* v. *Vaughn*, 259 Ark. 424, 534 S.W.2d 221 (1976). However, a guaranty contract, like any other contract, must be interpreted according to its language, if clear and unambiguous. *Bank of Morrilton* v. *Skipper, Tucker & Co.*, 165 Ark. 49, 263 S.W. 54 (1924). In ascertaining the meaning of the language of a contract of guaranty, the same rules of construction control as apply in the case of other contracts. In accordance with such rules it is important, if possible, to determine and give effect to the intention of the parties as ascertained by a fair and reasonable interpretation of the terms used and the language employed, read in the light of the attendant circumstances and the purposes for which

the guaranty was made. *Ouachita Valley Bank* v. *DeMotte*, 173 Ark. 52, 291 S.W. 984 (1927).

Although there are no Arkansas cases on point, we find guidance in two cases from other states cited by the appellee. In *North Carolina National Bank* v. *Corbett*, 271 N.C. 444, 156 S.E.2d 835 (1967), a woman had signed a guaranty for her husband to obtain a line of credit. The guaranty secured "any and all notes, drafts, obligations and indebtednesses of Borrower," and provided that "the amount of principal at any one time outstanding for which the undersigned shall be liable as herein set forth shall not exceed the sum of $ ___ ." The court considered the issue to be whether the failure to insert in the guaranty a limitation on the guarantor's liability rendered the instrument void. It concluded that:

> The blank space and the antecedent wording provided the guarantor opportunity to limit her liability for her husband's debts. She executed the agreement without inserting any limitation. She cannot, thereafter, ex parte, alter the terms of the agreement. The guaranty is to pay the notes . . . . Its terms are clear, free of ambiguity. Consequently, there is nothing for the Court to construe. The meaning becomes a question of law.

156 S.E.2d at 837.

In another case cited by the appellee, *Cessna Finance Corporation* v. *Meyer*, 575 P.2d 1048 (Utah 1978), the facts were remarkably similar to those in the case at bar. Intermountain Flight Center, Inc., had defaulted on its debt to Cessna Finance Corporation and filed a petition in bankruptcy. Cessna repossessed the collateral, sold it, and filed suit for a deficiency judgment against the guarantors. The trial court ruled as a matter of law that the guarantor's liability was based on an unlimited and continuing guaranty; that the agreement was valid; and that the failure to place a figure in a blank and thereby limit the guarantor's liability to a specific sum indicated unlimited liability. On appeal, it was argued that the guaranty agreement was not enforceable because the provision was left blank. The appellate court specifically noted that the appellant claimed that the amount limiting liability was an essential

element to the guaranty agreement and that the failure to include this term caused the contract to fail for lack of mutual assent. The court then stated:

> The unfilled blank, if not essential to the understanding between the parties, may be rejected as unnecessary and mere surplusage if it appears that the omission was intended. In the instant case, the appellant was eager to obtain financing from the respondent and, therefore, volunteered to execute the guaranty agreement. The agreement was a form contract and was given to the guarantors to fill in. The guarantors did fill in all the blanks except the one that limited their liability and duly executed the document. Respondent had no obligation to limit the amount of liability; that was for the guarantors to do if they so desired. If any of them had wanted to limit his obligation, he could have done so by filling in that blank on the form agreement.

575 P.2d at 1050-51.

In the case now under consideration, the guaranty agreement stated "the undersigned hereby . . . guarantee the full and prompt payment . . . of any and all indebtedness, obligations and liabilities of every kind and nature of said Debtor to said Bank." We find this language to be clear and unambiguous. It means that the guarantors' liability is unlimited unless a figure is written in the blank placing a dollar limit on their liability. This interpretation is consistent with the factual situation which the record shows surrounded the making of the agreement—that appellants wished to establish a line of credit with appellee Bank. If appellants had chosen to limit their liability, they could have easily placed a figure in the blank before executing the agreement. The record shows they had ample time to do so, as the document was mailed to them to execute, thus giving them time to study it and even have it examined by their attorney.

Appellants rely heavily on the dissenting opinion in *Shamburger* v. *Union Bank of Benton*, 8 Ark. App. 259, 650 S.W.2d 596 (1983), in support of their position that when a guaranty contract is ambiguous, parol evidence is not admissible

to clarify the ambiguity, and that an ambiguity in a contract must be construed against the drafter. However, we need not discuss the difference between the majority and minority views in *Shamburger* since the rules of law involved there are simply not applicable in this case. Here, the trial court found the guaranty contract to be clear and unambiguous, not requiring further evidence to ascertain the meaning of the parties, and we agree with the trial court's conclusion.

Appellants also argue that the trial court erred in granting summary judgment in favor of appellee because there was no meeting of the minds as to the amount guaranteed and this is an essential term of the contract. In considering a motion for summary judgment, a judge may consider pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, to determine whether there is a genuine issue as to any material fact and whether the moving party is entitled to summary judgment. *Hallmark Cards, Inc.* v. *Peevy*, 293 Ark. 594, 739 S.W.2d 691 (1987); ARCP Rule 56(c). Summary judgment is an extreme remedy and will be granted only when there is no genuine issue of material fact before the court; all proof 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. *First National Bank of Wynne* v. *Hess*, 23 Ark. App. 129, 743 S.W.2d 825 (1988). However, parties are presumed to have read and understood their contracts. In *Connelly* v. *Beauchamp*, 178 Ark. 1036, 13 S.W.2d 28 (1929), the court stated the rule as follows:

> The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention, if it can be done consistently with legal principles. The parties should always be bound for what they intended to be bound for, and no more. The intention of the parties means, however, the intention as shown by the contract, and not what they may have had in mind but did not express. The law presumes that the parties understood the import of their contract and that they had the intention which the terms of the contract manifest.

178 Ark. at 1042. *See also, Rodgers* v. *Lyon*, 256 Ark. 323, 507

S.W.2d 95 (1974). Here, there are uncontradicted affidavits that appellants were experienced business persons and were dealing with appellee at arms length. We find they are bound by the terms of the guaranty.

Since we have concluded that the contract was clear and unambiguous and that limiting the amount of the guaranty was a nonessential term, it follows that granting appellee summary judgment was proper.

Affirmed.

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

Gregory SWEAT *v.* STATE of Arkansas

CA CR 87-203 752 S.W.2d 49

Court of Appeals of Arkansas
Division I
Opinion delivered June 22, 1988

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

Steve Clark, Att'y Gen., by: *C. Kent Jolliff*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. Appellant, Gregory Sweat, was

convicted of possession of a controlled substance, marijuana, with intent to deliver, and sentenced to eight years in the Arkansas Department of Correction and a fine of $6,000.00.

The evidence showed that a confidential informant identified a house at 817 Cartwright Street in Jonesboro, Arkansas, as a place where he could buy drugs. State Police Officer Roger Perry testified that on May 6, 1986, the informant entered that residence and made a controlled buy for police. Officer Perry described a controlled buy as one in which an informant is first searched to make sure he has no drugs or money on his person; he is then given a specific amount of money on which the serial numbers have been recorded and is sent to make the drug purchase, all the while being kept under visual surveillance and frequently wearing a voice monitor; when he returns and turns the contraband over to officers, he is again searched to make sure he is holding nothing back.

On the basis of the confidential informant's controlled buy on May 6, a search warrant was obtained for the house at 817 Cartwright Street, where officers testified appellant lived. Officer Perry testified at trial that he obtained the warrant about 4:00 p.m.; telephoned the residence three times before getting an answer; then went to the residence about 9:00 p.m. with several other officers to conduct the search. There was testimony that appellant answered the door, was read his Miranda rights and let the officers into the house to search. When the officers arrived, there were two men in a car parked in the driveway and inside the house were appellant, his sister, and two other men. Shortly thereafter, appellant's mother returned home and told officers she was the owner of the house.

In the northwest bedroom, officers found a large bundle of money, $1,126.00, in a dresser drawer containing women's clothing. In the roll of money was a twenty dollar bill and a ten dollar bill that Officer Perry had given the informant that morning for the purpose of the controlled buy.

A chest in the other bedroom contained men's clothing and two sandwich bags with marijuana in them. In the refrigerator, officers found two Ziploc bags containing marijuana, with $100.00 in one bag and $45.00 in the other. On the kitchen table, they found a set of scales and a package of cigarette rolling

papers. In a canister on top of the freezer was more marijuana.

On appeal, it is argued that there was not substantial evidence to support the verdict. In reviewing the question of the sufficiency of the evidence in a criminal case, this court views the evidence in the light most favorable to the appellee and affirms the judgment if there is substantial evidence to support the findings of the trier of fact. *Lane* v. *State*, 288 Ark. 175, 702 S.W.2d 806 (1986); *Harris* v. *State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985). Substantial evidence is that which is of sufficient force and character that it will, with reasonable and material certainty and precision compel a conclusion one way or the other, without resorting to speculation or conjecture. *Jones* v. *State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984). The fact that evidence is circumstantial does not render it insubstantial. *Small* v. *State*, 5 Ark. App. 87, 632 S.W.2d 448 (1982).

The case law is clear that actual or physical possession of the contraband is not required. *Wade* v. *State*, 267 Ark. 1101, 594 S.W.2d 43 (1980). Possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control. *Cary* v. *State*, 259 Ark. 510, 534 S.W.2d 230 (1976). If evidence is presented that indicates joint occupancy and occupancy is the only evidence the state offers to prove possession, there must be some additional link between the accused and the contraband. *Osborne* v. *State*, 278 Ark. 45, 643 S.W.2d 251 (1982); *Cary* v. *State, supra.* Possession and control may be established by circumstantial evidence but such evidence must exclude every other reasonable hypothesis beyond a reasonable doubt. Whether that has been done is usually for the jury to determine, *Deviney* v. *State*, 14 Ark. App. 70, 685 S.W.2d 179 (1985), and, on appeal, the standard of review is one of substantial evidence. *Cassell* v. *State*, 273 Ark. 59, 616 S.W.2d 485 (1981).

In *Cary* v. *State, supra*, the Arkansas Supreme Court considered the sufficiency of the evidence against an appellant who was one of three occupants of an apartment where heroin had been discovered. The court said:

> Constructive possession of a controlled substance means knowledge of its presence and control over it. . . . Neither

> actual physical possession at the time of arrest nor physical presence when the offending substance is found is required . . . . As a matter of fact, neither exclusive nor physical possession is necessary to sustain a charge if the place where the offending substance is found is under the dominion and control of the accused. [Citations omitted.]

259 Ark. at 517. The court also quoted from a California case as follows:

> Constructive possession occurs when the accused maintains control or a right to control the contraband; possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another.

259 Ark. at 517. The court in *Cary* also made clear the following:

> When the evidence of possession is purely circumstantial, there must be some factor, in addition to joint occupancy of the place where narcotics are found, linking the accused with the narcotic in order to establish joint possession.

259 Ark. at 518.

In the instant case, there was some evidence to indicate that the appellant did not live with his mother at 817 Cartwright and that he had a brother in prison to whom the men's clothing found in one of the bedrooms might belong. However, there was other evidence to show that appellant did occupy the house with his mother. Two law enforcement officers testified that the appellant lived there, and there was testimony that the appellant opened the door and let the officers in when they came to execute the search warrant. There was testimony that the appellant had been seen at this house on numerous occasions by both his friends and by police officers. And one of appellant's own witnesses testified that if he wanted to find appellant at home, "I would have went to his house . . . on Cartwright." It is the province of the trier of fact to resolve any conflicts in the testimony and to determine the credibility of the witnesses, *Austin* v. *State*, 268 Ark. 373, 596 S.W.2d 691 (1980), and the fact finder's conclu-

sion on credibility is binding on the appellate court, *Thomas* v. *State*, 266 Ark. 162, 583 S.W.2d 32 (1979). We think there was sufficient evidence from which the jury could find that appellant lived with his mother in the house on Cartwright Street.

However, as we have seen, joint occupancy of the house is not, by itself, sufficient to support a finding that appellant was in constructive possession of the marijuana found in that house. A recent decision of the Arkansas Supreme Court explained the matter as follows:

> We agree the evidence might not have been sufficient had the only evidence been that the contraband was found in some portion of a structure occupied by the appellant and others. In *Osborne* v. *State*, 278 Ark. 45, 643 S.W.2d 251 (1982), we reversed a conviction for possession of drugs found in a bedroom. The reversal came, in part, because there was no testimony showing whose bedroom it was, and the residence in question was occupied by several persons. However, in *Cary* v. *State*, 259 Ark. 510, 534 S.W.2d 230 (1976), we held that joint occupancy coupled with "some factor . . . linking the accused with the narcotic" is sufficient. 259 Ark. at 518, 534 S.W.2d at 236.

Denton v. *State*, 290 Ark. 24, 26, 716 S.W.2d 198 (1986).

Therefore, in the instant case, our next question is whether there is evidence of some factor in addition to joint occupancy that will support a finding of constructive possession by appellant of the marijuana found by the officers in the house on Cartwright. We think there is substantial evidence to make the necessary link.

We start with the evidence that there was a total of more than two ounces of marijuana found in the house, and under Ark. Stat. Ann. § 82-2617(d) (Supp. 1985) [Ark. Code Ann. § 5-64-401 (1987)], the possession of more than one ounce creates a rebuttable presumption that the marijuana is possessed with intent to deliver. Some of the marijuana was found in the refrigerator and on top of the freezer—common areas of the

house which all occupants would be presumed to use. In addition, drug paraphernalia was found on the kitchen table. The officers also found almost $1,300.00 in the house. Some of this money was with the marijuana in the refrigerator and some in a dresser drawer containing women's clothing. Included with the money found in this drawer were some marked bills which had been used by the informant to purchase marijuana at this house on the very same day of the search. Moreover, Officer Perry testified that before the officers went to the house to execute the search warrant, he telephoned the house three times before getting an answer. The third time, a female answered and he asked for the appellant and a man came to the telephone. Perry testified that he told the man he wanted to buy some marijuana and "he said he didn't know me."

From the above evidence, we think the jury could have found that marijuana was being sold from the house on Cartwright Street and that the appellant knew this and was an active participant in the enterprise. We think that all of this, plus the marijuana found in the chest containing men's clothing, constitutes substantial evidence to support the appellant's conviction.

Affirmed.

COOPER and JENNINGS, JJ., agree.

Clayton HAMILTON *v.* JEFFREY STONE COMPANY
and The Travelers Insurance Company

CA 86-309 752 S.W.2d 288

Court of Appeals of Arkansas
Division II
Opinion delivered June 29, 1988
[Supplemental Opinion on Denial of Rehearing
August 17, 1988.]

[redacted]

The McMath Law Firm, by: *Eileen W. Harrison*, for appellant.

Michael E. Ryburn, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Arkansas Workers' Compensation Commission. Appellant, Clayton Hamilton, now deceased, appeals from a decision of the full Commission dated April 30, 1986, which held that Arkansas Statutes Annotated §§ 81-1314(a)(7) and -1318(a)(2) (Repl. 1976) (recodified at Ark. Code Ann. §§ 11-9-601(g)(1)(B) and 11-9-701(a)(2)(A) (1987)) are valid. We affirm.

Appellant was employed by appellee, Jeffrey Stone Company, from 1957 until 1969 as a rock crusher. In this capacity, appellant was exposed to silica dust. In 1969, appellant was hospitalized and treated for tuberculosis. Appellant was thought to have been cured and was released to return to work; however, his physician advised him not to return to the same type work. Appellant found employment as a security guard, a position he held until 1977 when breathing difficulties necessitated his retirement. In 1980, appellant consulted a different physician who diagnosed his condition as silicosis. Appellant immediately filed a claim for workers' compensation benefits which was denied because the statute of limitations had run.

On the first appeal of this case before the Arkansas Court of

Appeals, appellant challenged the constitutionality of the silicosis limitations statutes, Ark. Stat. Ann. §§ 81-1314(a)(7) and -1318(a)(2). This court in *Hamilton* v. *Jeffrey Stone Co.*, 6 Ark. App. 333, 641 S.W.2d 723 (1982), remanded the case to allow appellant the opportunity to argue the constitutional issues for the following reasons:

> In the instant case, appellant failed to properly raise before the Commission the issue concerning the constitutionality of §§ 81-1314(a)(7) and 81-1318(a)(2). Because we have never held, until now, that such issues must be raised first at the Commission level, we believe it would be unfair not to remand this cause in order to allow the appellant the opportunity to present and argue his constitutional issue.

Id. at 335-36, 641 S.W.2d at 725. On remand, the Commission upheld the constitutionality of the foregoing statutes and the case was again appealed to this court. In an unpublished opinion by this court, we affirmed the Commission's decision.

Appellant then petitioned the Arkansas Supreme Court for review. Review was granted from this court's unpublished opinion and the supreme court reversed and remanded the case to this court for a decision on the constitutionality of the above statutes stating we "refused to reach the constitutional questions although those issues were argued and briefed before the Commission and the court of appeals." *Hamilton* v. *Jeffrey Stone Co.*, 293 Ark. 499, 739 S.W.2d 161 (1987). Therefore, the instant appeal represents the third appearance of this case before our court.

In approaching questions pertaining to the constitutionality of legislative acts, it is appropriate to keep in mind basic principles regarding the presumptions and burdens of proof involved. It is well settled that before an act may be struck down as unconstitutional, it must clearly appear that the act is at variance with the Constitution. *Handy Dan Improvement Center, Inc.* v. *Adams*, 276 Ark. 268, 633 S.W.2d 699 (1982). There is a presumption of constitutionality attendant to every legislative enactment, and all doubt concerning an act must be resolved in favor of constitutionality. *Holland* v. *Willis*, 293 Ark. 518, 739 S.W.2d 529 (1987). If it is possible for the courts to construe an act so that it will meet the test of constitutionality, they not only

may, but should and will do so. *Davis* v. *Cox*, 268 Ark. 78, 593 S.W.2d 180 (1980). Also, the party challenging a statute has the burden of proving it unconstitutional. *The Citizens Bank of Batesville* v. *Estate of Pettyjohn*, 282 Ark. 222, 667 S.W.2d 657 (1984).

Applying the above law to the case at hand, appellant bears the burden of proving the unconstitutionality of §§ 81-1314(a)(7) and -1318(a)(2) which provide that a claim for compensation for disability from silicosis must be filed with the Commission within one year from disablement, provided disablement is within three years of the last injurious exposure to the hazards of the disease.

EQUAL PROTECTION

Appellant first argues that the above statutes are unconstitutional as violative of the equal protection clause of the fourteenth amendment to the United States Constitution. Appellant contends these provisions are more restrictive than the statute of limitations placed on industrial accident victims, particularly since the judicial adoption of the "discovery rule" which provides that the limitation period does not begin to run until the claimant knows or should reasonably be expected to know the nature and extent of his injuries. *Woodard* v. *ITT Higbie Mfg. Co.*, 271 Ark. 498, 609 S.W.2d 115 (Ark. App. 1980).

In determining whether a classification denies the equal protection of the laws, the court must consider if it has a rational basis and is reasonably related to the purpose of the statute. *Holland* v. *Willis*, 293 Ark. 518, 739 S.W.2d 529 (1987). A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. *Corbitt* v. *Mohawk Rubber Co.*, 256 Ark. 932, 511 S.W.2d 184 (1974).

The Supreme Court addressed the scope of state discretion in *McGowan* v. *Maryland*, 366 U.S. 420 (1961) that:

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classifica-

> tion rests on grounds wholly irrelevant to the achievement of the States objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. [Citations omitted.]

Id. at 425-26.

Here, the legislature could reasonably find that the limitation period established for silicosis victims prevents litigation on claims too old to be successfully investigated and defended. Additionally, the legislature could conclude that the distinction between the limitation periods for silicosis as opposed to accidental injuries is needed because each malady has a different mode of detection and treatment.

The record does not contain any indication that this apparently reasonable basis does not exist. Furthermore, while we agree with Justice Glaze that the constitutionality of the statutes are ripe for resolution, the record reveals that appellant did not comply with Judge Glaze's initial instruction to present proof on remand and argue the constitutional issue. The record contains no evidence to support appellant's position. The abstract contains only the requested briefs and opinions of the administrative law judge, Commission, and this court. Appellant did not meet the burden required of him to show that there was no rational basis for the distinction between the limitation period for silicosis versus accident victims. On its face, the silicosis limitation statute is not arbitrary because all silicosis victims are treated alike with regard to the allotted time within which their claims for disability must be filed. Furthermore, the statutes in question grant silicosis victims a greater limitation period than victims of other occupational diseases who must file claims within one (1) or two (2) years after the last injurious exposure to the hazards of the disease.

In this case, appellant's constitutional challenge to the silicosis limitations statute must fail for lack of proof that an arbitrary classification is involved or the statute is unsupported by a legitimate governmental interest. Considering the strong presumption of constitutionality and resolving all doubt in favor

thereof, we find that appellant has not clearly demonstrated that Arkansas Statutes Annotated §§ 81-1314(a)(7) and -1318(a)(2) violate the equal protection clause of the United States Constitution. *See Bill Dyer Supply Co.* v. *State*, 255 Ark. 613, 502 S.W.2d 496 (1973); *Green Star Supermarket, Inc.* v. *Stacy*, 242 Ark. 54, 411 S.W.2d 871 (1967).

DUE PROCESS

As set out under the equal protection portion of this opinion, appellant has not borne his burden of proving a violation of the due process clause. Appellant argues that the statute of limitations for silicosis victims denies due process of law by setting limitation of action periods so brief that they amount to unreasonable denials of rights and remedies due to the slow, insidious nature of the disease.

It is clear that the legislature has the power to set the statute fixing the limitation period within which a claimant must file a claim for benefits. As decided in *Owen* v. *Wilson*, 260 Ark. 21, 537 S.W.2d 543 (1976), the vital question is one of reasonableness, and the courts may not strike down a statute of limitations unless the period before the bar becomes effective is so short that it amounts to a virtual denial of the right itself or it can be said that the legislature has committed palpable error.

Any statute of limitations will eventually operate to bar a remedy and the time within which a claim should be asserted is a matter of public policy, the determination of which lies almost exclusively in the legislative domain, and the decision of the General Assembly in that regard will not be interfered with by the courts in the absence of palpable error in the exercise of the legislative judgment. *Id.*

Here, without sufficient proof to the contrary, we cannot say that the legislative determination of three years from the date of last exposure or one year from disablement is an unreasonably short time for silicosis victims to discover and assert their cause of action. Appellant presented no sufficient proof of record that the limitation period imposes an unreasonably short time for silicosis victims to file claims; therefore, we find no basis to declare it unconstitutional.

Affirmed.

COULSON, J., agrees.

CRACRAFT, J., concurs.

GEORGE K. CRACRAFT, Judge, concurring. I wholeheartedly agree with the reasoning and conclusion of the majority opinion but would enlarge on what I consider the sound basis for our decision that there is simply a total failure of proof to support the argument that these provisions are violative of the Fourteenth Amendment guarantees of equal protection and due process.

Our Workers' Compensation Act places compensable disabilities into two major classifications: (1) disability resulting from injury arising out of the employment; and (2) disability resulting from occupational disease. Silicosis is classified as an occupational disease. The appellant contends that the legislative distinction denies equal protection and due process because the period of limitation on claims for disability resulting from injury is more favorable than that for claims resulting from occupational diseases and because the period of limitation for occupational disease is, in any event, unreasonably short.

The constitutional guarantee of equal protection does not prohibit legislation affording different treatment for persons in different classifications so long as there is a rational basis for the different classifications and they have some reasonable relation to the objectives of the legislation. *Holland* v. *Willis*, 293 Ark. 518, 739 S.W.2d 529 (1987). It is also well settled that legislative discretion in setting periods of limitation on actions will not be disturbed on due process grounds unless it appears that the period provided is so short as to amount to a virtual denial of the right. *Owen* v. *Wilson*, 260 Ark. 21, 537 S.W.2d 543 (1976). All legislative acts are presumed to meet these requirements and will be so construed whenever possible. The burden of proving the contrary rests on the person attacking the validity of the statute. *Holland* v. *Willis, supra.*

This case was initially presented to the Commission on the assumption that constitutional issues could not be determined before that body. On the first appeal of this case we ruled that the issue must be first raised before the Commission in order to preserve it for our review, as this is the only way that a proper record can be made. As this was the first time that declaration had

been made, in fairness to the appellant we remanded the case to the Commission to enable the appellant to present the issue to the Commission and to develop a record for our review. *See Hamilton* v. *Jeffrey Stone Co.*, 6 Ark. App. 333, 641 S.W.2d 723 (1982).

This invitation was not fully accepted, however, as the record returned to us for our present review contains nothing, other than the additional written opinions of the administrative law judge, the Commission, and this court, that was not in the original record. There is no evidence tending to show that the legislature established these classifications without a reasonable basis or that the distinction between the two types of disability has no relation to the main objectives of the Act. Nor is there any scientific or other evidence that the period of limitation on silicosis claims is unreasonably short.

In the absence of proof of the legislative history or perhaps expert testimony establishing that the distinction could have no reasonable basis but was arbitrarily established, we cannot conclude that the legislation was invalid. Since the legislation is not arbitrary on its face, we must conclude that the classifications are reasonably based if they can be sustained on any conceivable set of facts. *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Handy Dan Improvement Center, Inc.* v. *Adams*, 276 Ark. 268, 633 S.W.2d 699 (1982); *Bill Dyer Supply Co., Inc.* v. *State*, 255 Ark. 613, 502 S.W.2d 496 (1973). A number of conceivable reasons for the separate classification of silicosis are discussed in *Gauthier* v. *Campbell, Wyant & Cannon Foundry Co.*, 360 Mich. 510, 104 N.W.2d 182 (1960); *Graber* v. *Peter Lametti Construction Co.*, 293 Minn. 24, 197 N.W.2d 443 (1972); and *Holt* v. *Nevada Industrial Commission*, 94 Nev. 257, 578 P.2d 752 (1978). The most prevalent reasons mentioned were that certain industries might be driven from the state due to the effect that the high incidence of silicosis in those industries would have upon compensation insurance rates and the inability to prove with exactness the time or place of employment at which the disease actually developed.

The appellant argues that there is no present, legitimate end to be gained by the distinction because the justification the legislature once saw has ceased to exist. There is no need for us to determine whether that argument would better be made to the

legislature than this court because the argument is not supported by anything in the record before us for review. The argument is based entirely on excerpts from and statements attributable to various persons in writings, such as medical treatises and statistical studies, which are completely dehors this record, and it is clear that allegations and arguments in briefs which are unsupported by evidence do not provide a proper basis for the determination of factual issues.

I would simply hold as did the Commission:

> There is *no showing* in the record that the distinction between silicosis and accidental injury claims envisioned by the statutes in question is arbitrary or unsupported by a legitimate government interest. The Arkansas General Assembly has concluded that the nature and characteristic symptoms of silicosis warrant a different limitations period than that applied to claims for accidental injuries under § 18 of the Act. There is *no proof* in this record that the limitations period applied to silicosis claims is scientifically unreasonable or diagnostically unsound. There is *no evidence* that this time period imposes potential silicosis claimants with an unreasonably short time for filing their claims. *In short, claimant has produced no evidence* to support a finding that the distinction that our Act makes between silicosis and accidental injury claimants is unreasonable, arbitrary, or capricious so as to violate the Equal Protection Clause of Amendment XIV of the United States Constitution. [Emphasis added.]

Appellant has failed in his burden of proving the statutory provisions to be constitutionally infirm, and the majority opinion properly affirms the decision of the Commission.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
AUGUST 17, 1988

754 S.W.2d 850

PER CURIAM. Appellant petitions for a rehearing pursuant to Ark. Sup. Ct. R. 20. The basis for his request is an absence from the record of certain exhibits introduced into evidence by him in a rehearing before the administrative law judge pursuant to a remand by this court for the purpose of developing issues of constitutionality of the silicosis limitation statutes. Arkansas Statutes Annotated §§ 81-1314(a)(7) and -1318(a)(2) (Repl. 1976). In *Hamilton* v. *Jeffrey Stone Co.*, 6 Ark. App. 333, 641 S.W.2d 723 (1982), we noted the general rule that the constitutionality of a statute will not be considered if raised for the first time on appeal, citing *Sweeney* v. *Sweeney*, 267 Ark. 595, 593 S.W.2d 21 (1980). Despite the rule in *Sweeney* and in light of the unusual circumstances of this case, appellant was allowed a rare opportunity "to present and argue his constitutional issue." In that case we emphasized that:

> [A]ppellant failed to properly raise before the Commission the issue concerning the constitutionality of §§ 81-1314(a)(7) and 81-1318(a)(2). Because we have never held, until now, that such issues must be raised first at the Commission level, we believe it would be unfair not to remand this cause in order to allow the appellant the opportunity to present and argue his constitutional issue.

Hamilton, 6 Ark. App. at 335-36, 641 S.W.2d at 725.

Following the remand, appellant presented a record and briefs to this court resulting in a denial of his claim in an

unpublished opinion by this court in *Hamilton* v. *Jeffrey Stone Co.*, No. 86-309 (Ark. App. May 6, 1987). The Arkansas Supreme Court granted review from our unpublished decision of May 6, 1987, in *Hamilton* v. *Jeffrey Stone Co.*, 293 Ark. 499, 739 S.W.2d 161 (1987), wherein the supreme court reversed and remanded the case to this court advising that "the record reflects those constitutional issues had been remanded to the Commission, decided by it and were clearly ripe for resolution by the court of appeals in this second appeal." *Id.* at 502, 739 S.W.2d at 163. On remand, this court determined affirmatively the constitutionality of the silicosis statutes of limitations in *Hamilton* v. *Jeffrey Stone Co.*, 25 Ark. 66, 752 S.W.2d 288 (1988).

The chronology of events in this case clearly indicates that appellant had numerous opportunities to insure the completeness of the record. Now for the first time in his petition for rehearing, appellant argues that he was not put on notice that the record lacked evidence he claims was previously submitted. We refuse to depart from the long standing rule that the burden is upon the appellant to bring up a record sufficient to demonstrate that the trial court was in error. Ark. R. App. P. 6(b). *See Young* v. *Young*, 288 Ark. 33, 701 S.W.2d 369 (1986); *City of Star City* v. *Shepherd*, 287 Ark. 188, 697 S.W.2d 113 (1985); *SD Leasing, Inc.* v. *RNF Corp.*, 278 Ark. 530, 647 S.W.2d 447 (1983); *McLeroy* v. *Waller*, 21 Ark. App. 292, 731 S.W.2d 789 (1987). It was appellant's responsibility to bring up a sufficient record and a proper abstract thereof. Appellant now advises this court that the record should be supplemented so as to include certain exhibits that should have been included in the record long ago. We refuse to do so and respectfully deny the petition for rehearing.

Petition denied.

Lodeen TRAMMELL and Laverne Trammell *v.* Gerald ISOM and Helen Jean Isom

CA 87-318 753 S.W.2d 281

Court of Appeals of Arkansas
Division I
Opinion delivered June 29, 1988

Morgan E. Welch and *Thorp Thomas*, for appellants.

Jerry D. Patterson, for appellees.

JAMES R. COOPER, Judge. This is a guardianship case concerning Tracy Trammell, a minor born March 23, 1977, who was orphaned in 1985. In a proceeding held on February 9, 1987, the trial court vested permanent guardianship of Tracy in the appellees. From that decision, comes this appeal.

For reversal, the appellants contend that the trial court abused its discretion in permitting an *ex parte* temporary guardianship proceeding to be held without justification; that the trial court erroneously continued the temporary guardianship beyond the ninety days permitted by statute; and that the trial court abused its discretion when, at the permanent guardianship hearing, it refused to permit the appellants either to review the guardian *ad litem*'s report or to cross-examine the guardian *ad litem*. We find no prejudicial error, and we affirm.

The record shows that the appellee, Helen Isom, is Tracy's

maternal aunt; the appellants are Tracy's paternal grandparents. The appellees assumed custody of Tracy upon learning of the death of her parents. On July 22, 1985, two days after Tracy's parents died, the appellees filed a petition in the trial court seeking appointment as temporary guardians of their niece's person and estate. The appellants filed an objection to the appellees' petition on August 7, 1985. By agreement, the parties subsequently adopted a practice whereby Tracy lived with the appellees, but visited the appellants every other weekend. This arrangement continued until September 1, 1986, when the appellants failed to return Tracy to the appellees, and enrolled her in the Higden schools in Cleburne County, near the appellants' home. Tracy had been enrolled in and attending school in Clinton the previous week. In an *ex parte* proceeding conducted on September 2, 1986, the appellees sought and obtained an order appointing them Tracy's temporary guardians. The appellants filed a petition to set aside the temporary guardianship on October 20, 1986, and asked that they be appointed as Tracy's guardians. At a hearing held on November 24, 1986, the appellees filed a petition for the appointment of a permanent guardian. The appellants objected to the filing of the petition on the morning of the hearing, and the trial court continued the proceedings. On December 17, 1986, the trial court entered an order appointing a guardian *ad litem*. On February 9, 1987, after a hearing at which the appellants, the appellees, and the guardian *ad litem* were present, the trial court vested permanent guardianship in the appellees.

The appellants first argue that it was an abuse of the trial court's discretion to permit an *ex parte* temporary guardianship proceeding to be held in the absence of evidence to support a finding that there was imminent danger to Tracy's life or health or of loss, damage or waste to her property as required by Ark. Stat. Ann. § 57-840 (Repl. 1971) [Ark. Code Ann. § 38-65-218 (1987)]. In their next point for reversal, the appellants cite the ninety-day limit on the duration of a temporary guardianship found in the above-referenced statutes for the proposition that the trial court erred in extending the temporary guardianship beyond the statutory limit of ninety days. We find both issues to be moot.

The temporary guardianship terminated upon entry of the order vesting permanent guardianship in the appellees.

Even assuming that both of the arguments covering the temporary guardianship advanced by the appellants are meritorious, reversal of the temporary guardianship at this point would have no practical effect. Error is no longer presumed to be prejudicial, and the appealing party bears the burden of demonstrating prejudicial error. *Cycle Center* v. *Allen*, 14 Ark. App. 215, 686 S.W.2d 808 (1985). The appellants contend that they were prejudiced by the temporary guardianship in that, as a result of that order, Tracy spent additional time in the appellees' household, a factor considered by the trial court in awarding permanent guardianship to the appellees. We find no merit in this contention. It is clear that the appellees had already had *de facto* custody of Tracy for over one year at the time the temporary guardianship was awarded. Moreover, we are unwilling to order the trial court to redetermine permanent guardianship without considering the ill effects of disrupting Tracy's established home life and the relationships she has developed with the appellees since the death of her parents. The continuity of care is a significant factor in assessing the best interests of the child in a child guardianship case, *Bennett* v. *McGough*, 281 Ark. 414, 664 S.W.2d 476 (1984), and the best interest of the child is the paramount consideration when appointing a guardian for a child. *Marsh* v. *Hoff*, 15 Ark. App. 272, 692 S.W.2d 270 (1985). In the absence of evidence to show that irregularities in the temporary guardianship proceedings caused the trial court to err in determining that it was in Tracy's best interest to vest permanent guardianship in the appellees, we hold that any error that may have resulted in those proceedings was harmless.

Next, the appellants contend that the trial court erred in refusing to permit them either to review the guardian *ad litem*'s report or to cross-examine the guardian *ad litem*. Linda Collier, an attorney, was appointed as guardian *ad litem* for Tracy in an order entered December 17, 1986. The order did not specify Ms. Collier's duties as guardian *ad litem*. It is clear that Ms. Collier prepared a report or recommendation which she intended to present to the trial court; the appellants asked to be shown the report at the permanent guardianship hearing. Ms. Collier stated to the trial court that she had such a report in her possession, but that only her secretary and herself had seen the report. She further stated that, if filing the report would subject her to cross-

examination, she would prefer not to present the report so that she could continue to act as an advocate for her client. The appellants argued that Ms. Collier was acting in the nature of a fact-finder for the trial court in her capacity as guardian *ad litem*, and that the report should thus be presented and subject to inspection. The trial court ruled that the report or recommendation would not be presented, stating that:

> [T]he Court is relying on Ms. Collier to represent the best interest of the child. And, if the Court feels that the best interest of the child is not to testify, not to make the report where she would be subject to cross-examinations, then the Court is not going to require her to make such a report.

The appellants contend that the preparation of a report or recommendation for the trial court shows that Ms. Collier was in fact functioning as a court-appointed expert, and that, under A.R.E. Rule 706, the parties were thus entitled to cross examine her and be advised of the findings contained in her report. We do not agree that Rule 706 is applicable, however, because we find no indication in the abstract to show that Ms. Collier's report or recommendation was prepared at the direction of the trial court. The trial judge stated that he appointed the guardian *ad litem* to represent the child, and the order appointing Ms. Collier did not impose upon her the duty of acting as a court-appointed expert. The function of a guardian *ad litem* appointed to represent a minor is discussed in *Kimmons* v. *Kimmons*, 1 Ark. App. 63, 68, 613 S.W.2d 110 (1981), where we said that:

> [A] guardian *ad litem* if appointed should be allowed an adequate opportunity to investigate the case, should be permitted to call his witnesses at trial and to cross examine those witnesses called by the parties. In short, he should be permitted to represent his child client as he would any client in preparation for and at trial.

It is well-settled that an attorney who is to serve as an advocate in a disputed action should refrain from testifying. *Aetna Casualty and Surety Co.* v. *Broadway Arms Corp.*, 281 Ark. 128, 664 S.W.2d 463 (1984); *Enzor* v. *State*, 262 Ark. 545, 559 S.W.2d 148 (1977). It is thus apparent that Ms. Collier's effectiveness as a guardian *ad litem* would have been largely destroyed had she been required to testify at the hearing. *See Kimmons* v. *Kim-*

mons, supra. Here, the trial judge determined that Tracy's best interest would be served by refusing to accept the report or recommendation, thus shielding Ms. Collier from cross-examination and allowing her to continue to serve as an advocate at the hearing. Since the report was not presented to the trial court, and in the absence of evidence to show that the report was prepared at the trial court's direction, we hold that the trial court did not err in refusing to permit the appellants to see the report or to cross-examine the guardian *ad litem.*

Affirmed.

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

The TRAVELERS INDEMNITY COMPANY
v. OLIVE'S SPORTING GOODS, INC., et al.

CA 87-319 753 S.W.2d 284

Court of Appeals of Arkansas
En Banc
Opinion delivered June 29, 1988

McMillan, Turner & McCorkle, for appellant.

The McMath Law Firm, P.A., for appellees Wayne and Vickie Warwick, and Worthen Bank & Trust Company.

Friday, Eldredge & Clark, by: *William H. Sutton, Frederick S. Ursery,* and *James C. Barker, Jr.*, for appellees Olive's Sporting Goods, Inc., and Tommie R. Olive, individually and as administratrix of the estate of Robert J. Olive, deceased.

JAMES R. COOPER, Judge. The appellees brought a declaratory judgment action to determine the rights of the parties under an insurance contract issued by the appellant, Travelers, to the appellee, Olive's Sporting Goods.

In July 1984, Wayne Lee Crossley and Ruby Swint entered Olive's and told the salesman that they wanted to purchase guns for Ms. Swint's protection. Ms. Swint filled out the necessary forms, but the guns, a .45 caliber Colt pistol and 12 gauge Smith and Wesson shotgun, were paid for by Crossley. Approximately eight days later, Crossley was stopped by Sergeant Wayne Warwick of the Hot Springs Police Department. Crossley shot and wounded Warwick with the .45 caliber Colt allegedly purchased from Olive's. Crossley then drove to the Grand Central Motor Lodge in Hot Springs, entered the lounge, and began shooting with both the pistol and the shotgun. Helen Frezee, Juanita Allen, James Stephens, and Tom Altringer were killed and John D. Crue was wounded. Crossley then committed suicide. Officer Warwick died approximately two years later, allegedly as a result of the injuries sustained in the shooting.

John Crue and the survivors of Officer Warwick and James Stephens, the appellees in the case at bar, have filed suits against Olive's alleging that it was negligent in the sale of the guns. In the separate action filed by Olive's for a declaratory judgment, Travelers contended that the insurance policy it issued to Olive's limited its liability to a maximum of $300,000.00. It was the contention of the appellees (Olive's and some of the victims of Crossley's shooting rampage), that the $300,000.00 policy limit applied to each victim because each shooting constituted a separate occurrence. The trial court agreed with the appellees, and the appellant appeals arguing three points: that the trial court erred in finding that there was more than one occurrence as that term is used in the contract; that the trial court erred in finding that the contract was ambiguous with regard to the aggregate

coverage; and that the trial court erred in finding that the "products hazard" and "completed operations hazard" sections had no application. We do not reach the merits of the appellant's arguments because we find that, since there was no justiciable controversy between the parties, the trial court erred in entering a declaratory judgment.

Our declaratory judgment act was not intended to allow *any* question to be presented by *any* person: the matters must first be justiciable. *Andres* v. *First Arkansas Development Finance Corp.*, 230 Ark. 594, 324 S.W.2d 97 (1959). The court in *Andres*, quoting Anderson, *Declaratory Judgments* § 186 (2d Ed. 1951), stated the following:

> "The requisite precedent facts or conditions, which the courts generally hold must exist in order that declaratory relief may be obtained, may be summarized as follows: (1) There must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy; in other words, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination."
>
> In the same authority in § 221 at page 488 the rule is stated:
>
> "The Declaratory Judgment Statute is applicable only where there is a present actual controversy, and all interested persons are made parties, and only where justiciable issues are presented."

Andres, 230 Ark. at 606, 324 S.W.2d at 104. It is our opinion that a determination of the extent of Travelers liability in the event Olive's is found to be negligent is premature and not ripe for judicial determination. *Maryland Casualty Co.* v. *Chicago and North Western Transportation Co.*, 126 Ill. App. 3d 150, 466 N.E.2d 1091 (1984). Furthermore, a determination of whether an insurer is liable for damages on an *unlitigated*, contingent claim is not appropriate for declaratory judgment. *Freeport Operators, Inc.* v. *Home Insurance Co.*, 666 S.W.2d 566 (Tex.

Civ. App. 1984). To make such a determination would be tantamount to issuing an advisory opinion, something courts are prohibited from doing. *Id.*

The case of *Batteast* v. *Argonaut Insurance Co.*, 118 Ill. App. 3d 4, 454 N.E.2d 706 (1983), involved facts similar to the case at bar. The appellant brought a personal injury action which alleged that he had suffered brain damage while in the care of St. Bernard's Hospital. The insurance company did not deny coverage and had not refused to defend the hospital in the tort action. During settlement negotiations, a dispute arose over the extent of coverage provided in the policy, and the appellant sought a declaratory judgment against the insurance carrier. In holding that there was no actual controversy between the parties, the court stated:

> The controversy here stems from the parties' differing interpretations of the provisions regarding amount of coverage in the applicable insurance policy. Regardless of their disagreement, the plaintiff's right to any amount is contingent upon a finding of liability in the underlying tort action. Even if liability is later established, a resolution of the dispute would remain unnecessary unless the damages awarded exceeded $1 million. Moreover, if we were to allow this action, there is no reason why every tort claimant would not, upon filing a personal injury action, concomitantly file a declaratory judgment action to determine the maximum amount of coverage to which he would be entitled in the event that liability was subsequently established. We cannot create the right to such premature litigation. The instant fact situation does not present an actual controversy between the parties.

454 N.E.2d at 708. Although that court's final determination was that the appellant did not have standing, the situation was analogous to the case at bar, and the same reasoning is applicable. In the present case, Travelers has not denied liability, (up to $300,000.00), or denied a duty to defend Olive's. The only controversy concerns the extent of Travelers potential liability. Unless and until a final determination is made that Olive's is liable for an amount in excess of $300,000.00, there is no justiciable controversy and this action is premature. *See Allstate*

Insurance Co. v. *Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981).

Reversed and dismissed.

CORBIN, C.J., concurs.

DONALD L. CORBIN, Chief Judge, concurring. I concur. I write only to point out an additional basis for reversing and dismissing. In *Board of Education* v. *Ozark School District No. 14*, 2 Ark. App. 112, 619 S.W.2d 304 (1981), this court on its own volition reversed a declaratory judgment because all necessary parties were not brought into court. There we relied on *Laman* v. *Martin*, 235 Ark. 938, 362 S.W.2d 711 (1962), *Johnson* v. *Robbins*, 223 Ark. 150, 264 S.W.2d 640 (1954) and portions of two Arkansas statutes, to wit:

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

Ark. Code Ann. § 16-111-106(a) (1987) (formerly Ark. Stat. Ann. § 34-2510 (Repl. 1962)).

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

Ark. Code Ann. § 16-111-108 (1987) (formerly Ark. Stat. Ann. § 34-2505 (Repl. 1962)).

The original complaint filed in this action by Olive's Sporting Goods, Inc., states at paragraph 10(c) that the claim of the survivors of Juanita Allen, Helen Freeze and Tom Altringer had not been made to date. The separate answer of defendant, Travelers Indemnity Company, does not deny this allegation which under our rules of procedure is deemed to be an admission. Thus, all interested parties to the controversy have not been made a party to this litigation.

I would also reverse and dismiss on the failure to join all the necessary parties.

Mitchell E. JOHNSON, d/b/a Sparky's *v.* Robert S. MOORE, Jr., Administrator of the Arkansas Alcoholic Beverage Control Division, et al.

CA 87-409 752 S.W.2d 293

Court of Appeals of Arkansas
En Banc
Opinion delivered June 29, 1988

Bramblett & Pratt, by: *Eugene D. Bramblett*, for appellant.

Treeca J. Dyer, for appellee Alcoholic Beverage Control Board.

Sanders & Hill, P.A., by: *Randy L. Hill*, for appellees Lee Hornaday and Benny Grant.

JOHN E. JENNINGS, Judge. Appellant, Mitchell E. Johnson, owns a business known as Sparky's in Sparkman, a town of 600 people in Dallas County. Sparky's is a combination convenience store, gas station, restaurant, and washateria.

Appellant applied to the Arkansas Beverage Control Board for a retail off-premises beer permit. After conducting a hearing the Board granted the permit. Subsequently, several persons opposed to the issuance of the permit, including the sheriff of Dallas County, Lee Hornaday, obtained an order of the Dallas County Circuit Court remanding the matter to the Board for the taking of additional evidence. On remand, the Board heard testimony from the sheriff; a fulltime deputy, Mr. Skinner; and a part-time deputy, Mr. Franks.

The sole issue on appeal is whether the Board's denial of the permit after remand is supported by substantial evidence. We affirm.

Although the circuit court affirmed the Board's denial of the permit and this appeal comes from the decision of that court, it is clear that we are reviewing the decision of the Board, not the circuit court's decision. *See Fouch* v. *State, Alcoholic Beverage Control Div.*, 10 Ark. App. 139, 662 S.W.2d 181 (1983). Our review is limited in scope: we uphold the Board's decision if it is supported by substantial evidence and is not arbitrary, capricious, or characterized by an abuse of discretion. *Marshall* v. *Alcoholic Beverage Control Bd.*, 15 Ark. App. 255, 692 S.W.2d 258 (1985). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Carder* v. *Hemstock*, 5 Ark. App. 115, 633 S.W.2d 384 (1982). We may not displace the Board's choice between two fairly conflicting views even though we might have made a different choice had the matter been before us *de novo. Fouch, supra.* The burden of proof was on the appellant to establish that the public convenience and advantage would be served by issuing him a beer permit. *Marshall, supra.*

It is reasonably clear from the order of the Board denying the permit that the denial was based upon a determination that it was not in the public interest to grant the permit because of inadequate law enforcement in the area. Law enforcement problems are certainly relevant to the Board's determination. *Fouch, supra.* We have no doubt that a finding that the issuance of a permit would create substantial law enforcement problems, if supported by the evidence, will in turn support a conclusion that the issuance of a permit will not promote public convenience and advantage.

Although the Board made extensive findings of fact in both its original order granting the permit and in the order issued after remand, we need examine only those findings relating to law enforcement problems because it is clear that this was the basis for the denial of the permit.

At the first hearing, appellant testified that the closest outlet for the sale of beer for off-premises consumption, in Dallas County, was 17 miles (Princeton). It is 12 miles from Sparkman to the closest outlet in Ouachita County. He testified that although Sparkman had hired one officer there was no city police department. He said that there was a part-time officer who was also a deputy sheriff who lives in Sparkman, and that his son is an

elected constable in the City of Sparkman.

Mr. Johnson's son testified that he is an auxiliary deputy sheriff for Dallas County and an elected constable for the City of Sparkman. He testified that he had talked to the sheriff and that at the time of their conversation the sheriff had no opposition to the application. He testified that he would enforce the law when he was on duty but that he had not personally arrested anyone because he was not sure of his powers of arrest. Richard Fleming, a former mayor of Sparkman testified that he thought there was inadequate law enforcement in the area now since it is a one hour drive to Fordyce.

Benny Grant, the pastor of the First Baptist Church in Sparkman, testified that he thought the permit should not be granted because of the proximity of Sparky's to a church and school. The Board also noted that it had received a letter in opposition to the application from Sheriff Lee Hornaday.

On remand, the Board heard testimony from Hornaday and made lengthy findings relating to that testimony. The sheriff testified that he had three full-time deputies including James Skinner, who lives in Sparkman and has a 200 square mile territory. The sheriff said he also had an unpaid auxiliary deputy who lived in Ouachita Township and worked in Sparkman. The auxiliary deputy has no power except under the supervision of the deputy or the sheriff. Hornaday said he needed three more deputies to adequately patrol the county, that Skinner is the busiest deputy in the county, and that Sparkman has the highest crime rate in the county. He said he had no assistance from the State Police in the western part of the county.

Hornaday expressed his opinion that the location of Sparky's, in a residential area near a church and school on Main Street, would make the workload greater for law enforcement. He said he would have trouble from the outlet because of the sale of beer and does not have the manpower to get to the store as soon as law enforcement is needed. Sparkman has no city police force. He said there was heavy traffic on the highway from the colleges in the area, especially in the spring.

Hornaday testified that Skinner had made approximately 90 arrests in the past two and one-half months and that at least one-third were put in jail at Fordyce. He testified that it takes three to

four hours to transport a suspect arrested in Sparkman to the county jail in Fordyce. He said that he currently needed two full-time deputies to patrol the Sparkman area.

On cross-examination the sheriff admitted that he had as much law enforcement availability in Sparkman as in those places where beer permits had been granted in Dallas County, Mom's Place, Farindale, and Princeton. He said that he had not objected to the permits at Princeton and Farindale because there was no opposition from area residents to the applications. He also said, however, that there is no town around Mom's Place and that Princeton has a population of forty-one. He said there was no school at any of the three locations.

The Board also heard testimony from James Skinner that he currently had his hands full with subpoena service, tickets, investigations, and the like, and that he worked seven days a week. He also gave his opinion that the issuance of the permit would increase law enforcement problems but could point to no specific problems which had arisen since the issuance of the permit to appellant.

On these facts we hold that the Board's ultimate conclusion, that the issuance of a beer permit for Sparky's would not be in the public interest, is supported by substantial evidence and is not arbitrary or capricious.

Appellant argues that our decision in *Snyder* v. *Alcoholic Beverage Control Bd.*, 1 Ark. App. 92, 613 S.W.2d 126 (1981), requires reversal here. In *Snyder*, we said:

> There is no evidence in this case to indicate that the public would be inconvenienced or would be placed at a disadvantage by the issuance of this permit. In fact, the Board seems to have based its decision primarily on the fact that there was opposition from a significant number of persons, including the chief of police and a lieutenant on the police department of the City of Camden. The number or official position of persons who object or support the issuance of retail liquor permits is of no significance under the statute. The reasons those persons oppose or support specific permit applications may be very significant. The reasons may clearly show whether the public convenience or advantage will be served.

Appellant's argument is that, because the sheriff testified that he would not have opposed the issuance of the permit at Sparky's if it were not opposed by people in the area, the Board in effect denied the permit because of such opposition. In our view, however, the sheriff's motive in testifying is relevant only to the issue of the credibility of his testimony. The credibility of witnesses is essentially a matter for the trier of fact, in this case the Board. *Arkansas Health Planning & Development Agency* v. *Hot Spring County Memorial Hospital*, 291 Ark. 186, 723 S.W.2d 363 (1987). The Board obviously believed the testimony of the sheriff and this was its prerogative. That testimony supports a finding that the issuance of a beer permit at Sparky's would create significant law enforcement problems, and such a finding, in turn, supports the Board's ultimate conclusion that the issuance of such a permit would not serve the public convenience or advantage.

Affirmed.

COOPER, J., dissents.

JAMES R. COOPER, Judge, dissenting. I dissent from the majority court's affirmance of the Board's decision denying the appellant an off-premises beer permit in Dallas County, a wet county. I agree with the majority court that we are reviewing the Board's decision, and not that of the circuit court, but I do not think that the Board's decision is supported by substantial evidence.

First it is necessary to outline the procedural history of this case. Originally, on January 21, 1987, the Board granted the permit in question. At that hearing, the Board had before it testimony on all facets of the case, as well as exhibits, including a letter from Sheriff Hornaday, in which he stated:

> I request that license for a retail beer permit to Mitchell Johnson, d/b/a Sparky's be denied because of lack of law enforcement in that area.

In spite of the opposition of members of the community and the sheriff's letter, the Board found that the public convenience and advantage would be served by the issuance of the permit. Next, Sheriff Hornaday wrote the Board asking that it reopen the case, recommending that the permit not be issued because of law

enforcement problems. Sheriff Hornaday and Reverend Grant then filed a circuit court action in Dallas County, seeking to appeal the Board's decision, to stay the issuance of the permit, and requesting that the circuit court remand the case to the Board for additional testimony. The court found that the case should be remanded for additional testimony by Sheriff Hornaday and others on the issue of adequacy of law enforcement in the area. No appeal was taken from the order of remand, and that order is not at issue in this appeal. On remand to the Board, in a hearing held on February 18, 1987, the Board heard three witnesses: Sheriff Lee Hornaday, Dallas County Deputy Sheriff James Skinner, and part-time deputy C.W. Franks. Skinner testified that he was also employed in a law enforcement capacity by the city of Sparkman, where the proposed permit was to be issued. He testified that he was responsible for the western half of Dallas county, that Sparky's had been operating for about three weeks (the circuit court denied the request for a stay in the issuance of the permit), and that he had had no problems related to the operation of Sparky's. He further stated that he believed that an alcohol outlet increased law enforcement problems, depending on the traffic situation. Franks testified that as a part-time deputy, he was authorized to work twenty hours per week, and that a lot of his work took him around Sparkman.

Sheriff Hornaday testified that he needed several more deputies, that the State Police did not help him in the western part of Dallas County, that Sparkman had the highest crime rate in the county, that Mr. Skinner was his busiest deputy, that Sparky's was close to a school, and that Skinner had to take his prisoners to Fordyce, some thirty miles away from Sparkman. Hornaday also stated that he had not opposed the issuance of permits at Farindale, at Mom's Place on Highway 9, and at Princeton. Of particular significance is that he then said that none of the persons living in those areas objected, so he did not object either. Further, the Sheriff stated that he knew that the issuance of a permit at Mom's Place would make law enforcement more difficult.

Based on this supplemental testimony, the Board reversed its earlier approval of the permit at Sparky's, and denied the appellant's application. On appeal, the circuit court affirmed, finding substantial evidence to support the Board's decision.

The majority correctly explains this Court's standard of review, and on the surface I must admit that the Board's decision appears to be supported by substantial evidence. However, a careful analysis makes it clear that neither the testimony of Skinner nor Franks provided substantial evidence for a finding that the issuance of the requested permit would not serve the public convenience and advantage due to a lack of law enforcement in the Sparkman area. Thus, the result in this case stands or falls on the testimony of Sheriff Hornaday.

The most striking aspect of the Sheriff's testimony is his candor. In response to a question by the appellant's attorney, Mr. Bramlett, Sheriff Hornaday said that he did not object to the permit application for Mom's Place because "there wasn't a soul up there objected; I don't see why I should . . . [t]hem people live up there and if they object, I object; if they don't I think that is their country and if they want beer up there they can have it; if they don't want to have it they ought not to have it." [T101].

Regarding the Princeton (population 41) permit application, the Sheriff said that he did not object to it, stating: "No, nobody up there objected out of the 40." [T102] As to the Farindale application, he said: "No, I didn't object to it; nobody else objected." [T102].

Finally, as to this appellant's application, the Sheriff said:

> If the people agree that they wanted beer in Sparkman, Arkansas, they wouldn't hear nothing from me and they could put up with the law as bad as it is if they want to. [T102].

Thus, it ought to be obvious to anyone that, regardless of the law enforcement needs of the communities he serves, regardless of the availability of police protection, regardless of the proximity of permitted premises to schools or busy highways, and regardless of the remoteness of the areas in which such premises were located, Sheriff Hornaday would not oppose a permit application unless there were objections from the residents of those areas. This is the substance of his testimony regarding the permits at Mom's Place, at Farindale, at Princeton, and the appellant's application for a permit. The majority discounts these amazingly candid admissions by suggesting that the Sheriff's motives in testifying are only relevant to his credibility, and then notes that

the Board chose to exercise its perogative and believe the sheriff. I disagree because not only the Sheriff's motives in appearing to testify, but the fact of his opposition, according to his own testimony, was based totally on public sentiment. It is clear to me that our decision in *Snyder* v. *Alcoholic Beverage Control Board*, 1 Ark. App. 92, 613 S.W.2d 126 (1981) is directly on point and requires reversal of this case. There we noted that the reasons witnesses oppose or support permit applications may be significant. The bottom line in this case is that the Sheriff admitted that his sole reason for testifying was public opposition. I submit that his testimony cannot constitute substantial evidence in light of his admissions.

In *Johnson* v. *ABC Board*, 6 Ark. App. 366, 642 S.W.2d 335 (1982), a case involving this same appellant, this Court, citing ABC Regulations, Section 1.32, affirmed the Board's denial of a permit where the Board cited the fact that a permit was to be located next to a dry county and that its location was remote. In *Copeland* v. *ABC Board*, 4 Ark. App. 143, 628 S.W.2d 588 (1982), this Court (with two judges dissenting) affirmed the Board's denial of a permit based on the remoteness of the proposed location. I have found no case in which the Board denied a permit, on the basis of inadequate law enforcement, which did not involve an application for a permit in a remote area, much less a denial on this basis involving the second most populous area of a given county. In this case, the Board, in its findings and conclusions of law following the February 18, 1987, hearing, specifically relied on Section 1.32(3) of its regulations, and stated:

> Section 1.32(3) prohibits the issuance to any premises for which adequate police protection is not available. The regulation provides that a permit cannot be issued if adequate police protection is not available due to the remoteness of the location of the premises from law enforcement within that city or town.

I submit that Regulation 1.32(3) offers no support for the Board's action, for in no sense of the word can the city of Sparkman be characterized as remote.

The attached map, the appellant's exhibit one, shows the fallacies of the Board's, and this Court's, reasoning. Permits exist at Farindale, a remote area in northeast Dallas county; at Princeton, a town of about 40 people, located approximately in

the middle of Dallas county; and at Mom's Place, a "round hill" according to Sheriff Hornaday, at the intersection of Highways 9 and 46 in the extreme north central part of the county. As noted earlier, in *Johnson* v. *ABC Board, supra*, we affirmed the Board's denial of a permit in Dalark, based on its remoteness.

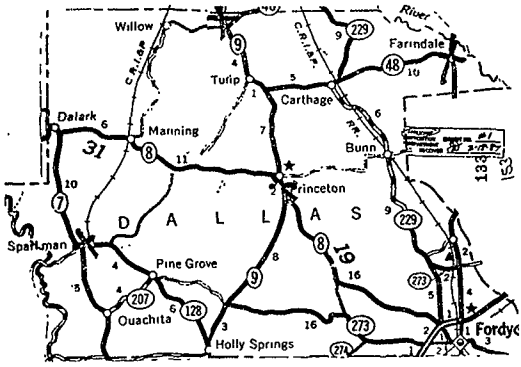
We should remember that Dallas County is a wet county where a majority of the residents, including those who elected the Sheriff, voted to allow permits such as this one. If it is the Board's policy to disallow permits in remote areas of wet counties because of a lack of law enforcement, and it is also the Board's policy, affirmed by the majority in this case, to deny permits in populated areas of wet counties, then it occurs to me to wonder where, in wet counties without enough deputies (all of them I suspect, according to their sheriffs) permits can be issued.

I would reverse this case and remand for the Board to issue the permit in question for several reasons. First, although I realize that, on remand, the Board was empowered to modify, reverse, or affirm its earlier ruling, no new evidence was really presented at the second hearing. Second, the Sheriff clearly stated that the lack of law enforcement was not the real basis for his stated opposition to the permit, but that his objection to the permit was actually based on the opposition of his constituents in the area—such opposition, according to his sworn testimony, determined not only whether he opposed a permit, but whether he even bothered to appear at hearings on permit applications in his county. Third, despite the original evidence that law enforcement was lacking, the Board initially decided that the public convenience and advantage would be served by issuing the permit in question. That the Board reversed its initial decision on the basis of the evidence presented on remand makes it obvious to me that the Board simply caved in to political pressure from the Sheriff, who, as noted, only bothered to appear and oppose because of political pressure brought to bear on him. For this Court to find that the Sheriff's testimony constituted substantial evidence, and to affirm, makes a mockery of the administrative process and our appellate review of ABC Board decisions.

There simply is no substantial evidence in this record to support the Board's decision, and I would reverse.

I dissent.

[redacted]



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ARKANSAS BLUE CROSS AND BLUE SHIELD
v. Phyllis REMAGEN

CA 88-25 752 S.W.2d 284

Court of Appeals of Arkansas
Division II
Opinion delivered June 29, 1988

[redacted]

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

Daily, West, Core, Coffman & Canfield, by: *Wyman R. Wade, Jr.*, for appellee.

MELVIN MAYFIELD, Judge. Appellant, Arkansas Blue Cross and Blue Shield, appeals a decision of the Sebastian County Circuit Court holding it liable to appellee for $1,564.81 hospital and medical bills plus costs, penalty and attorney's fees, under a health and hospitalization insurance policy.

In December, 1984, appellee had breast enlargement surgery. In August, 1985, she developed redness and tenderness in her left breast. Appellee's plastic surgeon, Dr. E. F. Still, testified that she gave him a history of being bitten by an insect while on a camping trip but at that time he could not tell whether the problem was caused by an infected insect bite or a rupture of the "capsule inside—not the implant, but the scar capsule around it." He said the symptoms were consistent with an insect bite. On September 5, 1985, Dr. Still performed surgery, but, he testified, he still could not determine the cause of the problem. He said the most plausible cause was an insect bite, that the abscess had drained, that his normal charge for "lysising the capsule from scar tissue" was $1,450.00, but he had charged appellee only $180.00, "the normal charge for opening and draining a complicated abscess."

Upon submission of the hospital and doctor bills for the surgery, appellant, Arkansas Blue Cross and Blue Shield, refused to pay, stating that the surgery was excluded from coverage under appellee's policy because it was cosmetic; "performed due to

complications arising from prior augmentation mammoplasty." Appellee filed a complaint against appellant for $1,763.02 plus attorney's fees and penalty, pursuant to Ark. Stat. Ann. § 66-3238 (Repl. 1980) [Ark. Code Ann. § 23-79-208 (1987)]. In answers to interrogatories and requests for admission, appellant admitted that appellee owned a valid policy of health insurance; that the premiums were paid up to date; that it had refused to cover the surgical and hospital bills; and that its only basis for denying the claim was that it contended the surgery was cosmetic in nature, and, therefore, excluded from coverage under the appellee's policy. In answers to interrogatories appellant also admitted that if appellee's claim had not been denied its liability on appellee's September 5, 1985, surgery would be: Crawford County Memorial Hospital, $1,227.21; Dr. Grimes, $193.60; and Dr. Still, $144.00; or a total of $1,564.81. Thereafter, appellee filed an amended complaint praying for actual damages of $1,564.81.

At the trial Irvin Pate, the Senior Claims Director for Arkansas Blue Cross and Blue Shield, testified that a claim passes through four levels of review before finally being denied. The claim is first examined by a clerk. If it is rejected it is then referred to the Utilization Review Division, a group of registered nurses; if they determine the claim is to be denied, it is then sent to a Medical Director for a third level of review. If he denies the claim, there is a fourth level of review called the Medical Services Review Committee, composed of thirty physicians from many specialties, who review disputed claims and make the final decision. Pate explained that appellee's insurance policy excluded from coverage any reconstructive or cosmetic surgery and any complications from cosmetic surgery, and that her claim had been rejected by the Medical Services Review Committee as being cosmetic. On cross-examination Pate testified that if it had been determined that Blue Cross and Blue Shield was liable for appellee's medical bills on this claim, considering deductibles and other exclusions Blue Cross and Blue Shield would have paid $1,564.81.

Appellee testified that her husband had first noticed that it looked like she had been bitten on the left breast by a spider. She said it was a red, purplish, infected looking area consistent with spider bites she had suffered in the past.

Leona Kennedy, Dr. Still's surgical nurse, testified that when she first observed it, appellee's left breast was quite red and there was a little pinpoint area where you could assume some type of insect had bitten her. Ms. Kennedy said it resembled insect bites she had seen in the past. She also testified that she assisted Dr. Still with appellee's surgery and that the infection was not inside the breast. She said no new implant was placed in appellee's breast; the original implant was returned.

The jury found for appellee and she was granted judgment against appellant for $1,564.81 plus costs, 12% penalty and attorney's fees as authorized by Ark. Stat. Ann. § 66-3238 (Repl. 1980). Arkansas Blue Cross and Blue Shield has appealed that verdict contending (1) that the court erred in allowing appellee's requested jury instruction number 12, which stated in part: "You must find for Ms. Remagen in the amount of $1,564.81"; (2) that the award of attorneys fees in the sum of $3,870.00 was excessive; and (3) that the court erred in submitting a verdict form to the jury which specified the amount of damages the jury was to award the appellee. As arguments (1) and (3) are essentially identical, they will be discussed together.

Appellant argues it was error to instruct the jury that if it found in favor of appellee it "must find for Ms. Remagen in the amount of $1,564.81" because its answers to the requests for admission, which were introduced into evidence, did not specify the amount which would have been due and payable if appellant was liable on the claim and the interrogatories which did specify this amount of liability on the claim were not introduced into evidence. Appellant contends that by so instructing the jury the judge made a factual decision and thus erroneously invaded the province of the jury.

The record shows that counsel for appellee, in Ms. Remagen's case in chief, called as her witness Irvin Pate, the Senior Claims Director for appellant and that he testified that Blue Cross and Blue Shield's liability on the claim, if eligible, would be $1,564.81. Although it is ordinarily the province of the jury to assess the amount of recovery, *see, Winters* v. *Barr*, 263 Ark. 618, 566 S.W.2d 745 (1978), where the amount of damages is undisputed it is not error for the court to give the jury a binding instruction which assumes as true matters which are established

by the undisputed evidence. *See St. Louis, I. M. & S. Ry. Co.* v. *Burrow*, 89 Ark. 178, 116 S.W. 198 (1909). *See also, Coleman* v. *Utley*, 153 Ark. 233, 240 S.W. 10 (1922), in which the court held that where the undisputed evidence showed that the plaintiff was entitled to a certain amount if he was entitled to recover anything, a verdict for a lesser amount was arbitrary, and it was error for the court to deny the plaintiff's motion for judgment for the full amount. *See also, Chaney* v. *Missouri Pacific Railroad Co.*, 167 Ark. 172, 267 S.W. 564 (1925).

We think appellee placed in evidence sufficient evidence to warrant the binding instruction to the jury that if it found in her favor, (in other words, if it found that the plaintiff's surgery was medically necessary and not merely cosmetic and that, therefore, Blue Cross and Blue Shield was liable for the plaintiff's medical bills) it should award the plaintiff the sum of $1,564.81. At the same time the jury was also instructed that it could find for the defendant (in other words, that Blue Cross and Blue Shield had no liability because the surgery was cosmetic and, therefore, excluded from coverage by the terms of the insurance policy). We find no error in the giving of these instructions.

Next appellant argues that the court erred in allowing appellee an attorney's fee. Ark. Stat. Ann. § 66-3238 (Repl. 1980), [Ark. Code Ann. § 23-79-208 (1987)], provides that if a loss occurs, and after demand has been made, the insurance company fails to pay the claim within the time specified in the policy, the insurance company "shall be liable to pay the holder of such policy or his assigns, in addition to the amount of such loss, twelve percent (12%) damages upon the amount of such loss, together with all reasonable attorney's fee . . . ." Appellant contends that because appellee's health insurance was a group contract between it and Rhodes Chevrolet of Van Buren, Arkansas, appellee was not the "holder of the policy" and, therefore, not entitled to the twelve percent penalty and attorney's fee. Appellant cites no authority and no real argument supporting its position. We do not consider on appeal matters unsupported by authority or convincing argument. *Harrison* v. *Benton State Bank*, 6 Ark. App. 355, 642 S.W.2d 331 (1982). Furthermore, the record does not indicate that this argument was presented to the trial court for its consideration and we do not consider issues which are raised for the first time on appeal. *Bull*

v. *Brantner*, 10 Ark. App. 229, 662 S.W.2d 476 (1984).

Appellant also argues that the $3,870.00 attorney's fee awarded was excessive. In support of this position appellant lists eleven cases and compares the percentage of attorney's fee awarded with the amount recovered and concludes that the average amount awarded was 23% and the maximum allowed was 41%. Appellant then contends that the fee allowed in the instant case should not have exceeded 41% of the recovery or $641.57. Appellee has filed a cross-appeal alleging that her attorney should have been granted the amount requested, $4,917.30. Appellee points out that although it was appellant who forced this matter to trial when it had no legitimate defense to appellee's claim, it was still necessary for her counsel to spend many hours in preparation for trial in order to prevail. She insists her attorney has documented 51.60 hours spent in preparing her case and he is entitled to his regular fee of $85.00 an hour, plus expenses.

In *Equitable Life Assurance Society* v. *Rummell*, 257 Ark. 90, 514 S.W.2d 224 (1974), the Arkansas Supreme Court considered a similar situation. It said:

> The purpose of the statute is to permit an insured to obtain the services of a competent attorney and the amount of the allowance should be such that well prepared attorneys will not avoid this class of litigation or fail to devote sufficient time for thorough preparation. *Old Republic Insurance Co.* v. *Alexander*, 245 Ark. 1029, 436 S.W.2d 829. It is contemplated that the allowance should not be a speculative or contingent fee but that it be such a fee as would be reasonable for a litigant to pay his attorney for prosecuting such a case. *Old Republic Insurance Co.* v. *Alexander*, supra.

257 Ark. 91-92. This court relied on the *Rummell* case in *Southall* v. *Farm Bureau Mutual Insurance Co. of Arkansas, Inc.*, 283 Ark. 335, 676 S.W.2d 228 (1984), when we stated:

> The Legislature, not the courts, enacted Ark. Stat. Ann. § 66-3238 (Repl. 1980) providing for an award of a reasonable attorney's fee against an insurer who wrongfully refuses to pay under an insurance policy. Our task is

> simply to carry out this legislative command. The computation of allowable attorneys' fees under the statute is governed by familiar principles. These factors include the experience and ability of the attorney and the time and work required of him, the amount involved in the case and the results obtained, the fee customarily charged in the locality for similar legal services and whether the fee is fixed or contingent.

283 Ark. at 337. The award of an attorney's fee is a matter for the sound discretion of the trial court and in the absence of abuse, its judgment will be sustained on appeal. *Southhall*, 283 Ark. at 338. We cannot say the trial court abused its discretion in its award of the attorney's fee in this case.

Affirmed.

COULSON and JENNINGS, JJ., agree.

James R. PHILLIPS *v.* STATE of Arkansas

CA CR 87-248 752 S.W.2d 301

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

Hough & Hough, by: *Stephen G. Hough*, for appellant.

Steve Clark, Att'y Gen., by: *R.B. Friedlander*, Solicitor Gen., for appellee.

DONALD L. CORBIN, Chief Judge. Appellant, James R. Phillips, appeals a decision of the Sebastian County Circuit Court revoking his suspended sentence imposed on a plea of guilty, entered July 21, 1986, to a charge of one count of possession of amphetamines with intent to deliver and one count of possession of drug paraphernalia. We affirm.

A petition to revoke was filed April 8, 1987, alleging appellant failed to pay the fine and costs imposed as a condition of his suspended sentence. Additionally, the petition alleged that on April 3, 1987, appellant committed the offenses of possession of a controlled substance with intent to deliver and possession of drug paraphernalia, thereby violating the terms of his suspended sentence. The trial court conducted two hearings which clearly establish that appellant and his vehicle were stopped and searched on April 3, 1987, based upon information received from reliable police informants. The arresting officer testified that he was informed that appellant and another person would be coming to Fort Smith in appellant's vehicle with Arkansas license NWJ-388, in possession of a quantity of a controlled substance, methamphetamine. The officer testified that the search revealed hypodermic syringes, small plastic bags containing off-white residue, marijuana residue and partially smoked marijuana cigarettes in the back of appellant's truck, additional controlled substances and similar drug paraphernalia under the front seat, as well as a substance which tested to be methamphetamine in appellant's wallet. The officer also testified that appellant had needle marks on his arm.

In addition, an employee of the prosecuting attorney's office testified that appellant was in arrears in paying the fine and costs assessed in his 1986 conviction. The testimony reveals that even though appellant was required to pay $100.00 monthly, no payments were received after December 6, 1986, leaving an unpaid balance of $1,146.25. This testimony was substantiated by a deputy sheriff whose job includes keeping circuit court records of fine payments. His records reveal that appellant made only four $100.00 payments prior to his 1987 arrest.

Appellant's wife testified that they were unable to make

regular payments on appellant's fine and costs. In support of this contention, she testified that appellant became self-employed in the latter part of 1986 causing irregularity of income. She also testified that their child had surgery during this period of time and they were responsible for their financial obligations, as well as support for appellant's brother and sister. Appellant's wife also stated that she was aware of appellant's drug habit but did not know how much of his income was expended to maintain that habit. Also, she was not surprised that appellant had $800.00 on his person at the time of his 1986 arrest and $100.00 at the time of his 1987 arrest. Appellant made a statement at the second hearing acknowledging his drug addiction problem.

Appellant raises the following two points for reversal: (1) The trial court failed to prepare and furnish to the appellant a written statement of the evidence relied on and the reasons for revoking appellant's suspended sentence; and (2) the trial court erred in finding that the State proved by a preponderance of the evidence that the conditions of appellant's suspended sentence were violated.

We will first address appellant's argument that the judgment of the trial court is contrary to the preponderance of the evidence. Appellant argues that he made bona fide efforts to acquire the resources to pay his fine and costs, and his inability to pay is excusable because of his numerous and substantial obligations. Furthermore, appellant questions the sufficiency of the evidence of the crimes of possession of a controlled substance and possession of drug paraphernalia resulting from the 1987 arrest.

In a hearing to revoke, the State bears the burden to prove the violation of a condition of the suspended sentence, and on appellate review, the trial court's findings are upheld unless they are clearly against the preponderance of the evidence. *Cavin* v. *State,* 11 Ark. App. 294, 669 S.W.2d 508 (1984). A determination of preponderance of the evidence turns heavily on questions of credibility and weight to be given the testimony and in that respect we defer to the superior position of the trial court. *Hoffman* v. *State,* 289 Ark. 184, 711 S.W.2d 151 (1986). Furthermore, the rules of evidence do not apply to proceedings for granting or revoking probation. *Fitzpatrick* v. *State,* 7 Ark. App. 246, 647 S.W.2d 480 (1983).

Based upon the evidence presented in the instant case, we cannot say that the court's findings that appellant violated the conditions of the judgment suspending imposition of sentence were clearly against the preponderance of the evidence with regard to the 1987 crimes being questioned by appellant in this appeal. Additionally, as to appellant's argument that his inability to pay the fine and costs was due to excusable circumstances, we defer to the superior position of the trial court and affirm its findings.

Appellant also argues that the trial court erred by not furnishing him a written statement of the evidence relied on and the reasons for revoking his suspended sentence as required by Arkansas Code Annotated 5-4-310(b) (5) (1987) (formerly Ark. Stat. Ann. § 41-1209(2) (Repl. 1977)).

We have held that when an error is alleged, prejudice must be shown, since we do not reverse for harmless error. *Berna* v. *State,* 282 Ark. 563, 670 S.W.2d 434 (1984), *cert. denied,* 470 U.S. 1085 (1985). One purpose of the written statement in question is to permit the defendant to know the precise basis of the trial court's decision so that he or she may conduct an intelligent appeal. *See Hawkins* v. *State,* 270 Ark. 1016, 607 S.W.2d 400 (1980). Here, the defense has failed to show the prejudicial effect of not receiving a written statement. Appellant was amply informed of the court's reason for setting aside his suspended sentence. Appellant received two separate hearings on the petition to revoke which set out in detail the alleged violations of the conditions of his suspended sentence. He attended both hearings and even made a statement at the latter. Accordingly, the trial court must be affirmed on this point.

Affirmed.

CRACRAFT and COOPER, JJ., agree.

James D. KNOX *v.* Madalyn D. KNOX

CA 87-444 753 S.W.2d 290

Court of Appeals of Arkansas
Division II
Opinion delivered July 6, 1988

W. Bruce Leasure, for appellant.

Judieth P. Balentine, for appellee.

GEORGE K. CRACRAFT, Judge. James D. Knox appeals from an order of the chancery court of Pulaski County denying his petition to vacate a divorce decree entered by that court and holding him liable for child support payments accrued under it. On appeal, he contends that the court lacked personal jurisdiction over him sufficient to resolve the property division and child-support issues and also lacked jurisdiction to determine custody of the parties' minor child. We affirm.

On February 24, 1986, the appellee brought an action for divorce in Pulaski County, Arkansas, alleging that she had been a resident of that county for more than sixty days, that the appellant was a resident of Tennessee, and that appellant had

subjected her to intolerable indignities, for which she was entitled to a divorce, custody of their child, a division of property, and an award of child support. The record shows that appellant was served with a copy of the complaint and summons delivered to him by certified mail in the State of Tennessee as permitted by Ark. R. Civ. P. 4(e) (3). The appellant filed a special appearance challenging the jurisdiction of the Arkansas court on the grounds that a complaint for divorce had already been filed in Tennessee, the parties were married and had lived in Tennessee, and the property was located in Tennessee. He contended that Tennessee was the only forum having jurisdiction of the property and child-related issues.

On April 22, 1986, former chancellor Bruce Bullion entered a decree reciting that appellant had not answered "though having been duly notified in compliance with Arkansas law by being notified by certified mail for which he personally signed." The decree further recited that appellee was present in person and through her attorney, and that an attorney from Memphis, Tennessee, had appeared seeking to represent the appellant but was not accompanied by an attorney authorized to practice in Arkansas. The decree recited that the Memphis attorney was present throughout the hearing and asked questions. The decree further recited that the court heard testimony of the appellee and five other witnesses, and, after considering the pleadings, testimony, exhibits, arguments of counsel, and other things and matters presented before it, found that "Madalyn D. Knox is a resident of the State of Arkansas and this court has jurisdiction over the parties and subject matter before it." The court found that the appellee had established her grounds for divorce, awarded her a divorce and custody of the minor child, ordered a division of the parties' property, and directed appellant to pay child support in the amount of $313.90 per month. No appeal was taken from that decree nor was the evidence heard by Judge Bullion preserved or brought forward in the record.

Over a year later, the appellee obtained a show-cause order directing appellant to appear and show cause why he should not be held in contempt for failure to pay the ordered child support. Appellant then filed a "Special Appearance for the Purpose of Contesting Jurisdiction and Motion to Set Aside the Divorce Decree as Void for Lack of Jurisdiction." In this petition, he

contended that the court was without jurisdiction to enter the decree of April 22, 1986, and that the decree should be set aside for that reason.

On September 28, 1987, the present chancellor, Ellen Brantley, conducted a hearing on appellee's motion for contempt and appellant's petition to vacate the decree. After the hearing, Judge Brantley concluded that appellant's conduct in accepting the benefits of the decree, including the property awarded him, estopped him from asserting that the original decree was invalid because the court had lacked jurisdiction of his person. We conclude that this finding was a permissible one on the evidence presented at that hearing. *Anderson* v. *Anderson,* 223 Ark. 571, 267 S.W. 2d 316 (1954).

There are, however, even more compelling reasons why that defense was not available to the appellant. Service was had on him in the State of Tennessee in the manner provided for service of summons outside this state as provided in Ark. R. Civ. P. 4(e)(3). In *Bunker* v. *Bunker,* 261 Ark. 851, 552 S.W.2d 641 (1977), the supreme court held that the acquisition of personal jurisdiction under our so-called "long-arm statute," Ark. Code Ann. § 16-58-120 (1987) (formerly Ark. Stat. Ann. § 27-339.1 (Repl. 1979)), is not restricted to tort actions but applies to *all* causes of action arising out of acts done within this state, including divorce, alimony, support, and property division. The court also held in *Bunker* that whether the exercise of jurisdiction on the basis of acts done within this state is reasonable depends on the "basic fairness" test of due process and on consideration of factors set forth in that opinion. Whether the acts of a nonresident are sufficient to give rise to a cause of action in this state and whether the basic fairness requirements are met are questions of fact for initial determination in the trial court. *Id.*

When a nonresident defendant is served with process outside this state, he has more than one option. He may elect one or the other but may not pursue both. If he has confidence in his belief that the jurisdictional facts required in *Bunker* do not exist, he may elect to do nothing, risk the entry of default judgment against him, and assert his defense of lack of personal jurisdiction when the judgment is sought to be enforced against him in his home state. *Hanson* v. *Denckla,* 357 U.S. 235 (1958); *Baldwin* v.

Iowa State Traveling Men's Association, 283 U.S. 522 (1931); *Hawes Firearm Co.* v. *Roberts,* 263 Ark. 510, 565 S.W. 2d 620 (1978). The nonresident may, on the other hand, elect to raise those jurisdictional issues in the trial court from which that summons was issued. However, if he does so, he submits himself to the jurisdiction of that court on those issues and, if aggrieved by the court's determination as to its jurisdiction, the error must be corrected on appeal. If he fails to appeal the ruling, or is unsuccessful in his appeal, he is estopped from thereafter raising that issue in any court. *Brown & Hackney, Inc.* v. *Stephenson,* 157 Ark. 470, 248 S.W. 556 (1923); *Ederheimer* v. *Carson Dry Goods Co.,* 105 Ark. 485, 152 S.W. 142 (1912). *See also Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694 (1982); *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 370 (1940); *Baldwin* v. *Iowa State Traveling Men's Association, supra;* 5 Am. Jur. 2d *Appearance* § 4 (1962).

The rule of general application is perhaps best stated in the Restatement of Judgments as follows:

> Where, however, the defendant appears in the action only to object that the court has no jurisdiction over him, that is where he enters a special appearance, the court does not acquire jurisdiction over him because of his appearance (see § 20), *except to decide the question so raised.* But if the court determines that it has jurisdiction over him, even though that determination is erroneous on the facts (see Illustrations 1 and 2) or on the law (see Illustration 3), the determination is res judicata between the parties. This is an application of the general principle of res judicata, precluding the parties from relitigating a matter determined by a court after a fair opportunity has been afforded to them to litigate the matter (see § 1).
>
> If the defendant appears in an action for the purpose of objecting that the court has no jurisdiction over him, he thereby *submits to the court for its determination the question whether the court has jurisdiction over him.* If the court erroneously determines that it has jurisdiction over the defendant, he has ground for reversal in an appellate court, and ground for carrying the case to the

> Supreme Court of the United States since a judgment rendered against him by a court having no jurisdiction over him deprives him of property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States. If, however, he does not avail himself of these remedies, or if the judgment is affirmed, or if the appellate court or the Supreme Court of the United States declines to consider the case, the defendant cannot thereafter successfully contend that the judgment was void, even though in fact the court had no jurisdiction over him. The defendant, having submitted the question of jurisdiction to the court, the court has jurisdiction to determine the question of its jurisdiction over the defendant, and the determination of that question is res judicata.

Restatement of Judgments § 9 comment a (1942) (emphasis added). In his treatise on conflict of laws, Dr. Robert Leflar states: "This has been called the 'bootstrap doctrine,' the idea being that a court which initially had no jurisdiction can, when the issue is litigated, lift itself into jurisdiction by its own possibly mistaken but *conclusive finding* that it does have jurisdiction." R. Leflar, L. McDougal and R. Felix, *American Conflicts Law* § 79 (4th ed. 1986) (emphasis added).

■ The decree in which the award of child support was made recognized and recited that the appellant was a resident of Tennessee and was served within that state, but the court found that it had jurisdiction of the subject matter and the persons of the parties. The appellant had submitted himself to the jurisdiction of the court on that issue by the entry of his "special appearance" and, as there was no appeal from the court's finding and decree, it became final and binding as to the factual determination of jurisdiction, whether or not correctly decided. The appellant was afforded his day in court on his special appearance and is not entitled to another one under the doctrines of *res judicata* and estoppel by judgment.

■ In oral argument, appellant contended that he was prevented by actions of the chancellor from fully presenting his motion to quash the summons at the divorce hearing. In the absence of a record, we do not know what transpired at that

hearing. However, by filing his motion questioning jurisdiction, appellant submitted that issue to the court and was bound by its determination from which he failed to appeal. If he felt aggrieved by a factual determination, procedural error, or discretionary ruling, he should have sought correction of it on appeal. Once the issue was submitted to the court, he could not simply walk away from the arena and begin his attack anew at some other time and place.

Even if the issue of the court's jurisdiction was an open one at the time of the second hearing, the result must be the same. The motion constituted a collateral attack on the decree. As the decree recited that the court had jurisdiction of the persons and subject matter, it will be presumed, until the contrary appears, that the court had facts before it on which to base its finding. *Frazier* v. *Merrill,* 237 Ark. 242, 372 S.W.2d 264 (1963); *Crittenden Lumber Co.* v. *McDougal,* 101 Ark. 390, 142 S.W. 836 (1911); *Hearns* v. *Ayres,* 77 Ark. 497, 92 S.W. 768 (1906). The burden of proving the contrary rests on the party attacking the decree. At the hearing, appellant did not testify or present affirmative evidence that the jurisdictional facts had not been shown or did not exist. Appellee's testimony related primarily to the issue of child support arrearages and appellant's acceptance of the benefits of the decree. There was no evidence that during the numerous visits to Arkansas appellant committed no act which would give rise to a cause of action sufficient to invoke our long-arm statute. Appellee had no burden to prove the existence of those facts which were presumed to exist.

The divorce decree recited that the appellant had been properly served with summons, and the court found that it had jurisdiction of his person and the subject matter of the action. None of the evidence considered by Judge Bullion on either finding is included in the transcript of the record presented to us or was before Judge Brantley on the motion to vacate. Although both parties based arguments on facts assumed to have been before Judge Bullion, we are bound by the record before us. When jurisdiction of a court of general jurisdiction depends on facts not appearing in the record, it will be presumed in a collateral proceeding that the court did have facts before it on which to base its finding in favor of its jurisdiction. *Frazier* v. *Merrill, supra; Crittenden Lumber Co.* v. *McDougal, supra; Hearn* v. *Ayres,*

supra.

Whether a chancery court of this state should exercise its jurisdiction to enter a custodial order under the provisions of Ark. Code Ann. § 9-13-203(a)(2) (1987) (formerly Ark. Stat. Ann. § 34-2703(a)(2) (Supp. 1985)) also depends on the resolution of questions of fact. *Pomraning* v. *Pomraning,* 13 Ark. App. 258, 682 S.W.2d 775 (1985). The rules set out above regarding *res judicata* and the presumptions in favor of the court's findings in the absence of a record apply equally to this issue. Furthermore, even if this issue could properly have been raised at the hearing before Judge Brantley, appellee stated at that hearing that she was born and raised in Little Rock and educated in its public schools. She graduated from our state university at Fayetteville. After her marriage she resided for four years in Memphis, Tennessee. Her parents and a number of close relatives continued to reside in Pulaski County, Arkansas. During her marriage she visited her parents here at least once monthly. On a number of occasions the child remained with appellee's parents while she and appellant were on vacation trips. On one prior occasion when domestic problems arose, she and the child returned to her parents' home. At one time they resided in her parents' home for over a month while appellant sought alcoholic rehabilitation in an Arkansas institution. At the time of the divorce hearing appellee and the child had been in this state for over four months. These facts are strikingly similar to those in *Pomraning* v. *Pomraning, supra,* in which we upheld the court's exercise of its jurisdiction to determine custody, and we cannot conclude that the court erred in so exercising its jurisdiction in this case.

Affirmed.

MAYFIELD and JENNINGS, JJ., agree.

ASSOCIATED NATURAL GAS COMPANY *v.* ARKANSAS PUBLIC SERVICE COMMISSION

CA 87-20 752 S.W.2d 766

Court of Appeals of Arkansas
En Banc
Opinion delivered July 6, 1988
[Rehearing denied August 17, 1988.]

Mitchell, Williams, Selig & Tucker, by: *Kent Foster, Michael O'Malley, and Joe Madden*, for appellant.

Douglas R. Strock, Chief Counsel, for appellee.

JAMES R. COOPER, Judge. The appellant, Associated Natural Gas Company (ANG), a wholly-owned subsidiary of Arkansas Power and Light Company (AP & L), appeals from an order of the Arkansas Public Service Commission granting it a rate increase of $311,202.00 on its request for an increase of $992,948.00. ANG's application was filed on December 20, 1985, and if granted in full, would have increased rates for its customers in Arkansas by 6.56%.

The appellant seeks reversal of the Commission's decision on four points. First, ANG contends that the 6.52% return on equity allowed it by the Commission is arbitrary and not based on substantial evidence; specifically, ANG contends that the use of "double leverage" in determining its return on equity is inappropriate in this case or, at the very least, the method was incorrectly applied. Second, ANG contends that the adoption of the "modified balance sheet approach" to estimate its working capital requirement is incorrect and is not supported by substantial evidence. Third, ANG claims that the Commission's disallowance of a particular item of payroll expense is erroneous. Finally, ANG contends that the elimination of certain expenses claimed

by it is arbitrary and not supported by substantial evidence.

We agree with ANG that the application of the concept of double leverage in these particular and unique circumstances is error and, therefore, we reverse on that point. We affirm the Commission's decision in all other respects.

Our review of appeals from the Public Service Commission is limited by the provisions of Ark. Stat. Ann. Section 73-229.1 (Supp. 1985) [Ark. Code Ann. Section 23-2-423(c)(3), (4), and (5) (1987)], which defines our standard of review as determining 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 the appellant under the laws or Constitution of the State of Arkansas or the United States. When this Court reviews such cases, we give due regard to the expertise of the Commission, which derives its ratemaking authority from the Arkansas General Assembly. The Commission has broad discretion in choosing an approach to rate regulation and is free, within its statutory authority, to make any reasonable adjustments which may be called for under particular circumstances. *General Telephone Co.* v. *Arkansas Public Service Commission,* 272 Ark. 440, 616 S.W.2d 1 (1981);*Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission,* 18 Ark. App. 260, 715 S.W.2d 45 (1986). In light of these considerations as to our standard of review, we now turn to the issues presented by appellant on appeal.

ANG first argues the Commission's finding allowing it a return on equity of only 6.52% is arbitrary, unreasonable, unjust and confiscatory and is not based on substantial evidence. Specifically, ANG argues that it was error for the Commission to apply what is known as double leverage to ANG; to ignore the greater risk to ANG stockholders which results from application of double leverage; and, to rely on historical growth data to find a 13% return on AP & L's common equity.

The fact that ANG is a wholly-owned subsidiary of AP & L makes calculation of its required return on equity more difficult

because its stock is not publicly traded;[1] therefore, double leverage was used here to impute to the subsidiary corporation (ANG) as its return on equity the parent corporation's (AP & L's) overall cost of capital and thereby provide a means to calculate the return on equity for ANG. Double leverage recognizes that in most cases it is probable that all sources funding a parent corporation's capital structure contribute relatively to the purchase of equity in the subsidiary corporation. Indeed, this Court and the Arkansas Supreme Court have recognized double leverage as a valid tool for the Commission to use. *General Telephone Co., supra; 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 costs 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.

The parties do not dispute the validity of the concept of double leverage as a general proposition, but the appellant argues

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[1] A method known as the "discounted cash flow" (DCF) formula is often used to derive a corporation's return on equity and depends on market information for its application. *Walnut Hill Tel. Co.* v. *Arkansas Public Service Comm'n,* 17 Ark. App. 259, 709 S.W.2d 98 (1986).

that because of the undisputed facts surrounding ANG's acquisition by AP & L, the existence of double leverage between AP & L and ANG is impossible, and is in fact illegal, and therefore the application of the concept in the calculation of ANG's required return on equity is inappropriate. We agree.

Associated Natural Gas Company was engaged in supplying gas service to customers in the State of Missouri until 1953, when it was acquired by Arkansas-Missouri Power Company (Ark-Mo Power), a utility which sold both electricity and natural gas in Arkansas and Missouri. Even after the acquisition of ANG, state regulatory agencies treated ANG and Ark-Mo Power independently. This situation existed until the early 1970's, when Middle South Utilities, Inc., a public utility holding company, bought Ark-Mo Power, thereby acquiring 100% ownership of ANG's common stock. Middle South Utilities also owns all of the common stock of Arkansas Power & Light Company, an electric utility, and as a condition of the acquisition by Middle South, the Securities and Exchange Commission required Middle South to dispose of Ark-Mo Power's gas operations within one year. Apparently, Middle South was unable to comply with this requirement, and in 1976, it sought revocation of the divestiture requirement. The SEC declined to waive the divestiture order but suggested that Ark-Mo consolidate all of the gas operations of Ark-Mo and Associated Natural Gas into ANG. This was accomplished in 1978. Ark-Mo then operated as an electric utility, and ANG operated as its wholly-owned subsidiary gas utility until 1981, when AP & L merged with and absorbed all of Ark-Mo's operations. In effecting the absorption of Ark-Mo and the acquisition of ANG's common stock, AP & L swapped its own first mortgage bonds to Ark-Mo bond holders in a debt-for-debt swap. Middle South exchanged AP & L common stock for Ark-Mo common stock in order to accomplish the equity side of the merger.

Ernest L. McKenzie, ANG's vice-president, chief financial officer, secretary, treasurer, and a member of its board of directors, was personally involved in virtually all of the transactions outlined above and testified in great detail as a witness in the hearings below. The important essence of McKenzie's testimony is that the acquisition of ANG by AP & L was a non-cash transaction involving the swap of bonds for bonds and stock for

stock; that it is impossible for borrowed funds to have been used by AP & L to purchase ANG common stock; that, since AP & L acquired ANG, it has purchased no additional stock nor has it loaned any money to ANG;[2] and that the gas operations of ANG have remained strictly separate from the electric operations of its parent company, AP & L, since the parent-subsidiary relationship came into being.

We agree that the use of double leverage was inappropriate in this case because of one critical fact: none of Arkansas Power & Light Company's debt could possibly have been used to finance its acquisition of ANG. Arkansas Power & Light was prohibited by law from using debt to purchase ANG; therefore, it is impossible for AP & L's debt to leverage down to ANG. It is inappropriate to use AP & L's overall cost of capital to determine ANG's cost of equity, because AP & L's investment in ANG's stock cannot consist of anything but a portion of AP & L's equity capital. An elementary premise on which the application of double leverage depends is missing from this case, i.e., that a parent corporation has debt-funding available to it which may be used to purchase the subsidiary corporation's stock.

The PSC claims that ANG's argument makes a mistaken assumption that no debt was used by AP & L to fund its investment in ANG. The PSC contends that all capital dollars are fungible, i.e., they cannot be traced to their source, and each dollar is an inseparable element of every financial transaction. While we agree that, as a general proposition, all dollars in a company's capital structure are fungible, we cannot accept the argument that the concept of fungibility should be recognized in this particular case because doing so would be absolute fiction. We hold that, because it is a factual and legal impossibility for double leverage to exist between this parent and this subsidiary corporation, as proven by the unrefuted evidence, the application of the concept of double leverage to this subsidiary corporation to ascertain its cost of equity for ratemaking purposes is inappropriate.

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[2] The parties agree that the Public Utilities Holding Company Act and applicable rules and regulations of the Securities and Exchange Commission prohibit such transactions.

Because we hold that the application of double leverage is inappropriate in these particular circumstances, we do not need to address the appellant's two remaining issues concerning its increased risk as a result of double leverage and the return on equity used for ANG's parent company by the Commission.

We now turn to the appellant's contention that the use of the Modified Balance Sheet Approach (MBSA) to compute ANG's working capital is incorrect. The MBSA is a relatively new ratemaking tool, but it has been used with approval in other cases. *General Telephone Co. of the Southwest* v. *Arkansas Public Service Commission,* 23 Ark. App. 73, 744 S.W.2d 392 (1988), *aff'd,* 295 Ark. 595, 751 S.W.2d 1 (1988). The use of the Modified Balance Sheet Approach to determine working capital in this case was not impermissible, and the appellee's use of it is supported by substantial evidence.

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.

Generally, the working capital allowance is derived through a device known as a "lead/lag study," which attempts to measure the advances and delays involved with expenses and revenues associated with a company's operations on a day-to-day basis. ANG submitted a lead/lag study in this case, which was accepted by the PSC staff subject to some adjustments. The staff additionally used an MBSA but advocated adoption of ANG's lead/lag study subject to staff's adjustments. The Commission rejected the lead/lag study as submitted by ANG and also rejected the adjusted lead/lag study advocated by the PSC staff because "a lead/lag must separately provide the amounts of working capital assets on a jurisdictional basis and the working capital liabilities on a total company basis." Neither the appellant nor the staff used total company liabilities and instead used Arkansas-only jurisdictional assets and liabilities. The appellant argues that our decision in *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission,* 19 Ark. App. 322, 720 S.W.2d 924 (1986),

prevents the use of Arkansas-only jurisdictional assets and total company liabilities. That decision is not applicable here.

In *Southwestern Bell, supra*, we required that consistent treatment be given all components of a public utility's capital structure. We held there that the use of Arkansas-only customer deposits along with total-company equity, debt, accumulated deferred income taxes and investment tax credits in calculating the company's weighted cost of capital was inconsistent and reversed and remanded on that basis. Here, no such inconsistency exists: liabilities were treated consistently on a total-company basis, and assets were treated consistently on an Arkansas-only basis. We hold that the Commission's decision to use Arkansas-only assets and total company liabilities in preparing the MBSA to determine working capital is supported by substantial evidence and does not run afoul of this Court's directives in *Southwestern Bell.*

The appellant's argument that the MBSA was not properly prepared is without merit. Our Supreme Court addressed this identical issue in *General Telephone Co. of the Southwest* v. *Arkansas Public Service Commission,* 295 Ark. 595, 751 S.W.2d 1 (1988), and affirmed the disallowance of "return on return." From our review of the record, we cannot say that the Commission's refusal to allow a return on return in this case was improper.

Next, ANG claims that the MBSA adopted by the Commission erroneously included a liability consisting of $631,364.00 of "quick turn-around" accumulated deferred income taxes (ADIT) in ANG's capital structure. ANG contends that the Commission should have accepted the testimony of its own witness, who testified that the tax timing differences will average out to zero in the short-term period. The PSC staff contends, on the other hand, that the amount of ADIT included by the Commission was fairly representative of a normal level of ADIT and was, therefore, proper, because ADIT is a source of cost-free capital.

As we pointed out in *General Telephone, supra*:

> 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).

General Telephone, 23 Ark. App. 83. From our review of the evidence, we cannot say that the appellee's acceptance of this tax adjustment is not supported by substantial evidence. Once the appellate court determines the appellee's factual findings are supported by substantial evidence, we defer to the expertise of the Commission. *General Telephone,* 295 Ark. *supra.*

ANG contends that the PSC erroneously disallowed a payroll expense adjustment proposed by ANG to permit it to recover expenses associated with a newly-created position of vice-president of marketing carrying with it a salary of $70,000.00 per year. Ark. Stat. Ann. Section 73-217.5 (Supp. 1985) [Ark. Code Ann. Section 23-4-406 (1987)] provides in pertinent part as follows: ". . . [t]he Commission shall permit adjustments to any test years . . . to reflect the effects on an annualized basis of any and all changes and circumstances which may occur within twelve months after the end of such test year where such changes are both reasonably known and measurable." Here, the PSC staff argued against inclusion of ANG's proposed adjustments because the person selected to fill the position in question did not begin work until about two weeks following the end of the *pro*

forma year.[3]

In *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission,* 18 Ark. App. 260, 268, 715 S.W.2d 451, 455 (1986), we said:

> It seems logical that a point or period in time must be fixed during the ratemaking process at which the interjection of variables must cease and rate calculations committed to paper. Only then can there be an element of certainty in this often uncertain process.

The adjustment proposed by ANG and rejected by the Commission in this case is the very type of dispute which Section 73-217.5 [Code Section 23-4-406] was designed to prevent. While the action of ANG in establishing a position and setting the salary for the position occurred at the very end of the twelve-month period following the end of the test year, the record reflects that the expenses associated with that position were not to be incurred during that *pro forma* year. The Commission's refusal to allow ANG's expense adjustment was correct. *See General Telephone, supra.*

Finally, ANG complains that the rejection of certain expenses associated with billings from Middle South Services, a corporation providing services to affiliates of Middle South Utilities Company, is error. Staff witness Lewis proposed elimination of $32,298.00 of these expenses, and the Commission adopted his recommendation in its final order. Company witness McKenzie testified in order to explain the expense items eliminated by Lewis, who claimed that the expenses were associated with lobbying efforts, did not benefit ratepayers, or were simply not justified by the appellant.

ANG has the burden under Ark. Stat. Ann. Section 73-237 (Repl. 1979) [Ark. Code Ann. Section 23-2-417 (1987)] to justify the rate application it filed with the Commission. Here, the Commission accepted the recommendation of the staff witness and was apparently unpersuaded by the explanations offered by the company witness as to the reasonableness of

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[3] The *pro forma* year consists of the twelve months immediately following the end of the test year.

the expenses disallowed. Since the Commission is the trier of fact, it is within its province to assess the credibility of the witnesses, the reliability of their opinions, and the weight to be accorded the evidence presented by the witnesses. *Arkansas Public Service Commission* v. *Continental Telephone Co.,* 262 Ark. 821, 561 S.W.2d 645 (1978). We cannot say from the record before us that the Commission's acceptance of witness Lewis' expense disallowance recommendation was incorrect.

We reverse and remand the decision of the Commission with respect to the use of double leverage in these particular and unique circumstances, with the sole consideration on remand to focus on the appropriate methodology by which the appellant's return on equity may be calculated and then included in its rate of return calculations. In all other respects, the decision of the Commission is affirmed.

Affirmed in part, reversed in part, and remanded.

William Eugene WILSON *v.* STATE of Arkansas

CA CR 87-200 753 S.W.2d 287

Court of Appeals of Arkansas
Division II
Opinion delivered July 6, 1988

Walker, Roaf, Campbell, Ivory & Dunklin, by: *Larry G. Dunklin*, for appellant.

Steve Clark, Att'y Gen., by: *David B. Eberhard*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with aggravated robbery, a violation of Ark. Stat. Ann. § 41-2102 (Supp. 1985) [Ark. Code Ann. § 5-12-103 (1987)]. After a non-jury trial, the court found the appellant guilty of that charge and sentenced him to ten years in the Arkansas Department of Correction. From that conviction, comes this appeal.

For reversal, the appellant contends that his aggravated robbery conviction is not supported by substantial evidence because there was no evidence to show that he knew his accomplices intended to employ a deadly weapon in the robbery. He also contends that the evidence is insufficient to support a conviction even for the lesser included offense of robbery.

We first address the appellant's contention that the evidence was insufficient to support a conviction for the lesser included offense of robbery. A person commits robbery when he employs or threatens to employ physical force upon another with the purpose of committing a theft. Ark. Stat. Ann. § 41-2103 (Repl. 1977) [Ark. Code Ann. § 5-12-102 (1987)]. The charges against the appellant were based on the theory that he participated in the crime as an accomplice. Accomplice liability is governed by Ark. Stat. Ann. § 41-303 (Repl. 1977) [Ark. Code Ann. § 5-2-403 (1987)], which provides that:

> A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, he: (a) solicits, advises, encourages or coerces the other person to commit it; or (b) aids, agrees to aid, or attempts to aid the other

person in planning or committing it. . . .

There was evidence at trial to show that Richard Hessee, the manager of a Pizza Hut restaurant, was robbed at approximately midnight on December 4, 1986. Keith Williams testified that he was present at and participated in the robbery. He also stated that Ricky Cooper was told, by a girlfriend who was formerly employed at the Pizza Hut, that the manager left the restaurant with money bags after locking up. Cooper relayed this information to Williams. Williams further stated that, on December 4, 1986, he, Cooper, and the appellant discussed getting a pizza and drove past the Pizza Hut three or four times in the appellant's car. They then drove to an apartment complex one or two blocks away from the Pizza Hut, where Cooper and Williams knocked on a girlfriend's door. Williams testified that the appellant told him and Cooper to "go get it from the manager," and remained in the car while Cooper and Williams walked to the back of the Pizza Hut; that, when Mr. Hessee came out of the restaurant, Cooper pointed a gun at him; and that they robbed Hessee of his briefcase, ran back to the apartment complex, and drove off with the appellant in the appellant's car. Hessee also testified, stating that he had been robbed in the Pizza Hut parking lot by two men on December 4, 1986; that one of the men pointed a revolver at him while the other frisked him; and that they ran from the parking lot after taking his briefcase, keys, and billfold. Finally, a statement made by the appellant was introduced into evidence. In his statement, the appellant admitted being with Williams and Cooper on the night of the robbery. He stated that the three of them were together at Cooper's girlfriend's house at 11:30 p.m. on December 3, 1986, and that he had overheard Cooper talking about robbing the manager of the Pizza Hut. He also stated that he told Williams and Cooper that he would go with them to the Pizza Hut, but that he would not participate in a robbery; that he took Williams and Cooper to the Pizza Hut shortly after midnight; that he parked about two blocks away from the restaurant; that Williams and Cooper got out of the car, walked toward the Pizza Hut, and came running back to the car fifteen minutes later; that Cooper had twelve dollars in his hand when he returned, and complained because "that guy only had twelve dollars;" and that the three men then left, with Cooper driving the appellant's car.

We first address the question of the sufficiency of the accomplice's (Williams) statement. The testimony of an accomplice on which a conviction is based must be corroborated by other evidence which is substantial, is independent of the statement of the accomplice, and tends to connect the defendant with the commission of the crime. *Kennel* v. *State,* 15 Ark. App. 45, 689 S.W.2d 5 (1985). The corroborating evidence need not be sufficient to support a conviction in and of itself. *Id.* In this case, the appellant's statement and Hessee's testimony adequately establish that a crime was committed, and the appellant's admission that he drove Williams and Cooper to and from the Pizza Hut despite his knowledge that a robbery had been planned connects the appellant with the commission of the crime. Thus, we would find no merit in a contention of insufficient corroboration even had the issue been argued by the appellant.

In reviewing criminal convictions by a court sitting without a jury, we view the evidence and all permissible inferences to be drawn from it in the light most favorable to the State, and we affirm if there is substantial evidence to support the conviction. *Biniores* v. *State,* 16 Ark. App. 275, 701 S.W.2d 385 (1985); *Holmes* v. *State,* 15 Ark. App. 163, 690 S.W.2d 738 (1985). Substantial evidence is evidence which induces the mind to go beyond mere suspicion or conjecture, and is of sufficient force and character to compel a conclusion one way or the other with reasonable certainty. *Dillard* v. *State,* 20 Ark. App. 35, 723 S.W.2d 373 (1987). The appellant in the case at bar has admitted hearing a plan to rob the Pizza Hut discussed, and that he nevertheless drove Williams and Cooper to and from the restaurant. In light of this evidence, and the testimony to the effect that the appellant told the other men to "go get it from the manager," we think the evidence is sufficient to support a conviction for the lesser included offense of robbery. We are unpersuaded by the argument that the appellant's statement to "go get it from the manager" meant only that the appellant wanted Williams and Cooper to go get a pizza. This interpretation of the phrase loses plausibility in light of the appellant's trial testimony that he thought the Pizza Hut was closed when the three men initially drove past it. We think that on this evidence the trier of fact could, without resorting to conjecture, find that the appellant purposefully aided and encouraged Williams to commit robbery.

The appellant next contends that his conviction for aggravated robbery is not supported by substantial evidence. He argues that there was no evidence that he was aware that his accomplices intended to use a gun in the robbery, and that such knowledge is a necessary element of accomplice liability for aggravated robbery. We do not agree.

Aggravated robbery is defined as robbery committed by a person armed with a deadly weapon, or by one who represents himself to be so armed. Ark. Stat. Ann. § 41-2102 (Supp. 1985) [Ark. Code Ann. § 5-12-103 (1987)]. Like the appellant in the case at bar, the appellant in *Savannah* v. *State,* 7 Ark. App. 161, 645 S.W.2d 694 (1983), was convicted of being an accomplice to aggravated robbery but denied knowledge that his accomplice who entered and robbed the store had a weapon. On appeal, he argued that the trial court erred in refusing to instruct the jury on the lesser included offense of robbery. In *Savannah* we noted that:

> For purposes of this case, aggravated robbery is distinguished from robbery because in the former, the person is, or represents he is, armed with a deadly weapon. In robbery, the person employs or threatens to employ physical force. *See* Ark. Stat. Ann. § 41-2102 and -2103 (Repl. 1977). In the instant case, this distinction becomes important if the evidence showed that appellant aided or advised another in planning or committing a robbery but that the other person committed the greater inclusive offense of aggravated robbery. Under these circumstances, appellant's liability would be limited to the lesser included offense of robbery. *See* Ark. Stat. Ann. § 41-303 (Repl. 1977) and its Commentary.

Id., 645 S.W.2d at 696. However, we think that *Savannah* is distinguishable from the situation presented in the case at bar. At issue in *Savannah* was whether, in a jury trial, it was error to refuse to instruct the jury on the lesser included offense of robbery. The essential question there was whether the evidence would permit a finding that the appellant therein intended only to aid or advise another to commit the lesser offense. In contrast, the case at bar arose from a bench trial and presents no question regarding jury instructions; here the question is whether the evidence was insufficient for the fact-finder to find that the

appellant aided or advised others in the commission of the greater offense of aggravated robbery.

The Commentary to Ark. Stat. Ann. § 41-303 (Repl. 1977), cited in *Savannah, supra*, contains the following language:

> If the crime actually committed is a greater inclusive offense of the offense planned, accomplice liability respecting the intended lesser included offense attaches in connection with the aider or advisor.

Accomplice liability is thus defined in terms of the crime which was planned. In the case at bar, there was evidence that a firearm was used in the crime; that the appellant was present when the crime was planned, and that the appellant transported his accomplices to and from the scene. Under these circumstances, we think the evidence was sufficient to permit the fact-finder to infer that the appellant knew that an aggravated robbery was planned, and we hold that the aggravated robbery conviction was supported by substantial evidence.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

Joseph McGHEE *v.* STATE of Arkansas

CA CR 87-232 752 S.W.2d 303

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

Bramblett & Pratt, by: *James M. Pratt, Jr.*, for appellant.

Steve Clark, Att'y Gen., by: *C. Kent Jolliff*, Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. Appellant, Joseph McGhee, pled guilty, in August of 1986, to theft by receiving and was placed on five years probation. Two of the conditions of his probation were that he was not to commit any further crime and not to possess firearms.

On September 30, 1987, the Ouachita County Sheriff's Department obtained a search warrant from a municipal judge based on information it had received that appellant was in possession of stolen VCR's, T.V.'s, video cameras and video tapes. The subsequent search of appellant's home turned up no stolen property, but the officers did find a small quantity of

cocaine and two firearms, one of which was a sawed-off shotgun. Appellant was arrested and charged with possession of cocaine and being a felon in possession of a firearm. The State also filed a petition to revoke his probation.

A pre-trial suppression hearing was held. The circuit judge ruled that the warrant was invalid and that the evidence obtained as a result of the search was inadmissible in the primary criminal proceedings against the appellant. The court also ruled, however, that the evidence would be admissible in the revocation proceeding. After a hearing on the petition to revoke, appellant's probation was revoked and he was sentenced to six years imprisonment. His sole argument on appeal is that the court erred in refusing to exclude the evidence obtained in the search in the revocation proceeding. We disagree and affirm.

The trial court was obliged to exclude the evidence obtained as a result of the unlawful search in the substantive criminal proceedings against appellant under *Mapp* v. *Ohio,* 367 U.S. 643 (1971). While it is true that probationers have certain rights under the due process clause of the fourteenth amendment, it is equally clear that those rights are not nearly so extensive as those guaranteed to a defendant in a substantive criminal proceeding. *Morrissey* v. *Brewer,* 408 U.S. 471 (1972).

The courts of this state have uniformly refused to extend the exclusionary rule to probation revocation proceedings. *Dabney* v. *State,* 278 Ark. 375, 646 S.W.2d 4 (1983); *Schneider* v. *State,* 269 Ark. 245, 599 S.W.2d 730 (1980); *Carson* v. *State,* 21 Ark. App. 249, 731 S.W.2d 237 (1987); *Harris* v. *State,* 270 Ark. 634, 606 S.W.2d 93 (Ark. App. 1980). As the supreme court said in *Schneider*, this is the view of the great majority of jurisdictions.

The United States Court of Appeals for the Third Circuit considered the issue in *United States* v. *Bazzano,* 712 F.2d 826 (3rd Cir. 1983). The court noted that of the seven federal courts of appeal that had considered the question whether the exclusionary rule is applicable to probation revocation proceedings, all but the Fourth Circuit had concluded that it is not. The Court explained its reason for adopting the majority rule:

> In our view, excluding from such proceedings reliable

> evidence bearing on a probationer's rehabilitation would contribute little to deterring constitutional violations while impeding society's interest in protecting itself against convicted criminals who have abused the liberty afforded them.

The Arkansas Supreme Court has reasoned similarly. "It has been observed that in such a situation the exclusion of illegally obtained evidence from a prosecution of the new offense should ordinarily be a sufficient deterrent to unlawful police activity." *Dabney* v. *State,* 278 Ark. at 377, 646 S.W.2d at 5.

It is true that the Arkansas Supreme Court, as well as this court, has suggested, by way of dicta, that there may be exceptions to the general rule that the exclusionary rule is inapplicable in probation revocation proceedings. In *Harris,* we said that the exclusionary rule would be inapplicable in revocation proceedings "at least where there has been a good-faith effort to comply with the law." 270 Ark. at 638, 606 S.W.2d at 95. In *Dabney, supra,* the court suggested that the exclusionary rule might be applicable if it appeared that the officers' primary purpose was to seek revocation of the defendant's probation. Other courts have suggested the possibility of a similar exception. *See e.g., Bazzano,* 212 F.2d at 832. Other suggested possible exceptions to the general principle that the exclusionary rule is inapplicable in probation revocation proceedings include cases involving harassment by the police, *United States* v. *Farmer,* 512 F.2d 160 (6th Cir. 1975), and official misconduct which shocks the conscience of the court. *People* v. *Williams,* 186 Colo. 72, 525 P.2d 463 (1974).

[redacted] During the course of the search the cocaine was found by an officer in a Crown Royal bag. Appellant argues that because the bag was not large enough to hold any of the items sought in the search, the scope of the invalid warrant was exceeded, and that this establishes bad faith so as to warrant the application of the exclusionary rule. It is not at all clear that the scope of the warrant was exceeded, but even if it was we do not think this asserted misconduct, in the absence of some indication that it was the purpose of the police to obtain the revocation of appellant's probation, would require the application of the exclusionary rule.

Finally, appellant contends that the State has the burden of proving "good-faith" or else the exclusionary rule will apply. That is true in a prosecution for a new criminal offense in which the exclusionary rule is ordinarily applicable and the good-faith exception established in *United States* v. *Leon,* 468 U.S. 897 (1984), is claimed to apply. In a probation revocation proceeding, however, the situation is just the opposite, i.e., the exclusionary rule will not apply unless the probationer demonstrates some exception. In *Harris* v. *State, supra,* the probationer argued that the State had the burden of introducing into evidence the written affidavit and search warrant. We rejected this contention.

We hold that the trial court did not err in declining to apply the exclusionary rule under the facts of this probation revocation proceeding.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

Joy Sue GARIBALDI *v.* Richard L. DIETZ, Administrator

CA 87-425 752 S.W.2d 771

Court of Appeals of Arkansas
En Banc
Opinion delivered July 6, 1988

Brian Wolfman, Legal Services of Arkansas, for appellant.

Claudia Driver, Asst. Gen. Counsel, Arkansas Department of Human Services, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a probate court order granting appellee's petition for termination of parental rights and appointment of a guardian with authority to consent, without notice to or consent of the natural parents, to the adoption of two minor children, Timothy Garibaldi, born February 11, 1976, and Casey Garibaldi, born December 3, 1984.

Timothy Garibaldi has been under the care and custody of the Arkansas Department of Human Services since September 9, 1985. On April 22, 1986, appellee Richard Dietz, Administrator of Adoption Services, Arkansas Department of Human Services, filed a petition seeking appointment as guardian with power to consent to adoption with respect to Timothy. Casey Garibaldi has been under the department's care and custody since March 4, 1986, and in January 1987, the department amended its petition to include her.

A hearing was held May 15, 1987, at which the appellant, Joy Sue Garibaldi, appeared and opposed the granting of appellee's petition. After hearing the evidence, the court granted the petition. The court found that the appellant suffers from a longstanding and uncontrollable mental or emotional illness; that the return of custody of the children to the appellant would present a substantial risk of serious harm to them as a result of appellant's illness; that the appellee had attempted for a period of six months to provide remedial support services designed to reunite the children with their mother, but these services were refused; that the testimony, except for James Moneypenny, a psychologist, is not indicative of any ability in appellant to care for her children; that appellant has functioned somewhat adequately in the structured setting of a nursing home, but this setting would not be appropriate for the raising of children and, from the evidence presented, appellant will never be able to care for her children outside such a structured setting; that the children's best interests will be served by termination of appellant's parental rights; and that appellant, by her own testimony, even at the time of trial, still holds some of her delusions.

On appeal to this court, appellant first argues the trial court erred in finding her an unfit parent because the appellee failed to provide appropriate remedial services and because appellant's mental illness is under control. Appellant says the evidence indicates that her mental illness is controlled and has been controlled since shortly after she received proper medical treatment.

Ark. Code Ann. § 9-9-304 (1987) lists the conditions which permit a court to appoint a guardian with power to consent to the legal adoption of the child or children. Under that statute, before entering a guardianship order, the court shall find from the evidence that:

> (3) Both parents are, or the surviving parent or the mother of an illegitimate child is, unfit to have the child for any of the following reasons:
>
> . . . .
>
> (F)(i) Placing the child in the custody of the parent would raise a substantial risk of serious harm to the child;
>
> (ii) However, before grounds may be established under this subdivision, the court must be satisfied that the parents have received for a period of up to six (6) months in the discretion of the court, from the Arkansas Department of Human Services, remedial support services designed to reunite the child and the parents and that such services have failed to substantially reduce the risk of harm to the child.
>
> (iii) In determining the risk the court may consider, but shall not be deemed to be limited to, one (1) or more of the following:
>
> (a) Longstanding and uncontrollable mental or emotional illness or mental deficiency of the parent;

In a proceeding to appoint a guardian with power to consent to adoption, the evidence justifying the appointment must be clear and convincing; and while this court reviews probate proceedings de novo, the findings of the trial court will not be disturbed unless clearly erroneous, giving due regard to the opportunity and superior position of the trial judge to determine the credibility of

the witnesses. *Burdette* v. *Dietz,* 18 Ark. App. 107, 711 S.W.2d 178 (1986).

In the instant case, there was evidence that appellant had been hospitalized three times between May 22, 1985, and July 3, 1986. A doctor testified that appellant's diagnosis after her third admission was "bipolar disorder manic, what we call mood congruent." He said appellant was "psychotic with a bipolar manic"; a "congruent psychotic" with "judgment markedly impaired by psychosis." After release from her third hospitalization, appellant resided in nursing homes until the date of the hearing in this matter. At that time, she had no place to live and was taking medication for her illness.

Dr. Matthews, who had examined appellant on her second and third hospital admissions, testified by deposition that appellant was not capable of parenting at the time of her third discharge. He said she was still very sick when she was discharged from the hospital and they felt she had to be in a structured environment and that is why they referred her to a nursing home. He testified that appellant's disorder can be controlled by medication, that she needs long-term medication, and that persons with her type of disorder are notorious for not staying on their medication. He said that, if appellant has been in a structured environment for the past eleven months with no manic episodes, it is not significant as to what will happen in the future. He stated the key to her being able to face life on the outside is whether she would stay on her medication.

Dr. Hickman, who interviewed appellant on April 21, 1987, testified by deposition that appellant suffers from mental illnesses of psychotic proportions and that her illnesses are not curable. He testified that appellant's chances to stay on medication are guarded at best. It was his impression that she was not interested in continuing her medication. He said appellant could not make it on the streets and that she does not recognize she is sick. Dr. Hickman testified that appellant did not talk about her children during the interview other than being concerned about getting them back, and that the more accurate measure of her parenting ability would be how she was as a parent prior to her illness. He said appellant would not be as good a parent now because psychosis does not improve parenting skills, and that appellant's

type of illness can be explosive even while on medication.

James Huett, appellant's oldest son, testified that his mother quit her job in Morrilton in 1982. At that point, he said, his mother started talking to herself and put "no trespassing" signs in the yard. After Casey was born, they moved to North Little Rock. His mother let his brother, Tim, stay home from school and she heard they were going to call Social Services, so the family left. He said the family took a bus to Fort Smith and hitchhiked from there to Oklahoma, then to Kansas City, and then all the way back to Morrilton. This was in April of 1985. James said that he had been the one primarily responsible for taking care of the kids because his mother couldn't do it. He testified that he had been scared of his mother; that her moods would change; and that she behaved erratically. He said she told him that he was paid to kill her and she'd kill him and have his daddy get the coffin and put James in it for his eighteenth birthday. James also testified that his mother had told him and the other children that she had a relationship with Mac Davis, the entertainer, and had plans to marry him. James's testimony detailed her psychotic episodes and delusions, and he testified that he thought the children should be in foster care.

As to appellant's contention that the appellee had failed to provide appropriate remedial services, the record shows that appellant was offered counseling and refused. Peggy Hendricks testified that she was a service worker for Children and Family Services and became involved in the Garibaldi case in 1985 when she had offered appellant counseling services and appellant refused. Linda Woodruff, who was the case worker from June 1985 through January 1987, testified that several services were offered to the appellant and that appellant refused the homemaker services, mental health counseling, and all of the educational information items. Ms. Woodruff also testified the only service ever accepted was transportation to go shopping on two occasions.

From the foregoing evidence, we cannot say the trial court's finding appellant an unfit parent was clearly erroneous.

Appellant next argues the trial court erred in admitting and considering the prior testimony of Timothy Garibaldi because it was hearsay. The court admitted testimony of Timothy taken at a

mandatory administrative review hearing held by a foster care magistrate for the purpose of deciding whether services provided to the children while in foster care were adequate, whether and to what degree parental visitation was proper, and similar matters. Appellant says Rule 804 of the Arkansas Rules of Evidence provides for the admission of some former testimony if the witness is "unavailable" within the meaning of the rule, but that Timothy was not unavailable under any of the criteria of Rule 804.

When the state sought to introduce Timothy's testimony, the following exchange took place:

> MS. DRIVER: At this point I would like to introduce into evidence Tim Garibaldi's testimony, if you have no objection. You wouldn't agree?
>
> MR. WOLFMAN: I don't mind us going over it, but I don't think it is admissible.

This was the extent of appellant's objection. Appellant's counsel failed to state the specific grounds of her objection to this testimony and we do not think they were apparent. Error cannot be predicated upon a ruling admitting evidence unless a timely objection is made stating the specific ground of the objection if the ground is not clear from the context. *Walt Bennett Ford, Inc.* v. *Brown,* 283 Ark. 1, 670 S.W.2d 441 (1984); A.R.E. 103(a)(1). Moreover, at best, this evidence was cumulative because substantially the same evidence was admitted without objection through the testimony of Janis Engelkes, a psychological examiner who had examined Timothy. Without objection, she testified to what Tim had told her. We find no prejudicial error in the admission of Tim's testimony.

Appellant finally argues the trial court erred in finding that termination of parental rights was in the best interest of the children, and especially, by failing to distinguish between the two children. Appellant contends the notion of best interest cannot be taken literally as it would in a custody dispute between parents; but rather, due regard must be given to the paramount rights of the natural parent. Appellant argues that there is some testimony that the mother-child bond between Timothy and the appellant has been broken because of appellant's illness, but that Casey has suffered no conscious rejection.

In *Burdette* v. *Dietz,* 18 Ark. App. 107, 711 S.W.2d 178 (1986), this court stated:

> While we agree that the rights of natural parents are not to be passed over lightly, these rights must give way to the best interest of the child when the natural parents seriously fail to provide reasonable care for their minor children. Parental rights will not be enforced to the detriment or destruction of the health and well-being of the child.

18 Ark. App. at 109. In the instant case, the trial judge heard evidence that appellant had hitchhiked across several states with the children; that James Huett had been primarily responsible for taking care of the children; that he thought Casey and Tim should be in foster care; that Timothy had no desire to go back and live with appellant because of the way his life was when he lived with her; that appellant's illnesses were not curable; and that appellant could not make it on the streets. While there was some evidence that appellant had functioned somewhat adequately in the structured setting of a nursing home, the trial court found that raising children in a nursing home is not in their "best interest."

The judge in his ruling from the bench stated:

> I know how important my children are to me, and I am sure they're just as important to Mrs. Garibaldi. I am truly concerned. I do not believe Mrs. Garibaldi can look after the children. . . . It is very sad. It is unfortunate. And, it certainly is not an easy thing to do, is to deprive a parent from the right to be with their children. But, it is not right to the children to place them with the parent simply because they're a parent, if it is not for the benefit of the children. . . . I am sure it would be beneficial to Miss Garibaldi to have the children with her, and probably be therapeutic. I don't think it would be therapeutic and beneficial to the children, and I don't think the past history of this family relationship is indicative that it will ever be a happy and congenial home for these children.

We cannot say that the trial court erred in finding that termination of parental rights was in the best interests of the children.

Appellant has filed a motion to strike certain portions of the

appellee's supplemental abstract and brief. We were aware of appellant's objections and have relied only on matters in the record in reaching our decision. Therefore, for practical purposes, the appellant's motion has been granted.

The trial court's decision is affirmed.

JENNINGS, J., dissents.

JOHN E. JENNINGS, Judge, dissenting. When the State seeks to terminate parental rights the probate court must first determine whether the parent is fit or unfit. *Dietz* v. *Bevell,* 276 Ark. 500, 637 S.W.2d 555 (1982). Only if the parent is found unfit does the court then address the issue of the best interest of the child. *Bevell, supra.* A finding of unfitness must be supported by specific findings of fact. *Bush* v. *Dietz,* 284 Ark. 191, 680 S.W.2d 704 (1984). The facts supporting a finding of unfitness must be shown by clear and convincing evidence. *Bush, supra; A.B. v. Arkansas Social Services,* 273 Ark. 261, 620 S.W.2d 271 (1981).

In this case the probate court's conclusion that Mrs. Garibaldi was unfit was solely and exclusively based upon its specific finding that Mrs. Garibaldi was suffering from a long-standing and uncontrollable mental illness. The probate judge then found that the children's best interests would be served by terminating Mrs. Garibaldi's parental rights and putting the children up for adoption.

I cannot say the probate judge was wrong in finding that it was in the best interests of the children that they be placed for adoption, and it is undisputed that Mrs. Garibaldi suffers from bipolar affective disorder.[1] It is also fair to characterize this disorder as "long-standing" because the evidence is that she has suffered from this disorder since 1982.

However, the real issue in this case is whether the chancellor's finding that her illness is "uncontrollable" is clearly erroneous under Ark. R. Civ. P. 52. If that finding was clearly wrong the

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[1] This illness is what psychiatrists used to call manic-depressive psychosis. *Arkansas Blue Cross & Blue Shield, Inc.* v. *Doe,* 22 Ark. App. 89, 733 S.W.2d 429 (1987). Although the issue was not raised, it is questionable that bipolar-affective disorder is a "mental" illness. *See Doe,* above.

trial court's order cannot stand, as a matter of law. Certainly we must give due deference to the superior position of the trial judge to determine the credibility of witnesses. Despite such deference it is nevertheless our duty to reverse the probate court when its factual determination as to a critical issue is clearly wrong. In my view, the probate court was clearly wrong in finding Mrs. Garibaldi's illness to be "uncontrollable."

The testimony of various witnesses established that during the almost one-year period prior to the hearing her illness was completely controlled. From her final release from the state hospital in June, 1986, until the hearing in May, 1987, Mrs. Garibaldi voluntarily resided in various nursing homes. Brenda Smith the Social Service Director at the Fulton County Nursing Center testified that she had observed Mrs. Garibaldi almost daily over a period of two to three months. She testified that her general demeanor was pleasant and cooperative and that she never gave them any problem. She said Mrs. Garibaldi never lost control emotionally nor went into a psychotic state. She had never known Mrs. Garibaldi to refuse to take her medication. Lisa Gannaway was the Social Services Director at Riverview Manor Nursing Home in Morrilton. She testified that she had daily contact with Mrs. Garibaldi over a period of about three months. She too said Mrs. Garibaldi created no problems and exhibited no psychotic behavior or loss of emotional control. She too testified that, to her knowledge, Mrs. Garibaldi never refused to take her medication.

Barbara Wilder, the resident service director at the Conway Convalescense Center testified that Mrs. Garibaldi was there for approximately one month. She described her as an ideal patient and testified that Mrs. Garibaldi had no emotional or psychotic outbursts whatsoever. She also said that Mrs. Garibaldi realized the importance of taking her medication. Even Linda Woodruff the caseworker who apparently had the primary responsibility in Mrs. Garibaldi's case conceded that in her contact with Mrs. Garibaldi after her release from the State Hospital she observed no psychotic episodes and that Mrs. Garibaldi's attitude was "real pleasant."

Mrs. Garibaldi was examined by Dr. Carl Arnold, M.D., on January 8, 1987. He thought that there was an excellent

possibility that, if she would take her medication, Mrs. Garibaldi could return to her normal activities at any given time.

Dr. James R. Moneypenny, a psychologist, evaluated Mrs. Garibaldi on April 20, 1987. He conducted a clinical interview and gave Mrs. Garibaldi psychological tests, including the Minnesota Multiphasic Personality Inventory and the Millon Clinical Multiaxial Inventory. In the summary to his written report Moneypenny said:

> Joy Garibaldi presents herself as alert, well oriented and psychologically stable. Her intellectual functioning is average. While her mental status was positive for recent history of psychosis in a psychiatric hospitalization, she appears to have recovered and is currently functioning at a level considered close to her pre-morbid level. There is a relative absence of psychiatric symptoms and emotional distress as evidenced on the testing though she was experiencing feelings of over sensitivity and suspiciousness. Her course of treatment at the State Hospital may represent an overly serious picture of the chronicity and seriousness of her illness due to the fact that she had an allergic reaction to her medication. Records indicate her thinking and behavior rapidly improved when her medication was corrected. She currently continues to take her medication and her compliance is considered to be good.
>
> The findings indicate she is currently capable of resuming a routine lifestyle, including the custody and care of her children.

In his trial testimony Moneypenny said that no active psychosis was shown on any of the psychological tests and that Mrs. Garibaldi was even without symptoms of neurosis. He testified that he thought she could be an "O.K. parent." While he agreed that her staying on medication was a legitimate concern and that it was possible under certain conditions for her to have another psychotic episode if she were to quit taking her medicine, he thought that there was a good chance that she would keep taking her medication outside the nursing home.

We must not forget that this is not a custody case — Mrs. Garibaldi is not seeking custody. She seeks only to avoid the

irrevocable termination of the parent-child relationship. We should also be mindful that this relationship is one which is protected by both the state and federal constitutions. *Bush* v. *Dietz,* 284 Ark. 191, 680 S.W.2d 704 (1984).

I would reverse.

LIBERTY LIFE INSURANCE COMPANY *v.* Martha FORSYTHE

CA 87-437 752 S.W.2d 305

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

Barrett, Wheatley, Smith & Deacon, for appellant.

Henry, Walden & Davis, for appellee.

MELVIN MAYFIELD, Judge. This appeal results from the trial court's entry of a default judgment against appellant, Liberty Life Insurance Company. Appellant raises three points for reversal: (1) the default judgment should be set aside because a defective summons was served upon appellant and appellant has a meritorious defense to the complaint; (2) the answer of codefendant Insurex Agency, Inc. inures to the benefit of appel-

lant; and (3) just cause existed for appellant's failure to file a timely answer. Because we find that codefendant Insurex's answer did plead a defense common to appellant, we reverse and remand.

The appellee filed suit against the appellant alleging that she was the beneficiary in a certificate issued by appellant, pursuant to its group insurance policy, insuring the life of appellee's deceased husband. Appellee alleged that she should have judgment against appellant for the amount provided by the certificate and, in the alternative, judgment against the codefendant Insurex. The issue presented in this case is whether the answer filed by the codefendant asserted a defense common to appellant and went to the merits of the whole cause of action. In *Firestone Tire & Rubber Co.* v. *Little,* 269 Ark. 636, 599 S.W.2d 756 (Ark. App. 1980), we said:

> In 78 A.L.R. 939 is found a statement as follows:
>
> The courts are agreed with practical unanimity that in actions against several defendants jointly, where the defense interposed by the answering defendant is not personal to himself (as is the defense of infancy, coverture, or bankruptcy on the part of the pleader), but common to all, as where it goes to the whole right of the plaintiff to recover at all, as distinguished from his right to recover as against any particular defendant, or questions the merits or validity of the plaintiff's entire cause of action in general, or his right to sue, such defense, if successful, inures to the benefit of the defaulting defendants both in actions at law and suits in equity, with the result that final judgment must be entered not merely in favor of the answering defendant, but also in favor of the defaulting defendants.
>
> In 71 C.J.S., Pleadings, Section 117, at p. 268 is found the statement as follows:
>
> While as a general rule one defendant cannot in his answer assert the rights of a codefendant who does not answer, a defense which goes to the merits of the whole

> case as tending to show no cause of action in plaintiff may, when pleaded by one defendant, inure to the benefit of his codefendants.
>
> It is not every answer filed by a defendant that inures to the benefit of a nonanswering codefendant. It is only when the answering defendant answers an allegation directed at and common to his nonanswering codefendant. The purpose and effect of an answer by general denial is to put the plaintiff to proof on each of the allegations made in the complaint.

269 Ark. at 642-3.

In *Arkansas Electric Co.* v. *Cone-Huddleston,* 249 Ark. 230, 458 S.W.2d 728 (1970), the Arkansas Supreme Court stated, "Commercial [non-answering defendant] timely requested its insured, Cone-Huddleston, to file an answer in the former's behalf and to defend, as it was contractually obligated to do. Of course the defenses would be identical and Commercial Union's liability would be predicated on Cone-Huddleston being liable." 249 Ark. at 231. In *Southland Mobile Home Corp.* v. *Winders,* 262 Ark. 693, 561 S.W.2d 280 (1978), however, the Arkansas Supreme Court distinguished its holding in *Arkansas Electric.*

> The appellees are mistaken in arguing, on the basis of the result reached in *Rogers* v. *Watkins*, 258 Ark. 394, 525 S.W.2d 665 (1975), that there must be a derivative liability in order for the answer of one defendant to inure to the benefit of another. That was the situation in *Rogers*, but the rule is not confined to that state of facts. The true test is whether the answer of the non-defaulting defendant states a defense that is common to both defendants, because then a "successful plea . . . . operates as a discharge to all the defendants but it is otherwise where the plea goes to the personal discharge of the party interposing it." [Citations omitted] Here the effect of the manufacturer's answer was to deny the plaintiffs' allegations of negligence and breach of warranty. That denial went to the existence of the plaintiffs' cause of action, asserted a defense common to both defendants, and therefore inured to the benefit of the appellant.

262 Ark. at 694.

In *Allied Chemical Corp.* v. *Van Buren School District No. 42*, 264 Ark. 810, 575 S.W.2d 445 (1979), the appellants argued that codefendant Celotex's timely answer brought their case within the rule that any defense filed by one defendant, common to a codefendant, inured to their benefit. The Arkansas Supreme Court responded:

> Here Celotex filed a timely answer, preserving its objection to venue, and asserted that the appellees' complaint did not state sufficient facts to constitute a cause of action, denied the allegations of appellee's complaint, interposed the statute of limitations as a complete defense . . . . These denials by Celotex's answers went to the existence of appellee's cause of action and asserted defenses common to both appellants which inured to their benefit.

264 Ark. at 815.

In the present case, the appellee alleged separate causes of action against appellant and defendant Insurex. The allegation as to defendant Insurex is that it misrepresented the fact that appellee's husband would be covered under his employer's group policy with appellant. The appellee did not allege joint and several liability as to Insurex and appellant but asked for relief against Insurex, if appellee was not successful on her claim against appellant.

Appellee's specific claim against appellant is based upon waiver and estoppel. In paragraph 11 of her amended complaint, appellee specifically alleges:

> That [appellant], Liberty Life Insurance Company, by their actions in accepting premiums for the life insurance coverage on Robert Lewis Forsythe [appellee's husband], as well as the medical care coverage, and also in honoring all claims for medical care coverage under the policy, should be found to have waived any right to deny coverage under the policy, and should be stopped [sic] from denying coverage under same.

In response to this allegation, defendant Insurex answered,

"[t]his defendant can neither admit nor deny the allegations contained in Paragraph 11 of the Amended Complaint, as said allegations are directed toward Liberty Life Insurance Company, but this defendant would demand strict proof of said allegations if its rights are to be affected." Thus, defendant Insurex did not answer for appellant. Nevertheless in paragraphs 16 & 17 of its answer, defendant Insurex further pleads:

> For further defense, the defendant, Insurex Agency, Inc., alleges that the [appellee] is barred from recovery in this case on the ground that Richard Lewis Forsythe specifically misrepresented his employment status in February of 1985 by stating that he worked a minimum of thirty hours per week and that he was an active, full-time employee, all of which induced Liberty Life Insurance Company to show him as an insured . . . . This defendant avers that the plaintiff is barred from recovery on the basis of the misrepresentation of Richard Lewis Forsythe, which representations void any coverages to which he or his beneficiary might otherwise be entitled.
>
> 17. The plaintiff is estopped to claim the benefits of life insurance coverage on the life of Richard Lewis Forsythe because of the above-described misrepresentations as to the work status of Richard Lewis Forsythe.

Thus, we think it clear that the defenses of misrepresentation of employment status and estoppel pled by Insurex were defenses common to Insurex and appellant, Liberty Life. Therefore, the timely answer of Insurex inures to the benefit of Liberty Life, and it was error to enter default judgment against appellant.

Reversed and remanded.

COOPER and JENNINGS, JJ., agree.

FARMERS AND MERCHANT'S BANK, Rogers, Arkansas *v.* Mauriece DEASON and Letha Dell Deason

CA 87-391 752 S.W.2d 777

Court of Appeals of Arkansas
Division II
Opinion delivered July 13, 1988

Croxton & Boyer, by: *Hardy W. Croxton, Jr.*, for appellant.

James G. Lingle, for appellee.

JAMES R. COOPER, Judge. The appellees in this civil case brought an action against the appellant bank for damages arising from an alleged breach of a trust agreement, to which the appellees were beneficiaries. After a jury trial, a verdict in favor of the appellees was returned, and the trial court entered judgment for the appellees in the amount of $10,000.00 plus six percent interest and costs. From that decision, comes this appeal.

For reversal, the appellant contends that the jury finding that the appellant breached a duty to the appellees was against the weight of the evidence, and that the jury finding on the issue of damages was likewise contrary to the weight of the evidence. The appellant also contends that the trial judge erred in denying its motion for a directed verdict on the ground that the appellees waived their rights under the trust agreement by executing a release of a mortgage to which the trust agreement was irrevocably tied. On cross-appeal, the appellees argue that the trial court erred in ordering a remittitur of the jury verdict from $12,500.00 to $10,000.00. We affirm on both the direct and cross-appeal.

The record shows that, in 1979, the appellees sold a forty-acre farm to David and Norva Coles for $128,000.00. The Coles made a down payment of $50,000.00, and executed a $78,000.00 note and mortgage to the appellees to secure the balance of the purchase price. In October 1979, the Coles asked the appellees to release fifteen of the forty acres from the mortgage. The appellees agreed on the condition that the Coles purchase a $10,000.00 certificate of deposit, which would be held in trust for the benefit of the appellees in the event that the Coles defaulted on the note and mortgage. The Coles subsequently executed an instrument labeled "declaration of trust—revocable," dated October 31, 1979, whereby the appellant bank acknowledged receipt of a $10,000.00 certificate of deposit and agreed to act as trustee. The trust agreement provided that cash dividends on the certificate of deposit were to be paid to the Coles, but that, should the Coles default as to a material term of their first mortgage with the

appellees within eight years of the date of the trust agreement, the trustee was to deliver the certificate of deposit to the appellees. By its own terms, the trust agreement terminated after eight years from its inception, or payment of the mortgage, whichever came first. On November 1, 1979, the appellees released the fifteen acres from the mortgage.

On March 31, 1983, the Coles removed the certificate of deposit from the trust account. There was evidence that the certificate was cashed by the Coles and deposited in the appellees' account as part of a large mortgage payment intended to reduce the principal balance.

In September 1984, the appellees learned that the $10,000.00 was no longer being held by the appellant in the trust account. The Coles subsequently breached their mortgage agreement with the appellees by failing to make scheduled payments for the first three months of 1985. In March 1985, the appellees agreed to release the first mortgage in return for a $35,000.00 payment from the Coles and an unsecured promissory note for the remaining indebtedness of approximately $5,400.00. At that time, the balance on the original note was approximately $40,000.00. After the property was released, the Coles left the area for parts unknown, and never made a payment on the new unsecured note. The appellees subsequently made demand upon the appellant for the $10,000.00 certificate of deposit which was the corpus of the trust agreement. The appellant denied liability, and this action resulted.

The appellant first contends that the jury finding that the appellant bank breached a duty to the appellees is contrary to the evidence, arguing that, because the instrument was labeled a "revocable trust", the bank acted properly in releasing the corpus of the trust to the Coles for deposit in the appellees' account. We think that the question of breach of duty hinges on the terms of the trust, an issue which requires the intent of the parties to be determined.

> Where the creation of the trust is evidenced by a written instrument, the terms of the trust include not only express provisions of the instrument, but also whatever may be gathered as to the intention of the settlor with respect to the trust from the language used in the instrument as inter-

> preted in the light of all the circumstances of its creation; but it does not include extrinsic expressions of intention varying the effect of the instrument, since these are inadmissible in evidence because of the parol evidence rule.

IV A. Scott, *The Law of Trusts* § 330 (3d ed. 1967). In the case at bar, the record shows that the trust terms are based on the first mortgage between the appellees and the Coles, and its creation was prompted by the desire of the Deason's to have additional security after the release of the fifteen acres. Although the trust was labelled as "revocable", this term was not repeated in the body of the instrument, and no power of revocation was expressly reserved to the settlors. Under these circumstances, we think that the terms of the trust, and thus the extent of the trustee's duty, was a question of fact, and, on this record, we cannot say that the jury's finding that the appellant breached a duty to the appellees by releasing the trust corpus to the settlors, without notice to the beneficiaries, was not supported by the evidence. *See Hardy* v. *Hardy*, 217 Ark. 296, 230 S.W.2d 6 (1950).

Next, the appellant contends that the trust operated as an unenforceable liquidated damages provision. We do not reach this issue because it was never presented to the trial court. We do not address issues raised for the first time on appeal. *C&L Trucking, Inc.* v. *Allen*, 285 Ark. 243, 686 S.W.2d 399 (1985).

As to the appellant's argument that the trial court erred in denying its motion for a directed verdict, we also affirm. First, the appellant made a general motion for a directed verdict which did not comply with Civil Procedure Rule 50, which states that "a motion for a directed verdict shall state the specific grounds therefor." Now, in its reply brief, the appellant argues that the motion should have been granted because the Deason's released the mortgage and thereby waived their right to rely on the terms of the trust. Initially we note that we do not consider arguments raised for the first time in a reply brief. *Shueck Steel, Inc.* v. *McCarthy Brothers Co.*, 289 Ark. 436-A, 717 S.W.2d 816 (1986) (supp. op. on reh'g). Even had the appellant raised the issue in his original brief, it is clear that no such contention was expressed to the trial court in the motion for directed verdict and there is nothing in this record to show that the motion was ever acted on. Because the sufficiency of the evidence was not properly

questioned, and because there were issues of fact for the jury, we find no error on this point. *Hooper* v. *Ragar*, 289 Ark. 152, 711 S.W.2d 148 (1986).

After the trial, the appellant filed a motion titled "Omnibus Motion For Post Judgment Relief." This was a motion for judgment notwithstanding the verdict pursuant to Civil Procedure Rule 50(b) and was based on the assertion that the jury's verdict was not supported by substantial evidence. Alternatively, the appellant sought a new trial because it alleged that the damages awarded were excessive, or a remittitur down to the balance owed by the Coles to the appellants, approximately $5,430.00. The trial court found that the jury could find that the Deason's were damaged by the Bank's allowing the Certificate of Deposit to be cashed and that a fact question was created as to whether Mr. Deason knew the true facts when he signed the mortgage release. Although the appellant does not argue on appeal that the motion for judgment notwithstanding the verdict should have been granted, we note that even in that motion, the waiver issue was not presented to the trial court.

On cross-appeal, the appellees argue that the trial court erred in ordering either a remittitur down to $10,000.00 from the jury verdict, or a new trial (the appellees accepted the remittitur). Generally, the rule is that, when a plaintiff elects to accept a reduction in his verdict after the trial court has found the verdict to be excessive, he is bound by that decision and may not appeal. *See* 4 Am. Jur. 2d, *Appeal and Error* § 245 (1962); *see also* Annotation, 16 ALR 3d 1327, *Party's Acceptance of Remittitur in Lower Court As Affecting His Right to Complain in Appellate Court As To Amount of Damages for Personal Injury*. However, a plaintiff's election to accept the trial court's conditional order by consenting to remittitur does not bar the plaintiff from cross-appealing when the defendant appeals. *Kroger Co.* v. *Standard*, 283 Ark. 44, 670 S.W.2d 803 (1984); *See Morrison* v. *Lowe*, 274 Ark. 358, 625 S.W.2d 452 (1981).

Since the issue is properly raised on cross-appeal, we will decide it. The trial court held that there was no testimony which would justify the jury's verdict for $12,500.00. The appellees attempt to justify the verdict by claiming that the jury was attempting to compensate them for the loss of use of the

$10,000.00 certificate of deposit. The argument is speculative and we agree with the trial court that the verdict for $12,500.00 was not supported by substantial evidence.

We affirm on direct appeal and on the cross-appeal.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

Roy Edgar HARDCASTLE *v.* STATE of Arkansas

CA CR 87-12 755 S.W.2d 228

Court of Appeals of Arkansas
Division I
Opinion delivered July 13, 1988
[Rehearing denied August 24, 1988.]

Jacoway, Sherman & Pence, by: *William F. Sherman*, for appellant.

Steve Clark, Att'y Gen., by: *Leslie M. Powell*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was charged by information with securities fraud, filing a false statement with the

Arkansas Securities Commission, and theft of property. After a jury returned a verdict of guilty on all three counts, the appellant was sentenced to eight years for fraud and fined $10,000.00; four years for false filing and fined $6,000.00; and eight years for theft and fined $11,000.00. The trial court ordered the prison sentences to run concurrently, and the fines were cumulative.

The appellant argues ten points on appeal. We find that the conviction for false filing should be dismissed because the charge was barred by the statute of limitations. The appellant's convictions are otherwise affirmed.

The appellant was charged on February 14, 1985, with making false and misleading statements in violation of Ark. Stat. Ann. § 67-1250 (Repl. 1980) [Ark. Code Ann. § 23-42-110 (1987)], in a document filed with the Arkansas Securities Commission. On October 26, 1979, the appellant allegedly caused to be filed with the Commission a claim for exemption for Founder's Development Corporation which contained false and misleading statements. The Commission's request for additional information on the dilution factor of the stock was responded to by a letter dated November 6, 1979. The Commission then issued a letter acknowledging the filing and compliance with the filing requirements on November 20, 1979, and noted that the exemption was effective for one year. The record reveals only one other communication with the Commission: a letter received by the Commission dated December 15, 1980, indicating that Marvin Clausing, M.O.N.E.Y. Makers Ltd., and Herbert Brechtel had invested in Founder's.

It is the appellant's contention that the charge filed against him in February 1985, alleging that he had filed falsely, was beyond the statute of limitations found in Ark. Stat. Ann. § 67-1255(i) (Repl. 1980) [Ark. Code Ann. § 23-42-105(a) (1987)]. That section provides:

> Prosecutions for offenses described in this Section must be commenced within the following periods of limitation: (1) Felonies—five (5) years from the date of the occurrence; (2) Misdemeanors—one (1) year from date of occurrence. The five year felony and one year misdemeanor period of limitation does not begin to run until after the commission of the last overt act in the furtherance of a scheme or course

of conduct.

The issue is when the prohibited conduct occurred. The State contends that the letter received on December 15, 1980, was the last overt act committed by the appellant or, in the alternative, that the one-year period of time the exemption remained on file constituted a continuing course of conduct. We disagree on both points.

There is no evidence in the record to establish that any of the information in the December 1980 letter was false or misleading. It is clear from the plain language of § 67-1250 that the filing of a document is criminal *only* if it contains false or misleading statements. We find that the last overt act which occurred was the letter concerning the dilution factor filed in November 1979. Therefore, the charge filed on February 14, 1985, was beyond the five-year statutory period, and we accordingly reverse and dismiss the appellant's conviction for filing false and misleading statements.

Because we dismiss this charge against the appellant, we will not address it further in connection with the appellant's remaining arguments.

THE SUFFICIENCY OF THE EVIDENCE

The appellant challenges the sufficiency of the evidence. In accordance with *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), we review the sufficiency of the evidence, including any allegedly erroneously admitted evidence, prior to the consideration of other trial errors. In criminal cases, we view the evidence in the light most favorable to the State, and affirm if there is any substantial evidence to support the verdict. *Biniores* v. *State*, 16 Ark. App. 275, 701 S.W.2d 385 (1985). Substantial evidence must do more than merely create a suspicion; it must be of sufficient force and character to force the mind beyond mere conjecture and compel a conclusion one way or the other with reasonable certainty. *Id.* The fact that evidence is circumstantial does not render it insubstantial—the law makes no distinction between direct evidence of a fact and evidence of circumstances from which a fact may be inferred. *Breault* v. *State*, 280 Ark. 372, 659 S.W.2d 176 (1983).

In Count I the appellant was charged with fraud or deceit in

connection with the offer, purchase, or sale of securities. Arkansas Statutes Annotated § 67-1235 (Repl. 1980) [Ark. Code Ann. § 23-42-507 (1987)] provides as follows:

> It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or
>
> (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

The persons identified in the bill of particulars as victims in Count I were Herbert Brechtel and Marvin Clausing; both testified at the trial. Clausing testified that he specifically remembered the appellant giving him a "confidential memorandum" prior to investing, which contained information on Founder's. Brechtel did not recall the memorandum, but acknowledged his signature on the cover indicating that he had received it. He stated that he had talked with the appellant about investing, that he did not know a lot about investing in stock, and that he relied on what the appellant told him. Brechtel invested $15,000.00 and he received 30,000 shares of Founder's stock; Clausing purchased 16,000 shares of Founder's stock for $8,000.00.

In the confidential memorandum, P.A. Treadway was listed as a director, as president, and as secretary of Founder's. The biographical sketch of Treadway stated that she majored in psychology at Kent State University, that she was an "Arkansas educator," and that she had a background in marketing and management. At trial, Treadway testified that she was the appellant's secretary, that she did not attend Kent State, that she had only been a substitute teacher for a short while, and that the only marketing and managerial experience she had was as manager of a rental company for a short period of time. She also testified that she had signed various documents at various times at the appellant's request, but that she had never been either an

officer or stockholder of Founder's. Both Clausing and Brechtel stated that, if they had been aware of the true facts of Treadway's background and status, they would not have invested in Founder's.

At the time Clausing and Brechtel invested, Founder's was in default on a note it had given M.O.N.E.Y. Makers for the purchase of forty acres of property. Universal Growth, a corporation in which the appellant was the principal stockholder and an officer, had purchased eighty acres of land for approximately $240,000.00 in September 1979. On October 22, 1979, Universal entered into a purchaser's agreement with M.O.N.E.Y. Makers, another business entity in which the appellant was the principal member. This agreement provided that, upon payment of the purchase price of $240,000.00, forty acres of the land owned by Universal would be conveyed to M.O.N.E.Y. Makers. On the same day, M.O.N.E.Y. Makers entered into an identical agreement with Founder's; the only difference was that the purchase price of the same forty acres was $260,000.00. The end result was that, by passing the land through the different entities, the appellant had artificially inflated the value of the land. Furthermore, by the terms of the various purchase agreements, legal title would not pass until the land was paid for in full. In the event of a default, title would revert to the business entities owned by the appellant. None of these facts were disclosed either to Brechtel or Clausing, and Clausing stated that he was under the impression that his investment was to be used only for improving the land and that there was no money owed on the land itself.

It is clear that these facts were material to Founder's financial condition. We find that this evidence is sufficient to support the jury's finding that the appellant made untrue statements of material facts and failed to reveal material facts which misled the victims. *See Selig* v. *Novak*, 256 Ark. 278, 506 S.W.2d 825 (1974).

In Count III, the appellant was charged with theft of property, a violation of Ark. Stat. Ann. § 41-2203 (Repl. 1977) [Ark. Code Ann. § 5-36-103 (1987)]. According to § 41-2203, a person commits theft of property if he knowingly obtains the property of another person, by deception, with the purpose of depriving the owner thereof. The bill of particulars listed seven-

teen victims, including Clausing and Brechtel, and involved over $79,000.00. There are five volumes of record in this case and hundreds of pages of documents, spread sheets, and financial records. Without going into unnecessary detail, the record shows that the appellant (1) induced investors to invest in one of his several business entities; (2) deposited the money into the appropriate bank account of that business entity; and (3) subsequently withdrew the money and transferred it to another business entity. Generally, as one business entity became financially troubled, the appellant would create another entity, gather investors, then transfer the funds to the troubled entity.

For example, Leamon Bush, who was listed in the bill of particulars as a victim in Count III, first invested $5,000.00, and then another $2,250.00, in an entity called Air Base Mini-Rental, which was purported to be a business which purchased equipment, such as lawnmowers, for rental to the public. He stated that he believed his money was going to be used to purchase equipment. However, the record reveals this business never got off the ground; according to Treadway, only a few pieces of equipment were purchased, not nearly enough to operate this type of business. Bush further stated that he was told his investment would also entitle him to an interest in Air Base Mini Storage.

According to the cancelled checks in the record, Bush's checks were deposited into the Air Base Mini-Rental checking account. The account was opened in August 1981 and closed in October 1982. A check from investor Carol Felix for $5,000.00 was also deposited in this account. The appellant falsely represented to Bush that the total capital contribution in Air Base Mini-Rental was $100,000.00.

Bush stated further that he did not know where his money went. According to the checks written on the Air Base Mini-Rental account, $2,900.00 went to M.O.N.E.Y. Makers and $1,076.25 went to Diversified Land (another of the appellant's business entities). Later, a $2,900.00 check from Diversified Land was deposited which indicated it was repayment of a loan. There were also checks written which were purportedly for construction costs; however, no construction was done for Air Base Mini-Rental, and apparently the checks were for construction by other business entities. There were also two checks to

United Jewelers which totaled $77.58, and a check made out to cash, endorsed by Kroger, which was purported to be for a lawnmower. Out of approximately $12,000.00 invested by Bush and Felix, only a little over $3,000.00 was actually spent on rental equipment.

Eventually, Bush had a falling out with the appellant and Clausing. The appellant told Bush that Air Base Mini-Rental and Air Base Mini Storage were to be merged. Clausing resisted the merger and was ousted from the company; later, the appellant returned Bush's money to him.

The appellant commingled the various investment funds and treated them as his own without regard to the best interests of the investors. John Mallet invested $6,150.00 in Square One Mini Storage on November 1, 1982, and his check was deposited in Square One's checking account. On November 22, 1982, $6,000.00 was withdrawn from Square One's account; on the same day $6,000.00 was placed into the account of M & R R.V. and Boat Storage, which at one time was owned entirely by the appellant and his wife. Again, on the same day, $6,000.00 was withdrawn from M & R's account and $6,000.00 was placed into Diversified Land's account.

When Mallet purchased his interest in Square One, he was told that the total capital contribution was $164,000.00 and that his money was to be used to complete a new storage building. When Mallet later discovered that he was the only investor, he confronted the appellant and was told that his money had been used in the construction of another building. The appellant offered him a five percent interest in Air Base Mini Storage, without regard to the effect this would have on Air Base's previous investors.

We are not persuaded by the appellant's defense that he was juggling the accounts because of the effect a bounced check for $5,000.00 had on the business entities. If this was true, it would not have been necessary for the appellant to run the $6,000.00 through four different accounts. Furthermore, reconciling conflicts in the testimony and weighing the evidence are within the province of the jury, and it is the jury's prerogative to accept such portions of the testimony which it believes to be true and discard that deemed false. *Vasquez* v. *State*, 287 Ark. 468,

701 S.W.2d 357 (1985), *reh'g denied*, 287 Ark. 473A, 702 S.W.2d 411 (1986).

It is the appellant's contention that, since the investors either got their money back or received property in lieu of cash, the State failed to prove that the investors were "deprived" of their property. In addition to voluntary refunds and settlements, there was evidence that several investors had been reimbursed after filing lawsuits which either were concluded or settled out of court. "Deprived" is defined in Ark. Stat. Ann. § 41-2201(4) (Repl. 1977) [Ark. Code Ann. § 5-36-101(4) (1987)] as follows:

> (a) to withhold property or to cause it to be withheld either permanently or under circumstances such that a major portion of its economic value, use, or benefit is appropriated to the actor or lost to the owner; or
>
> . . .
>
> (c) to dispose of property or use it or transfer any interest in it under circumstances that make its restoration unlikely.

The evidence clearly establishes that the appellant did not use the funds he received from the investors for the purposes represented to them. Consequently, the investors were deprived of the use and benefit of their property. *See Hixson* v. *State*, 266 Ark. 778, 587 S.W.2d 70 (Ark. App. 1979), *cert. denied*, 444 U.S. 1079 (1980). We hold that there was sufficient evidence to support the verdict as to Counts I and III.

THE TESTIMONY CONCERNING AN INJUNCTION

The appellant next argues that the trial court erred in allowing Nancy Jones, Assistant Securities Commissioner, to testify about an injunction issued against the appellant in an unrelated case. An order entered in February 1973 temporarily enjoined the appellant and others acting in concert with him from offering or selling securities within the State of Arkansas. In July 1974 an order was entered continuing the injunction. In a 1985 action to which the Commission was not a party, the chancellor found that the injunction had expired.

At trial, Ms. Jones testified that, had the department known that the appellant was involved in the 1979 exemption request, the department would not have allowed the exemption because

the department had participated in and was aware of the earlier injunction proceeding against him. The appellant argues on appeal that this statement was irrelevant and prejudicial. We disagree.

Arkansas Rules of Evidence Rule 404(b) 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.

In *Smith* v. *State*, 266 Ark. 861, 587 S.W.2d 50 (Ark. App. 1979), *cert. denied* 445 U.S. 905 (1979), we stated that evidence of other prior or similar transactions involving the offer and sale of securities is admissible to show habit, practice, or a common scheme, plan, and course of conduct, provided that the previous conduct is not too remote in time from the offense charged and is similar in nature to the offense charged. Remoteness is addressed to the sound discretion of the trial judge, whose determination will be reversed on appeal only when it is clear that the questioned evidence has no connection with the case. *Id.* The evidence in question was highly relevant to show the appellant's intent to defraud and, in light of the appellant's assertions that his actions were the result of his being a "bad businessman," to show lack of mistake.

Even if we were to find that the testimony was erroneously admitted into evidence, we would not reverse. This court will not reverse on the basis of nonprejudicial error. *Hughes* v. *State*, 17 Ark. App. 34, 702 S.W.2d 817 (1985). In light of the trial court's restriction of Jones's testimony concerning the injunction, the appellant's refusal of the trial court's offer to admonish the jury, and the presentation of other testimony about the injunction by the appellant, we fail to see any prejudice.

JURY INSTRUCTIONS

The appellant makes several arguments regarding various instructions given to the jury by the court, and several instructions offered by the appellant and refused by the court. We note at the outset that there are no model instructions in the

AMCI for securities fraud. In determining whether the trial court erred in refusing an instruction in a criminal case, the test is whether the omission infects the entire trial so that the resulting conviction violates due process. *Conley* v. *State*, 270 Ark. 886, 607 S.W.2d 328 (1980). Just because an offered instruction contains a correct statement of the law does not mean that it is error for a trial court to refuse to give it. *Id.*

The first instruction that the appellant contends was erroneously given is the court's instruction number 10. This instruction tracks the language found in the Arkansas Securities Act, states the purpose of the Act, and discusses generally disclosures, registration, and exemptions. The last paragraph states:

> The anti-fraud provisions of the Arkansas Securities Act, which is charged to have been violated in this case, have the purpose of controlling and remeding [sic] schemes to defraud. The particular section of the law charged in this case was designed to protect the investors by requiring full and truthful disclosures of important facts regarding the character of a security and to prevent investors from being victimized by fraud.

The instruction proffered by the appellant is nearly identical with the exception of language added to the end which states "the Act does not authorize the Arkansas Securities Department to pass upon the merits of the securities' proposal to be offered." However, this language, which the appellant wishes to add, is misleading. The "confidential memorandum" which was received by Clausing and Brechtel was filed by the appellant with his request for an *exemption.* Although Ark. Stat. Ann. § 67-1251 (Repl. 1980) [Ark. Code Ann. § 23-42-212 (1987)] states that registration of a security does not indicate that the Commission has made any recommendation or passed on the merits of the security, Ark. Stat. Ann. § 67-1248(c) (Repl. 1980) [§ 23-42-505(a)] does authorize the Commissioner to deny or revoke any *exemption.*

The appellant next argues about an instruction regarding the alleged fraud in the offer and sale of the securities. The court instructed:

> Roy Hardcastle is charged with the offense of securities fraud in the offer, sale, or purchase of Founder's Development stock as charged in Count I. To sustain this charge the State must prove beyond a reasonable doubt that Roy Hardcastle knowingly violated Section I of the Arkansas Securities Act which provides:
>
> It is unlawful for any person, in connection with the offer, sale or purchase of an security to directly or indirectly—
>
> (1) to employ any device, scheme or artifice to defraud, or
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made in light of the circumstances under which they are made, not misleading, or
>
> (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on any person.

The court then instructed the jury on the definition of "knowingly" as found in AMCI 2203-P. It is the appellant's contention that the phrase "that the defendant acted knowingly and with the intent to defraud," should have been included in the instruction.

The instruction given by the court essentially tracks the statute, Ark. Stat. Ann. § 67-1235 (Repl. 1980) [Ark. Code Ann. § 23-42-507 (1987)]. This section does not specify any intent necessary for conviction of the crime of securities fraud. If the statute defining an offense does not describe a culpable mental state, culpability is nonetheless required and is established if a person acts purposely, knowingly, or recklessly. *See Martin* v. *State*, 261 Ark. 80, 547 S.W.2d 81 (1977). Arkansas Statutes Annotated § 67-1255(a) (Repl. 1980) [Ark. Code Ann. § 23-42-104(a) (1987)] provides:

> Any person who knowingly violates Section 1 [§ 67-1235] of this Act [§§ 67-1235-67-1262] shall be guilty of the offense of "securities fraud".

"Knowingly" shall be defined as set forth in the Arkansas Criminal Code. Ark. Stat. Ann. § 67-1255(j) (Repl. 1980) [Ark. Code Ann. § 23-42-104(f) (1987)]. Furthermore, fraud is not limited to common-law deceit under the Act. Ark. Stat. Ann. §

67-1247(d) (Repl. 1980) [Ark. Code Ann. § 23-42-102(4) (1987)]. We find that the instruction given was adequate, a correct statement of the law, and fully covered the requisite mental state of the appellant. *Blaney* v. *State*, 280 Ark. 253, 657 S.W.2d 531 (1983).

SEVERANCE OF COUNTS I AND III

The appellant contends that Counts I and III are unrelated; that the facts were not connected; and that it was prejudicial for the trial court to deny his motion to sever. We disagree.

When offenses are based on the same conduct or on a series of acts connected together or constituting parts of a single plan or scheme, they may be joined for trial, but the decision to join or sever offenses is within the discretion of the trial court, and the appellate court will not reverse absent an abuse of discretion. *Rubio* v. *State*, 18 Ark. App. 277, 715 S.W.2d 214 (1986); A.R.Cr.P. Rule 21.1(b). The offense alleged in Count I was the use of false and misleading statements to procure the sales of the securities. Clausing and Brechtel and their involvement with Founder's were the basis of the charge in Count I, and they were also listed as victims in Count III. The charges in Count III resulted from the appellant's commingling of bank accounts that belonged to Founder's as well as to the business entities in Count III. We find no abuse of discretion and affirm the trial court's finding that the acts involved constituted a continuing course of conduct. A.R.Cr.P. Rule 21.1(b).

THE MOTION TO DISMISS

The appellant argues that the trial court erred in refusing to dismiss the charges in Count III because the felony information did not describe an offense, and because the alleged acts of theft were security transactions.

An information is not defective if it "sufficiently apprises the individual of the specific crime with which he is charged to the extent necessary to enable him to prepare for his defense." *Richard* v. *State*, 286 Ark. 410, 413, 691 S.W.2d 872 (1985). An information will not be affected by any defect which does not tend to prejudice the substantial rights of the defendant on the merits. *Drew* v. *State*, 8 Ark. App. 120, 648 S.W.2d 836

(1983).

The appellant's attack on the information is merely an exercise in semantics. The information stated that the appellant, "through on or about the 31st day of December, 1983, did with the purpose of depriving the true owners of their property, take unauthorized control over property of a value in excess of $2,500.00, by deception, such being the property of another." It is the appellant's argument that the words "by deception" should have been deleted from the information.

The appellant received both a bill of particulars and a supplemental bill of particulars. The appellant's attorney stated that he did not object to the content of the information, and that his objection was "legal." We simply fail to discern any prejudice to the appellant because the prosecutor included additional language which more fully described the offense.

The appellant also argues that the trial court should have dismissed the information because the "facts" described a securities transaction and not theft of property. We find no error because there is no provision in our law which permits a criminal charge to be dismissed, prior to trial, because the facts that *may* be presented do not amount to criminal conduct, although a case may be dismissed if the charge does not state a criminal offense under the law. *State* v. *Jamison*, 277 Ark. 349, 641 S.W.2d 719 (1982). The jury was the factfinder, and, until the evidence had been presented to them, there was no basis to dismiss the information for the reason the appellant argues.

DELAY BY PROSECUTOR IN FILING THE INFORMATION

The Securities Commission began an investigation of the appellant in April 1982. The first felony information was filed on February 14, 1985, and the amended information was filed on July 18, 1985. In 1984, the appellant defended several civil actions involving the same transactions which are at issue in this case. The appellant contends that the three-year-period between the initiation of the investigation by the Commission and the filing of the information was an unreasonable delay.

In April 1982, the Commission appointed Steve Bennett to investigate these cases. He testified that he did little with the case

and that he left the Commission in June 1983. Nancy Jones was appointed to investigate in October 1983. She testified that her investigation did not begin as a criminal investigation and that she did not remember when the investigation became a criminal one. She testified further that the Commission does not have the authority to prosecute, and that once it was determined that criminal acts had taken place, the case was referred to the prosecuting attorney's office.

The prosecution cannot delay the filing of charges in order to gain a tactical advantage over the accused. *Bliss* v. *State*, 282 Ark. 315, 668 S.W.2d 936 (1984). Furthermore, the prosecution cannot delay if the delay causes substantial prejudice to the appellant's right to a fair trial. *United States* v. *Marion*, 404 U.S. 307 (1971). However, a prosecutor may delay action until he is satisfied that the charges should be brought and can be proven. *United States* v. *Lovasco*, 431 U.S. 783 (1977).

The only prejudice alleged by the appellant is that his resources were exhausted from the defense of the civil actions, and thus he was not "at his best" to defend the criminal action. We think that the delay in filing this complicated case has been sufficiently explained, that the prosecution neither sought nor obtained any tactical advantage, and that there was no prejudice to the appellant.

THE TRANSFER OF THE CASE

This case was originally assigned to the Pulaski County Circuit Court, First Division. On motion of the prosecutor the case was transferred to the Fifth Division. The reason given was that the prosecutor, Jim Neal, had been transferred to Fifth Division. The appellant objected, stating that he did not think that Mr. Neal was going to actually try the case because of a conflict of interest, and that the transfer would cause another delay. The trial judge stated that he was granting the transfer because the lawyers were being frequently changed, that the parties had hesitated and delayed, that too much time had been spent on the case already, and that they should "get somebody that understands it and knows what they're doing."

The appellant alleges that he was prejudiced because the transfer caused unreasonable delay. The trial in First Division

was scheduled to begin in December 1985. The trial began in Fifth Division on June 30, 1986, which was, as the State points out, within the eighteen months mandated by Arkansas law on speedy trials. A.R.Cr.P. Rule 28.1.

The appellant, although stating that the delay prejudiced him, does not state specifically how he was prejudiced, and this Court will not reverse because of an alleged error unless actual prejudice is shown. *Hughes* v. *State*, 17 Ark. App. 34, 702 S.W.2d 817 (1985), *reh'g denied*, 17 Ark. App. 37-A, 705 S.W.2d 455 (1986). Furthermore, from the remarks in the record, the trial judge was obviously frustrated with the delays and felt that a transfer would expedite matters.

The appellant also argues that the transfer violated his fifth, sixth, and fourteenth amendment rights to a fair and speedy trial. However, the appellant did not offer an objection to the trial court based on these constitutional rights, and we will not address issues raised for the first time on appeal. *Wilson* v. *State*, 272 Ark. 361, 614 S.W.2d 663 (1981).

EXCLUSION OF A VENIREMAN

During jury selection, one of the potential jury members told the trial court that she would have a problem considering the full range of penalties because she "knew some people who had been there" (in prison). After continued questioning by the court and the prosecutor, the potential juror again stated that she did not know if she could consider the full sentencing range provided by Arkansas law for the offenses with which the appellant was charged. She was stricken for cause, and the appellant argues that the court erred in doing so.

The question of a juror's qualifications lies within the sound discretion of the trial judge. *Miller* v. *State*, 8 Ark. App. 165, 649 S.W.2d 407 (1983). It is proper to excuse for cause a juror who cannot consider the possible range of sentences. *Allen* v. *State*, 281 Ark. 1, 660 S.W.2d 922 (1983), *cert. denied*, 472 U.S. 1019 (1985). We find no abuse of discretion in excluding this juror for cause.

MOTION FOR A NEW TRIAL

The appellant's last argument is that the trial court erred in

denying his motion for a new trial. During the trial, one of the jurors was seen talking to an attorney who represented an insurance company against which the appellant had filed a claim. The appellant states that the insurance claim was related to his criminal case. However, the appellant concedes that there was no harm, and asserts only that it created a prejudicial situation. Because the appellant withdrew the argument in his reply brief and because he concedes that there was no harm, we will not address this argument.

We reverse and dismiss the appellant's conviction for filing false and misleading statements with the Commission because the charges were brought beyond the statute of limitations; the appellant's convictions for securities fraud and theft of property are affirmed.

Affirmed in part and reversed and dismissed in part.

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

Raenita McKIM *v.* STATE of Arkansas

CA CR 88-7 753 S.W.2d 295

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

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

Steve Clark, Att'y Gen., by: *Olan W. Reeves*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with DWI, first offense, after registering .11 on a breath analysis administered following a one-vehicle accident. After a jury trial, she was convicted of that offense, sentenced to forty-eight hours in jail, and fined $750.00. From that conviction, comes this appeal.

For reversal, the appellant contends that the trial court erred in denying her motion to suppress the results of the breathalyzer test, and in ruling that evidence concerning the results of the breathalyzer test given another arrestee, and records and testimony from the Department of Health concerning the certification of the breathalyzer, were not relevant. We reverse on her second point.

The record shows that, on the evening of March 10, 1986, the appellant's vehicle overturned on a highway curve as she was returning from the horse races at Hot Springs. She admitted to a police officer at the accident scene that she had drunk two glasses of beer several hours beforehand. The appellant was arrested on suspicion of DWI and taken to the Montgomery County Sheriff's

Office, where she registered .11 on a breathalyzer test.

On November 17, 1986, the appellant filed a motion to suppress the results of the breathalyzer test. At a hearing on the motion conducted on November 28, 1986, the appellant proffered evidence to show that the breathalyzer was not functioning properly at the time of her arrest, including evidence that the machine had twice been decertified in the three months prior to the appellant's arrest, and that it had been repaired at least once during that time. In addition, the appellant proffered the testimony of two witnesses, Tim Chambers and Phillip Chambers. According to the proffer Tim Chambers would have testified that, on the day before the appellant's arrest, he took two breathalyzer tests on the machine used for the appellant's test, and that the results of his tests, administered within five minutes of one another, were inconsistent. Phillip Chambers, Tim's father, would have testified that he appeared at the police station when his son was arrested and offered to take a breathalyzer test himself, and, although he had not been drinking, registered .07 on the machine. The appellant proffered further evidence to show that certain procedures involving the administration of the test and the use of the machine were not in accordance with Department of Health regulations. The trial court ruled that the issues raised by the appellant's proffered evidence went to the weight of the breathalyzer results, and denied the motion to suppress.

The appellant first contends that the trial court erred in denying her motion to suppress, and asks this Court to reconsider and reverse *Almobarak* v. *State*, 22 Ark. App. 69, 733 S.W.2d 422 (1987). In *Almobarak* we held that evidence that the breathalyzer was not in proper working order and that the machine operator had not strictly complied with Department of Health procedures for insuring accuracy did not require suppression of the test results, but instead went to the weight to be given the evidence. We decline to overrule *Almobarak*, and find it applicable to the circumstances of this case. Preliminary matters concerning the admissibility of evidence are for the trial court to decide, and we will not reverse the trial court's ruling in the absence of an abuse of discretion. *Id.*; A.R.E. Rule 104. We hold that the trial court did not abuse its discretion in denying the appellant's motion to suppress the breathalyzer results.

Next, the appellant contends that the trial court erred in ruling that certain evidence concerning the certification of the breathalyzer and its proper functioning at the time that her test was administered was inadmissible for lack of relevance. On cross-examination of the breathalyzer operator, the appellant elicited testimony that the device was obtained by the Montgomery County Sheriff's Office three years prior to trial, and was acquired as a used machine; that, although Department of Health regulations require an instruction manual to be kept with every certified machine, the instruction manual kept with the machine in question was for a different model breathalyzer; that the breathalyzer ampules used by the Sheriff's Office were not produced by the machine's manufacturer, although the manufacturer, in the operation manual, disclaimed responsibility for the precision and accuracy of the device when ampules other than those produced by the manufacturer were used; and that not every breathalyzer test administered on the machine was recorded in the logbook. The appellant then attempted to elicit testimony concerning the tests given to Tim and Phillip Chambers, fifteen hours before the appellant's test was administered. The State objected to this testimony on the ground of lack of relevancy, and the objection was sustained by the trial court. The appellant proffered that Tim Chambers would testify that he registered .10 on his first test, and .08 on another test given five minutes later. Phillip Chambers would testify that he tested .07 although he had not consumed any alcoholic beverages.

Continuing the cross-examination of the machine operator, the appellant elicited testimony concerning the records which Department of Health regulations require to be kept by a certified installation. The trial court again sustained a relevancy objection by the State, and the appellant proffered that the examination of the witness, if permitted, would show that the machine was inoperable for three months in 1985, and had been working improperly on several occasions during the previous two years, including two instances of decertification before the appellant's test and one decertification afterward. In her case-in-chief, the appellant proffered the testimony of Ms. Gay Horn, director of the State Department of Health division in charge of certifying breathalyzers, concerning the machine's repair record, including testimony that the machine's certification had been suspended

three times; that every test given must be logged in order to accurately certify the machine; that certification is based on the accuracy and complete disclosure of the log records; and that the Montgomery County Sheriff's Office had been admonished on two prior occasions for not sending in the log records as required.

We initially note that all of the proffered evidence is, to some extent, relevant to the issues of whether the machine was properly certified and whether it was functioning properly at the time the appellant's test was administered. Nevertheless, the trial judge's statement when sustaining the State's relevancy objection shows that the ruling in question was not based solely on relevancy:

> We are not going to go through all of this. If we open the door to this, every DWI case in the State would take three days. The machine is certified and its operator is certified. That is as far as you may go. . . .

We think that this statement makes it clear that the trial judge did not base his ruling on the ground of relevancy *per se*, but instead refused to admit the proffered evidence on the basis that it would be too time-consuming to do so.

Rule 403 of the Arkansas Rules of Evidence provides that:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The question before us with respect to this issue is whether the trial judge abused his discretion in ruling that the probative value of the proffered testimony was substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *See Lee* v. *State*, 266 Ark. 870, 587 S.W.2d 78 (Ark. App. 1979). We note that the appellant was pursuing two interconnected, yet distinct, theories with respect to the proffered evidence: first, that deviations from Department of Health regulations by the Montgomery County Sheriff's Office detracted from the reliability of the certification process. Under this theory, the appellant attempted to show that the device could have been functioning improperly at the time of the last certifica-

tion. Second, through the proffered testimony of Tim and Phillip Chambers, the appellant sought to show that, even had certification been accurately determined and properly issued, the machine was nevertheless unreliable by the time the appellant's test was administered. Although the appellant was permitted to elicit testimony supporting her first theory from the machine operator, the trial court's ruling barring testimony concerning the tests given to Tim and Phillip Chambers effectively foreclosed development of the second theory. We hold that the trial court abused its discretion in excluding the evidence, and we reverse. In so holding, we do not mean to imply that, on retrial, any and all evidence concerning the history of the breathalyzer and its certification must be accepted as relevant to its proper functioning and certification. At some point, such evidence will be properly excludable on the grounds of needless delay, waste of time, and its cumulative effect. We only hold that, when the trial judge excluded the evidence in the case at bar, that point had not yet been reached.

Reversed and remanded.

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

Tilman Clayton RUSSELL *v.* STATE of Arkansas

CA CR 87-234 753 S.W.2d 298

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

Mark R. Johnson and *Jack D. Files*, for appellant.

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

MELVIN MAYFIELD, Judge. This is an appeal from the revocation of a suspended sentence. On February 7, 1985, appellant Tilman Russell pleaded guilty to seven separate charges pending against him in Jackson County. He was sen-

tenced to the Arkansas Department of Correction for five years, four years of which were suspended subject to certain conditions, among which were that he lead a law-abiding life, be of good behavior, and not violate any state, federal, or municipal law punishable by imprisonment.

On June 12, 1987, the state filed a petition to revoke alleging appellant had violated the terms of his suspended sentence in that on December 20, 1986, he was arrested in Sharp County, Arkansas, and was found to possess over three ounces of marijuana, and therefore, possessed a controlled substance with intent to deliver it. After a hearing held August 7, 1987, the circuit court in Jackson County revoked appellant's suspended sentence and sentenced him to four years in the Arkansas Department of Correction to run concurrent with the sentence he had received in Sharp County.

On appeal to this court, the appellant makes two contentions. One is that the state did not introduce sufficient evidence to support a finding that appellant violated a condition of his suspended sentence. In a revocation hearing, the state has the burden to show a violation by a preponderance of the evidence and, on appellate review, the trial court's findings are affirmed unless clearly against a preponderance of the evidence. *Hoffman* v. *State*, 289 Ark. 184, 711 S.W.2d 151 (1986); *Dunavin* v. *State*, 18 Ark. App. 178, 712 S.W.2d 326 (1986). The rules of evidence do not apply to revocation hearings, *Felix* v. *State*, 20 Ark. App. 44, 723 S.W.2d 839 (1987); and the trial court may consider all relevant evidence, *Harris* v. *State*, 270 Ark. 634, 606 S.W.2d 93 (Ark. App. 1980).

Two witnesses testified for the state. The first witness was the circuit clerk of Jackson County. He identified the original judgment of the appellant's February 7, 1985, conviction, and a certified copy of the judgment was introduced into evidence.

The next witness was Bob Wilkin, a probation officer for Jackson County. Mr. Wilkin testified that he was present in the courtroom on February 7, 1985, when appellant entered a plea of guilty to various charges in Jackson County and was sentenced to five years with four suspended. He testified that he was also in the Sharp County Circuit Court on June 23, 1987, when the jury returned a verdict finding the appellant guilty of possession of a

controlled substance with intent to deliver. He said he was "vaguely" familiar with the Sharp County case, did not know who arrested the appellant on the charge for which he was being tried, had no personal knowledge of the facts, and was present in the courtroom just at the end of the trial when the jury verdict was returned.

This was the extent of the state's case and the only evidence offered by the appellant was just prior to the calling of the state's first witness. At that time, counsel for appellant made an oral motion stating that the case should not be heard because the Sharp County conviction had been appealed but not yet decided. Appellant's counsel then introduced into evidence a copy of the appellant's Notice of Appeal and Designation of Record filed in the Sharp County case. The court overruled the appellant's motion and later in the proceedings revealed his reasoning by stating that the petition for revocation was not based on a conviction but on an allegation that appellant had violated a law of the state. The conviction, the court said, was simply evidence of the violation—whether appealed or not.

At the conclusion of the state's evidence, the appellant moved that the petition for revocation be dismissed because the evidence was not sufficient to prove that the appellant had violated a condition of his suspended sentence. This brings us back to the first argument in the appeal to this court. Applying the standard of review set out above, we cannot say that the trial judge's finding that appellant had violated a law punishable by imprisonment is clearly against the preponderance of the evidence. The rules of evidence do not apply as to admissibility, and we have evidence of the finding of a violation by a Sharp County jury, testified to by a probation officer who knew the defendant there was the same defendant placed on suspended sentence in Jackson County.

Appellant's next argument on appeal does reveal a defect in the state's evidence. This argument is based on the fact that the state's evidence did not show a violation of the law committed during the four years of the appellant's suspended sentence. For all we know, from the evidence presented, the violation for which appellant was convicted in Sharp County could have occurred prior to his conviction in Jackson County.

However, we do not believe this matter was sufficiently called to the trial court's attention. In *Janes* v. *State*, 285 Ark. 279, 686 S.W.2d 783 (1985), our supreme court said:

> We have consistently held that where there is a particular defect in the State's proof that might readily have been corrected had an objection been made, the absence of any objection prevents the point's being raised for the first time on appeal. For instance, where the State's proof by accomplices is not corroborated, the absence of an objection on that ground at trial waives the omission. [Citation omitted.]

285 Ark. at 281. In the instant case, the closest the appellant got to stating the specific grounds now urged on appeal was the statement that "the petition to revoke is predicated solely on the commission of a particular act and we feel that the state did not prove that." This is followed by a reference to the probation officer's statement that he "vaguely" remembered what happened in court. There is, however, no statement that the proof failed to show that there was a violation of the law *during the period of appellant's suspended sentence.* Had this specific objection been called to the court's attention, it seems highly likely that the missing proof could have been supplied. Surely, the state had a copy of the Sharp County Judgment or the Information filed in that county, one of which probably stated the date of the violation involved. We simply do not think that the motion to dismiss was specific enough to meet the requirements of the law.

Finally, the appellant argues that the trial court *lacked jurisdiction* to revoke his suspended sentence because the state did not show that a violation of a condition of the suspended sentence occurred during the period the sentence was suspended. Appellant argues that jurisdiction may be raised at any time.

While it is unquestionably true that the issue of jurisdiction can be raised at any time, we do not agree with appellant's contention that the trial court lacked jurisdiction in this matter. In Arkansas, the circuit court has subject matter jurisdiction to try cases involving the violation of criminal statutes and has the authority to impose or suspend sentences and to revoke those suspended sentences. *Banning* v. *State*, 22 Ark. App. 144, 737 S.W.2d 167 (1987). In the instant case, the circuit

court clearly had jurisdiction over the subject matter of the revocation hearing and the appellant was properly before the court. *Banning* v. *State, supra.*

Affirmed.

COOPER and JENNINGS, JJ., agree.

Wesley GRIFFIN *v.* STATE of Arkansas

CA CR 88-20 755 S.W.2d 574

Court of Appeals of Arkansas
Division I
Opinion delivered August 24, 1988
[Rehearing denied September 7, 1988.]

Daniel D. Becker, for appellant.

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

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Garland County Circuit Court. Appellant, Wesley Griffin, appeals his conviction of interference with a law enforcement officer with the use of a firearm, a violation of Arkansas Code Annotated § 5-54-104 (1987) (formerly Ark. Stat. Ann. § 41-2804 (Repl. 1977)), and the sentence imposed therefor. We affirm.

An information was filed June 11, 1987, charging appellant with interference with a law enforcement officer and criminal trespass in that he did unlawfully, feloniously and knowingly employ and use deadly physical force against a law enforcement officer employing a firearm in furtherance of said felony. Further, the information charged that appellant did unlawfully and purposely enter the premises of another person against the peace and dignity of the State of Arkansas. Prior to trial, the State nolle prossed the criminal trespass charge.

Before arraignment, appellant filed a notice putting into

issue his fitness to proceed and that he would rely on the defense of mental disease or defect. On the same day, appellant filed a motion requesting a court-ordered mental examination at the state hospital.

A hearing was held on appellant's motion, and the court ordered that appellant undergo a preliminary evaluation at the Ouachita Regional Mental Health Center due to the extended delay required for admission to the state hospital. In the court's examination order, the center was directed to make a written report and findings in accordance with Arkansas Code Annotated § 5-2-305(d) (Supp. 1987) (formerly Ark. Stat. Ann. § 41-605(4) (Repl. 1977)). After examination and in response, the center wrote a letter stating that they were "unable to come up with a consensus" in answering the questions posed and recommended a complete evaluation at Rogers Hall.

At the arraignment on August 6, 1987, the court directed that appellant be examined at the state hospital because of the health center's recommendation. Following an exchange of inquiries and responses with appellant, the court allowed appellant to withdraw his defense of mental defect and set a hearing date for the trial.

On September 2, 1987, a pre-trial hearing was conducted in chambers on the morning of trial to determine if appellant was mentally capable to withdraw his incompetency defense and for consideration of another matter not pertinent to this appeal. After finding appellant competent to withdraw his defense, the trial ensued. Appellant was found guilty as charged by the jury and sentenced to ten (10) years imprisonment.

Lack of mental capacity is an affirmative defense. Ark. Code Ann. § 5-2-312 (1987) (formerly Ark. Stat. Ann. § 41-601 (Repl. 1977)). Affirmative defenses can be withdrawn; however, the inherent nature of the mental defect defense, once asserted, requires the court to examine closely a defendant's ability to take his competency out of issue. Although appellant argues the trial court erred in finding him fit to proceed and continuing with trial, we must first determine whether the court erred in allowing appellant to withdraw his affirmative defense of mental disease or defect. This presented a question of fact for the trial court and it is well settled that findings of fact by a trial judge

will not be set aside by this court unless clearly erroneous. *Arkansas Blue Cross and Blue Shield, Inc.* v. *Fudge*, 12 Ark. App. 11, 669 S.W.2d 914 (1984). Thus, on appeal our inquiry is whether the court was clearly erroneous in allowing the withdrawal of the incompetency defense and proceeding to trial. The record supports the fact that the court did not err in this regard.

At the arraignment in the case at bar, the court generally acknowledged that the case could not proceed to trial on the basis of the health center's letter and for that reason directed that appellant be taken to Rogers Hall for a complete mental evaluation. At that time, appellant expressed his wish to withdraw his defense and the court advised him that whether or not to proceed with his defense was a decision only he and his attorney could make and thereupon gave them time to confer. When the arraignment continued, the court allowed the withdrawal and found appellant fit to proceed.

Appellant argues under *Pate* v. *Robinson*, 383 U.S. 375 (1966) that the health center's letter created a "bona fide doubt" as to his competency to stand trial. In *Pate*, the Supreme Court held that the defendant was constitutionally entitled to a hearing on the issue of his competency to stand trial because the facts and evidence presented to the trial court raised a "bona fide doubt" as to the defendant's competency as is required under Illinois statutory law. We agree that in the instant case the health center's letter may have created a bona fide doubt as to appellant's competency. However, such an argument is misplaced since the court, in the case at bar, conducted a hearing prior to trial which complied with the procedural due process requirements set out in *Pate*. During a pre-trial hearing on the morning of trial, the court considered the propriety of appellant's withdrawal of his incompetency defense before allowing the case to proceed.

On the record before us, the trial court properly allowed appellant to withdraw his defense. The court had appellant before him at two separate hearings and observed his demeanor, made inquiry of him, and considered his responses. A review of appellant's testimony at various stages of this case, supports the court's allowance of the withdrawal. Not only did appellant inform the court that he was able to cooperate and discuss his

case, witnesses, and defenses with his attorney; he emphatically stated his desire not to go to Rogers Hall but to proceed to trial. Upon this basis, the trial court found appellant fit to proceed and we cannot say the court was clearly erroneous in allowing appellant to withdraw his incompetency defense prior to trial.

Furthermore, under Arkansas Code Annotated § 5-2-305(a)(2) (1987) (formerly Ark. Stat. Ann. § 41-605)(1)(b) (Repl. 1977)), the court may raise the incompetency defense on its own at any time it has "reason to doubt" a defendant's fitness to proceed. Here, an examination of the record reveals that the court saw nothing which gave it reason to doubt appellant's fitness to proceed. At trial, appellant participated in his own defense, testified regarding the events which gave rise to his arrest, and was cross-examined by the State. Upon this record, appellant has failed to demonstrate that he was prejudiced by the court finding him fit to proceed and continuing with the trial.

Affirmed.

CRACRAFT and COOPER, JJ., agree.

Frank Elmo SPARKS II *v.* STATE of Arkansas

CA CR 87-230 756 S.W.2d 911

Court of Appeals of Arkansas
Division II
[Substituted Opinion on Denial of Rehearing
August 24, 1988.]

Hartenstein, Lassiter & Oberlag, by: *Jack T. Lassiter*, for appellant.

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

Gen., for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Pulaski County Circuit Court, First Division. Appellant, Frank Elmo Sparks II, appeals his conviction of operating a motorboat while intoxicated. We affirm.

A felony information was filed August 6, 1986, charging appellant with manslaughter, a violation of Arkansas Code Annotated § 5-10-104 (1987) (formerly Ark. Stat. Ann. § 41-1504 (Repl. 1977)) and driving a boat while intoxicated, a violation of Arkansas Code Annotated § 27-101—202(7) (1987) (formerly Ark. Stat. Ann. § 21-229(b) (Repl. 1968)). These charges resulted from a jet boat accident which occurred on the Little Maumelle River on May 9, 1986, in which the passenger in the boat driven by appellant died from injuries sustained when the boat hit a tree. A jury trial was held May 4, 1987, wherein appellant was found not guilty of manslaughter and guilty as charged for driving a boat while intoxicated for which he was sentenced to ten (10) days in jail and a $500.00 fine.

As his only point for reversal, appellant asserts that the trial court erred in denying his motions for a directed verdict in that there was not sufficient evidence to support a conviction for driving a boat while intoxicated. We disagree.

Arkansas Code Annotated § 27-101—202(7) requires that:

> No person shall operate any motorboat or vessel or manipulate any water skis, aquaplane, or similar device while intoxicated or under the influence of any narcotic drug, barbiturate, or marijuana or while under any physical or mental disability so as to be incapable of operating the motorboat or vessel safely under the prevailing circumstances.

In this case, the jury was instructed on the definition of "intoxication" as defined in Arkansas Code Annotated § 5-65-102 (1987) (formerly Ark. Stat. Ann. § 75-2502(a) (Supp. 1985)) as:

> (1) "Intoxicated" means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination thereof, to such a degree that the

driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians;

Appellant asserts that there was insufficient evidence presented at trial to establish that he was intoxicated. The test for determining sufficiency of the evidence is whether there is substantial evidence to support the verdict. *Mann* v. *State*, 291 Ark. 4, 722 S.W.2d 266 (1987). On appeal in a criminal case, whether tried by a judge or jury, we will affirm if there is substantial evidence to support the finding of the trier of fact. *Gullett* v. *State*, 18 Ark. App. 97, 711 S.W.2d 836 (1986). Substantial evidence is that evidence that is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or another; it must force the mind to pass beyond suspicion or conjecture. *Jimenez* v. *State*, 12 Ark. App. 315, 675 S.W.2d 853 (1984). The appellate court need only consider testimony lending support to the jury verdict and may disregard any testimony that could have been rejected by the jury on the basis of credibility. *Hill* v. *State*, 285 Ark. 77, 685 S.W.2d 495 (1985).

At trial, appellant successfully objected to an instruction regarding the presumptions a jury may or may not make based upon the blood alcohol content in a person's blood, urine, breath, or other bodily substance as set out in Arkansas Code Annotated § 5-65-206 (1987) (formerly Ark. Stat. Ann. § 75-1031.1 (Supp. 1985)). Appellant alleges that the presumptions do not apply since this is not a motor vehicle case. On appeal, appellant argues that, without these presumptions, the State should have produced an expert witness to explain the legal significance of appellant's blood alcohol level to the jury. Appellant asserts that the blood alcohol content is meaningless without such testimony. We disagree. Expert testimony explaining the meaning of blood alcohol content is not required to prove intoxication. In fact, one may be convicted of driving while intoxicated without the use of a blood alcohol test. *See, e.g., Whaley* v. *State*, 11 Ark. App. 248, 669 S.W.2d 502 (1984).

Here, not only did the jury have the benefit of knowing that appellant's blood alcohol content was 0.16% two and one-half

hours after the accident, it was also presented with ample other evidence from which it could have concluded that appellant was guilty of driving his boat while intoxicated.

Although there was conflicting evidence in the case at bar, reviewing the evidence in the light most favorable to the State, we find substantial evidence to support the jury verdict. Appellant testified that he had a beer and a Chivas and water during lunch on the day of the accident. He testified that he sipped from the decedent's glass of wine while going to check on his boat. Also, appellant admitted that he stopped at a liquor store on the way to the river and purchased two magnums of champagne for himself and the deceased. Further, appellant testified that he was drinking in the boat prior to the collision. There was evidence presented that after the collision, a Chivas bottle and cork which could have come from a champagne bottle were found in the boat, and an ice chest and other debris were floating in the water nearby. Evidence was presented that the area where the accident occurred is a narrow strip of the river containing many stumps and trees. The State presented an abundance of testimony from people who witnessed appellant's behavior on the river prior to the accident.

Jack Harris, owner of the River Valley Marina, testified that appellant came through the "no wake" area at the Marina traveling approximately forty (40) miles per hour. Mr. Harris stated that appellant's boat was in a plane and caused a substantial wake.

George Reeves was on his boat at the Little Maumelle River Marina when he heard a high speed boat approaching. His testimony reveals that appellant was driving the boat in an erratic manner by accelerating and then backing off the accelerator. Mr. Reeves further testified that appellant was driving at a high rate of speed in a wooded area causing a wake which created enough force to push his boat into the pilings at the marina.

William Durham was on his party barge on May 9, 1986. He testified that appellant came around a curve toward him at a "terrific" rate of speed and veered the jet boat toward some cattle standing in the river causing them to flee to the shore. Mr. Durham testified that he yelled at appellant to slow down.

Willie Douglas was fishing on the Little Maumelle and heard a boat approaching. Mr. Douglas testified that appellant drove his boat toward him at "quite a bit of speed" but suddenly turned the boat in another direction. Moments later Mr. Douglas heard a "thud" when appellant's boat struck the tree, and he then responded to appellant's cry for help.

The paramedic who accompanied appellant to the hospital testified that appellant admitted he was drinking while driving the boat and struck the tree while driving approximately forty-five to sixty miles per hour.

In the case at bar, the evidence indicates that the jury could have utilized their common knowledge and experience to conclude that appellant's reactions, motor skills and judgment were substantially altered so as to cause a clear and substantial danger of physical injury or death to himself and others. Ark. Code Ann. § 5-65-102.

We find substantial evidence in the record to support appellant's conviction; therefore, we affirm.

Affirmed.

CRACRAFT and COULSON, JJ., agree.

James T. PLUNKETT *v.* ST. FRANCIS VALLEY LUMBER COMPANY

CA 88-51 755 S.W.2d 240

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

Kelley Webb, for appellant.

Barrett, Wheatley, Smith & Deacon, by: *Lucinda McDaniel*, for appellee.

JAMES R. COOPER, Judge. In this appeal from the Workers' Compensation Commission the only issue is whether the Commission was correct in holding that the appellant's claim is barred by the statute of limitations. We affirm.

The appellant was injured on July 11, 1979, when a ladder on which he was standing came into contact with a power line. On June 3, 1981, the appellant filed a civil suit in the circuit court of Poinsett County against the appellant, Arkansas Power and Light, and E. Ritter Company. On April 11, 1983, the trial court granted the appellee's request for a directed verdict, finding that there was no negligence on the part of the appellee. The appellant then filed a claim with the Workers' Compensation Commission on August 8, 1984. The administrative law judge found that the appellant's claim was barred by the statute of limitations and this finding was adopted by the Commission. The appellant contends that the statute of limitations on workers' compensation claims was tolled by the filing of his civil suit which was subsequently

dismissed.

Arkansas Statutes Annotated § 81-1318(a) (Supp. 1985) [Ark. Code Ann. § 11-9-702(a)(1) (1987)] provides that a claim of compensation shall be barred unless filed with the Commission within two years from the date of injury. However, according to Ark. Stat. Ann. § 81-1318(e) (Repl 1972) [Ark. Code Ann. § 11-9-702(e) (1987)], the limitation period in § 81-1318 may be tolled:

> Whenever recovery in an action at law to recover damages for injury to or death of an employee is denied to any person on the ground that the employee and his employer were subject to the provisions of the Act [§§ 81-1301—81-1349], the limitations prescribed in subsections (a) and (b) shall begin to run from the termination of such action.

It is clear that in order to toll the statute section (e) requires (1) an action at law for damages; (2) denial of recovery; and (3) that recovery be denied on the ground that the employer and employee were subject to the Act. *Bryan* v. *Ford, Bacon & Davis*, 246 Ark. 327, 438 S.W.2d 472 (1969); *Guthrie* v. *Tyson Foods, Inc.*, 20 Ark. App. 69, 724 S.W.2d 187 (1987). In the present case, the appellant has not met the third requirement for tolling the statute. The trial court did not dismiss the appellant's civil suit because the claim was subject to the Workers' Compensation Act, but because there was no evidence of negligence on the part of the employer. The burden of filing a claim within the statute of limitations is on the claimant. *St. John* v. *Arkansas Lime Co.*, 8 Ark. App. 278, 651 S.W.2d 104 (1983). The court cannot extend the period of the statute of limitations on appeal, despite the fact that the claim may be meritorious. *Miller* v. *Everett*, 252 Ark. 824, 481 S.W.2d 335 (1972). Any statute of limitations will eventually operate to bar a remedy and the time within which a claim should be asserted is a matter of public policy, the determination of which lies almost exclusively with the legislative domain, and the decision of the General Assembly in that regard will not be interfered with by the courts in the absence of palpable error in the exercise of the legislative judgment. *Hamilton* v. *Jeffrey Stone Co.*, 25 Ark. App. 66, 752 S.W.2d 288 (1988).

Affirmed.

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

Billy Don LIVELY *v.* STATE of Arkansas

CA CR 88-8 755 S.W.2d 238

Court of Appeals of Arkansas
Division II
Opinion delivered August 24, 1988

Milas Hale III, by: *Arthur L. Allen* of *Allen Law Firm*, for appellant.

Steve Clark, Att'y Gen., by: *David B. Eberhard*, Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. Appellant, Billy Don Lively, was charged with delivery of a controlled substance, cocaine, in

violation of Ark. Stat. Ann. § 82-2617 (Repl. 1976) (now Ark. Code Ann. § 5-64-401 (1987)). The case was tried to the circuit court, sitting without a jury. Lively was convicted and sentenced to a term of 10 years imprisonment.

Appellant does not argue that the evidence is insufficient to establish that he sold cocaine but argues on appeal that he is entitled to reversal because the State failed to prove that cocaine is a "controlled substance" or that cocaine is a "narcotic drug." We disagree and affirm.

The statute under which appellant was convicted, Ark. Stat. Ann. § 82-2617, provides in pertinent part:

> (1) Any person who violates this subsection with respect to:
>
> (i) a controlled substance classified in Schedule I or II which is a narcotic drug . . . is guilty of a felony and shall be imprisoned for not less than ten (10) years . . . For all purposes other than disposition, this offense is a class Y felony.

Arkansas Statutes Annotated § 82-2602 (Repl. 1976) provides that the commissioner shall administer the Controlled Substances Act and may add or delete substances from the schedules. Arkansas Statutes Annotated Section 82-2601(x) (Repl. 1976) (now Ark. Code Ann. § 5-64-101(x) (1987)) defines the "commissioner" as the director of the Arkansas Department of Health or his duly authorized agent. Section 82-2606 (Repl. 1976) (now Ark. Code Ann. § 5-64-205 (1987)) establishes criteria to be used by the commissioner in placing substances in Schedule II. At the time of the offense the applicable Department of Health regulations listed cocaine as a controlled substance in Schedule II.

Arkansas Statutes Annotated § 82-2601(o)(4) (Repl. 1976) (now Ark. Code Ann. § 5-64-101(o)(4) (1987)) provides:

> (o) "Narcotic drug" means any of the following. . .
>
> . . .

> (4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances . . .

Thus, cocaine is defined as a "narcotic drug" under an Arkansas statute and is made a Schedule II controlled substance under the terms of a board regulation adopted in accordance with the statute.

In *Johnson* v. *State*, 6 Ark. App. 78, 638 S.W.2d 686 (1982), we said:

> Appellant contends that as this regulation was not tendered for judicial notice or otherwise proved in the trial court we are required to reverse his conviction on jurisdictional grounds. It is not necessary to introduce evidence of statutes in this state. The court judicially knows them. [Citations omitted.] Nor is it necessary to introduce evidence of regulations of the State Health Department promulgated pursuant to statutory authorization. Courts take judicial notice of such rules and regulations of boards and agencies which are adopted pursuant to law. [Citations omitted.] As the regulation listing Meperidine as a Schedule II controlled substance was a matter within the judicial knowledge of the trial court it was not error for him to exercise the jurisdiction conferred by the regulation.

6 Ark. App. at 81, 638 S.W.2d at 688.

Appellant concedes that the trial court could have taken judicial notice of either matter but argues that it is error to do so absent a request by the state. He cites *St. Paul Insurance Company* v. *Touzin*, 267 Ark. 539, 592 S.W.2d 447 (1980). There, in discussing a department of health regulation, the court said:

> Judicial notice may be taken of that regulation, but the proper procedure is for the party relying on such judicial notice to aid the court or administrative law judge by calling attention to the regulation. *Turnage* v. *Gibson*, 211

Ark. 268, 200 S.W.2d 92 (1947); Unif. R. Evid. 201(d), Ark. Stat. Ann. § 28-1001 (Repl. 1979).

This portion of *Touzin* stands only for the proposition that one who has a legal argument based upon a state regulation should call the trial court's attention to the regulation or risk being precluded from relying on it on appeal. The case at bar is not governed by Ark. R. Evid. 201 as that rule governs only judicial notice of adjudicative facts. The statute and regulations involved in this case do not constitute "adjudicative facts." *See United States* v. *Coffman*, 638 F.2d 192 (10th Cir. 1980); *United States* v. *Gould*, 536 F.2d 216 (8th Cir. 1976). Even if this case were governed by Rule 201, that rule expressly authorizes the court to take judicial notice whether requested or not. Ark. R. Evid. 201(c).

Appellant also cites *Pascall* v. *Smith*, 263 Ark. 428, 569 S.W.2d 89 (1978). In *Pascall* the supreme court held that it had erred in taking judicial notice of what was clearly an adjudicative fact when the matter had not been raised in the trial court. *Pascall* has no application to the facts of this case.

We hold that it was unnecessary for the State to offer evidence to the trial court, sitting without a jury, that cocaine was listed by the Health Department as a Schedule II controlled substance or that cocaine is classified by the legislature as a narcotic drug.

Affirmed.

MAYFIELD and COULSON, JJ., agree.

FOUNDATION LIFE INSURANCE COMPANY of Arkansas *v.* Chris KELLEY, Administrator of the Estate of Everett Elwood Kelley, Deceased

CA 88-47 757 S.W.2d 775

Court of Appeals of Arkansas
En Banc
Opinion delivered August 24, 1988
[Rehearing denied June 8, 1988.]

Rex Terry, for appellant.

No response.

PER CURIAM. The appellant has filed a Motion for Additional Costs seeking to recover for the premium paid by it on the supersedeas bond posted in this case pending the decision on appeal.

While the appellant prevailed in this court and is entitled to its costs on appeal, we have been cited no authority, and we know of none, which authorizes the premium on a supersedeas bond to be taxed as costs.

In 20 C.J.S. *Costs* § 367 (1940), it is stated:

> In general, money paid as premiums for appeal or stay bonds is taxable as costs only when and in the amount provided by statute or rule of court.
>
> Although there is some authority to the contrary, the general rule is that money paid to a surety company for becoming surety on an appeal or stay bond is not taxable as costs, in the absence of some statutory provision or rule of court specifically authorizing it, particularly where the

bond was not ordered by the court.

See also 5 Am. Jur. 2d *Appeal and Error* § 1019.4 (Supp. 1988).

Motion denied.

Ester Pamela DEMAREST *v.* STATE of Arkansas

CA CR 88-22 755 S.W.2d 577

Court of Appeals of Arkansas
Division I
Opinion delivered August 31, 1988

Wilson & Associates, P.A., by: *Jack T. Lassiter*, for appellant.

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

Gen., for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Garland County Circuit Court. Appellant, Ester Pamela Demarest, appeals her conviction of theft in excess of $2,500 in violation of Ark. Code Ann. § 5-36-103 (1987) (formerly Ark. Stat. Ann. § 41-2203 (Repl. 1977)). We find reversible error and remand.

Appellant was employed by Dr. Bhaktnan Krishnan and performed nursing as well as office duties. During her employment, appellant wrote two checks to herself totaling $2,866.77 which she signed with the doctor's signature stamp. The check disbursement journal reveals that appellant made false entries on both checks for payee and check amounts. The evidence regarding the checks is conflicting. Appellant argues that she was initially hired as a surgical assistant; however, her duties later expanded to include part-time office work. Appellant contends that she wrote the checks in question at the direction of Dr. Krishnan as compensation for the additional office duties. Appellant also contends that Dr. Krishnan instructed her to make the false entries in the journal because he did not want his wife to know about the money paid appellant for additional office duties. Dr. Krishnan denies any such agreement with appellant. He argues that he did not authorize appellant to write the two checks in issue or make the false journal entries, and he terminated her when he became aware of her actions. Dr. Krishnan made a complaint to the police and the case proceeded to trial wherein the jury found the appellant guilty and assessed a fine of $15,000. From the judgment of conviction comes this appeal.

For reversal, appellant raises the following two points as error: (1) The lower court erred in sustaining the State's objection to the proffered prior inconsistent statement of Dr. Krishnan; (2) the lower court erred in sustaining the State's objection to testimony which established hostility between Dr. Krishnan's wife and appellant.

First, appellant argues that she was denied a fair trial by the lower court's refusal to allow Nelda Hunt's proffered testimony which would have placed doubt on Dr. Krishnan's credibility. We agree. Arkansas Rules of Evidence provide that all relevant evidence is admissible. A.R.E. Rule 402. Relevant evidence is

defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. A.R.E. Rule 401.

Here, the proffered testimony reveals that Ms. Hunt would have testified to a prior inconsistent statement by Dr. Krishnan. Specifically, she testified that Ms. Hunt interviewed for a job with the doctor at which time he told her that she would be his bookkeeper and officer manager and that appellant would be his surgical nurse. This testimony would have contradicted testimony elicited from Dr. Krishnan during cross-examination when he denied telling Ms. Hunt that appellant was going to be his surgical nurse and Ms. Hunt his office manager and bookkeeper. Dr. Krishnan testified that he discussed the job with Ms. Hunt but in the meantime talked with and employed appellant who agreed to work as both a nurse and office worker.

Both parties to this action agree that the issue to be resolved is whether the checks were written by deception without authorization of Dr. Krishnan or whether Dr. Krishnan authorized the checks and directed the false entries in the cash disbursement journal. Ms. Hunt's proffered testimony goes to the existence of some fact that is of consequence to the determination of this action. This evidence makes the existence of that fact more probable because it suggests that Dr. Krishnan recognized two separate jobs associated with his medical practice. It places Dr. Krishnan's credibility in doubt and is relevant to appellant's defense that she agreed to perform office duties in addition to her nursing position for which she was to receive additional compensation. *See* A.R.E. Rule 401.

Arkansas Rules of Evidence provide methods by which the credibility of a witness may be impeached. Rule 607 provides that the credibility of a witness may be attacked by any party, including the party calling him. Also, Rule 613(b) allows extrinsic evidence of a prior inconsistent statement by a witness into evidence if the witness and the opposite party are afforded an opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness.

It is the general rule that relevancy of evidence is within the trial court's discretion and, absent a showing of abuse

of that discretion, its decision will be affirmed. *Lewis* v. *State*, 288 Ark. 595, 709 S.W.2d 56 (1986). Here, the trial court's refusal to allow the proffered testimony of Ms. Hunt demonstrates an abuse of discretion.

Secondly, appellant argues the lower court erred in sustaining the State's objection to testimony which established hostility between Dr. Krishnan's wife and appellant. The record reveals that during direct examination of appellant, the court disallowed testimony regarding appellant's relationship with Dr. Krishnan's wife. The proffered testimony would have been that Mrs. Krishnan came to the office on two occasions and was upset and hostile toward appellant, asking many questions. Appellant would have testified that she felt physically threatened by Mrs. Krishnan's behavior.

The trial judge has discretion in deciding evidentiary issues and his decision will not be reversed on appeal unless he has abused that discretion. *Baumeister* v. *City of Fort Smith*, 23 Ark. App. 102, 743 S.W.2d 396 (1988). Here, the trial court abused its discretion in excluding evidence of the hostility. The trial court improperly limited evidence that tended to make the existence of a specific fact more probable, i.e., whether Dr. Krishnan directed the false journal entries so that his wife would not be aware of the additional funds paid appellant for office duties.

Accordingly, the judgment is reversed and remanded.

Reversed and remanded.

CRACRAFT and JENNINGS, JJ., agree.

Robert WHITFIELD *v.* LITTLE ROCK PUBLIC SCHOOLS

CA 87-406 756 S.W.2d 125

Court of Appeals of Arkansas
Division I
Opinion delivered August 31, 1988

Mitchell and Roachell, by: *Richard W. Roachell*, for appellant.

Friday, Eldredge & Clark, by: *Christopher Heller*, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Pulaski County Circuit Court, Third Division. Appellant, Robert Whitfield, appeals from the order dismissing his appeal of the decision rendered by the Little Rock School District Board of Education regarding termination of his employment. We affirm.

Appellant, a second grade teacher in the Little Rock School District, received a letter from his principal, Mary Guinn, on January 9, 1986, alleging that he had grossly neglected his responsibility to handle behavior problems and disruptions on twelve occasions despite prior conferences on the matter. The letter noted that failure to correct the problem would necessitate probationary status pursuant to the Professional Negotiations Agreement (hereinafter "PNA"), an agreement between the Little Rock School District (hereinafter "District") and the Little Rock Classroom Teacher's Association, and requested that appellant discuss the matter with her as soon as possible. On February 21, 1986, Principal Guinn notified appellant in writing

that he was being placed on 60 days probation in accordance with Article VI, Section B of the PNA for failing to render efficient and competent instructional service. The letter referred to deficiencies in planning, instructional procedures, handling behavior problems, classroom organization and management, record keeping, report handling and other concerns. Pursuant to the PNA and in conformance therewith, appellant filed a grievance with Principal Guinn alleging that he was improperly evaluated in violation of Article XIX, Section F of the PNA and requested that his probation be rendered invalid. Principal Guinn notified appellant on March 3, 1986, that she agreed that a procedural error had been made and removed appellant from probationary status. On March 4, Principal Guinn, after obtaining authorization from the superintendent of schools, notified appellant that he was suspended from employment with pay in accordance with Article VI, Section C of the PNA. In a letter dated March 24, Principal Guinn stated that "the reason for your suspension is that five (5) fights occurred in your classroom prior to 12:45 p.m. on March 4, 1986. You were observed on three out of the five fights to be standing in the middle of the classroom as though you had neighter [sic] seen nor heard anything." The letter also informed him that a conference was held on the same day with a parent of one of his students who alleged that appellant threw a wastebasket at her child.

Appellant filed a grievance alleging a violation of Article VI, Section B which allows 60 contract days to remedy deficiencies in efficient and competent service. Appellant asserted that the suspension was in reprisal for the grievance filed successfully against Principal Guinn. The grievance was presented to his principal, the superintendent of schools and finally to the Little Rock District Board of Education (hereinafter the "Board"). The grievance was denied at all levels on the basis that the incidents occurring on March 4, 1986, were conduct sufficient to warrant the suspension. Pursuant to Arkansas Code Annotated § 6-17-1510(d) (1987) the decision rendered by the Board was appealed to Pulaski County Circuit Court. The trial judge, sitting as a jury, affirmed the Board's decision and dismissed the appeal. From that judgment comes this appeal.

For reversal, appellant alleges that the circuit court erred by dismissing appellant's claim that the Little Rock School District

breached the PNA. We disagree. Appellant essentially argues that under the terms of the PNA he was entitled to 60 contract days to remedy the deficiencies for which he was terminated because his actions were improperly characterized as conduct seriously prejudicial to the best interest of the school system.

Appellee argues that the Board's decision must be upheld unless it was arbitrary, capricious or discriminatory pursuant to the Teacher Fair Dismissal Act. Appellee asserts that the PNA is merely a voluntary effort on the part of the District to define the relationship between the District and its teachers. However, pursuant to Arkansas Code Annotated § 6-17-204(a) (1987) the personnel policies of each district are incorporated as terms of the employment contract and are binding upon both parties unless changed by mutual consent. Although the PNA may have been a voluntary effort on the part of the District, it is policy which is to be incorporated pursuant to the statute. The standard of arbitrary and capricious under the Teacher Fair Dismissal Act may be displaced where the incorporated policies govern the issue of teacher dismissal and expand the teacher's rights by contract. As the supreme court recently noted in *Murray* v. *Altheimer-Sherrill Public Schools*, 294 Ark. 403, 743 S.W.2d 789 (1988), as a matter of contract law and fair dealing a teacher may reasonably expect the district to comply substantially with its own declared policies even though such policies do not have the force of law. *Id.* at 410, 743 S.W.2d at 792 (quoting *Maxwell* v. *Southside School Dist.*, 273 Ark. 89, 618 S.W.2d 148 (1981)). Whether a provision of the PNA was violated in the present case is a matter of contract law, and traditional contract principles apply to teacher employment contracts. *See Maddox* v. *St. Paul School Dist.*, 16 Ark. App. 112, 697 S.W.2d 130 (1985). We will reverse only if we find, on review of the trial court's decision, that the court's findings were clearly erroneous. *Murray* at 406, 743 S.W.2d at 790.

Teacher dismissal is governed by Article VI of the PNA. The two sections of Article VI pertinent to this appeal deal with the termination and non-renewal of tenured teachers and teacher suspension. Section B regarding the termination and non-renewal of tenured teachers states in pertinent part:

1. A tenure teacher will not be discharged or non-renewed

> for arbitrary or capricious reasons or without justification. The annual contract of all teachers on tenure shall be renewed unless the following procedure has been pursued . . . .
>
> > a. Any teacher who is not rendering efficient and competent service shall be given written notice of the particular areas in which such service is considered to be inefficient and incompetent. . . . A teacher, so charged, will be given sixty (60) contract days to remedy the alleged deficiencies.

Section C, under which appellant was charged, governs teacher suspension and states in pertinent part:

> The contract of any teacher who engages in conduct seriously prejudicial to the best interest of the school system may be suspended with pay at any time. Upon suspension, the teacher will receive a list of the specific charges that led to the suspension.

Appellant alleges that he was discharged for not rendering efficient and competent "service" under Section B(1)(a) rather than "conduct" seriously prejudicial to the best interest of the school system under Section C and was thus entitled to 60 days probation. However, he offered no proof at the trial court level that the Board deviated from an established definition in classifying his deficiencies as "conduct" rather than "service." Instead, he now urges on appeal that we adopt the standard of remediation used by other jurisdictions to differentiate the two terms. The remediation standards cited are mandated by statute in the respective jurisdictions. We have no comparable statute and adoption of such standard would amount to legislating by this court.

The question of whether certain actions constituted "conduct" or inefficient "service" is one of fact to be resolved by the trier of fact; in this case, the Board. On appeal to the circuit court, the trial judge must be satisfied that there was substantial evidence to support the Board's characterization of appellant's actions as violative of Article VI Section C. In the absence of proof that the provisions were interpreted differently by the Board in this case than in others, appellant failed to meet his

burden that the provisions were violated. We cannot say that the trial court's finding that the appeal should be dismissed based upon the evidence presented is clearly erroneous.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

Donald Ray ADAMS *v.* STATE of Arkansas

CA CR 87-242 755 S.W.2d 579

Court of Appeals of Arkansas
Division II
Opinion delivered August 31, 1988

Phil Barton, for appellant.

Steve Clark, Att'y Gen., by: *Lynley Arnett*, Asst. Att'y Gen., for appellee.

BETH GLADDEN COULSON, Judge. Appellant, Donald Ray Adams, brings this appeal from a conviction of theft by receiving under Ark. Code Ann. § 5-36-106 (1987), and as an habitual offender under Ark. Code Ann. § 5-4-501 (1987). On appeal, appellant challenges his sentence of six years in the Arkansas Department of Correction, arguing that the State waived the mandatory sentence for habitual offenders by failing to object to a jury instruction which omitted a term of imprisonment.

On January 6, 1987, appellant was charged with theft by receiving, a Class C felony, and as an habitual offender, which carries a penalty for a conviction of a Class C felony of not less than six nor more than twenty years imprisonment. On March 10, 1987, a jury found appellant guilty of theft by receiving, and the trial court determined that appellant was an habitual offender. The verdict form erroneously provided an option permitting the jury merely to assess only fine not to exceed $10,000. When the form was delivered by the jury to the court, only a fine of $5,000 was indicated. Despite the fact that the deputy prosecutor had not objected to the incorrect form, the trial court, on March 12, 1987, struck the fine and imposed a sentence of six years imprisonment. From that judgment, this appeal arises.

During the sentencing phase, the trial court, after reading a jury instruction that clearly stated the jury's sentencing options were limited to either a term of imprisonment or a term of imprisonment and a fine, submitted to the jury a verdict form that contained the improper alternative penalty of only a fine. Realizing that a mistake had occurred, the court advised the attorneys for appellant and the State. The court first suggested withdrawing the erroneous verdict form but then decided, for reasons that are not clear from the record, to allow it to remain uncorrected. The deputy prosecutor observed that, while under the Habitual Offender Act one can either be imprisoned or imprisoned and fined, one "cannot be given just a fine." Nevertheless, he declined to request that a correct form be substituted, relying instead on the jurors' "common sense."

It is appellant's contention that the State, by electing not to object to the erroneous verdict form, waived the mandatory prison sentence requirement of the Habitual Offender Act. A reading of Ark. Code Ann. § 5-4-104(e)(4) (1987) reveals that

not even a judge, much less a prosecutor, can waive that requirement at least after it has been established, pursuant to the statute, that the defendant is an habitual offender.

> The court shall not suspend imposition of sentence, place the defendant on probation, *or sentence him to pay a fine* if it is determined, pursuant to § 5-4-502, that the defendant has previously been convicted of two (2) or more felonies.

Explaining the statutory language, the Arkansas Supreme Court, in *Kinsey* v. *State*, 290 Ark. 4, 716 S.W.2d 188 (1986), stated that "This sentence is a limitation on the court's exercise of leniency allowed in the first part of the statute. Read in context, it obviously means that the court is not allowed to 'only' impose a fine in place of a prison sentence when the defendant is an habitual offender." 290 Ark. at 8, 716 S.W.2d at 190.

Further, Ark. Code Ann. § 16-90-107(d) (1987) provides that:

> If the jury in any case assesses a punishment, whether of fine or imprisonment, below the limit prescribed by law for offenses of which the defendant is convicted, the court shall render judgment and pronounce sentence according to the lowest limit prescribed by law in such cases.

In the present case, the trial court pronounced a sentence of six years according to the lowest limit of the range prescribed by Ark. Code Ann. § 5-4-501(a)(4) (1987). It is within the trial court's discretion to set punishment for a defendant within the statutory range of punishment provided for in a particular crime. *Noland* v. *State*, 265 Ark. 764, 580 S.W.2d 53 (1979). The court's action was taken in order to correct its earlier error in allowing the jury to use an erroneous form.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

COLLEGE CLUB DAIRY *v.* George CARR, and State of Arkansas, Second Injury Fund

CA 88-84 756 S.W.2d 128

Court of Appeals of Arkansas
Division I
Opinion delivered September 7, 1988

Gilker & Swan, by: *Michael R. Jones*, for appellant.

James O. Strother, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes from the Arkansas Workers' Compensation Commission. Appellant, College Club Dairy, appeals from a decision of the full Commission entered January 20, 1988. We affirm.

Appellee, George Carr, sustained a right knee injury on January 2, 1985, while employed by appellant as a milk route salesman. Appellee received medical expenses and disability benefits through the first week of June, 1986. A hearing was conducted before the Administrative Law Judge on June 11,

1986, to determine appellee's eligibility for further benefits. The Administrative Law Judge entered a decision finding that appellee was barred from recovery of benefits under the doctrine of *Shippers Transport of Georgia* v. *Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979) because he failed to disclose prior knee injuries. In that case, the Arkansas Supreme Court stated:

> The following factors must be present before a false statement in an employment application will bar benefits: (1) The employee must have knowingly and wilfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury.

265 Ark. at 369, 578 S.W.2d at 234.

On appeal to the full Commission, the decision of the Administrative Law Judge was reversed and remanded. The Commission found that appellant did not meet its burden to establish that Mr. Carr knowingly and willfully misrepresented his physical condition as is required in the first factor in the *Shippers Transport* defense. Furthermore, the Commission found no causal connection as required under the third factor in *Shippers Transport*. This appeal comes from the decision of the full Commission.

Appellant makes three contentions for reversal: (1) The Workers' Compensation Commission placed an impermissibly strict limitation on the type of information an employer can elicit and evaluate concerning an employee's history of physical defects, injuries or health problems under the rule of *Shippers Transport of Georgia* v. *Stepp*; (2) The Commission erred in impermissively limiting its consideration to the claimant's false application answer, ignoring his misrepresentation during his pre-employment interview with appellant; and (3) The Commission's decision is not supported by substantial evidence and should be reversed. The arguments will be addressed together because they all essentially go to the ultimate issue of whether there is substantial evidence to support the Commission's decision that the appellant did not meet its burden of proving entitlement to the *Shippers Transport* defense.

On appeal this court is required to view the evidence in the light most favorable to the findings of the Commission and give the testimony its strongest probative value in favor of the order of the Commission. The issue on appeal is not whether the evidence would have supported a finding contrary to the one made. The question is solely whether the evidence supports the finding made by the Commission, and the decision must be upheld if supported by substantial evidence. *DeFrancisco* v. *Arkansas Kraft Corp.*, 5 Ark. App. 195, 636 S.W.2d 291 (1982). Substantial evidence has been defined as more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It is of such force and character that it would with reasonable and material certainty and precision compel a conclusion one way or another. *General Ind.* v. *Gibson*, 22 Ark. App. 217, 738 S.W.2d 104 (1987).

Appellant first argues that in its opinion, the Commission establishes an impermissibly strict new standard and burden of proof for employers not supported by authority interpreting the *Shippers Transport* defense. We disagree. The Commission found that appellant failed to prove that appellee knowingly and willfully misrepresented his physical condition on his job application wherein he answered "No" to the question, "Do you have any physical defects?" With regard to the question, the Commission stated:

> The employer knows which physical conditions or maladies would be relevant to fitness for the particular tasks he expects the applicant to perform. Therefore, employers relying upon the *Shippers Transport* affirmative defense must show that the employee was questioned in some degree regarding health history, and present condition in such a way as to elicit responses likely to be worthwhile in assessing the employee's health history, condition, and capacity for performing the employment. The question posed in this case is so general and broad that it conveys no message about any aspect of one's health that it may be germane to employability.

We cannot say that reasonable minds could not reach the conclusion of the Commission or that the application of the law to that conclusion was erroneous.

Additionally, we cannot agree with appellant's contention that the Commission ignored statements made by appellee in his pre-employment interview with appellant. Appellant bases this argument on the fact that the Commission's opinion makes no mention of the interview. The evidence of record indicates that during the interview, appellant's supervisor, Mr. Tice, explained the strenuous nature of the job and asked if appellee had any physical problems, to which appellee answered negatively. It further reveals that Mr. Tice did not ask appellee any questions regarding his physical condition, past injuries, or medical problems. The Commission had before it all evidence relating to this case. Based upon this evidence, the Commission rendered its opinion. From our review of the record, appellant has not demonstrated that the Commission did not consider the interview in reaching its decision. Viewing the evidence in the light most favorable to the Commission, we find no error in this regard.

Lastly, appellant contends that the Commission's decision is not supported by substantial evidence. The Commission found that appellant failed to meet its burden of proving willful misrepresentation under the first test in *Shippers Transport* and further that proof was lacking on the third test involving causal connection. All three tests set out above must be shown by an employer to successfully raise the *Shippers Transport* defense of misrepresentation on an employment application. *Roberts-McNutt, Inc.* v. *Williams*, 15 Ark. App. 240, 691 S.W.2d 887 (1985). Further, the party having the burden of proof on an issue must establish it by a preponderance of the evidence. Ark. Code Ann. § 11-9-704(c)(2) (1987) (formerly Ark. Stat. Ann. § 81-1323(c) (Supp. 1985)).

The evidence reveals that in 1981 appellee sustained injuries to his right knee in a noncompensable motorcycle accident. Appellee was employed in physically demanding jobs from 1981 until his on-the-job injury in 1985 without any medical attention or known work interruptions relating to knee problems. Furthermore, appellee did not receive any disability compensation for the prior injury.

The record reveals that appellee understood the question "Do you have any physical defects?" to refer to congenital defects. However, testimony adduced from Mr. Tice,

appellant's supervisor, during cross-examination reveals that he interpreted "physical defect" to mean an injury. The Commission found appellee's interpretation reasonable and once the Commission has made its decision on issues of credibility, this court is bound by that decision. *Linthicum* v. *Mar-Bax Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987). Weight and sufficiency of evidence are matters for determination by the Commission. *Central Maloney, Inc.* v. *York*, 10 Ark. App. 254, 663 S.W.2d 196 (1984). The Workers' Compensation Commission is better equipped, by specialization and experience, to analyze and translate evidence into findings of fact than we are. *Id.* The reviewing court may not set aside the Commission's decision unless it cannot conscientiously find from a review of the entire record that the evidence supporting the decision is substantial. *DeFrancisco* v. *Arkansas Kraft Corp.*, 5 Ark. App. 195, 636 S.W.2d 291 (1982).

With these considerations in mind, we find substantial evidence on which the Commission could find that appellee's failure to disclose his 1981 knee injury on his employment application was not a willful misrepresentation. For this reason, we will not reach the issue of the causal connection test because failure of proof on one part of the defense test precludes its use by an employer. *See Shippers Transport of Georgia v. Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979).

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

Berta KUNZ *v.* Louie JARNIGAN

CA 88-24 756 S.W.2d 913

Court of Appeals of Arkansas
Division I
Opinion delivered September 14, 1988

Raymond C. Smith, P.A., by: *Raymond C. Smith*, for appellant.

Larry D. Douglas, P.A., by: *Larry D. Douglas*, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal results from the chancellor's refusal to modify appellant's alimony award and determine the parties' intent regarding the termination of alimony. We affirm the chancellor on all points.

The parties were divorced on May 13, 1986. On the day of the hearing, the parties' attorneys dictated a stipulation into the record of the court, whereby appellee, Louis Jarnigan, defendant at trial, agreed to withdraw his answer and counterclaim to appellant's complaint for divorce and the parties agreed to a division of their marital property. In regard to appellee's military retirement pay, the parties' stipulation provided:

> In regards to the alimony, [appellee] is a military retiree and receiving military retirement benefits. He agrees to pay, as alimony, to [appellant] one half of that retirement check. . . . [I]n relation to this settlement, then the retirement check will be split fifty-fifty, fifty percent of it going as alimony . . . .

[There was then a discussion off the record and the stipulation continued:]

> In preparing this decree and property settlement, we will

> have to refer to Federal Regulations in regards to the terminology but it is our intent that this be alimony, at this time, and we will have to get the proper terminology and we will have to plug in however the military retirement people in Denver, Colorado, designate the payment to be made. And I take it, both parties will agree whether the check comes in as one or split between the two . . . .

At the conclusion of this agreement, appellee's attorney asked appellant if the stipulation was her agreement as stipulated and she affirmed that it was. The terms of the oral stipulation agreement were incorporated into the divorce decree and it provided in part as follows:

> 4. That a property settlement agreement which is hereby ratified by the Court is as follows:
>
> (i) [Appellee] is presently a recipient of a military retirement benefit and the [appellee] hereby agrees to pay as alimony 50% of the net military retirement benefits to [appellant], that he agrees to complete all paperwork to that designation as alimony . . . .

On February 25, 1987, appellant filed a petition to modify the divorce decree alleging that the parties intended that she receive one-half of appellee's military retirement benefits until appellee's death and that appellee had mistakenly labeled her half of the benefits as alimony. A hearing was held on appellant's motion, at the conclusion of which, the chancellor found the divorce decree reflected the parties' intent that appellant receive fifty percent of the net retirement check as alimony, that there was no misunderstanding on the part of appellant, and that there was no basis for modifying the decree. The court further stated it had grave doubts as to whether it could remake a property settlement agreement between the parties absent a showing of fraud or overreaching. The court declined to make any finding on whether appellant's alimony would terminate if she remarried, stating that because the event is uncertain, there is no question before the court upon which it can make a finding.

Appellant first argues the chancellor erred in refusing to modify the agreement to reflect that she receive one-half of appellee's gross retirement pay as her share of marital property.

She contends the parties' stipulation was not an independent agreement and was modifiable by the chancellor, and the case should be remanded to the chancellor to establish the true intentions of the parties.

In *Linehan* v. *Linehan*, 8 Ark. App. 177, 649 S.W.2d 837 (1983), we held that when a stipulation dictated into open court covers all the rights and liabilities of the parties in a total and complete agreement, it will have the full force and effect of a binding agreement, and it will not be modifiable. The stipulation in *Linehan* is similar to the stipulation in the case at bar. In *Linehan*, on the day set for the divorce hearing, the parties, through their respective attorneys, negotiated a stipulated agreement. The appellant's counsel dictated it into the record of open court, and the stipulation covered every facet of the controversy from a division of property down to visitation with the children. The divorce decree incorporated the terms of the stipulated agreement with no variances. On appeal, the appellant contended the stipulated agreement could not qualify as an independent contract because it was not in writing nor signed by the parties. This court, rejecting the appellant's contention, stated:

> Oral stipulations made in open court which are taken down by the reporter and acted upon by the parties and court are valid and binding. Such stipulations are in the nature of a contract. . . . Contractual stipulations affect the subject matter of the lawsuit. They deal with the rights or property at issue and are styled stipulations only because they occur in connection with the litigation. *Lawrence* v. *Lawrence*, 217 N.W.2d 792 (N.D. 1974).
>
> . . . A contractual stipulation can only be withdrawn on grounds for nullifying a contract, i.e., fraud, misrepresentation.

Linehan, 8 Ark. App. at 180-81, 649 S.W.2d at 839.

In the case at bar, appellee's attorney dictated the stipulation into the record of the court. The stipulation withdrew appellee's contest of the divorce and provided in detail for a division of the parties' property. At the conclusion of the stipulation, both parties were asked if the stipulation reflected their agreement and they affirmed that it did. The stipulation was

a complete settlement of the parties' marital rights and was not modifiable by the court.

Furthermore, even if the stipulation was subject to modification, we do not find the chancellor erred in failing to do so. Appellant, at the modification hearing, testified that it was her understanding that she would receive one-half of appellee's military retirement benefits as property and not alimony, but that she did not care what it was called as long as she received half of the benefits. She stated she agreed to the stipulated property agreement, but she did not understand it. She stated that when she received the proposed decree with the alimony wording in it she voiced her opposition to her attorney but did not file an objection. Appellant's attorney who represented her at the time the stipulation was dictated but was relieved as her attorney prior to the decree being entered testified that, at the time of the stipulation, he could not recall that it was the parties' intention that her share of the retirement benefits be considered alimony. Appellee testified he specifically requested his attorney to use the term alimony in the stipulation, because it was not his intention to pay permanent alimony but for it to terminate upon appellant's remarriage.

At the conclusion of the hearing, the chancellor stated he was wholly persuaded appellant was not misled nor did she misunderstand, and it was entirely clear from the beginning that the parties intended and expressed that appellee's military retirement benefits should be received by appellant as alimony. He also found that throughout the divorce appellant was represented by or consulted with four separate attorneys and it could not be said that appellant did not have the full opportunity to be informed about the matter.

■ We review chancery cases *de novo* on appeal and the chancellor's findings of fact will not be reversed unless they are clearly against the preponderance of the evidence; we give due regard to the chancellor's superior opportunity to assess the credibility of the witnesses. *Kesterson* v. *Kesterson*, 21 Ark. App. 287, 731 S.W.2d 786 (1987).

■ Appellant further argues that the chancellor erred in not finding her alimony should be based upon fifty percent of appellee's *gross* retirement pay. The chancellor noted that the

wording of the decree, "[appellee] hereby agrees to pay as alimony 50% of the net military benefits to the [appellant]," differed from the wording of the stipulation, "[appellee] agrees to pay, as alimony, to [appellant], one half of that retirement check." The chancellor concluded, however, there was no substantial difference between the decree and stipulation, because under both wordings the alimony would be based upon one-half of the money received by appellee after all the deductions had been subtracted. We agree with the chancellor's conclusion that, in terms of the dollar amount, the stipulation and decree are the same.

Appellant also contends that the exact amount of the deductions which appellee can elect to withhold from his check should be set to prevent appellee from receiving a windfall by electing to have a larger amount of his check withheld. The chancellor found the decree and stipulation both provided for appellant to receive one-half of appellee's *net* retirement benefit, i.e., one-half of appellee's retirement check as alimony. There is no provision in the stipulation or decree that appellee is not to have deductions withheld from his gross military retirement pay nor do they provide that appellee's pay is to be split and deductions withheld only from appellee's portion. While we agree with appellant that appellee could have a larger amount withheld from his check in order to reduce the alimony she receives, it is clear from the parties' actions that this is not their intent; and there is no evidence appellee has attempted to do so. We therefore find it unnecessary to interpret the parties' contract where there is no evidence of bad faith or breach on the part of appellee.

We also find no error in the chancellor's refusal to determine whether appellant's entitlement to alimony would terminate in the event she remarried. Normally, remarriage is a sufficient basis to terminate alimony. *McGaugh* v. *McGaugh*, 19 Ark. App. 348, 721 S.W.2d 677 (1986). However, remarriage of an ex-spouse does not automatically terminate the obligation as there are circumstances under which continued payment to the ex-spouse may be warranted. *Frawley* v. *Smith*, 3 Ark. App. 74, 622 S.W.2d 194 (1981). At the time of the hearing appellant had not remarried and the chancellor held the question was not properly before the court.

The case of *McGaugh*, relied on by appellant, is distinguishable from the case at bar. There, this court reversed and remanded the case to the chancellor to consider evidence showing when the parties intended for the appellee's alimony to terminate. Although it is not apparent from reading *McGaugh*, the record filed in this court demonstrates that the appellee in *McGaugh* had remarried at the time the appellant sought a modification of the divorce decree. Here, appellant had not remarried when she sought a determination from the chancellor; therefore, the issue was premature and not properly before the court. To make a determination under this fact situation would have been tantamount to issuing an advisory opinion, which courts are prohibited from doing. *See Traveler's Indem. Co.* v. *Olive's Sporting Goods, Inc.*, 25 Ark. App. 81, 753 S.W.2d 284 (1988).

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

Everett CRUTCHFIELD *v.* STATE of Arkansas

CA CR 87-190 763 S.W.2d 94

Court of Appeals of Arkansas
Division I
Substituted Opinion on Denial of Rehearing
October 12, 1988

Pruitt & Hodnett, by: *Roger T. Jeremiah*, for appellant.

Steve Clark, Att'y Gen., by: *R.B. Friedlander*, Solicitor General, for appellee.

GEORGE K. CRACRAFT, Judge. Everett Crutchfield appeals from his conviction of the crimes of attempted kidnapping and being a felon in possession of a firearm for which he was sentenced to concurrent terms of ten and three years in the Arkansas Department of Correction. On appeal he argues several points for reversal. We find no merit in any of them and affirm the judgment of the trial court.

Appellant first contends that the trial court erred in denying his motion for a directed verdict because there was insufficient evidence to sustain these convictions. He does not contend that the State's evidence did not establish that the offenses charged had occurred, but only that the finding that he was the perpetrator of those crimes is not supported by substantial evidence.

On appeal from a jury verdict, the evidence is viewed in the light most favorable to the State and the verdict affirmed if there is substantial evidence to support it. Evidence is substantial if the jury could have reached the conclusion without having to resort to speculation or conjecture. In this review, we need only consider testimony lending support to the verdict and may disregard any testimony that could have been rejected by the jury on the basis of credibility. *Hill* v. *State*, 285 Ark. 77, 685 S.W.2d 495 (1985); *Chaviers* v. *State*, 267 Ark. 6, 588 S.W.2d 434 (1979).

After testifying to the events constituting the offenses for which the appellant was charged, the victim positively identified appellant as the person who had attempted to abduct her at gunpoint and who had fired several shots at her after she escaped. In support of his defense of alibi, the appellant offered the testimony of a number of persons who stated that at the time

these events occurred the appellant was in Port Aransas, Texas. Some of these witnesses were relatives and others were friends. We agree that if their testimony had been accepted as true by the jury the appellant could have been acquitted. However, the jury may accept or reject any or all of any witness's testimony and is entitled to accept as true only that part of the evidence it believes to be more credible and worthy of belief. It was not bound to believe appellant's witnesses. *Hamilton* v. *State*, 262 Ark. 366, 556 S.W.2d 884 (1977). We cannot conclude that the jury's finding that appellant was the person who attempted to abduct the victim is not supported by substantial evidence.

Appellant next contends that the identification testimony of the victim was the result of an unduly prejudicial, defective identification procedure and was impermissibly suggestive. Suppression of an in-court identification is not warranted unless the pretrial identification procedure was so suggestive as to create a substantial likelihood of irreparable misidentification. *Forgy* v. *State*, 16 Ark. App. 76, 697 S.W.2d 126 (1985). *See also Martinez* v. *State*, 269 Ark. 231, 601 S.W.2d 576 (1980). At the hearing on the motion to suppress, the victim testified that she had a good opportunity to see and observe the appellant during the attack. Immediately after the attack, she furnished the officers with a detailed description of him and informed them of distinctive, recognizable decay of her attacker's teeth and that he had one protruding tooth. She stated that at the time of the attack she thought he said, "You are not Shelia," but that he at least said something about "Shelia."

Based on this and other information, the police officers then questioned Shelia Suttles, who informed the officers that the description furnished them by the victim was that of the appellant, who at one time had been Ms. Suttles' brother-in-law and with whom she had had numerous encounters. She furnished the officers with two photographs of the appellant from an album. The police officers then exhibited one to the victim. The victim stated that it "looks like" the man, but pointed out that her attacker had facial hair whereas the man in the photograph did not. The officers then photocopied the photograph and penciled in facial hair as the victim had described it. She then positively identified that photograph as being a photograph of the person who had attacked her. A day or two later, she again identified the

appellant as her attacker from a six-photo spread. At trial she stated that she had not been coached by the officers at the prior identifications and that there was no doubt in her mind that the appellant was the person who attacked her. At the time she identified him in the courtroom, she stated she was basing her identification on her observation at the time of the attack and not upon the photographs or any suggestions made by the police officers.

We have declared that the factors to be considered in testing the reliability of a pretrial identification include the opportunity of the witness to view the criminal at the time of the crime; the witness's degree of attention; the accuracy of any prior description of the criminal; the level of certainty demonstrated by the witness at the time of confrontation; and the length of time between the crime and the confrontation. *Whitt* v. *State*, 281 Ark. 466, 664 S.W.2d 876 (1984). The evidence shows that the victim had ample opportunity to view the appellant at the time of the crime and was able to give a detailed description of the person immediately after the crime. There is nothing to indicate that that description was other than accurate. She positively identified the appellant as her attacker in the initial photographs and from a photo line-up within a matter of days after the crime, with no suggestion or encouragement from the police to do so.

It is for a trial court to determine if there are sufficient aspects of reliability surrounding an identification to permit its use in evidence, and then it is for the jury to determine what weight the identification testimony should be given. *Wilson* v. *State*, 282 Ark. 551, 669 S.W.2d 889 (1984); *Forgy* v. *State, supra*. We cannot conclude from this record that the trial court erred in its determination that there were sufficient aspects of reliability surrounding this identification to permit its use in evidence.

At trial Shelia Suttles testified, over appellant's objection, that the appellant had for several years been infatuated with her and over a period of time had made telephone calls professing his love for her. She stated that the appellant had followed her around and had gotten "physical" in his advances toward her "three or four" times. The last of these attacks had occurred two years previously, when appellant broke into Ms. Suttles' home

and threatened and choked her. She stated, however, that the telephone calls from appellant had continued up until "March of this year." Ms. Suttles also testified that in the summer months she rode a bicycle over a nine-mile course every afternoon at about the same hour and that this route passed the point at which the attack was made on the victim.

Appellant's motion for a mistrial was denied. The court ruled that the testimony was relevant for the purpose of showing intent, motive, and identification of the appellant. The appellant contends that the trial court erred in not granting his motion for a mistrial because the evidence could only have been admitted to show that the appellant was a bad man, was too remote in time to be considered, and was not relevant to the instance for which the trial was being had. We do not agree. Rule 404(b) of the Arkansas Rules of Evidence provides that evidence of other acts may not be admitted merely to prove the character of a person in order to show that he acted in conformity with that trait of character at the time in question. However, it also provides that such evidence may be admitted for the purpose of proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. To be admissible under this rule, the evidence must be independently relevant and its probative value must not be substantially outweighed by the danger of unfair prejudice.

This evidence was relevant. The victim did not personally know the appellant and was unable to give a motive for the attack. Proof of one's purpose or motive for an abduction is an essential element of the offense of kidnapping, *see* Ark. Code Ann. § 5-11-102(a) (1987) (formerly Ark. Stat. Ann. § 41-1702(1) (Repl. 1977)), and proof of the identity of the assailant is essential to conviction. There was evidence that this victim was attacked while riding a bicycle at a place where Shelia Suttles regularly rode a bicycle. He had attacked and threatened Ms. Suttles because she had spurned his affections. There was evidence that at the time of the attack appellant had referred to the victim as, or made some reference to a person named, Shelia. The appellant had placed his identity in issue by offering an alibi as his sole defense. As he had questioned the victim's identification of him, this evidence was independently relevant to establish

that fact, as well as the fact that the appellant had attempted to abduct her to avenge his unrequited love for Shelia. We also note that the trial court on its own motion offered to and did give a limiting instruction to the jury as to the purposes for which that evidence could be considered. From our review of the facts and circumstances surrounding the admission of that testimony, we cannot conclude that the trial court erred in admitting it for the limited purposes we have discussed.

During the cross-examination of appellant, the prosecuting attorney asked him if a particular individual had not visited him while he was in jail. The appellant moved for a mistrial, which was denied. He argues that this testimony so prejudiced him that he could not receive a fair trial and deprived him of his due process rights. The appellant does not point to us wherein he was prejudiced by that testimony or how it was a significant factor in his conviction. Our courts have held that facts indicating incarceration are not prejudicial per se and that prejudice is not presumed where there is nothing to indicate what impression may or may not have been made on the jurors by the remark and where the appellant offers no proof of prejudice. *Hill* v. *State*, 285 Ark. 77, 685 S.W.2d 495 (1985). The defendant must bear the burden of affirmatively demonstrating prejudice and appellant has failed in that burden.

Appellant finally contends that the trial court erred in limiting the closing arguments to twenty-five minutes per side. Trial courts have inherent power to govern and control the orderly progress of trials, and it is within the sound discretion of the court to limit the time for argument by counsel. It is well settled that the range as well as the length of arguments must necessarily be left up to the discretion of the trial judge and the exercise of that discretion will not be disturbed unless it is manifestly abused to the prejudice of the parties. *Ethridge* v. *State*, 9 Ark. App. 111, 654 S.W.2d 595 (1983); *Kelley* v. *State*, 7 Ark. App. 130, 644 S.W.2d 638 (1983). The appellant here does not point out to us what arguments he was unable to cover during the period provided by the court or any manner in which he might have been prejudiced by the court's ruling. The only issues before the court were the identity of the appellant and the question of his alibi.

Although a number of witnesses and exhibits were introduced in support of those positions, we cannot conclude that the trial court abused its discretion or that prejudice resulted from the limitation on argument placed by the trial court.

Affirmed.

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

Jimmy Dale GRAHAM *v.* STATE of Arkansas

CA CR 88-32 756 S.W.2d 921

Court of Appeals of Arkansas
Division II
Opinion delivered September 14, 1988

WQ Hall, for appellant.

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

MELVIN MAYFIELD, Judge. The appellant in this case was convicted in the Elkins Municipal Court for driving while intoxicated. On appeal to circuit court, he was again convicted. In his appeal to this court, the appellant argues that the City of Elkins could not be the plaintiff in a criminal prosecution for violation of a state law; that it could not be the plaintiff in a case where the offense occurred outside the city limits; and that the circuit court had no jurisdiction to change the plaintiff to the State of Arkansas in the appeal from municipal court. We do not agree, and we affirm the conviction.

By stipulation, the record shows that on January 25, 1987, at approximately 2:18 a.m., appellant was westbound on Highway 45 near Goshen, Arkansas, and Washington County Deputy Otis Harris was eastbound on the same road. As Deputy Harris approached appellant's vehicle, he observed appellant's car cross the center line of the road, move back to the right side, then go off onto the shoulder of the road. Deputy Harris turned around and followed appellant's car for a short time. He observed it cross the center line again, and saw it sway in the east-bound lane as it traveled east. Harris stopped appellant and noticed a strong odor of alcohol about him. Appellant admitted he had consumed a "couple of beers." Harris administered field sobriety tests which appellant failed. He was then taken to the Washington County Sheriff's Office and given a breathalyzer test.

The stipulation states that appellant's rights were read to him and that the breathalyzer test was administered on a properly certified and standardized machine by an officer certified to perform the test. Appellant registered 0.15%. He was found guilty of DWI and sentenced to pay a fine of $150.00, court costs of $306.75, his driver's license was suspended for 90 days and he was ordered to attend safe driving school. We take judicial notice that the City of Elkins is in Washington County, and it is stipulated that appellant was arrested in that county but outside the city limits of Elkins.

In his appeal to this court appellant first argues that the City of Elkins cannot be plaintiff in a criminal prosecution for violation of state law because Rule 1.5 of the Arkansas Rules of Criminal

Procedure provides:

> All prosecutions for violations of the criminal laws of this state shall be in the name of the State of Arkansas, provided that this rule shall in no way affect the distribution, as provided by law, of moneys collected by municipal courts.

The Arkansas Supreme Court recently considered this issue in *Urich* v. *State*, 293 Ark. 246, 737 S.W.2d 155 (1987).

> That municipal courts may exercise jurisdiction over state misdemeanor violations is settled law. Article 7, § 1 of the Arkansas Constitution provides:
>
> > The judicial power of the State shall be vested in one Supreme Court, in circuit courts, in county and probate courts, and in justices of the peace. The General Assembly may also vest such jurisdiction as may be deemed necessary in municipal corporation courts . . . .
>
> Ark. Stat. Ann. § 22-702 establishes municipal courts and § 22-709 grants jurisdiction to municipal courts over misdemeanors.
>
> The same issue was raised in *Ex Parte Hornsby*, 228 Ark. 975, 311 S.W.2d 529 (1958), where the petitioner was convicted in municipal court of violating a state DWI statute. We found the argument without merit, citing Ark. Stat. Ann. § 22-709.

293 Ark. at 247. It would have been correct to have styled this case in municipal court as "State of Arkansas v. Jimmy Dale Graham" and this might have prevented this appeal; however, the style naming the plaintiff as the "City of Elkins" did not affect the court's jurisdiction to try the crime charged.

Next, appellant argues that the City of Elkins cannot be the plaintiff in a case where the offense happened outside its city limits. It was stipulated that appellant was arrested in rural Washington County. The first sentence of Ark. Stat. Ann. § 22-709 (Repl. 1962) [Ark. Code Ann. § 16-17-206(d) (1987)] provides:

> The municipal courts shall have original jurisdiction coextensive with the county wherein the said court is situated . . . .

See also, Horn v. *State*, 282 Ark. 75, 665 S.W.2d 880 (1984).

Finally, appellant argues that the circuit court had no jurisdiction to change plaintiffs in an appeal from a municipal court. Actually, the real party in interest was not changed because the city, county and state were each interested in the prosecution of the crime. Furthermore, the Constitution of the State of Arkansas, Article 7, § 14 provides that:

> The circuit courts shall exercise a superintending control and appellate jurisdiction over county, probate, court of common pleas and corporation courts and justices of the peace, and shall have power to issue, hear and determine all the necessary writs to carry into effect their general and specific powers, any of which writs may be issued upon order of the judge of the appropriate court in vacation.

Thus, the circuit court had jurisdiction to try this case and the style of its judgment "State of Arkansas, County of Washington" was proper.

Affirmed.

COOPER and COULSON, JJ., agree.

Helen WADE *v.* MR. C. CAVENAUGH'S, and Cigna Insurance Company

CA 88-30 756 S.W.2d 923

Court of Appeals of Arkansas
Division II
Opinion delivered September 14, 1988

Riffel, King and Smith, by: *Kirby Riffel*, for appellant.

Friday, Eldredge & Clark, by: *Elizabeth J. Robben*, for appellee.

BETH GLADDEN COULSON, Judge. This appeal comes from the Arkansas Workers' Compensation Commission. Appellant, Helen Wade, appeals the Commission's decision rendered on October 12, 1987, finding that she is not entitled to workers' compensation benefits for psychiatric treatments and disability that she claims were caused by a compensable injury she received when the store where she was working was robbed. We remand.

On October 12, 1985, appellant was employed as a clerk in the Mr. C. Cavenaugh's convenience store in Black Rock. During the early morning hours, two men robbed the store. One of the men punched appellant on the left side of the face, knocking her down and rendering her momentarily unconscious. After police interviewed her about the robbery, appellant finished her shift, but after she returned home appellant had a friend take her to a hospital emergency room. She was examined by a physician and also treated by a dentist. On October 13, 1985, the dentist treated her for pain and inability to open her mouth because of injury from the blow to her face. On October 15, 1985, appellant was examined by the dentist, and on this occasion appellant also complained of reduced vision in her left eye. On October 21, 1985, the dentist examined appellant again and released her to return to work.

Appellant worked from October 23, 1985, until November 10, 1985, when she was fired. There was testimony that appellant's termination resulted from three cash shortages. However, the record contains testimony of a store bookkeeper who said that appellant was one of several employees who had cash shortages, and at least one of her shortages could be explained as resulting from an improper tallying procedure, not because any money was missing. On November 19, 1985, appellant returned to the dentist and complained of pain in her jaw and reduced vision in her left eye. The dentist concluded that appellant should be examined by physicians.

Several physicians examined appellant for her vision problem, but none of the doctors could find any physical basis for it. Dr. Walter Jay, an opthamologist, found no organic abnormality affecting appellant's vision and recommended psychological evaluation. A psychologist administered the Minnesota Multiphasic Personality Inventory (MMPI). Appellant's personality profile was normal. The MMPI profile did not indicate a conversion disorder related to physical injuries. Dr. Jay recommended that appellant obtain psychiatric treatment closer to her home, and she became a patient of Dr. Edward Price, a psychoanalyst at Jonesboro.

Appellees paid for appellant's medical treatment until March 1986, including her initial evaluation by Dr. Price, but refused to pay for further treatment, controverting appellant's claim for additional temporary total disability benefits and medical benefits. After two hearings, an administrative law judge denied appellant's request for additional benefits. The Commission affirmed the law judge's decision. The Commission found that appellant had failed to prove a causal connection between the compensable injury received during the robbery and the disability and additional benefits appellant claimed after her employment was terminated. Although the Commission found that appellant was upset by the robbery, it found that her emotional reaction did not rise to the level of a psychiatric problem or the level of disability within the meaning of Ark. Code Ann. § 11-9-102(5) (1987) [formerly Ark. Stat. Ann. § 81-1302(e) (Repl. 1976)].

Appellant's five arguments for reversal may be condensed to the following three points: (1) that the Commission erred in not giving the claimant the benefit of the doubt of all factual determinations, (2) that the Commission's findings were not based on substantial evidence, and (3) that any pre-existing injury did not disqualify appellant's claim.

Appellant's argument that the Commission erred by not giving her the benefit of the doubt lacks merit. Act 10 of 1986 states in part that the Commission must "weigh the evidence impartially and without giving the benefit of the doubt to any party" when determining whether a party has met the burden of proof on an issue. This court recently addressed that issue. *See*

Marrable v. *Southern LP Gas, Inc.*, 25 Ark. App. 1, 751 S.W.2d 15 (1988).

Appellant has two arguments that we find persuasive concerning the basis of the Commission's decision. Appellant argues that the Commission should be reversed because its opinion states that it found "significant" that during the hearing before the law judge, appellant became upset and cried while testifying about being denied unemployment benefits and other related problems, but "not while describing the robbery." The only way the Commission could make that determination would be to rely upon the statement in the law judge's opinion or to rely upon statements in the transcript made by the court reporter and by the attorneys. In the first place, we do not believe those statements will support the Commission's finding; certainly not the finding that appellant did not become upset and cry "while describing the robbery." In the second place, the Commission's finding about the claimant's physical reactions during her testimony before the law judge is not a matter that the Commission can see or judge for itself. It is well settled that the Commission must weigh the credibility of the witnesses and that appellate courts are not at liberty to judge the witnesses' credibility on review. *Dena Construction Company* v. *Herndon*, 264 Ark. 791, 575 S.W.2d 155 (1979). Despite the deference this court must grant to the Commission in determining witnesses' credibility, we cannot allow the Commission to reach outside the record for facts that may or may not exist. Twenty-five years ago the Supreme Court of Arkansas held that "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 ruling of the Referee." *Moss* v. *El Dorado Drilling Company*, 237 Ark. 80, 371 S.W.2d 528 (1963). This rule still applies. *Dedmon* v. *Dillard Department Stores, Inc.*, 3 Ark. App. 108, 623 S.W.2d 207 (1981). We hold that in the instant case the Commission was not performing its duty, as set out in *Moss, supra*, by reaching a conclusion based on matters that it is not in a position to evaluate for itself.

Appellee correctly states that this court must view the evidence in the light most favorable to the findings of the Commission and that our standard of review is whether the Commission's decision is supported by substantial evidence. *City*

of Fayetteville v. *Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Those standards must not totally insulate the Commission from judicial review and render this court's function in these cases meaningless. We will reverse a decision of the Commission where convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the Commission. *Boyd* v. *General Industries*, 22 Ark. App. 103, 733 S.W.2d 750 (1987). In the instant case, we cannot say that fair-minded persons would have reached the same conclusion about the "significant" factor of when appellant became upset while testifying and how that factor related to her credibility and to the cause of appellant's emotional problems.

Appellant also contends that the Commission erroneously characterized the testimony of appellant's psychiatrist, Dr. Price, concerning his opinion about the cause of appellant's emotional problems. In support of its conclusion that appellant's emotional problems were not causally linked to the robbery, the Commission stated:

> The preponderance of the evidence in the record is that even if Wade is too traumatized to work and in need of psychotherapy, the emotional problems stem not from the robbery but from the firing and accusations regarding the alleged cash shortages and the denial of benefits by the Employment Security Division. Not only do these other matters figure much more prominently in Dr. Price's reports and testimony, but we find it significant that Wade became distraught and began crying during the hearing before the Administrative Law Judge when questioned about the ESD problems but not while describing the robbery. . .

Although the Commission's opinion is correct in stating the rule from *Wilson & Company* v. *Christman*, 244 Ark. 132, 424 S.W.2d 863 (1968) that a physician's opinion is not conclusive or binding on the Commission, an administrative body like the Commission is not granted leeway to arbitrarily disregard a witness's testimony. *See Richards* v. *Daniels*, 1 Ark. App. 331, 615 S.W.2d 399 (1981). Even when questioned by appellee's attorney about the cause of appellant's difficulties, Dr. Price testified that appellant's legal problems since being fired were a

"provocative factor" but not the cause of her emotional problems. Dr. Price stated several times that his medical opinion was that the robbery was the cause of appellant's difficulties.

Appellant's final point is that she should not be denied additional workers' compensation benefits merely because of evidence that she had eye problems that pre-existed her compensable injury. Appellant correctly states the rule that when a pre-existing injury is aggravated by a later compensable injury, compensation is in order. *Henson* v. *Club Products*, 22 Ark. App. 136, 736 S.W.2d 290 (1987). However, a claimant must prove that a compensable injury is the cause of any aggravation to a pre-existing injury. *Id.*

For the reasons discussed, we remand for the Commission to make a new decision in keeping with this opinion.

Remanded.

MAYFIELD and COOPER, JJ., agree.

L.J. KELLETT, Larry Kellett and Karen Kellett *v.* POCAHONTAS FEDERAL SAVINGS & LOAN ASSOCIATION

CA 88-103 756 S.W.2d 926

Court of Appeals of Arkansas
Division I
Opinion delivered September 21, 1988

Fulkerson & Todd, P.A., by: *Michael E. Todd*, for appellants.

Riffel, King and Smith, by: *Philip G. Smith*, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us

from Randolph County Chancery Court. Appellants, L.J., Larry, and Karen Kellett, appeal from a judgment entered in favor of appellee, Pocahontas Federal Savings and Loan Association. We affirm.

Appellants received a loan from appellee in the amount of $125,134.79 and executed a promissory note for the sum bearing interest from maturity at the rate of 13% per annum, payable at $141,357.74 on April 24, 1986. A mortgage with a power of sale, financing statement and security agreement were executed, delivered and filed to secure the note. The appellants defaulted and on January 26, 1987, a decree of foreclosure was filed in favor of appellee, appointing a commissioner and ordering a sale of the security. Proof of Publication was filed February 27, 1987. A public sale was held on March 17, 1987 and appellee purchased the real property for a price of $75,000. The personal property was also sold, the facts of which are not pertinent to this appeal. On March 22, 1987, the court approved and confirmed the sale. A petition for a deficiency judgment was filed and granted in the amount of $59,225.46 plus interest. The Commissioner's Deed was filed of record March 20, 1987. On June 23, 1987, appellants moved to have the deficiency judgment, order approving sale, report of sale, and sale of property set aside. The chancellor denied the motion but reduced the deficiency judgment by $12,500 to reflect a sale by appellee to a third party for $87,500 on the same day of the public sale, in accord with appellee's usual policy. It is from the denial of the motion that appellants appeal.

For reversal, appellants argue that the court erred in denying their motion since there was evidence of irregularities in the public sale of their property and since the property was sold for a grossly inadequate sale price.

■ In judicial sales the court is the vendor, and in the exercise of sound judicial discretion, it may confirm or refuse to confirm a sale made under its order. *Campbell* v. *Campbell*, 20 Ark. App. 170, 725 S.W.2d 585 (1987). In determining whether the chancellor abused his discretion, the appellate court does not substitute its decision for that of the trial court but merely reviews the case to see whether the decision was within the latitude of the decisions that the court could make in a case like the one being reviewed. *Id.*

Appellants argue that the chancellor abused his discretion in failing to set aside the judicial sale because of alleged irregularities. The record reflects that prior to the judicial sale, appellee's representative, Rex Tyler, engaged in a conversation with Gilbert Burgess regarding the sale of the subject property. Appellants contend that through this conversation appellee engaged in conduct tending to discourage Mr. Burgess from bidding on the subject property. Evidence was also presented that on the day of the judicial sale, appellee sold the subject property to Larry Carter and Darrell Johnson jointly for a price of $87,500. Carter and Johnson divided the property into three parcels and sold it for a total of $100,000 approximately one month later. However, there was no evidence that Carter and Johnson or the subsequent purchasers were discouraged from bidding or that other irregularities existed with regard to their purchases. Their testimony appears to be relevant only on the issue of adequacy of price.

Judicial sales are not to be treated lightly, and to give them a certain desired stability, the court should not refuse to confirm a sale for mere inadequacy of price. *Campbell*, 20 Ark. App. at 171, 725 S.W.2d at 586. When great inadequacy of price is shown, the courts will seize upon slight circumstances to go along with the inadequacy of price and justify a refusal to approve the sale. *Looper* v. *Madison Guar. Sav. & Loan Ass'n*, 292 Ark. 225, 729 S.W.2d 156 (1987).

Appellants contend that $75,000 was an inadequate sale price for the property. Thus, the issue for appeal is whether the chancellor's finding that the price received was adequate, is clearly erroneous. We first note that appellants actually received credit for an $87,500 sale price to reflect the subsequent sale to Carter and Johnson on the same day as the sale. Therefore, the focus is upon the adequacy of $87,500. No fixed formula exists or can exist to determine what is an inadequate sale price. *See Looper*, 292 Ark. at 227, 729 S.W.2d at 157. The chancellor heard testimony from several witnesses regarding the value of the property, ranging from $75,000 to $138,000. The $75,000 price was bid at a sale well attended by the public. The value of the property was a question of fact for the chancellor and the sale price fell within the range of testimony presented. The chancellor specifically stated that the evidence of the adequacy of the sale price was conflicting, but found by a preponderance of the

evidence that the price received at the public sale was not inadequate. Factual determinations by the chancellor must be upheld unless clearly erroneous. Ark. R. Civ. P. 52(a). All relevant evidence was before the chancellor and we cannot say that his finding that the price was not inadequate, is clearly erroneous. Having failed to show an inadequate sale price, the issue of fraud or irregularities is irrelevant in the case at bar. Mr. Burgess, the purchaser who the appellants contend was discouraged from bidding by appellee's representative, testified that he was willing to pay between $80,000 and $85,000 for the subject property. Appellants received the benefit of a sale price of $87,500, which was more than Mr. Burgess was willing to pay. We cannot see how any alleged irregularities adversely affected the appellants, as they failed to show that a price higher than $87,500 would have been received absent the alleged irregularities.

In reviewing the exercise of discretion, the test is whether the ordinary, reasonable, prudent judge, under all the facts and circumstances before him, would have reached the conclusion that was reached. *Looper*, 292 Ark. at 234, 729 S.W.2d at 160. Viewed in that light, we cannot say that the chancellor abused his discretion in denying appellant's motion to set aside the sale.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

ARKANSAS DEPARTMENT OF HUMAN SERVICES
v. Donnie Ray SHIPMAN

CA 87-449 756 S.W.2d 930

Court of Appeals of Arkansas
Division I
Opinion delivered September 21, 1988

Debby Thetford Nye, General Counsel, for appellant.

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

GEORGE K. CRACRAFT, Judge. In 1971, Donna Shipman, then less than a year old, was placed in foster care by order of the juvenile court of Perry County. In late 1986, she had moved into the home of Edwin and Jerreld Boudra, who had been social workers at the orphanage in which she had originally resided but had never been appointed her guardians or custodians. In March of 1987, Donna requested that she be permitted to reside permanently in the home of a sister in Chicago, Illinois. The Arkansas Department of Human Services (Department) was requested by the Boudras to assist them in obtaining the necessary order to comply with her request. The petition was filed by the Department in the Probate Court of Perry County to accomplish that purpose.

At a March 20, 1987, hearing on the petition it was agreed by the parties and the court that before a permanent change of residence was ordered the Department should provide round-trip transportation for the child for a summer visit of six weeks or less with the sister in Chicago to determine if her desire was genuine. It was determined that if after that time she still desired to live in Chicago a permanent order would be considered at a hearing to be held in August.

The trial court ordered that temporary custody be placed in the Boudras, that the Department provide the necessary transportation for the trip and request home studies of the minor's two sisters in Chicago from the appropriate agency in the State of Illinois, and that the child not be permitted to leave until a favorable report on the home of at least one sister was received. The court stated that the petition for a permanent change of

residence would be considered after the summer visit. The court further stated that, before the permanent change was effected, the Department should have obtained such necessary medical, dental, and orthodontic examinations, to enable the child to go to Chicago with her medical treatment and records completely up to date. A written order was prepared by the attorney for the Department and entered by the court on April 7, 1987, containing all those directives except a specific provision concerning the medical records at the time of any permanent transfer. The order merely provided that the Department should provide "Protective Services," a term the attorney understood to encompass any services the child might need and an order which would enable the Department to obtain the necessary funding for those services.

The minor went to Chicago on June 22 and returned on July 25, stating that she had changed her mind and wished to continue to reside in the home of the Boudras.

At a hearing held on August 21, 1987, the Department announced to the court the child's determination to remain in Arkansas and asked that the order directing Protective Services and naming the Boudras as the custodians of the child be continued. The court announced that it would hold a hearing to determine whether there had been compliance with its order of April 7. After a short hearing the court summarily adjudged two Department social workers and its attorney in criminal contempt and ordered them incarcerated in the county jail until they made specific monetary deposits with the clerk or sheriff. He indicated that he would, however, continue the custodial arrangement with the Boudras and the order that the agency furnish the child with the necessary Protective Services including necessary medical and dental services.

Although the court ordered the attorney for the Department to prepare a precedent for entry on those orders and present it to him by August 27, the court instead prepared and signed its own order holding the parties in contempt on August 26. It rejected the order submitted by the appellant's attorney, filed its order holding the Department employees in contempt on August 28, and entered its own order on the merits on September 4. Both orders of the court contained findings that the Department had failed to comply with the court's previous orders to obtain home

studies on both of the minor's sisters in the State of Illinois, and obtained a written report on only one of them. It found that the previous order failed to reflect its orders for medical, dental, and orthodontic examinations and that this failure resulted in neither medical nor orthodontic examinations being performed. It further found that the Department did not offer appropriate services to the minor. The three persons held in contempt were unaware that the separate order of contempt had been filed on August 28, and a notice of appeal from the order of September 4, 1987, was filed. The notice of appeal was on behalf of the Department and made no mention of the two social workers or the attorney or that they wished to appeal from an order holding them in contempt.

On appeal the Department contends that the recited findings contained in the order of September 4, are not supported by the evidence and are clearly erroneous. The only evidence in the record on the subject of home studies reflects that the Department did request, and obtain in writing, a favorable report on the home of one sister before the minor departed. Both social workers testified that they had requested additional home studies on both homes and had been verbally informed by the Illinois agency that the conditions in both homes were favorable for the visitation. They testified that, although they indicated that both home studies were urgently needed, they were informed that due to the Illinois agency's heavy work load a written report could not be transmitted for four or five months but that one would follow. There was no competent evidence that would support a finding that the failure to obtain the written reports on both homes was due to any fault or neglect on the part of the social workers. Rather, it is clear that the only finding the evidence would support is that the failure was due solely to the inability of the corresponding agency in Illinois to complete the work requested by the Department pursuant to the court's order.

Nor was there any evidence to support a finding that the medical and orthodontic examinations had not been performed. At the March hearing the court specifically directed that at the time the child permanently moved to Chicago her medical records should be up to date, including an orthodontic examination and such orthodontic treatment as may be found necessary. The child never moved to Chicago permanently. There was evidence that immediately upon returning from her summer visit

she was examined by her regular physician and treated by a dentist. The dentist performed some dental work, scheduled an appointment for additional work, and reported that the child was not a proper candidate for orthodontic treatment because her teeth did not contain enough "points." Her custodian testified that the Department had provided for all of the necessary medical and dental needs.

While we agree that the trial court's findings as to any alleged failure by the Department in the performance of its duties are wholly unsupported by any competent evidence, the error does not warrant reversal. The Department petitioned the probate court to appoint the Boudras as the continuing custodians of the child and to continue its order that the Department provide the child with Protective Services. The court entered just such an order. We find no prejudice that resulted from the erroneous findings by the court.

The two Department social workers and its attorney contend that the evidence as recited herein is insufficient to sustain a finding that they acted in such a manner as to undermine the dignity, integrity, or public respect for the courts, or warrant an adjudication of criminal contempt. They argue that in any event the summary manner in which the court made the adjudication was in total disregard of both statutory and judicial declarations that persons accused of criminal contempt committed outside the court's view must be first notified by a writing, sufficiently definite to inform them to a reasonable degree of certainty of the charge against them, and then be afforded a reasonable time and opportunity to prepare and defend themselves against the charge. Ark. Code Ann. § 16-10-108(c) (1987) (formerly Ark. Stat. Ann. § 34-903 (Repl. 1962)); *Edwards* v. *Jameson*, 283 Ark. 395, 677 S.W.2d 482 (1984). They argue that the trial court's total disregard of these rules and basic concepts of justice and fair play deprived them of due process of law and an opportunity to present a defense.

While we agree that the action of the trial court was inexcusable and could not withstand appellate review, we reluctantly must conclude that the propriety of that action is not properly before us for review. The notice of appeal filed in this case stated that the Department of Human Services appealed

from the court's order entered on September 4, 1987. It made no reference to the two social workers or attorney or that they were taking an appeal from the August 28 order holding them in contempt.

For over a century the proper manner for seeking review of contempt matters was by certiorari, because the statutes made no provision for appeals. In *Frolic Footwear, Inc.* v. *State*, 284 Ark. 487, 683 S.W.2d 611 (1985), the supreme court recognized that this was an anomaly since Rule 3 of the Arkansas Rules of Appellate Procedure now provides that appeal is the proper mode for review of all judgments and orders. The court declared that in the future contempts would be reviewed as appeals but gave no guidance other than that "we . . . shall regard them as being governed by the statutes [and rules] pertaining to appeals." 284 Ark. at 490, 683 S.W.2d at 612-13. Rule 3 provides that appeals are to be taken by filing a notice of appeal which shall specify the party or parties taking the appeal and the order appealed from.

Although it is readily apparent that the employees of the Department intended to appeal from their convictions of criminal contempt, we have held that a notice of appeal must be judged by what it recites and not what it was intended to recite. *Garland* v. *Windsor Door*, 19 Ark. App. 284, 719 S.W.2d 714 (1986). It must state the parties appealing and the order appealed from with specificity, and persons not named as parties to the notice and orders not mentioned in it are not properly before the appellate court. It is now our settled rule that a contemnor, not a named party in the original proceeding but held in contempt of the court's orders, must file a notice of appeal in his own right, specifying that he is appealing from the order holding him in contempt. *Marsh* v. *Hoff*, 15 Ark. App. 272, 692 S.W.2d 270 (1984); *Williams* v. *Williams*, 12 Ark. App. 89, 671 S.W.2d 201 (1984).

Nor is there merit in the argument that the failure to file a proper notice should be excused because the accused parties were not aware that the trial court had entered its own order holding them in contempt on August 28. The rule of general application would require them to keep abreast of the filings in the case and hold them accountable for having failed to do so.

However, there are at least two exceptions to that rule applicable to notices of appeal. Rule 4(a) of the Arkansas Rules of Appellate Procedure provides that the trial court in any case may grant an extension up to an additional sixty days for filing the notice where there is a showing that the person desiring to appeal failed to receive notice of entry of the judgment. Rule 36.9 of the Arkansas Rules of Criminal Procedure allows the supreme court to grant an even longer extension in criminal cases "when a good reason for the omission is shown" within eighteen months of the commitment. The record does not disclose that application for extension of time was made under Ark. R. App. P. 4(a) or has yet been made under Ark. R. Crim. P. 36.9.

Affirmed.

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

Edward RESPALIE *v.* Barbara RESPALIE

CA 87-423 756 S.W.2d 928

Court of Appeals of Arkansas
Division I
Opinion delivered September 21, 1988

Warren H. Webster, for appellant.

Walker, Snellgrove, Laser & Langley, by: *Glenn Lovett, Jr.* and *Todd Williams*, for appellee.

GEORGE K. CRACRAFT, Judge. Edward Respalie appeals from that part of a decree of divorce granting custody of the parties' three minor children to Barbara Respalie. We find no error and affirm.

A suit for divorce was filed by Mrs. Respalie in September of 1985. No action was taken on the complaint for a considerable period of time during which the custody of the children was in constant dispute. In November of 1986, a temporary order was entered in which the court directed that the custody of the older child, Rachel, remain with the mother and the other two children be in the custody of Mr. Respalie until further orders of the court and pending reports from the Department of Human Services as to the conditions of the homes of the two parties.

At a hearing on the divorce in December of 1986 it was announced that, although the reports from the Department had not been received, the court should have the benefit of them and would permit such additional testimony as the parties might wish to be taken with reference to the reports. At that hearing appellee testified that she could provide adequate living conditions for all three children and would do so. There was evidence that she was able to fully provide for their physical and emotional needs. She admitted in the course of her testimony that for the past year she had resided with a man to whom she was not married, and that she had no immediate plans to marry him. Appellant testified that he was better able to provide for the needs of the children and would do so. He admitted that he had also lived with a woman while the children were with him but stated that he had broken off the relationship.

Subsequent to the hearing, reports of the Department were filed with the court, without objection to their being considered. The report on the home of the appellee was favorable, and stated that all three of the children were living with the appellee in pleasant and well-kept surroundings. The older child stated that her father had caused her to have two black eyes and a concussion, and that she had returned to live with her mother. The Department further reported that there had been a substantiated report that appellant had sexually abused the four-year old girl, April. It also investigated complaints that appellant had been giving his children intoxicating liquors, not providing them with food, not sending them to school, and not providing utilities or water in the home. It reported that all subsequent attempts to contact appellant for home visits had failed and that he had refused to attend scheduled meetings at the Department's offices. The report stated that after being interviewed on the abuse complaints appellant took the children to their mother, informed her that she should have custody of all the children, and removed himself to the State of New York. The Department recommended that none of the children be placed with appellant. The report concluded: "Due to the instability that John and April have endured, especially in the last few weeks, and the harm that is indicated by the substantiated sexual abuse complaint, this agency recommends that custody of the children be granted to Barbara Respalie."

The court then entered a decree of divorce in which custody of the three children was granted to appellee subject to reasonable visitation rights in the appellant. Appellant then filed a motion asking the court to reconsider its order with respect to custody and to permit him to rebut the content of one of the Department's reports. After a hearing the court denied the motion, finding no change in circumstances warranting modification. The testimony taken at that hearing was not preserved in the record and is not the basis for argument on appeal. Appellant argues only that the trial court erred in granting custody to appellee while living with a man to whom she was not married and that the award was not in the best interest of the children.

■ While our courts have never condoned a parent's promiscuous conduct or lifestyle when conducted in the presence of a child, we have recognized the distinction between those human weaknesses and indiscretions which do not necessarily

adversely affect the welfare of the child and that moral breakdown leading to promiscuity and depravity which does render one unfit to have custody of a minor child. *Anderson* v. *Anderson*, 18 Ark. App. 284, 715 S.W.2d 218 (1986); *Watts* v. *Watts*, 17 Ark. App. 253, 707 S.W.2d 777 (1986). Here there was evidence that the mother adequately provided for the needs of the children and was a good mother to them. There was no evidence that the man with whom she lived was other than kind and good to the children, or that his presence in the home was presently affecting them adversely. There was evidence that appellant did not adequately provide for their physical needs while in his care and had sexually and physically abused them.

The chancellor was in a superior position to assess the situation and the effect appellee's conduct would have on the children's welfare. We have often recognized that there is no case in which greater deference should be given the chancellor's position, ability and opportunity to see and evaluate the evidence than those involving the welfare of minor children. *Calhoun* v. *Calhoun*, 3 Ark. App. 270, 625 S.W.2d 545 (1981). Chancellors cannot always provide flawless solutions to unsolvable problems, especially where only limited options are available. Although the conditions in which these children are placed are not ideal, we cannot conclude that the chancellor's order does not more adequately provide for the welfare of these children than any option then available to him.

Affirmed.

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

Paul COSSEY and Grace Cossey v. TRANSAMERICA INSURANCE COMPANY

CA 88-27 757 S.W.2d 176

Court of Appeals of Arkansas
En Banc
Opinion delivered September 21, 1988

Elcan & Sprott, by: *Frank C. Elcan II*, for appellants.

McAllister & Wade, P.A., by: *Lynn F. Wade*, for appellee.

JOHN E. JENNINGS, Judge. On April 2, 1977, Grace Cossey was injured in an automobile accident. The driver of the other car was Stephen Crowed, an employee of Builder's United Construction, Inc. At the time of the accident Builder's United was insured by appellee, Transamerica Insurance Company.

On March 7, 1980, Cossey filed a lawsuit against Crowed and Builder's United. No answer was filed and on November 18, 1981, Cossey took a default judgment against both defendants for $17,000.00. On November 27, 1984, Cossey filed a direct action against the insurer, Transamerica. In a second amended complaint filed February 9, 1987, in the direct action proceedings,

Cossey asked the trial court, alternatively, to set aside the default judgment previously rendered in her favor. On October 16, 1987, the trial court granted summary judgment to Transamerica and refused to set aside the default judgment.

On appeal, the sole point relied upon by the appellant is that the trial court erred in refusing to set aside the default judgment under Ark. R. Civ. P. 60(c). We affirm.

Appellant cites no Arkansas cases in which a plaintiff has sought to set aside a default judgment entered in his favor, and we can find none. However, the general rule is that, under appropriate circumstances, he may. *See* Annotation, 40 A.L.R.2d 1121 (1955); *Cf. Combs* v. *Hyden*, 142 Ind. App. 426, 235 N.E.2d 77 (1968). For purposes of this decision we assume, without deciding, that in appropriate circumstances the trial court has the power to set aside a default judgment at the request of the successful plaintiff.

Even so, it is within the sound discretion of the trial court to grant or deny a motion to set aside a default judgment, and the question on appeal is whether there has been an abuse of that discretion. *Burns* v. *Shamrock Club*, 271 Ark. 572, 609 S.W.2d 55 (1980); *Johnson* v. *Jett*, 203 Ark. 61, 159 S.W.2d 78 (1952). Here the plaintiff seeks to set aside her default judgment against Crowed and Builder's United. There is no indication that either defaulting defendant has received notice of the plaintiff's request to set aside her own judgment against them. The accident occurred in 1977 and the default judgment was taken in 1981. It was not until 1987 that the plaintiff, for the first time, sought to have her default judgment set aside.

On these facts we cannot say that the circuit judge abused his discretion in refusing to set aside the default judgment.

Affirmed.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I dissent from the majority decision in this case for two reasons. First, the opinion is based upon a myopic view of what is involved. It is true, as the majority opinion states, that the appellants' point relied upon is that the trial court erred in refusing to set aside the default

judgment entered in appellants' favor. That point, however, involves considerations much broader than the simplistic treatment it is given in the majority opinion.

What happened in this case is that the appellants filed suit against a company and its employee to recover for damages sustained in an automobile accident. The company had liability insurance coverage with the appellee in the case at bar, Transamerica Insurance Company. No answer was filed in the tort suit and appellants obtained a default judgment. The judgment was not paid and appellants subsequently filed suit against Transamerica under the authority of Ark. Stat. Ann. § 66-4001 (Repl. 1980) [Ark. Code Ann. § 23-89-101 (1987)], which gives an injured party a direct action against an insurer where the judgment against the insured is not satisfied.

Transamerica's defense in the suit against it was that its insured, in violation of the insurance policy conditions, failed to notify it of the filing of the suit and failed to cooperate with it in defending the suit. In an amended pleading, the appellants reiterated their prayer for recovery in the amount of the default judgment and, in the alternative, prayed that the default judgment be set aside and the insurance company be directed to defend the merits of the appellants' claim for damages. Based on the pleadings, responses to interrogatories, requests for admission, and affidavits, the trial court granted Transamerica's motion for summary judgment and dismissed appellants' complaint.

Against the background outlined above, it is easy to understand why the appellee is resisting the setting aside of the default judgment against its insured; and it is this unique situation that calls for a look beyond the mere words used by the appellants in stating their point relied upon for reversal. In fact, the appellants are saying if the appellee is really sincere in its position, we will solve its problem and agree that it may defend the merits of the claim against its insured. This brings me to my second reason for dissenting from the decision reached in the majority opinion.

I agree with the statement in the appellants' brief that "the fundamental issue in this case is the public policy consideration of whether the nonfeasance of a tort feasor originally entitled to the benefits of liability insurance coverage should operate to the

detriment of innocent third parties" who are injured by the tort feasor. At the time of the automobile accident in this case, the law enacted by the state legislature provided that the failure to pay a judgment for damages arising out of the use of a motor vehicle would result in the suspension of the registration of all vehicles owned by the judgment debtor unless proof was made of the owner's financial responsibility for their future use by filing a certificate of insurance, or some form of bond, with the Director of the Department of Finance and Administration. *See* Ark. Stat. Ann. §§ 75-1452 to -1463 (Repl. 1979) [Ark. Code Ann. §§ 27-19-706 to -712 (1987)]. It is now unlawful to even operate a motor vehicle in this state without liability insurance coverage. *See* Ark. Code Ann. § 27-22-104 (Supp. 1987). Surely the concern evidenced by these legislative enactments indicates that a narrow and rigid view of the conditions set out in automobile liability insurance policies is contrary to the intent of the legislature.

I do not believe, however, that the appellants are entitled to have the default judgment set aside and the cause of action alleged in that suit tried again. This would overlook the question of whether appellee's ability to defend the suit has been prejudiced. Many courts hold that the failure of an insured to comply with the provisions for notice and cooperation contained in an automobile liability policy will not relieve the insurance company from liability, even where the provisions are made conditions precedent, unless the company was substantially prejudiced by the failure to comply. *See Morales* v. *National Grange Mutual Insurance Co.*, 176 N.J. Super. 347, 423 A.2d 325 (1980); *Hendrix* v. *Jones*, 580 S.W.2d 740 (Mo. 1979); *M.F.A. Mutual Insurance Co.* v. *Cheek*, 66 Ill.2d 492, 363 N.E.2d 809 (1977); *Lindus v. Northern Insurance Company of New York*, 103 Ariz. 160, 438 P.2d 311 (1968); *Fox* v. *National Savings Insurance Co.*, 424 P.2d 19 (Okla. 1967); *M.F.A. Mutual Insurance Co.* v. *Sailors*, 180 Neb. 201, 141 N.W.2d 846 (1966); and *Johnson* v. *Doughty*, 236 Or. 78, 385 P.2d 760 (Or. 1963).

In *Campbell* v. *Allstate Insurance Co.*, 60 Cal.2d 303, 384 P.2d 155, 32 Cal. Rptr. 827 (1963), a leading case on this point, the court held that an insurer cannot assert defenses based upon a breach of the policy conditions pertaining to notice and cooperation unless the insurer is substantially prejudiced thereby and

that the burden of proving that a breach of these conditions resulted in prejudice is on the insurance company. I think the result reached by the above cases is in keeping with the public policy of this state and that the case of *Southern Farm Bureau Casualty Insurance Co.* v. *Jackson*, 262 Ark. 152, 555 S.W.2d 4 (1977), relied upon by the appellee, does not suggest otherwise.

In the case at bar, the record shows that on May 5, 1977, a claims adjuster for appellee wrote a letter to counsel for appellants acknowledging receipt of their letter dated April 18, 1977, informing appellee of the appellants' claims. The accident with appellee's insured occurred on April 2, 1977, and suit was not filed against the insured until March 7, 1980. Nothing in the record shows any breach of policy provisions except the failure of the insured to send the appellee notice of the actual service of summons upon it. From the record I cannot say that this failure substantially prejudiced the appellee; there may have been no valid defense to appellants' claims. Therefore, I think the trial court erred in granting appellee's motion for summary judgment and I would reverse and remand this case for trial of the factual issue of whether there was a prejudicial breach of insurance policy provisions.

Jeffery SHIPLEY, a/k/a Sterling Timothy Mullins, Tim Mullins, or Tim Shipley *v.* STATE of Arkansas

CA CR 88-29 757 S.W.2d 178

Court of Appeals of Arkansas
Division I
Opinion delivered September 28, 1988

Stripling & Morgan, by: *M. Edward Morgan,* for appellant.

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

DONALD L. CORBIN, Chief Judge. This appeal comes from Searcy County Circuit Court. Appellant, Sterling Timothy Mullins, appeals his conviction of murder in the second degree and the sentence imposed therefor. We find error and reverse and remand.

A felony information was filed March 23, 1987, charging appellant with murder in the first degree, a violation of Arkansas Code Annotated § 5-10-102 (Supp. 1987) (formerly Ark. Stat. Ann. § 41-1502 (Supp. 1985)). Appellant was found guilty on the reduced charge of murder in the second degree in violation of Arkansas Code Annotated § 5-10-103 (1987) (formerly Ark. Stat. Ann. § 41-1503 (Repl. 1977)) and was sentenced to ten years imprisonment and a fine of $5,000 plus costs. From this conviction and fine, comes this appeal.

For reversal, appellant asserts the following: (1) The trial court erred in failing to direct a verdict for appellant; (2) the trial court erred in allowing Dr. Fahmy A. Malak to testify as to the

blood type of Thomas Lafoon; and (3) the trial court erred in not granting a mistrial after Officer Cornett alluded to offering a polygraph examination to the defendant.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Nelke* v. *State*, 19 Ark. App. 292, 720 S.W.2d 719 (1986). Although we find reversible error on other grounds, we will address appellant's challenge to the sufficiency of the evidence prior to considering any alleged trial error as required by *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984). The court must consider all evidence, including any which may have been inadmissible, in the light most favorable to the appellee and affirm if there is substantial evidence to support the verdict. *Id.* Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable and material certainty, compel a conclusion one way or the other without resorting to speculation or conjecture. *Phillips* v. *State*, 17 Ark. App. 86, 703 S.W.2d 471 (1986).

The evidence reflects that on December 30, 1986, a fire destroyed Thomas Lafoon's residence in a rural area north of Marshall, Arkansas. The skeletal remains of Mr. Lafoon were found among the debris. While investigators were at the scene on that day, appellant approached the victim's homesite on foot then turned and walked in the opposite direction. Keith Cornett, an investigator for the Arkansas State Police, saw appellant and shouted for him to come back. Mr. Cornett's testimony reveals that appellant was nervous, his stomach was jerking, and his coat had what appeared to be blood stains on it.

Al Castro, an investigator for the Searcy County Sheriff's Office walked up at that time and after asking questions determined that appellant knew the victim and helped him unload and move a couch into his home the night before.

At that time, appellant was taken to the sheriff's office for questioning. Appellant then gave his first statement identifying himself and signing his rights form with the alias name of Jeffery Shipley. During this questioning, appellant related that on the evening of December 28, 1986, the victim came to his house asking for help unloading a couch. Appellant had company but agreed to help the victim the following night. Appellant asserted that on December 29, 1986, he helped his brother cut wood then

went to the victim's home between 5:30 p.m. and 6:00 p.m. to help with the couch. Appellant alleged that the victim was asleep and drunk when he arrived. Appellant said they drank vodka and then he left the victim asleep on the couch and went home at 8:00 p.m. or 9:00 p.m. and also went to sleep. He alleges he was told of the fire on December 30, 1986, at about 2:30 p.m.

During the first statement, appellant did not know how he got blood on his coat. He explained that he got the cuts on his hand and the scratch over his eye while cutting wood but could offer no explanation for the other injuries and bruises on other parts of his body.

Appellant was interviewed again on the following day, December 31, 1986, and offered a new statement explaining the events on December 29, 1986. He said that he laid his jacket over a chair inside the victim's home while they moved the couch. While bringing the sofa through the patio sliding door, the victim tripped and fell through the door knocking the glass inside the house. The victim allegedly received several small cuts which could have gotten on appellant's jacket in the fall.

A third interview was scheduled for appellant to take a polygraph test; however, he refused to take the test when the officer informed appellant that he knew his real name was Sterling T. Mullins rather than Jeffery Shipley.

R.C. Rea with the Arkansas Forestry Commission testified that he arrived at the scene of the fire at approximately 1:30 p.m. on December 30, 1986, and estimated that the fire had been burning at least twelve hours based upon the weather and breeze conditions.

Marlee Stancell, who lives near the victim's home, testified that he heard a gunshot between 8:00 p.m. and 9:00 p.m. on December 29, 1986, followed by an explosion at 2:00 a.m. on December 30, 1986. Mr. Stancell stated that the shot sounded like it came from a high-powered rifle.

Expert testimony was presented that the victim died as a result of a .22 caliber bullet wound to the left side of his head. Also, there was evidence that the victim was right-handed and it would have been virtually impossible for him to commit suicide considering the location of the wound and path of the bullet. Five

firearms were found in the remains, including a .22 caliber gun with nine spent cartridges. Other physical evidence at the scene indicated that the glass from the patio door was outside the house rather than inside. The evidence revealed that the victim had blood type O and appellant blood type A. The blood on appellant's jacket and left boot was blood type O. On his right boot, blood type A was found.

The fact that appellant used an alias evidenced a consciousness of guilt. *Kidd* v. *State*, 24 Ark. App. 55, 748 S.W.2d 38 (1988). Also, appellant related different versions of the events prior to the victim's death and for the blood stains on his jacket. The Arkansas Supreme Court has held that a defendant's false, improbable and contradictory statements explaining suspicious circumstances may be considered by the jury as proof of guilt. *Still* v. *State*, 294 Ark. 117, 740 S.W.2d 926 (1987); *Watson* v. *State*, 290 Ark. 484, 720 S.W.2d 310 (1986).

Appellant argues that the facts of this case are insufficient to support his conviction. We disagree. Guilt need not always be proven by direct evidence. Circumstantial evidence can present a question to be resolved by the trier of fact and be the basis to support conviction. *Yandell* v. *State*, 262 Ark. 195, 555 S.W.2d 561 (1977). We have often said that the fact that evidence is circumstantial does not render it insubstantial. *See, e.g., Ashley* v. *State*, 22 Ark. App. 73, 732 S.W.2d 872 (1987). The jury is allowed to draw any reasonable inference from circumstantial evidence to the same extent that it can from direct evidence. *Payne* v. *State*, 21 Ark. App. 243, 731 S.W.2d 235 (1987).

Viewing the above and all evidence of record in the light most favorable to appellee, we find substantial evidence from which the jury could have found appellant guilty of second degree murder without resorting to surmise and conjecture. Therefore, we affirm as to appellant's first point for reversal.

Secondly, appellant argues the trial court erred in allowing Dr. Fahmy Malak to testify as to the victim's blood type. We agree. During direct examination the State elicited information from Dr. Malak regarding the victim's naval records which were in Dr. Malak's possession. The court overruled appellant's hearsay objection and, under A.R.E. Rule 803(6) (business

records exception), allowed Dr. Malak to testify from the victim's naval records, that his blood type was O. Further Dr. Malak testified that blood type O was identified on appellant's jacket.

Allowing Dr. Malak to testify from the naval records of the victim might have been accomplished under A.R.E. Rule 803(6) (business records exception) or Rule 803(8) (public documents exception), among other possible exceptions to the hearsay rule. The hearsay exception rules require that certain foundation requirements be established before records may be admitted into evidence. Here, the victim's naval records were not introduced into evidence; therefore, we cannot determine if there was compliance with the foundation requirements. For the reasons stated above, we find the trial court erred by overruling appellant's objection.

Lastly, appellant argues that the trial court erred in not granting a mistrial after Officer Cornett alluded to offering a polygraph examination to appellant. We agree. During direct examination, the officer stated that he asked appellant "if he would take a polygraph exam." Appellant's counsel objected and the court admonished the jury to "not put any degree of evidentiary value on the word 'polygraph.' Simply play like it didn't exist."

A mistrial is an extreme remedy which should be resorted to only where there has been an error so prejudicial that justice cannot be served by continuing the trial and there is no other method by which the prejudice can be removed. *Daley* v. *State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987). The question on appeal is whether the trial court abused its discretion in failing to grant a mistrial. *Ellis* v. *State*, 4 Ark. App. 201, 608 S.W.2d 871 (1982).

Both parties agree that the settled rule in Arkansas is that polygraph tests are not admissible in criminal cases without mutual agreement, and absent such agreement or justifiable circumstances, any reference to a polygraph test constitutes error. *See Van Cleave* v. *State*, 268 Ark. 514, 598 S.W.2d 65 (1980). Appellee admits that the officer's statement regarding the polygraph was not admissible, yet argues that it did not result in prejudice so pronounced as to warrant a mistrial.

In *Van Cleave*, the court found that reference to the test during closing argument was not prejudicial because the polygraph was mentioned twice during the trial by a witness, without objection. In the case at bar, the polygraph was only mentioned during Officer Cornett's testimony. From this testimony, the jury could only conclude that appellant refused to take the polygraph test or that he took the test but failed. Under these circumstances, the trial court abused its discretion in refusing to grant a mistrial.

For the reasons stated, the judgment against appellant is reversed and the case remanded.

Reversed and remanded.

CRACRAFT and JENNINGS, JJ., agree.

Julius Edward SPIVEY *v.* STATE of Arkansas

CA CR 87-235 757 S.W.2d 186

Court of Appeals of Arkansas
Division II
Opinion delivered September 28, 1988

William Adolph Owings, for appellant.

Steve Clark, Att'y Gen., by: *Lynley Arnett,* Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge: The appellant in this criminal case was charged with two counts of theft of property on October 15, 1985. He was arrested on December 2, 1986. Amended informations were filed on February 15, 1987, and March 19, 1987. After a jury trial on April 29, 1987, the appellant was found guilty of two counts of theft of property and was sentenced as an habitual offender to twenty-five years in the Arkansas Department of Correction on each count. Within ninety days after the judgment was entered, the appellant petitioned the trial court for reduction of his sentence under Ark. Stat. Ann. § 43-2314 (Supp. 1985), now codified at Ark. Code Ann. § 16-90-111 (Supp. 1987). The trial court denied the petition in an order filed August 24, 1987. From those convictions, comes this appeal.

For reversal, the appellant contends that he received ineffective assistance of counsel in both the guilt phase and the sentencing phase of his trial. We affirm.

The appellant first argues that he received ineffective assistance in the guilt phase of his trial because his attorney failed to assert his right to a speedy trial under A.R.Cr.P. Rule 28.1, or to enter a motion to dismiss on that ground. The State argues that the appellant has failed to preserve this issue for appeal.

The record shows that the felony information was filed on October 15, 1985, and that trial was held on April 29, 1987. The appellant contends that trial was thus held fifteen days after the expiration of the time limit for bringing him to trial under Rule 28.1(c). The appellant concedes that he waived his rights under the speedy trial rule by his failure to move for dismissal under that rule, *see* A.R.Cr.P. Rule 30.2, but he argues that his waiver of the right to a speedy trial did not operate as a waiver of the right to effective assistance of counsel. *See Hall* v. *State*, 281 Ark. 282, 663 S.W.2d 926 (1984).

The appellant never raised any issue at trial concerning the effectiveness of his trial counsel. In his post-trial motion for reduction of sentence under Ark. Stat. Ann. § 43-2314, he asserted that his trial counsel was ineffective in that he failed to "raise motions" and subpoena witnesses as requested by the appellant. The petition also alleged that one of the appellant's prior convictions was improperly used to enhance his sentence.

As the Arkansas Supreme Court stated in *Lasiter* v. *State*, 290 Ark. 96, 717 S.W.2d 198 (1986), ineffectiveness of counsel is not generally considered when a case is first appealed because the facts relevant to that issue have not been developed. However, the Court noted that if the facts *have* been presented to the trial court at a hearing related to motions for a new trial, the Court will look at the issue on direct appeal. In the present case, the appellant did not specify in his § 43-2314 petition the motions which he assertedly requested but his attorney failed to make. The present contention of ineffective assistance based on counsel's failure to protect the appellant's right to a speedy trial was never presented to the trial court. We disagree with the appellant's contention that no objection was required to preserve for appeal his argument concerning ineffective assistance of counsel. Our Supreme Court has "reiterated time and again that the question of effectiveness of counsel may not be raised for the first time on appeal." *Sumlin* v. *State*, 273 Ark. 185, 617 S.W.2d 372 (1981). It is also settled that an argument based on the trial court's failure to list all excluded time periods in determining whether a defendant received a speedy trial will not be considered on appeal when it has never been raised in the trial court. *Allen* v. *State*, 294 Ark. 209, 742 S.W.2d 886 (1988). With few exceptions, not applicable here, *see, e.g., Wicks* v. *State*, 270 Ark. 781,

606 S.W.2d 366 (1980), an argument for reversal will not be considered in the absence of a timely, clear, and specific objection in the trial court. *Horn* v. *State*, 282 Ark. 75, 665 S.W.2d 880 (1984); *Dillard* v. *State*, 20 Ark. App. 35, 723 S.W.2d 373 (1987). It is clear that the speedy trial issue was never raised in the trial court, and may not be raised for the first time on appeal. The appellant's remedy is to challenge the adequacy of his attorney's representation in a petition for post-conviction relief under A.R.Cr.P. Rule 37. *Carrier* v. *State*, 278 Ark. 542, 647 S.W.2d 449 (1983).

The appellant's next contention concerns the use of one of his prior convictions for sentence enhancement under the Habitual Offender Statute. The appellant asserts that one of the three prior convictions offered for sentence enhancement should not have been considered. The record shows that the appellant raised this issue in his § 43-2314 petition for reduction of sentence. The appellant's argument, although couched in terms of ineffective assistance, is that the Habitual Offender Statute was improperly applied, and we will address it on that basis.

The conviction which is the subject of this point for reversal stems from an offense which occurred on December 14, 1982. The appellant contends that Ark. Stat. Ann. § 41-1001 (Supp. 1985), now codified at Ark. Code Ann. § 5-4-501 (1987), prohibits the use of convictions for offenses committed before June 30, 1983, for sentence enhancement purposes. We find no merit to this contention. Arkansas Statutes Annotated § 41-1001(1) provides that:

> A defendant who is convicted of a felony committed after June 30, 1983, and who has previously been convicted of more than one (1) but less than four (4) felonies, may be sentenced to an extended term of imprisonment. . . .

The statute clearly distinguishes between the conviction being enhanced, which must have occurred after June 30, 1983, and the "previous" conviction or convictions used for enhancement purposes, for which no limitation period is stated. The Supreme Court has stated that § 41-1001 "provides in clear language that in an appropriate case, a prior conviction, *regardless of the date of the crime*, may be used to increase punishment." *Washington* v. *State*, 273 Ark. 482, 621 S.W.2d 216, 218 (1981) (emphasis

supplied). We think that the June 30, 1983, time limit is clearly applicable only to the conviction being enhanced, and not to prior convictions being used for enhancement purposes.

Affirmed.

MAYFIELD and COULSON, JJ., agree.

Delbert L. BASS *v.* SERVICE SUPPLY COMPANY, INC.

CA 88-37 757 S.W.2d 189

Court of Appeals of Arkansas
Division II
Opinion delivered September 28, 1988
[Rehearing denied October 26, 1988.]

Kit Williams, for appellant.

Charles E. Hanks, and *Gunn & Borgognoni,* by: *Charles E. Young III,* for appellee.

MELVIN MAYFIELD, Judge. Delbert Bass appeals a judgment on a guaranty agreement for appellee, Service Supply Company, Inc. On appeal, appellant argues that the trial court's findings are clearly erroneous. We disagree and affirm.

Since approximately 1970, appellant and his wife, Mary Bass, were the sole shareholders of a corporation entitled Bass Plumbing, Heating & Cooling, Inc. Appellee later began selling materials to Bass Plumbing, Heating & Cooling on open account. After a period of time, in 1983, appellant signed a guaranty agreement for credit extended by appellee to Bass Plumbing, Heating & Cooling. This guaranty provided as follows:

I/WE HEREBY AUTHORIZE SERVICE SUPPLY

> COMPANY, INC. THE RIGHT TO RECEIVE ANY INFORMATION PERTAINING TO MY/OUR CREDIT WITH THE ABOVE REFERENCES, BANKS, OTHER CREDITORS OR CREDIT BUREAUS. GUARANTY IS GIVEN BY THE UNDERSIGNED TO SERVICE SUPPLY COMPANY, INC., HEREINAFTER CALLED THE COMPANY, IN ORDER TO INDUCE IT TO EXTEND CREDIT TO, OR OTHERWISE BECOME THE CREDITOR OF THE APPLICANT. I/WE HEREBY GUARANTEE TO THE COMPANY THE PROMPT PAYMENT, WHEN DUE, OF EVERY CLAIM OF THE COMPANY WHICH MAY HEREAFTER ARISE IN FAVOR OF THE COMPANY AGAINST THE APPLICANT. THIS IS A CONTINUING GUARANTY AND SHALL REMAIN IN FORCE UNTIL REVOKED BY ME/US BY NOTICE IN WRITING TO THE COMPANY, BUT SUCH REVOCATION SHALL BE EFFECTIVE ONLY AS TO CLAIMS OF THE COMPANY WHICH ARISE OUT OF TRANSACTIONS ENTERED INTO AFTER ITS RECEIPT OF SUCH NOTICE. THIS OBLIGATION SHALL COVER THE RENEWAL OF ANY CLAIMS GUARANTEED BY THIS INSTRUMENT OR EXTENSIONS OF TIME OF PAYMENT THEREOF, AND SHALL NOT BE AFFECTED BY ANY SURRENDER OR RELEASE BY THE COMPANY OF ANY OTHER SECURITY HELD BY IT FOR ANY CLAIM HEREBY GUARANTEED. I/WE CERTIFY THAT I/WE HAVE READ, UNDERSTAND, AND AGREE TO THE TERMS AND CONDITIONS ABOVE AND ON THE REVERSE SIDE OF THIS APPLICATION.

In signing the guaranty, appellant did not indicate his title or position with Bass Plumbing, Heating & Cooling. After the guaranty was signed, appellee continued to sell materials on open account to Bass Plumbing, Heating & Cooling. In 1986, Bass Plumbing, Heating & Cooling changed its name to Bass Mechanical Contractors, Inc. No other changes were made in the corporate structure, and notices were sent to the corporation's creditors informing them of the name change. Bass Mechanical

Contractors continued to purchase materials on open account from appellee.

In 1987, appellee sued appellant as personal guarantor for the debts of Bass Mechanical Contractors in the amount of $19,398.61 and relied upon the guaranty executed by appellant in 1983. After trial, the circuit court found that there was proper consideration for appellant's guaranty because appellee promised to extend credit to the company although they were under no obligation to do so; that appellant signed the guaranty in his individual capacity; and that the name change of the corporation was not a material change and did not extend appellant's liability beyond the express limits or terms of the guaranty agreement. Judgment was entered for appellee in the amount of $18,010.98 plus interest and costs.

For his first point, appellant argues that the circuit court's finding that there was adequate consideration for the guaranty agreement is clearly erroneous and clearly against a preponderance of the evidence. The findings of fact of a circuit court sitting as a jury will not be reversed on appeal unless clearly against a preponderance of the evidence, and in making that determination, we give due regard to the superior opportunity of the trial court to judge the credibility of the witnesses and the weight to be given their testimony. *Shelter Insurance Co.* v. *Hudson*, 19 Ark. App. 296, 720 S.W.2d 326 (1986).

A guaranty is a collateral undertaking by one person to answer for the payment of a debt of another; for a guarantor to become liable under a guaranty of payment, there need only be a failure of the primary obligor to make payment. *First American National Bank* v. *Coffey-Clifton, Inc.*, 276 Ark. 250, 633 S.W.2d 704 (1982). *See Cleveland Chemical Co. of Arkansas, Inc.* v. *Keller*, 19 Ark. App. 7, 716 S.W.2d 204 (1986). A guaranty contract may be supported by sufficient consideration so long as there is a benefit to a principal debtor or guarantor, or a detriment to the guarantee. *Shamburger* v. *Union Bank of Benton*, 8 Ark. App. 259, 650 S.W.2d 596 (1983). Consideration is any benefit conferred or agreed to be conferred upon a promisor to which he is not lawfully entitled, or any prejudice suffered or agreed to be suffered by a promisor other than such as he is lawfully bound to suffer. *McIlroy Bank & Trust Co.* v. *Comstock*, 13 Ark. App. 13,

678 S.W.2d 782 (1984).

Appellant argues that there was no consideration to support the guaranty because appellee had extended credit to Bass Plumbing, Heating & Cooling for years before 1983, and no further benefits or incentives were given to the corporation to induce appellant to sign the guaranty agreement in 1983. We disagree. When appellant signed the guaranty agreement in 1983, appellee was not legally obligated to extend further credit to Bass Plumbing, Heating & Cooling. After appellant signed the agreement, appellee did in fact extend further credit to the corporation. The trial court's finding that this was sufficient consideration for the guaranty is not clearly erroneous or clearly against a preponderance of the evidence, and we affirm on this point.

For his second point, appellant argues that the trial court erred in finding that the guaranty, to pay the debts for Bass Plumbing, Heating & Cooling, could be extended to require payment of the debts of Bass Mechanical Contractors. "The rule in Arkansas with respect to an interpretation of a guaranty agreement is that the guarantor is entitled to have his undertaking strictly construed and he cannot be held liable beyond the strict terms of his contract." *Shamburger, supra*, at 262. *Moore* v. *First National Bank*, 3 Ark. App. 146, 623 S.W.2d 530 (1981). In *Moore*, we followed the well-settled principle that a material alteration in the obligation assumed, made without the assent of the guarantor, discharges him.

In the case at bar, appellant points out that he refused to execute a new guaranty at appellee's request after the corporation's name was changed. We are not persuaded by this argument. The guaranty agreement, which appellant admitted signing, stated that it was a continuing guaranty and would remain in force until revoked by the guarantor by notice in writing to appellee. Appellant admitted at trial that he had not revoked this guaranty in accordance with its terms. Further, appellant made the following admission of fact which was introduced into evidence:

> 4. Admit that Bass Mechanical, Inc. formerly known as Bass Plumbing, Heating & Cooling, Inc. owes to Plaintiff [appellee] the sum of $19,398.61. If you deny this

> request then please state in detail why you deny it and also state how much the said Bass Mechanical Contractors, Inc. formerly known as Bass Plumbing, Heating & Cooling, Inc. does owe to Plaintiff. DENIED. Corporate records indicate that the corporation is indebted at no more than $18,010.98 to plaintiff.

The evidence shows that the name change of Bass Plumbing, Heating & Cooling, Inc., to Bass Mechanical Contractors did not change the identity of the corporate entity to which appellee extended credit. As Mary Bass admitted at trial, the name change was effected "[s]imply because we were doing real good. We thought it would be a very professional sounding name. . . . That's all there was to it." Other than the change of name, no changes were made in the structure of the corporation.

> Generally speaking, a change in the corporate name does not make a new corporation, and, whether effected by special act or under a general law, has no effect on the identity of the corporation, or on its property, rights, or liabilities . . . . The corporation continues, as before, responsible in its new name for all debts or other liabilities which it had previously contracted or incurred, and is also entitled to enforce contracts made or other liabilities incurred to it before the change; so, the enforceability of a contract of guaranty is not affected by a change in the name of the corporation in whose favor the guaranty runs. [footnotes omitted]

18 C.J.S. *Corporations* Section 171 f(1) (1939). "An authorized change in the name of a corporation has no more effect on its identity as a corporation than a change of name of a natural person has upon his identity; the corporation's identity remains unchanged." 18A Am. Jur. 2d *Corporations* Section 288 (1985).

We find no error in the trial court's finding that appellee was not extending appellant's liability beyond the express terms of the guaranty agreement.

Affirmed.

COOPER and COULSON, JJ., agree.

NORTHWEST NAT'L BANK *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

CA 88-34 757 S.W.2d 182

Court of Appeals of Arkansas
Division II
Opinion delivered September 28, 1988

[redacted]

[redacted]

Law Offices of E. Lamar Pettus, by: *Harry McDermott III,* for appellant.

Hilburn, Calhoon, Harper & Pruniski, Ltd., by: *Scott Daniel,* for appellee.

BETH GLADDEN COULSON, Judge. In this appeal from a decision of the Washington County Chancery Court, appellant, Northwest National Bank, raises two points for reversal. We find neither argument persuasive and affirm.

On August 23, 1984, James Dickson executed a $35,000 note to appellant bank. The note stated that it was secured by a security agreement covering assignment of various Merrill Lynch accounts. A standard financing statement and security agreement form dated August 23, 1984, signed by Dickson and appellant bank, stated that Dickson granted to appellant bank (the "Secured Party") a "Security Interest pursuant to the Uniform Commercial Code" in the property described. File numbers were appended to each case. The property description was prefaced with the phrase: "Assignment of fees payable to James F. Dickson for the following Merrill Lynch cases." The printed language of the form also stated that this security interest included "all replacements thereof and all accessories, parts and equipment now or hereafter affixed thereto or used in connection therewith (hereinafter collectively called the "Goods"); and. . . UNTIL DEFAULT hereunder, Debtor shall be entitled to the possession of the Goods and to use and enjoy the same."

On November 1, 1984, appellant bank hand delivered a letter to the Fayetteville branch of appellee Merrill Lynch, Pierce, Fenner & Smith, Inc., which stated that:

> Mr. James Dickson has pledged as collateral on a loan at Northwest National Bank accounts receivable from Merrill Lynch, Pierce, Fenner [&] Smith, Inc. (Paramount Petroleum, Ray Lofton, William Christensen, George Hernreich, Steve LaFontain, First National Bank of Little Rock, Jerry Dan McBride, Butch McCallum, Bill Kersey,

> Larry Cabelka, CMI Investments [,] Allied Electric and Electric Service Co. of Ft. Smith, Goff, and Epley).
>
> Please mark your records so that payments are made to Mr. Dickson and Northwest National Bank.

A copy of the August 23, 1984, financing statement and security agreement was attached to the letter.

Appellant bank and Dickson subsequently extended the due date on the note to April 15, 1986, by executing five extension agreements which all stated that the collateral securing the original obligation would continue to secure the amended obligation. No other agreements or instruments were executed by the parties. Between August 23, 1984, and the due date, appellant bank accepted various payments of principal and interest from Dickson. When the note became due on April 15, 1986, Dickson failed to pay the outstanding balance of $10,782.54 to appellant bank.

Frances Sabbe, a loan officer with appellant bank, wrote Dickson a letter on September 22, 1986, notifying him that his loan was "seriously delinquent" and requesting a conference for discussion of a plan for repayment. On October 28, 1986, appellant bank's attorney wrote to the Fayetteville branch of appellee Merrill Lynch, advising that no payment of Dickson's legal fees had been received and requesting an accounting. Receiving no reply to either letter, appellant bank filed suit against Dickson and appellee Merrill Lynch, praying for a judgment against Dickson and an accounting and judgment against appellee Merrill Lynch.

At trial, on September 22, 1987, only two persons testified: Frances Sabbe on behalf of appellant bank and Paula Sutton, administrative manager of appellee Merrill Lynch in Little Rock, Arkansas. James Dickson did not testify. In a judgment filed on October 7, 1987, the chancellor found for appellant bank against Dickson but dismissed the cause of action against appellee Merrill Lynch, finding that even though appellee had been notified of the security agreement between appellant and Dickson on November 1, 1984, the security agreement did not constitute an assignment, and the November 1, 1984, letter from appellant to appellee had no legal effect. From that decision, this appeal

arises.

Appellant argues, in its first point for reversal, that the chancellor erred in ruling that the note and security agreement between James Dickson and Northwest National Bank did not constitute an assignment to appellant bank of the legal fees owed Dickson by Merrill Lynch. On appeal, chancery cases are tried de novo on the record; we will not reverse the findings of the chancellor unless they are clearly erroneous, *i.e.*, clearly against the preponderance of the evidence. A.R.C.P. Rule 52(a); *RAD-Razorback Ltd. Partnership* v. *B.G. Coney Co.*, 289 Ark. 550, 713 S.W.2d 642 (1986). We give due regard to the opportunity of the trial court to assess the credibility of the witnesses. *Special Insurance Services, Inc.* v. *Adamson*, 20 Ark. App. 8, 722 S.W.2d 875 (1987).

When accounts receivable are assigned to secure the performance of a debt, the account debtor, under Ark. Code Ann. § 4-9-318(3) (1987) "is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee." Appellant contends that the preponderance of the evidence shows that an assignment had been made, that Northwest National Bank had notified appellee of its status as assignee and that payment should have been made to appellant bank.

The Arkansas Supreme Court, in *Robinson* v. *City of Pine Bluff*, 224 Ark. 791, 276 S.W.2d 419 (1955), held that, to constitute an assignment, no particular words are necessary. The court, quoting *Edison, et al.* v. *Frazier*, 9 Ark. (4 Eng.) 219 (1848), defined an assignment as "the setting over, or transferring, the interest a man hath in anything to another," and emphasized that an assignment is an expression of intention by the assignor that his rights should pass to the assignee. 224 Ark. at 794, 276 S.W.2d at 421.

In *Turner* v. *Rust*, 228 Ark. 528, 309 S.W.2d 731 (1958), the Arkansas Supreme Court noted that an assignment is generally interpreted or construed under the rules governing construction of contracts, with the primary object always being to ascertain and carry out the intention of the parties. To insure validity, the assignment must adequately describe or identify the property or thing to be assigned, "but, when such a description is

inserted, the assignment ordinarily passes to the assignee all of the rights, title, or interest of the assignor in or to the property or property rights that are comprehended by the terms used, or are within the intention or understanding of the parties, as ascertained in accordance with the general rules of construction." 228 Ark. at 534-535; 309 S.W.2d at 735. Where a contract is ambiguous, the court will accord considerable weight to the construction given to it by the parties themselves, evidenced by subsequent statements, acts, and conduct. *RAD-Razorback Ltd. Partnership* v. *B.G. Coney Co., supra.*

The chancellor in the present case recognized that there was undoubtedly a security agreement but held that "the bank could not unilaterally impose a duty of payment on Merrill Lynch simply by virtue of that instrument," despite the use of the term "assignment" in the document. As the Arkansas Supreme Court stated in *Wimberley Grocery Co.* v. *Border City Broom Co.*, 166 Ark. 570, 266 S.W. 679 (1924):

> At § 73 of the chapter on Assignments, in 5 C.J., p. 906, it is said: "Where the assignment is in writing, no special form of words or language is required to be used, although the operative words of an assignment generally used are 'sell, assign, and transfer,' or 'sell, assign, and set over.' It may be in the form of an order on the debtor or holder of the fund assigned to pay the debt or fund to another person. Any language, however informal, if it shows the intention of the owner of the chose in action to transfer it, will be sufficient to vest the property therein in the assignee."

166 Ark. at 577, 266 S.W. at 682. While no particular words are necessary to constitute an assignment, the traditional language of assignment may be used by a court as an indication of the intention of the parties to effect an assignment. The chancellor here found no such suggestion of intent.

Frances Sabbe, appellant bank's own witness, testified that there was "no separate document called an assignment"; only the financing statement and security agreement existed to show a relationship among the parties. She verified that the "assignment" of Dickson's fees, reflected in those instruments, was for the purpose of providing collateral on the loan. The ultimate

purpose, then, of the assignment language on the two forms was to provide a means of perfecting a security interest in the accounts receivable.

In the security agreement, it was provided that "UNTIL DEFAULT hereunder, Debtor shall be entitled to the possession of the Goods and to use and enjoy the same." If, as appellant bank suggests, this language creates an ambiguity, the contract, prepared by Northwest National Bank, must be strictly construed against it, *Gilstrap* v. *Jackson*, 269 Ark. 876, 601 S.W.2d 270 (1980), in the light of the subsequent statements, acts, and conduct of the parties, *RAD-Razorback Ltd. Partnership* v. *B.G. Coney Co., supra.* During the twenty-six months between the time the loan was made, in August, 1984, and the time it was declared in default, in October, 1986, appellant bank continued to accept payments of principal and interest from Dickson, who continued to collect fees on the cases described in the security agreement. Frances Sabbe acknowledged that, under the agreement, Dickson was permitted to collect those fees until the time of default. It is therefore unfeasible for the security agreement in this case to be considered at the same time an assignment. It would have been a clear expression of intent for the parties here to have executed a separate oral or written agreement. For example, in *Newton* v. *Merchants & Farmers Bank of Dumas*, 11 Ark. App. 167, 668 S.W.2d 51 (1984), a letter, separate from a consumer note and security agreement, provided:

> I, Kenneth Rogers, D/B/A Ken Rogers Plumbing Co., hereby assigns [sic] set over and deliver to Merchants and Farmers Bank of Dumas, Arkansas, a certain subcontract between Wayne Newton Construction Company of Magnolia Arkansas and Delta Lodge Motel, in the amount of $22,100, dated February 11, 1981.

11 Ark. App. at 170, 668 S.W.2d at 52. No such independent agreement was made in the present case, and the chancellor was not clearly erroneous in ruling that the note and security agreement did not constitute an assignment to appellant bank of the legal fees owed James Dickson by appellee Merrill Lynch.

In its second point for reversal, appellant bank contends that the chancellor erred in ruling that the letter dated November 1, 1984, from Northwest National Bank to appellee Merrill Lynch

had no legal and binding effect. The chancellor's rationale was that because no valid assignment had been made, the letter was merely notice from the bank to Merrill Lynch that there was a security agreement between appellant and Dickson. We agree.

The text of the letter of November 1, 1984, nowhere indicates that an assignment has been made. There appears a statement that "Mr. James Dickson has pledged as collateral on a loan at Northwest National Bank accounts receivable from Merrill Lynch, Pierce, Fenner [&] Smith, Inc." and a request that appellee Merrill Lynch "mark your records so that payments are made to Mr. Dickson and Northwest National Bank." The attached copy of the financing statement and security agreement showed only that appellant bank had been granted a security interest in the accounts receivable and that Dickson was entitled to possession of those "goods" until default. Neither the security agreement nor the letter provided appellee instruction regarding the amount of money involved, the time when payments were to begin, or the duration of the purported assignment.

The record clearly reveals that Dickson made payments under the terms of his note until the extended due date of April 15, 1986. Appellant bank's witness, Frances Sabbe, who signed the November 1, 1984, letter, testified that she did not consider the loan in default until October 28, 1986, the date on which Northwest National, through its attorney, made demand upon appellee Merrill Lynch for payment of Dickson's fees. At no time prior to default, however, was appellee informed of the various loan extensions granted Dickson by appellant or asked for an accounting of fees owed or paid to Dickson.

These actions and omissions indicate that appellant bank considered the transaction to be governed by the Uniform Commercial Code's provisions on the secured party's collection rights:

> When so agreed and in any event on default the secured party is entitled to notify an account debtor or the obligor on an instrument to make payment to him whether or not the assignor was theretofore making collections on the collateral and also to take control of any proceeds to which he is entitled.

Ark. Code Ann. § 4-9-502(1) (1987). Similarly, Ark. Code Ann. § 4-9-503 (1987) provides that "Unless otherwise agreed, a secured party has on default the right to take possession of the collateral." No other agreement was made, and appellant did not seek the accounts receivable before default. By its own conduct appellant bank seemed to have regarded its letter of November 1, 1984, as nothing more than notice to appellee Merrill Lynch of the existence of the security agreement. The evidence does not suggest that the chancellor was clearly erroneous in deciding that the letter had no legal and binding effect.

Appellee Merrill Lynch, in its brief, renewed its motion to strike Appendix A from appellant's brief on the grounds that it is not a part of the record and violates Rule 9(d) of the Rules of the Supreme Court and Court of Appeals. Appellant's Appendix A consists of a photocopy of a consumer note and security agreement from the record in *Newton* v. *Merchant & Farmers Bank of Dumas, supra.* As it is not a part of the record in this case it was not considered and the motion to strike is moot.

Affirmed.

MAYFIELD and COOPER, JJ., agree.

Herman Frederick FRANKLIN *v.* Phoebe Ann FRANKLIN

CA 88-135 758 S.W.2d 7

Court of Appeals of Arkansas
Division II
Opinion delivered October 5, 1988

Burbank, Dodson & McDonald, by: *Gary D. McDonald*; and *Beverly Carpenter*, for appellant.

Compton, Prewett, Thomas & Hickey, P.A., by: *Carol Crafton Anthony*, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Union County Chancery Court. Both parties appeal from the decree and order filed of record January 19, 1988. We affirm in all respects.

Herman and Phoebe Franklin were married December 12, 1957. The parties separated on or about October 9, 1984, and Mr.

Franklin petitioned the court for absolute divorce. The case was heard on August 24, 1987, and a decree awarding divorce was filed January 19, 1988. The decree also disposed of the parties' property and awarded bi-monthly alimony to Mrs. Franklin.

For reversal, appellant, Herman Franklin, raises the following five points: (1) The chancellor erred and abused his discretion in awarding alimony to Mrs. Franklin; (2) alternatively, the chancellor erred in the amount of alimony awarded; (3) alternatively, the chancellor erred in awarding alimony retroactively; (4) the chancellor erred in failing to adjudicate marital property as of October 9, 1984; and (5) the chancellor erred in awarding Mrs. Franklin an unequal division of marital property. Appellee, Phoebe Franklin, filed a cross-appeal asserting the following two points: (1) The chancellor erred in refusing to allow Mrs. Franklin to name a contingent alternative payee on the retirement benefits; and (2) the chancellor abused his discretion in failing to award Mrs. Franklin an attorney's fee.

Appellant's first three points regarding the alimony will be treated together. 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 and the appellate court will not reverse absent a clear abuse of that discretion. *Wilson* v. *Wilson*, 294 Ark. 194, 741 S.W.2d 640 (1987). There are many factors which may be considered in determining whether to allow alimony and fixing the amount to be allowed.

> Among [the factors] are the financial circumstances of both parties, the financial needs and obligations of both the couple's past standard of living, the value of jointly owned property, the amount and nature of the income, both current and anticipated, of both husband and wife, the extent and nature of the resources and assets of each that is "spendable," the amounts which, after entry of the decree, will be available to each of the parties for the payment of living expenses, the earning ability and capacity of both husband and wife, property awarded or given to one of the parties, either by the court or the other party, the disposition made of the homestead or jointly owned property, the condition of health and medical needs of both husband and wife, the relative fault of the parties and their conduct,

> both before and after separation, in relation to the marital status, to each other and to the property of one or the other or both,[1] the duration of the marriage and even the amount of child support.

Boyles v. *Boyles*, 268 Ark. 120, 594 S.W.2d 17 (1980).

The record reflects that the parties were married twenty-seven years prior to their separation. During the period of separation Mrs. Franklin was diagnosed as having multiple sclerosis. Prior to the final hearing Mrs. Franklin resigned from her job due to her inability to properly perform her duties resulting from her health problems. The chancellor found that because of her health and her limited vocational skills, Mrs. Franklin's opportunity to realize gainful employment and to acquire capital assets was poor. We cannot say that such a finding is clearly erroneous. The record also reveals that Mr. Franklin has steady employment from which he nets approximately $33,000 per year and receives various other benefits in connection with his employment. We cannot conclude under these circumstances that the chancellor abused his discretion in awarding alimony to Mrs. Franklin.

The same factors are considered in determining the amount at which to fix the payments. *See, id.* Using the Arkansas Domestic Relations Manual support chart as a guide, the chancellor awarded Mrs. Franklin bi-monthly alimony of $244. Appellant contends that the chancellor erred in using the chart because it is designed for use only in situations where the court awards child support to a custodial parent of dependent children, and that the chancellor did not consider his "spendable" income as enunciated in *Boyles*. It is clear that the chancellor considered many of the factors enunciated in establishing the amount of alimony. Furthermore, while Mrs. Franklin presented testimony regarding her expenses such as rent and insurance, it does not appear that Mr. Franklin put on any proof regarding his "spendable" income. Although "spendable" income is one of the factors the chancellor *may* consider, he is unable to consider

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[1] In *Russell* v. *Russell*, 275 Ark. 193, 628 S.W.2d 315 (1982), the Arkansas Supreme Court deleted the relative fault of the parties as a factor considered by the court with regard to alimony.

something not before him. Finally, the chancellor stated that he was using the support chart as a guide. The suggestions for use of the chart, appended thereto, provide that a dependent custodian should be counted as two dependents as a guide in determining support. Although Mrs. Franklin is not a custodian, we find no error in using the chart as a guide and cannot say that the chancellor abused his discretion in fixing the amount of alimony at $244 bi-monthly.

Mr. Franklin also argues that the chancellor abused his discretion in awarding alimony retroactively, as of the day following his first letter opinion in the matter. Although the alimony award could not be enforced until the entry of the decree, *see* ARCP Rule 58, the date on which it begins to accrue is a decision within the broad discretion of the chancellor. Appellant has cited no authority which convinces us that the chancellor abused his discretion in this instance.

Next appellant argues that the chancellor erred in failing to adjudicate marital property as of October 9, 1984, the date of separation. In support of his argument, appellant cites *Ford* v. *Ford*, 272 Ark. 506, 616 S.W.2d 3 (1981). However, in *Ford*, the supreme court merely upheld the chancellor's unequal division of property, noting that his findings properly addressed the criteria to be considered under the statute in effect at the time. Contribution of each party in acquisition, preservation or appreciation of marital property is a factor to be considered. Although the chancellor in *Ford* seemed to rely heavily on the wife's lack of contribution during the five and one-half years of separation, the supreme court's decision did not imply that the property was not marital property subject to division, nor did it imply that the contribution factor was to be controlling. It is clear from decisions of both our court and the supreme court that assets acquired after separation and prior to a grant of divorce are marital property, and are to be divided giving due consideration to the factors enunciated in Arkansas Code Annotated § 9-12-315(a)(1)(A) (Supp. 1987) (formerly Ark. Stat. Ann. § 34-1214(A)(1) (Supp. 1985)). *See, e.g., Wilson* v. *Wilson*, 294 Ark. 194, 741 S.W.2d 640 (1987); *Lee* v. *Lee*, 12 Ark. App. 226, 674 S.W.2d 505 (1984). We find no error in awarding Mrs. Franklin an interest in assets acquired by Mr. Franklin after separation.

Both parties raise issues on appeal regarding the division of property and the arguments will be treated together. The applicable statute provides as follows:

> (a) At the time a divorce decree is entered: (1)(A) All marital property shall be distributed one-half (½) to each party unless the court finds such a division to be inequitable. In that event the court shall make some other division that the court deems equitable taking into consideration:
>
> (i) The length of the marriage;
>
> (ii) Age, health, and station in life of the parties;
>
> (iii) Occupation of the parties;
>
> (iv) Amount and sources of income;
>
> (v) Vocational skills;
>
> (vi) Employability;
>
> (vii) Estate, liabilities, and needs of each party and opportunity of each for further acquisition of capital assets and income;
>
> (viii) Contribution of each party in acquisition, preservation, or appreciation of marital property, including services as a homemaker; and
>
> (ix) The federal income tax consequences of the court's division of property.
>
> (B) When property is divided pursuant to the foregoing considerations the court must state its basis and reasons for not dividing the marital property equally between the parties, and the basis and reasons should be recited in the order entered in the matter.

Ark. Code Ann. § 9-12-315(a)(1) (Supp. 1987) (formerly Ark. Stat. Ann. § 34-1214(A)(1)).

Mr. Franklin asserts error in the chancellor's unequal division of property in the case at bar. Prior to disposition of the parties' property, the chancellor stated in the decree that he based his decision upon the parties' twenty-seven year marriage, Mrs. Franklin's deteriorating health, her poor opportunity to realize

gainful employment and to acquire capital assets, and her limited vocational skills. His findings are amply supported by the record. Mr. Franklin attaches special significance to the fact that the chancellor stated that he found an unequal division to be "appropriate" rather than "equitable." However, we find no such significance in his choice of words and cannot say that the chancellor's findings that the circumstances warranted an unequal division of property, were clearly erroneous.

Mrs. Franklin, in her first point on cross-appeal, argues that the chancellor erred in refusing to allow her to name a contingent alternative payee on her share of the retirement benefits. The chancellor awarded Mrs. Franklin a share of various retirement benefits of Mr. Franklin's but stated that if she predeceased Mr. Franklin her share was to revert back to Mr. Franklin. Mrs. Franklin argues that, in effect, she was given only a life estate in the benefits. We agree that is the effect of the chancellor's ruling. However, we see no error in awarding such a life estate as part of an unequal distribution. As discussed above, prior to disposition of any property the chancellor specifically stated that he was awarding an unequal property division and stated his reasons for so doing. Had the chancellor stated that he was awarding an equal division of property, we would have a different issue before us. We cannot say that the chancellor erred in the manner in which he chose to distribute the property.

Finally, Mrs. Franklin argues that the chancellor erred in failing to award attorney's fees. We disagree. The trial court has considerable discretion in the allowance of attorney's fees in a divorce case, and in the absence of clear abuse, the chancellor's fixing of an attorney's fee will not be disturbed on appeal. *Wilson* v. *Wilson*, 294 Ark. 194, 741 S.W.2d 640 (1987). Unless the chancellor finds it to be equitable, there is no compelling reason for the husband to automatically pay the wife's attorney's fees. *Id.* Upon our review of the record, we cannot say that the chancellor clearly abused his discretion in failing to award attorney's fees to Mrs. Franklin.

Affirmed.

CRACRAFT and MAYFIELD, JJ., agree.

Carey Wayne ALEXANDER *v.* STATE of Arkansas

CA CR 87-167 757 S.W.2d 571

Court of Appeals of Arkansas
Division I
Opinion delivered October 5, 1988

Maxie G. Kizer, for appellant.

Steve Clark, Att'y Gen., by: *Lynley Arnett*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was convicted by a jury of theft by receiving, and after a finding that he was an habitual offender, he was sentenced to fifteen years in the Arkansas Department of Correction. On appeal he argues that the trial court erred in not granting his motion to suppress evidence he claims was seized pursuant to an invalid arrest and that the trial court should have also suppressed a statement he made after his allegedly invalid arrest. We affirm.

The appellant had been employed by Apache Van Lines. Apache reported to the Pine Bluff Police Department that several thefts had occurred when the appellant was working on moves. Sergeant Roy L. Ryan discovered that the appellant had pawned a man's gold wedding band, later identified by the owner, which had been reported as stolen by Apache. Sergeant Ryan and Detective Mack Cook then went to the appellant's home. Detective Cook testified that they did not have a warrant and that they went to the appellant's house specifically to arrest him.

Detective Cook stated that they got to the appellant's house at about 8:00 a.m. on May 9, 1986. Sergeant Ryan went to the back of the house and Detective Cook knocked on the front door. The door was answered by the appellant's wife. According to Detective Cook, he identified himself as a police officer and asked if the appellant was there. Sergeant Ryan joined Detective Cook at the front door. Detective Cook stated that Mrs. Alexander invited them into the house and went to get the appellant.

When the appellant appeared in the living room, he was not dressed. Sergeant Ryan told the appellant that he was under arrest and told him to get dressed. The bedroom was next to the living room, and when the appellant went into the bedroom, Sergeant Ryan followed him and stood in the doorway. While waiting for the appellant to gather up his clothes, Sergeant Ryan noticed a pearl necklace in a clear plastic case on the dresser. Recalling that a similar necklace had also been reported as stolen, Sergeant Ryan seized the necklace. This necklace is the piece of evidence that the appellant argues should have been suppressed.

The fourth amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. *Payton* v. *New York*, 445 U.S. 573 (1980). However, here there was no forcible entry into the appellant's home. Instead there was a consensual entry of the type that is not barred by *Payton*. *Davis* v. *State*, 275 Ark. 264, 630 S.W.2d 1 (1982). In *Lamb* v. *State*, 23 Ark. App. 115, 743 S.W.2d 399 (1988), the arrest was found to be invalid because the arrest warrant was not authorized by a judge. The State's argument that the arrest was a valid warrantless arrest was found to be without merit because Lamb was arrested at his home and there was no evidence that anyone residing in the home

consented to the entry by police officers. That is not the situation in the case at bar; the appellant's wife consented to the entry. *See United States* v. *Purham*, 725 F.2d 450 (8th Cir. 1984). Because the necklace was seized pursuant to a valid warrantless arrest and was in plain view, it was proper for the trial court to refuse to suppress it.

Because the appellant's arrest was valid, the incriminating statement that he made after his arrest is also admissible, and we find no error in trial court's refusing to suppress it. *Davis, supra.*

Affirmed.

COULSON and JENNINGS, JJ., agree.

Shirley BLEVINS, Widow of Roger Blevins, Deceased
v. SAFEWAY STORES and Home Insurance Company

CA 88-33 757 S.W.2d 569

Court of Appeals of Arkansas
Division I
Opinion delivered October 5, 1988

Cliff Jackson, P.A., for appellant.

Lovett Law Firm, by: *Tom F. Lovett*, for appellee.

JOHN E. JENNINGS. Judge. Roger Blevins was a produce buyer for a Little Rock Safeway store. On March 10, 1983, Blevins and Alice Denson, a co-worker, went out to dinner with Quinton Lundberg, a regional produce supervisor. Sometime late that evening, or early the next morning, Blevins was killed in a one vehicle accident. He was found dead in his car at 10:00 a.m. on

March 11. A posthumous blood alcohol test registered .22 percent. The Workers' Compensation Commission denied the claim for benefits filed by the appellant, Mr. Blevins' widow. On appeal, she raises three arguments: (1) that Blevins' death was not "substantially occasioned" by intoxication; (2) that even if his death was caused by intoxication, the appellee should be estopped to assert this defense, and (3) that Blevins' death arose within the scope of his employment. We affirm the Commission's decision.

Appellant first argues that Blevins' death was not substantially occasioned by intoxication. Ark. Stat. Ann. § 81-1305 (Repl. 1976) (now Ark. Code Ann. § 11-9-401(a)(2) (1987)) provides that "there shall be no liability for compensation under this Act where the injury or death from injury was substantially occasioned by intoxication of the injured employee. . . ." There is a statutory presumption that the injury did not result from intoxication. Ark. Stat. Ann. § 81-1324 (Repl. 1976) (now Ark. Code Ann. § 11-9-707 (1987)).

At the hearing before the ALJ, the appellee asked to be permitted to depose a medical witness to establish the effect of a blood alcohol level of .22 percent. In response, the appellant stipulated that the effect was "bad," that .22 percent is more than double the legal intoxication level, and that it was common knowledge as to the condition of a person having such a blood alcohol level. Ms. Denson, Blevins' co-worker, testified in fair detail about Mr. Blevins' drinking that night, and Mrs. Blevins testified that he invariably came home inebriated after being out in the evening with the produce supervisor. While it is true that there was no direct evidence that Blevins was driving in a dangerous manner on the night of March 10, and there was no eyewitness to the accident, we are persuaded that there was substantial evidence to support the Commission's finding that Mr. Blevins' death was "substantially occasioned" by his intoxication.

Appellant next argues that even if Blevins' death was substantially occasioned by intoxication, the employer is estopped from raising the defense. The courts have taken two basic approaches to this issue. Some have held that the doctrine of estoppel can never bar the employer's assertion of the defense of intoxication. *See Hopper* v. *F.W. Corridori Roofing Co.*, 305

A.2d 309 (Del. 1973); *Smith* v. *Trader's & General Ins. Co.*, 258 S.W.2d 436 (Tex. Civ. App. 1953). This approach has been described as "draconian." *See* 1 A. Larson, *The Law of Workmen's Compensation* § 34.36, n. 51 (1985). Another group of cases hold that an employer may, in appropriate circumstances, be estopped from asserting the defense and that the issue of estoppel is generally one of fact. *See Tate* v. *Industrial Accident Commission*, 261 P.2d 759 (1953); *McCarty v. Workmen's Compensation Appeals Board*, 12 Cal. 3d 677, 527 P.2d 617, 117 Cal. Rptr. 65 (1974); *West Florida Distributors* v. *Laramie*, 438 So.2d 133 (Fla. Dist. Ct. App. 1983).

This court has implied that estoppel may be available to bar the assertion of the defense of intoxication, under appropriate circumstances. *See Davis* v. *C & M Tractor Co.*, 4 Ark. App. 34, 627 S.W.2d 561 (1982); In *Davis* we said:

> The employer testified that while he was aware that appellant drank intoxicants on a regular basis and had done so for the past fifteen years, he had no knowledge of how much he drank and had never seen him so influenced by alcohol that he could not perform his duties satisfactorily or drive and control a vehicle. He had no knowledge that appellant was intoxicated on the date of the accident or at the time the accident occurred. Reviewing the testimony most favorable to the finding of the Commission, the Commission could, and did find that the employer did not know that appellant was intoxicated on the date of the accident and has no knowledge of his having previously consumed alcohol to such an extent as to affect his driving or ability to perform fully all of his duties satisfactorily. There was no evidence that the employer participated in any drinking sprees or that he knowingly permitted the appellant to continue to work in an intoxicated condition. Mere knowledge of his propensity to consume alcohol does not, in our opinion, estop the employer from raising the defense of intoxication under the circumstances presented by this record.

At the hearing in the case at bar, Mrs. Blevins testified that, at one time, she had been a produce buyer for Safeway. She said that the regional manager would come to town three or four times

a year and that it was customary for the produce buyer to pick him up at the airport and spend time with him afterwards. Quinton Lundberg had been her husband's supervisor for approximately five years. She testified that there were usually dinner meetings after work, that business was usually discussed at those meetings and that there was always drinking involved. Sometimes she went with her husband to these dinners and sometimes she did not. She said that when she did not go with him, Mr. Blevins invariably came home in an inebriated condition. She testified that it was his custom to drink a six-pack of beer every night. She said that it was her belief that appellee knew of Mr. Blevins' drinking problem because the manager of the McAllen Produce Buying Department had told her that he thought Blevins had a drinking problem some years before. She said that she thought Mr. Blevins was reimbursed for his mileage in taking the manager from place to place. She also testified that the employer did not require the produce buyer to go out to dinner with the supervisor, nor did the employer require that the buyer drink.

Alice Denson was a buyer accountant for Safeway and worked for Mr. Blevins. She testified that she ordinarily went to dinner with Mr. Blevins and Mr. Lundberg when Lundberg was in town. She said that the bill for dinner, including whatever drinks were consumed, was paid sometimes by Mr. Lundberg and sometimes by Mr. Blevins. If Lundberg paid the bill it would be charged back to Safeway on his expense account. She testified that there was no requirement that either she or Mr. Blevins go out to dinner with the regional manager.

Ms. Denson said that on March 10, 1983, they closed the office at 4:30 and went to Mr. Lundberg's hotel room. She, Blevins, and Lundberg had a couple of drinks there. Sometime after 6:00 p.m. they went to dinner at the Sir Loin's Inn in North Little Rock. They all had appetizers and a few more drinks before dinner. She testified that while she and Mr. Lundberg had wine with their dinner she wasn't sure that Mr. Blevins did. Ms. Denson said that they each had an after-dinner drink. She testified that Blevins and Lundberg followed her home to make certain that she got there safely, and that when they left her at around 10:15 p.m., she had no indication that Blevins was intoxicated. She also said that Lundberg told her the next morning that he and Blevins had gone back to the bar and had "a

couple more drinks" before Blevins left.

John Guy was the Safeway employee who replaced Mr. Blevins as produce buyer. He testified that he would routinely go to dinner with the regional manager when he came to town, but that there was no Safeway policy that required buyers to go to dinner with regional managers. He also said that there was no requirement that they have drinks at dinner and that he, in fact, did not drink at all.

The question of whether an employer is estopped to raise the defense of intoxication will depend on the particular circumstances of the case. *See, e.g., Davis* v. *C & M Tractor Co.*, 4 Ark. App. 34, 627 S.W.2d 561 (1982); *West Florida Distributors* v. *Laramie*, 438 So.2d 133 (Fla. Dist. Ct. App. 1983). Estoppel is ordinarily an issue of fact. *State* v. *Industrial Acc. Commission*, 261 P.2d 759 (1953). In workers' compensation cases, the Commission functions as the trier of fact. On appeal to this court, the question is whether the Commission's findings are supported by substantial evidence. *DeBoard* v. *Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). On appeal, we must view the evidence in the light most favorable to the findings of the Commission and give the testimony its strongest probative force in favor of the Commission's actions. *See McCollum* v. *Rogers*, 238 Ark. 499, 382 S.W.2d 892 (1964). In the case at bar, we hold only that the Commission's finding that the employer was not estopped to assert the defense of intoxication is supported by substantial evidence. Because we hold that the Commission did not err in finding that the claim was barred by the defense of intoxication, we need not reach appellant's final argument.

Affirmed.

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

Dale CRISTEE *v.* STATE of Arkansas

CA CR 87-229 757 S.W.2d 565

Court of Appeals of Arkansas
Division II
Opinion delivered October 5, 1988

Robert C. Marquette, for appellant.

Steve Clark, Att'y Gen., by: *R.B. Friedlander*, Solicitor General, for appellee.

MELVIN MAYFIELD, Judge. Appellant was found guilty by a jury of the crime of attempted burglary. He was sentenced as an habitual offender to a term of 10 years in the Arkansas Department of Correction and fined $5,000.

Joy Butler, who lived directly across the street from Meadors Lumber Company, in Alma, Arkansas, testified that on the night of December 18, 1986, her husband, who had taken the dog out, came back into the house and told her that the lumberyard

burglar alarm was going off. She stepped out on her front porch and saw a man trying to climb over the fence that enclosed the lumberyard. He was on the inside, trying to get out. Mrs. Butler told her son, Jerry Adamson, who had been sitting in the living room with her, what she saw, and he went outside and yelled at the man. The man climbed down off the fence and started running. While Mrs. Butler called the police, her son chased the man across some railroad tracks and through a produce shed to where he was arrested by a police officer. At trial, Adamson was not able to identify the man he saw running down the street but testified that the man climbing over the fence was the man the police arrested.

Officer Harris testified that he arrested the appellant pursuant to a call he had received. He said he observed appellant running south coming onto Fayetteville Street, and he chased appellant in his unit and on foot. He testified that appellant was running down the street with gloves on, holding a crowbar, and that appellant dropped the crowbar and the gloves and came to a complete stop just prior to his arrest. Harris patted appellant down and found a knife in his pants pocket. This was about 8:30 p.m.

Russell White, of the Alma Police Department, was called to assist Officer Harris. He saw a white, 1976 Ford parked just off the alley behind the old bank building in the area of the lumberyard. After appellant was advised of his rights, he told Officer White that he had driven the vehicle to where it was sitting behind the bank building.

Steve Meadors, who worked for Meadors Lumber Company, testified that on the morning of December 19, he discovered a two-foot by two-foot hole in the back wall of the office and that the hole went all the way through the wall. He said the wall consisted of Sheetrock with insulation and insulation board on the outside. He said Sheetrock was on a desk beneath the hole in the wall, and insulation was scattered on the floor beneath the hole. Meadors said they have a burglar alarm that is set off by motion inside the office. He did not know the appellant and had not given him permission to be in the lumberyard on the night of December 18, 1986.

Carlos Brown testified that the appellant had worked for him

on December 18, 1986. Appellant got off work about 6:30 p.m. His job was helping to measure, cut, and hang Sheetrock.

On appeal, appellant argues the trial court erred in failing to grant his motion for a directed verdict made at the conclusion of the state's testimony and renewed at the close of all the testimony. This motion was a challenge to the sufficiency of the evidence. *Glick* v. *State*, 275 Ark. 34, 627 S.W.2d 14 (1982). In resolving the question of the sufficiency of the evidence in a criminal case, the appellate court views the evidence in the light most favorable to the appellee and affirms the judgment if there is substantial evidence to support the finding of the trier of fact. *Lane* v. *State*, 288 Ark. 175, 702 S.W.2d 806 (1986). Substantial evidence is that which is of sufficient force and character that it will with reasonable and material certainty and precision compel a conclusion one way or the other, without resorting to speculation or conjecture. *Jones* v. *State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984). The fact that evidence is circumstantial does not render it insubstantial. *Small* v. *State*, 5 Ark. App. 87, 632 S.W.2d 448 (1982). When circumstantial evidence alone is relied upon, it must indicate the accused's guilt and exclude every other reasonable hypothesis; whether circumstantial evidence excludes every other reasonable hypothesis is usually a question for the jury. *Murry* v. *State*, 276 Ark. 372, 635 S.W.2d 237 (1982). It is only when circumstantial evidence leaves the jury solely to speculation and conjecture that it is insufficient as a matter of law. *Deviney* v. *State*, 14 Ark. App. 70, 685 S.W.2d 179 (1985). Also, the action of an accused in fleeing from the scene of a crime is a circumstance that may be considered with other evidence in determining probable guilt. *Murphy* v. *State*, 255 Ark. 90, 498 S.W.2d 884 (1973).

Arkansas Statutes Annotated § 41-701 (Repl. 1977) [Ark. Code Ann. § 5-3-201 (1987)] provides:

> (1) A person attempts to commit an offense if he:
>
> . . . .
>
> (b) purposely engages in conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of an offense whether or not the attendant circumstances are as he believes them to be.

Section 41-2002 (Repl. 1977) [Ark. Code Ann. § 5-39-201 (1987)] provides:

> (1) A person commits burglary if he enters or remains unlawfully in an occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment.

Although the appellant was convicted of attempted burglary, it was nevertheless necessary to prove that he attempted to enter an occupiable structure with the purpose of committing therein an offense punishable by imprisonment. A building where people assembled for social activities, religious sessions, and classroom meetings has been held to be an occupiable structure regardless of whether anyone was occupying it at the time. *Barksdale* v. *State*, 262 Ark. 271, 555 S.W.2d 948 (1977). *See also Grays* v. *State*, 264 Ark. 564, 572 S.W.2d 847 (1978) (defendant went into a seed company building when it was not open for regular business). The real question in the present case is whether the evidence is sufficient to support a finding that the appellant entered the lumber company's office building with the intent to commit an offense punishable by imprisonment.

In *Norton* v. *State*, 271 Ark. 451, 609 S.W.2d 1 (1980), the court said that the United States Supreme Court's decisions in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), and *Patterson* v. *New York*, 432 U.S. 197 (1977), held that due process requires the prosecution to prove beyond a reasonable doubt every element of the crime charged. The *Norton* opinion also stated that specific criminal intent and illegal entry are both elements of the crime of burglary and that existence of the intent cannot be presumed from a mere showing of the illegal entry. A conviction for burglary was reversed in *Norton* because, the court said, "[a]t most, the evidence revealed that appellant was standing inside the doorway of an office building which he had illegally entered and from which nothing was taken, speaking to his friends passing by." *See also Wortham v. State*, 5 Ark. App. 161, 634 S.W.2d 141 (1982) (conviction for burglary reversed where the defendant was discovered standing in a doorway in a house, but there was no proof that he had attempted to harm anyone, take anything, or commit any other crime).

Recognizing the proof requirements set out in *Norton*, we

believe the appellant's conviction must be affirmed in the present case. First, we have evidence from which the jury could find that the burglar alarm was activated when the Sheetrock and insulation fell into the office from the hole made through the office wall. The jury could find that the appellant then ran from the building, climbed the fence, and tried to run away from Jerry Adamson and Officer Harris. In *Grays* v. *State, supra*, a man who entered a business building in the night, when the business was not open, ran from the building when police officers inside the building shined a light on him and told him to "freeze." The appellate court specifically cited *Patterson* v. *New York, supra*, and its requirement that the state must prove every material element of the offense charged and held that the trial court did not err in refusing to instruct the jury on the lesser included offense of criminal trespass because "[e]ven when we consider the facts in the light most favorable to appellant we can find no rational basis for a verdict acquitting appellant of the offense of Burglary . . . ." The *Norton* case distinguished *Grays* on the basis that the defendant in *Grays* ran when he was discovered in the building by the police officers and the defendant in *Norton* did not. The opinion states: "We have consistently suggested that the flight of an accused to avoid arrest is evidence of his felonious intent." *See* 271 Ark. at 454. So, in the present case we have the evidence that this appellant ran from the building and from Officer Harris for some distance before he stopped.

In the second place, in *Grays* the appellate court could "find no rational basis" for the defendant in that case to enter the building during the night that would acquit him of burglary. This reasoning applies in the present case. The appellant here did not testify but we cannot think of any rational reason to explain his conduct except an attempt to commit burglary. As the court in *Grays* said, "the fundamental theory, in absence of evidence of other intent or explanation for breaking or entering an occupiable structure at night, is that the usual object or purpose of burglarizing an occupiable structure at night is theft." This point marks a difference between this case and *Wortham* v. *State, supra*, where the opinion states that the defendant in that case had, on a prior occasion, talked to the girls who lived in the house which he entered without seeking permission. The opinion says that while that appellant may have intended to commit some

crime when he entered the open door, "it is equally reasonable" to believe that he wanted only to talk to the girls again. *See also Washington* v. *State*, 268 Ark. 1117, 599 S.W.2d 408 (Ark. App. 1980), where the court in reversing a burglary conviction said, "an innocent purpose would not be inconsistent with the circumstances shown." 268 Ark. at 1121.

The existence of criminal intent or purpose is "a question of fact for the jury when the evidence shows facts from which it may reasonably be inferred." *Grays*, 264 Ark. at 570 (quoting from *Cassady* v. *State*, 247 Ark. 690, 447 S.W.2d 144 (1969)). We think there is substantial evidence to support the jury's verdict in the present case.

Affirmed.

JENNINGS and COULSON, JJ., agree.

Walter H. CREDIT *v.* STATE of Arkansas

CA CR 88-71 758 S.W.2d 10

Court of Appeals of Arkansas
Division II
Opinion delivered October 12, 1988

Lynn Frank Plemmons, for appellant.

Steve Clark, Att'y Gen., by: *Olan W. Reeves*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Judge. The sole issue presented by this appeal is whether a constable is authorized to make an arrest and issue a valid citation charging one with the offense of driving a motor vehicle while intoxicated, first offense, which is committed in his presence within the township for which he was elected.

We conclude that he is.

Walter H. Credit was stopped, arrested, and issued a citation to appear and answer the charge of driving a motor vehicle while intoxicated. The arrest was made in Danley Township, Faulkner County, Arkansas, by a duly elected constable of that township who personally observed the conduct for which the appellant was charged. The appellant does not contend that the evidence was not sufficient to sustain his conviction of the offense but argues only that the trial court erred in not granting his motion to dismiss the charge on the ground that the constable lacked authority to arrest him or issue a citation for the offense. We disagree and affirm the conviction.

The authority for constables to make arrests is found in Ark. Code Ann. § 16-19-301 (1987) (formerly Ark. Stat. Ann. § 26-210 (Repl. 1962)). That section provides that constables shall be conservators of the peace, shall suppress riots, affrays, fights, and unlawful assemblies, and shall make arrests for such breaches of the peace. It further provides that, "[i]f any offense cognizable before a justice of the peace in his township is committed in his presence, the constable shall immediately arrest the offender and cause him to be dealt with according to law."

Article 7, § 40, of the Arkansas Constitution declares those matters which shall be cognizable before a justice of the peace. It provides that justices of the peace shall have original and concurrent jurisdiction with other named courts as to specific civil matters and "such jurisdiction of misdemeanors as is now, or may be, prescribed by law." The legislature has vested in justices of the peace "jurisdiction in all [criminal] matters, less than felony," provided that the circuit courts shall have concurrent jurisdiction in all such cases. Ark. Code Ann. § 16-88-101(a)(3)(B) (1987) (formerly Ark. Stat. Ann. § 43-1405 (Repl. 1977)). The offense of driving while intoxicated is less than a felony, unless one is found guilty of a fourth or subsequent offense occurring within three years of the first one. Ark. Code Ann. § 5-65-111 (1987) (formerly Ark. Stat. Ann. § 75-2504 (Supp. 1985)). As the appellant was charged with driving while intoxicated, first offense, he was charged with less than a felony.

Appellant contends that a municipal court has been established in the City of Conway, Faulkner County, Arkansas,

and that the legislation allowing for its creation abolishes all criminal jurisdiction of justices of the peace in those counties in which municipal courts are established. *See* Ark. Code Ann. § 16-17-206(a)(2) (1987) (formerly Ark. Stat. Ann. § 22-709 (Repl. 1962)). His reliance on *Albright* v. *Karston*, 206 Ark. 307, 176 S.W.2d 421 (1943), as supporting this argument is misplaced. *Albright* declared that the only change that legislation made in the jurisdiction of justices of the peace over criminal matters was to deprive them of jurisdiction over misdemeanors occurring "in townships affected by the act." The court later declared that, although municipal courts have countywide jurisdiction of misdemeanors, that jurisdiction is concurrent with that of the justices of the peace in all townships except the township in which the municipal court sits. Therefore, only in the township in which the municipal court sits is its jurisdiction exclusive of the jurisdiction of justices of the peace. *Lee* v. *Watts*, 243 Ark. 957, 423 S.W.2d 557 (1968); *Logan* v. *Harris*, 213 Ark. 37, 210 S.W.2d 301 (1948).

Here the arrest was made in Danley Township by a constable for that township who observed the occurrence. Although the record does not disclose the township in which the City of Conway is located, courts may take judicial notice of political subdivisions and divisions and locations of townships within counties. *Lee* v. *Watts, supra; St. Louis, Iron Mountain & Southern Railway Co.* v. *State*, 68 Ark. 561, 60 S.W. 654 (1901). We therefore note that the City of Conway is not located in Danley Township, and conclude that the arrest and the citation issued by the constable in this case were lawful and sufficient to sustain the conviction.

Appellant finally contends that the action of the constable could not be sustained in any event because, as he was not qualified to act as a "law enforcement officer" under Ark. Code Ann. §§ 12-9-101 et seq. (1987) (formerly Ark. Stat. Ann. §§ 42-1001 et seq. (Repl. 1977)), any official action taken by him as a police officer is to be held as invalid. We disagree. The Act on which appellant relies purports to apply only to appointed officers, and constables, as officers "elected by a vote of the people," are not subject to its provisions. Ark. Code Ann. § 12-9-102(1) (1987) (formerly Ark. Stat. Ann. § 42-1001(a) (Repl. 1977)).

Affirmed.

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

FIRST NATIONAL BANK AND TRUST COMPANY of Rogers, Representative of the Estate of F.H. "Mike" Hummel *v.* ESTATE OF Hal B. HUMMEL, First State Bank of Springdale, and Harold D. and Connie S. Calloway

CA 88-82 758 S.W.2d 418

Court of Appeals of Arkansas
Division I
Opinion delivered October 12, 1988

Williams, Schrantz & Wood, P.A., for appellant.

Davis & Associates, P.A., by: *Charles E. Davis*, for appellee Estate of Hal B. Hummel.

JAMES R. COOPER, Judge. The appellant in this case is the personal representative of the estate of F.H. "Mike" Hummel. In February 1980, Mike conveyed by warranty deed property known as the "auction house" to himself and his brother, Hal B. Hummel, as joint tenants with rights of survivorship. The appellee in this case is the estate of Hal Hummel, who originally was a defendant, but died before the cause was heard.

The appellant brought suit in the Benton County Chancery Court, seeking a declaratory judgment that the proceeds from a note and mortgage from the sale of the auction house were part of Mike's estate. The chancellor found that the note and mortgage should remain in Hal's estate. On appeal, the appellant argues that the deed was an invalid testamentary disposition; that there was no valid delivery of the deed; and that the deed worked a fraud upon Mike's wife, Josephine, and deprived her of her dower rights in the property. We affirm.

Shortly after Mike created the joint tenancy, he married Josephine on February 22, 1980, and moved to Missouri. In April 1980, Mike sold the auction house to Johnnie and Ora Bassett. The real estate sales agreement and warranty deed were executed by Mike alone. The note and mortgage given to secure the loan were executed in favor of Mike.

On December 1, 1982, an escrow account was established at the appellant bank, First National Bank of Rogers, to receive the note payments from the Bassetts. The escrow agreement was signed solely by Mike. Payments received by the Bank were placed into a savings account held jointly by Mike and Hal with rights of survivorship. The account was closed by Hal three days after Mike's death. The note and mortgage were assumed by appellees Harold and Connie Calloway on January 9, 1985. The agreement for assumption identifies only Mike as the lender. At the time of Mike's death on June 15, 1986, the deed creating the joint tenancy was found in Hal's safe. Hal recorded it after Mike's death.

Copies of Mike's income tax returns for the years 1982 through 1985 were entered into evidence. The returns reflect that

interest income from the Bassett note was paid solely to Mike.

The appellant first argues that the deed from Mike to himself and Hal as joint tenants was an attempt by Mike to make a testamentary disposition because Mike did not intend Hal to have a present interest in the property. At trial, Lois Buchannan, a sister of both Hal and Mike, testified that Hal was instructed by Mike not to file the deed until after Mike had died. The appellant argues that this, coupled with the fact that Mike alone sold the property, indicates that the deed was in reality a "will."

In the cases relied upon by the appellant, *Ransom* v. *Ransom*, 202 Ark. 123, 149 S.W.2d 937 (1941), and *Broomfield* v. *Broomfield*, 242 Ark. 355, 413 S.W.2d 657 (1967), the grantors did not create joint tenancies in themselves; rather, the grantors were attempting to divest themselves of all their interest in the property. These cases turned on whether there was delivery, which we will shortly discuss. We are not persuaded that Mike's continued exercise of control over the property defeated Hal's interest. A joint tenancy is a present estate in which *both* joint tenants are seized of the real estate. *Miller* v. *Riegler*, 243 Ark. 251, 419 S.W.2d 599 (1967) (emphasis added). Both cotenants are possessors and owners of the whole estate. *Id.* Mike's continued involvement with the property is consistent with a joint tenancy.

The fact that we find dispositive is that the proceeds from the note were deposited into a joint account in both brothers' names, indicating that Hal's interest in the property was a present interest. Furthermore, the fact that Mike apparently had exclusive use of the funds for two years prior to the establishment of the escrow account and the fact that it appears Mike alone claimed the benefits on his tax return forms for four years, do not convince us that the deed was not valid. Joint tenants may contract with each other concerning the use of the common property as for the exclusive use of the property by one of them, or the division of income from the property. *Miller* v. *Riegler, supra*, quoting 48 C.J.S. *Joint Tenancy* § 10.

The appellant next argues that the deed was not delivered. A valid delivery includes an intention to pass title immediately and loss of dominion by the grantor over the deed. *Adams* v. *Dopieralla*, 272 Ark. 30, 611 S.W.2d 750 (1981).

Generally, for delivery to be effective, the instrument must pass beyond the grantor's dominion and control. *Broomfield*, v. *Broomfield*, 242 Ark. 355, 413 S.W.2d 657 (1967). We think that in cases where the grantor creates a joint tenancy in himself and another person, it is unreasonable to require that the grantor give up all control. *See Miller* v. *Riegler, supra.*

In the present case the deed contained a notation indicating that the deed was to be delivered to Hal and listed Hal's address. The deed was placed in Hal's safe, to which, testimony revealed, both brothers had access. There is a strong presumption in favor of a deed when it is shown to have been executed by a competent person not acting under undue influence, if the document remains in the hands of the named grantee. *Woodruff* v. *Miller*, 212 Ark. 91, 205 S.W.2d 181 (1947). Under the facts of this case, the presumption is not rebutted merely because both brothers had access to the safe and Mike continued to exert some individual control over the property.

The appellant's final argument concerns whether Mike's creation of the joint tenancy four days prior to his marriage to Josephine operated to defraud her of her dower rights. The appellant had to show by clear and convincing evidence that Mike had conveyed the property for the purpose of depriving his intended wife of the legal benefits of the marriage. *Wilhite* v. *Wilhite*, 242 Ark. 705, 415 S.W.2d 44 (1967).

On our review of chancery cases, we will not set aside a chancellor's findings of fact unless they are clearly erroneous or against the preponderance of the evidence. *Cuzick* v. *Lesly*, 16 Ark. App. 237, 700 S.W.2d 63 (1985). At the time of the marriage, Mike was 75 and Josephine was 78. Both had been married before. Josephine's house was sold, and the proceeds from the sale, along with a $500.00 contribution from Mike, were used to buy certificates of deposit in the names of Josephine and her children. They then purchased a residence for themselves. Lois Buchanan testified that Mike told Josephine that "what was his was his and what was hers was hers." Prior to the marriage, Mike told Roy Hummel, his nephew, that he had taken care of everything and "what's mine is mine and what's hers is hers."

Although we agree with the chancellor that this evidence will not support a finding that Mike and Josephine had a

prenuptial agreement, we do think it will support a finding that both Mike and Josephine intended for their respective families to benefit from their separate property. The evidence simply will not support a finding that Mike intended to defraud Josephine of her dower rights when he created the joint tenancy.

Affirmed.

COULSON and JENNINGS, JJ., agree.

Doyce STEVENSON *v.* STATE of Arkansas

CA CR 88-33 759 S.W.2d 220

Court of Appeals of Arkansas
Division II
Opinion delivered October 12, 1988

Guy Jones, Jr., P.A., for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was convicted in the Municipal Court of Clinton, Van Buren County, Arkansas, of the offense of driving while intoxicated. He appealed this conviction to the Circuit Court of Van Buren County for trial *de novo*. The circuit court's local rules required the appellant to file his proposed jury instructions on December 3, 1987. The appellant failed to do so on that date, but did file proposed instructions the next day, December 4, 1987. Trial was set for December 7, 1987.[1] Both parties appeared on that date and announced that they were ready for trial. The trial court, *sua sponte*, found that the appellant's jury instructions were not timely filed under the local court rule; ordered the appeal dismissed; and remanded the case to municipal court. From that decision, comes this appeal.

For reversal, the appellant contends that the trial court erred in dismissing his appeal to circuit court because the dismissal denied him the right to a jury trial. We agree, and we reverse.

The State contends that the issue is not properly before us because the appellant did not object to the dismissal. The proceedings in the circuit court have not been transcribed. The circuit judge's order recites that both parties were present and ready for trial, but does not indicate whether the appellant's counsel objected or whether he had an opportunity to do so. Similar facts appear in *Harrell* v. *City of Conway*, 296 Ark. 247, 753 S.W.2d 542 (1988), and *Weaver* v. *State*, 296 Ark. 152, 752 S.W.2d 750 (1988). In both cases, the same circuit judge dismissed an appeal from a municipal court conviction on his own motion because the appellants did not comply with the same local rule governing jury instructions. The Supreme Court nevertheless held that the dismissal issue could be presented for the first time on appeal because the trial court's *sua sponte* dismissal prevented either side from presenting arguments. 296 Ark. at 249-50. We think those cases stand for the proposition that, even in the absence of an objection, an argument that a trial court's *sua*

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[1] Stevenson's trial was held December 7, 1987. The local rule at issue in that case was effective at that time, although local rules were abolished by the Supreme Court's revocation of Ark. R. Civ. P. Rule 83 by *per curiam* dated December 21, 1987, which went into effect on March 14, 1988. *Weaver* v. *State*, 296 Ark. 152, 154 (1988).

sponte dismissal was erroneous will be addressed on appeal unless the record affirmatively shows that the appellant had an opportunity to present the argument to the trial court. Therefore, we will consider the issue on its merits.

Again, the facts of *Harrell* and *Weaver* are helpful. In *Weaver* the appellant failed to submit any proposed jury instructions. When he appeared ready for trial, he informed the trial court that he considered the instructions proposed by the State to be adequate. The trial court dismissed Weaver's appeal from his municipal court conviction on the ground that Weaver was in violation of the local rule requiring the defendant to prepare all instructions applicable to the defendant's case. 296 Ark. at 153-54. On appeal, Weaver argued that the trial court deprived him of his constitutional right to a jury trial, as no jury is available in municipal court. The Supreme Court held that the local rule had been unreasonably applied and reversed. 296 Ark. at 155-56. The *Weaver* Court recognized that there were limitations on local rules: "[t]wo of these limitations are that such local rules must not contravene a valid statute or be unreasonable." 296 Ark. at 155, quoting *Letaw* v. *Smith*, 223 Ark. 638, 268 S.W.2d 3 (1954). The Court noted that the application of the local rule caused Weaver to lose access to the circuit court, and cited authority for the proposition that a local rule should neither be elevated to the status of a jurisdictional requirement, nor be applied in a manner which defeats altogether a litigant's right of access to the court. 296 Ark. at 156, *citing Lyons* v. *Goodson*, 787 F.2d 411 (8th Cir. 1986).

In *Harrell*, the appellant failed to file a complete set of proposed jury instructions, although those instructions which were submitted were timely filed, and proposed instructions were filed by the State. The trial court dismissed Harrell's appeal on its own motion for failure to file adequate jury instructions under the local rule. The Supreme Court reversed, noting that Ark. Code Ann. § 16-89-107(b)(1) (1987) and § 16-96-111(a) (1987) provided the appellant with the right to a jury trial, and holding that the dismissal was an unreasonable application of the local rule because it denied Harrell his statutory right to a jury trial. 296 Ark. at 249-50.

We think that these cases stand for the proposition

that a local rule may not be applied in a manner which contravenes a valid statute or is otherwise unreasonable. *Weaver* v. *State, supra; Harrell* v. *City of Conway, supra.* Although the instant case presents a somewhat different fact situation in that here the appellant did submit instructions differing from those proposed by the State, rather than failing to submit any instructions or submitting inadequate instructions as in the cases cited above, we find no meaningful distinction between the facts of this case and those presented in *Weaver* and *Harrell, supra.* The essential question under the rules enunciated in those cases is whether the local rule was applied in such a manner as to contravene a statute or completely defeat a litigant's right of access to the court. In the case at bar the appellant was denied his statutory right to a jury trial, *see Harrell, supra*, and was completely denied access to the court. The local rule was thus improperly applied, and we reverse and remand for a trial on the merits.

Reversed and remanded.

MAYFIELD and COULSON, JJ., agree.

Walter R. YOCKEY *v.* Nancy Z. YOCKEY

CA 88-18 758 S.W.2d 421

Court of Appeals of Arkansas
Division I
Opinion delivered October 12, 1988

Mobley and Smith, by: *William F. Smith*, for appellant.

Joe Cambiano, for appellee.

JOHN E. JENNINGS, Judge. In 1978, appellant, Walter Yockey, paid $1,000.00 for 20% of the stock in Poultry Production Systems, Inc., a closely held family owned corporation. He and the appellee, Nancy Yockey, were married on February 29, 1980. The parties separated on May 29, 1986, and this divorce action followed.

From the date of the inception of the corporation in 1978, and throughout the marriage, Mr. Yockey worked full-time for the corporation, selling and installing poultry equipment. Mrs.

Yockey taught school until 1983 when she began working for Arkansas Power and Light Company. The annual income of each party, as reported for tax purposes, follows:

	Nancy Yockey	Walter Yockey
1980	$ 11,516.44	$ 10,000.00
1981	14,151.01	1,000.00
1982	13,710.63	4,000.00
1983	28,339.30	1,292.77
1984	29,882.08	6,000.00
1985	31,471.47	3,500.00
1986	34,337.34	12,840.00
TOTALS:	$ 193,290.35	$ 38,632.77

Mrs. Yockey testified that her husband chose to live on her income and reinvest his money back into the company. The chancellor heard expert testimony that in September of 1987 the value of the corporation was $195,365.00. There was also evidence that, at the time of the marriage, the value of Mr. Yockey's one-fifth interest in the corporation was $2,717.00. From these figures it was calculated that the extent of the increase in value of Mr. Yockey's stock, during the marriage, was $36,356.00. The chancellor awarded Mrs. Yockey one-half of this increase in value, because he believed the increase in value to be marital property under the supreme court's holding in *Layman* v. *Layman*, 292 Ark. 539, 731 S.W.2d 771 (1987).

The primary issue presented on appeal is whether the chancellor was correct in deciding that the increase in value of Mr. Yockey's stock was marital property. We hold that the increase in value was non-marital property and reverse.

Arkansas Code Annotated Section 9-12-315(b) provides:

> For the purpose of this section "marital property" means all property acquired by either spouse subsequent to the marriage except:
>
> . . .
>
> (5) The increase in value of property acquired prior to the marriage . . . .

The language of the statute is clear: the increase in

value of property acquired prior to the marriage is not marital property. Although *Layman* v. *Layman*, 292 Ark. 539, 731 S.W.2d 771 (1987) is quite similar factually to the case at bar, it is distinguishable. In that case, Mr. Layman acquired stock in a closely held corporation, by gift from his parents, *after the marriage*. The supreme court held that the increase in value of the stock, during the marriage, was marital property. The court's opinion, however, notes that Ark. Stat. Ann. § 34-1214 (Supp. 1985) (now Ark. Code Ann. § 9-12-315 (1987)) "pointedly [excludes] from the marital property umbrella . . . increases in value of property acquired *prior* to the marriage [emphasis in original]." While it is true that the court in *Layman* cited, with approval, *Jensen* v. *Jensen*, 629 S.W.2d 222 (C.A. Tex. 1982), and that under the holding in *Jensen*, the increase in value of the stock in the case at bar would be treated as marital or community property (under Texas law), it must be recognized that Texas, unlike Arkansas, has no statute expressly governing this particular issue.

The fact that our property division statute provides that the increase in value of property acquired by one party prior to the marriage is non-marital property does not mean that the chancellor, on remand, must award the entire amount of the increase to Mr. Yockey. Instead, the statute expressly provides that the court may make some other division that it deems equitable. Ark. Code Ann. § 9-12-315(a)(2) (1987). If the trial court does determine that it is equitable to divide non-marital property between the parties, however, the statute requires that the court take into consideration those factors listed in Ark. Code Ann. § 9-12-315(a)(1)(A) (1987) and that the court state in writing its reasons. Here, the chancellor believed that the increase in value of the stock was marital property, under the holding in *Layman, supra*. It is appropriate for us to remand the case to the trial court for it to determine whether the increase in value of the stock should be awarded to Mr. Yockey or divided in some way between the parties. As the supreme court has held, the overriding purpose of our property division statute is to enable the court to make a division that is fair and equitable under the circumstances. *See Canady* v. *Canady*, 290 Ark. 551, 721 S.W.2d 650 (1986).

The trial court awarded Mrs. Yockey an expert witness

fee of $1,800.00, which she incurred in establishing the increase in value of the stock. While there is no contention that the amount awarded is excessive, we agree with Mr. Yockey that, because we sustain his first argument, we must also reverse the chancellor's award of expert witness fees. On remand, the propriety of awarding expert witness fees will depend upon the chancellor's disposition of the increased value of the stock.

Finally, Mr. Yockey argues that the chancellor erred in awarding Mrs. Yockey a credit for certain expenditures made by her in connection with the home of the parties, during the separation. We find no error in the chancellor's ruling on this matter.

Reversed and remanded.

COOPER and COULSON, JJ., agree.

Odis ROSS, Administrator of the Estate of Robert Ross, Jr.
v. Dorothy MOORE

CA 87-447 758 S.W.2d 423

Court of Appeals of Arkansas
Division II
Opinion delivered October 19, 1988

Felver A. Rowell, Jr., for appellant.

Dale Lipsmeyer, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Conway County Circuit Court. Appellant, Odis Ross, administrator of the estate of Robert Ross, Jr., appeals from a judgment finding that Robert Ross, Jr. is the father of appellee Dorothy Moore's children, Tracy Moore and Dexter Moore. We reverse and remand.

This suit was initiated in Conway County Circuit Court by the State in the name of appellee. Appellee did not wish to file the action but was required to do so in order to continue receiving welfare benefits. The action was heard by the county court and Robert Ross was adjudged to be the father of Dexter and Tracy Moore. Mr. Ross appealed the judgment to the circuit court, but died prior to the case being called. The cause of action was revived in the name of Odis Ross, Administrator of the Estate of Robert Ross, Jr., Deceased, by order filed of record June 16, 1987. The case was heard *de novo* July 8, 1987, by the circuit judge sitting without a jury. A judgment entered July 21, 1987 adjudged Robert Ross, Jr. to be the natural father of Dexter Moore and Tracy Moore. From this judgment, comes this appeal.

For reversal, appellant alleges in his only point that the

evidence was insufficient on behalf of the appellee to establish paternity.

We have held that in a bastardy proceeding brought against a living putative father, the mother's burden of proof is nothing more than a mere preponderance of the evidence, since the proceeding is civil in nature rather than criminal even where the action is bought in the name of the State. *McFadden* v. *Griffith*, 278 Ark. 460, 647 S.W.2d 432 (1983). In contrast, one who claims to be the illegitimate child of a deceased person seeking to share in the decedent's estate must prove paternity by clear and convincing evidence. *Lewis* v. *Petty*, 272 Ark. 250, 613 S.W.2d 585 (1981). The differing standards present a novel issue with regard to the facts in the case at bar. As noted above, the case was heard in county court while Mr. Ross was living. Ms. Moore's burden of proof in that proceeding was clearly to establish paternity by a preponderance of the evidence. The decision of the county court was appealed to circuit court pursuant to Arkansas Code Annotated § 9-10-106(d) (1987) (formerly Ark. Stat. Ann. § 34-701.1(b) (Supp. 1985)). However, prior to the case being called in circuit court, Mr. Ross died. The State revived the action and pursued the appeal in circuit court. The initial question is which burden was applicable in the circuit court proceeding.

Upon appeal of a bastardy action from county court, a trial *de novo* without a jury shall be conducted by the judge of the circuit court. *Id.* A *de novo* trial has been defined as trying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered. Black's Law Dictionary 392 (5th ed. 1979).

Because the matter was tried anew before the circuit judge after the putative father died, the reasoning of the supreme court in *McFadden* seems equally applicable in the analogous situation before us. In *McFadden*, the court explained that a higher standard of proof is required where one claims to be the illegitimate child of a deceased person because the death of the man charged with having fathered the child has deprived the estate of its most valuable witness. *Id.* at 461, 647 S.W.2d at 432. The same is true in a bastardy proceeding against the estate of a deceased putative father. For this reason, Ms. Moore was required to establish paternity by clear and convincing evidence

before the circuit judge. Thus, the question on appeal is whether the trial judge's finding that paternity was proved by clear and convincing evidence is clearly erroneous. ARCP Rule 52(a).

Clear and convincing evidence has been defined as evidence so clear, direct, weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitation, of the matter asserted. *Reed* v. *Reed*, 24 Ark. App. 85, 749 S.W.2d 335 (1988). Viewed in the light most favorable to the appellee, the evidence reflects that Dorothy Moore testified that she had sexual relations with Robert Ross, Jr. when the two children were conceived and that during the time these children were conceived she did not have sexual relations with any other man. She also stated that Mr. Ross brought presents for them on holidays and sometimes gave them money when school started. During her testimony, she stated that a blood test had been performed in connection with these proceedings. However, for reasons unknown, the test results were not made part of the record. Several witnesses testified on behalf of the estate, all of whom generally testified that Mr. Ross had never acknowledged paternity of the children to them, nor were they otherwise aware of the alleged paternity.

The trial judge accepted Ms. Moore's testimony as undisputed because none of appellant's witnesses were able to affirmatively deny that Robert Ross was the father of the children. However, such acceptance seems questionable in light of the fact that the deceased would have been the only witness available to affirmatively deny paternity. Mr. Ross clearly denied having fathered the children in his answer to the complaint. Ms. Moore also testified that he denied the children were his in the prior court proceeding. The trial judge's finding that Ms. Moore's testimony was undisputed is clearly erroneous under these circumstances, and appellee's attorney so conceded in his oral argument of the case before this court. The trial court, in ruling upon the paternity issue stated: "I find that Robert Ross is the father of these two children based upon the testimony, the scant testimony I have on the matter." We believe the trial judge was clearly wrong in finding that the "scant" evidence adduced at trial rose to the level of clear and convincing proof.

Although appellant asks that the case be reversed and

dismissed, we find it appropriate in this situation to remand. As the supreme court stated in *Little Rock Newspapers, Inc.* v. *Dodrill*, 281 Ark. 25, 660 S.W.2d 933 (1983), when a trial record discloses a simple failure of proof, justice demands that we remand the cause and allow plaintiff an opportunity to supply the defect unless it clearly appears that there can be no recovery. *See also, Colonial Life and Accident Ins. Co.* v. *Whitley*, 10 Ark. App. 304, 664 S.W.2d 488 (1984). Here, the evidence might well have been much more developed than it was and it is not clear that there can be no recovery. Therefore we believe a remand is the appropriate course.

We would also note that despite appellee's failure to file a notice of appeal, she asserts that the trial judge erred in not allowing the testimony of Joe Cambiano. Mr. Cambiano was the attorney for Robert Ross, Jr. prior to his death. Appellee sought to present evidence through Mr. Cambiano regarding conversations he had with Mr. Ross prior to his death. However, Mr. Cambiano's proposed testimony was not proffered into the record. Error may not be predicated upon a ruling that excludes evidence unless the substance of the evidence is proffered. Ark. R. Evid. 103.

Reversed and remanded.

CRACRAFT and MAYFIELD, JJ., agree.

ARKANSAS STATE HIGHWAY COMMISSION *v.* Jack PAKIS and Niobe Pakis

CA 88-67 758 S.W.2d 21

Court of Appeals of Arkansas
Division I
Opinion delivered October 19, 1988

[redacted]

[redacted]

Robert L. Wilson, Philip N. Gowen, and *Charles Johnson,* for appellant.

Q. Byrum Hurst, Jr., for appellees.

JAMES R. COOPER, Judge. The appellant in this eminent domain case, the Arkansas State Highway Commission, brought an action for condemnation of 7.33 acres of the appellees' 8.8 acre tract in Hot Springs, Arkansas. The appellees filed a counterclaim alleging that the Highway Department's estimated compensation was inadequate, and seeking just compensation for the taking of their property. The jury fixed the landowners' damages at $1,363,000.00. From that decision, comes this appeal.

For reversal, the appellant contends that the trial court erred in denying its motion to strike the landowner/appellee's testimony with respect to the value of the land and improvements. We affirm.

The condemned property, acquired by the appellant because of highway construction, was zoned for commercial use and bordered on Highway 7 in Hot Springs. Several improvements are located on the property, including flea market stalls, a warehouse, a workshop, two cottages, and a 4,900 square foot residence. Jack Pakis, the landowner, testified that, in his opinion, the value of the property was $2,083,526.00. That figure included approximately $1,437,000.00 for the land itself, computed on the basis of its value as commercial property; $45,000.00 for the flea market stalls; and $390,000.00 for the residence.

The appellant argues first that Mr. Pakis improperly combined residential and commercial values in his value testimony and that the trial court erred in denying its motion to strike the testimony. The Arkansas Supreme Court has held that it was error for the trial court to refuse to strike the testimony of three witnesses who testified that the highest and best use of the property was commercial, but who intermingled residential and commercial values in their opinions of just compensation for the entire property. *Arkansas State Highway Commission* v. *Toffelmire*, 247 Ark. 74, 444 S.W.2d 241 (1969). However, we are not convinced that the landowner in the case at bar combined residential and commercial values in his opinion of the value of the property. Although the $390,070.00 attributable to the residence was added to the $1,437,480.00 attributed to the commercial value of the land in the landowner's opinion of the property value, the landowner did not state that his opinion of the value of the house was based on its value as a residence, and there was testimony to show that other homes in the area had been converted into restaurants or otherwise used commercially. It is entirely proper to allow evidence of all potential uses of a landowner's property, *Arkansas State Highway Commission* v. *Griffin*, 241 Ark. 1033, 411 S.W.2d 495 (1967), and on this record we cannot say that the landowner's testimony improperly combined commercial and residential values.

Next, the appellant contends that the landowner failed to depreciate the value of the improvements, and that the trial court erred in refusing to strike the landowner's testimony on that basis. On cross-examination, Mr. Pakis stated that he did not depreciate the improvements in determining their value; in addition, he stated that, although he included an estimate of the value of the improvements in the flea market area in his opinion of the overall value of the property, he did not believe that those improvements contributed any additional value to the land.

Proper deduction must be made for depreciation by wear and tear when evidence of the construction and cost of buildings is admitted as relevant to the extent to which the buildings enhance the market value of the real estate. *Arkansas State Highway Commission* v. *Person*, 258 Ark. 379, 525 S.W.2d 77 (1975). In *Person*, the Supreme Court held that a landowner's testimony making no deduction for wear and tear was properly

admitted where the landowner gave reasons for his belief that there was no functional or economic depreciation. *Person*, 258 Ark. at 387. In the present case, Mr. Pakis testified that he did not apply depreciation to the residence, warehouse, or flea market area because he did regular maintenance which kept the structures in "perfect shape." An appraiser testifying on behalf of the Highway Department testified that it was readily apparent from his examination of the residence that a very stringent maintenance program had been followed. We think that Mr. Pakis offered a reasonable basis for concluding that no deduction for wear and tear was proper in this case, and we find no abuse of discretion in the trial court's denial of the appellant's motion to strike the testimony on this ground. *See Person, supra.* Nor do we think that the trial court erred in denying the motion to strike on the theory that the landowner improperly included the value of the flea market structures in his opinion of the overall value of the land. A landowner expressing an opinion based on his familiarity with the property has more leeway in fixing values than does an expert, and, to demonstrate error in the trial court's refusal to strike such testimony, the adverse party must show that there was no reasonable or logical basis for the landowner's opinion. *Arkansas State Highway Commission* v. *Person, supra.* A landowner need not be shown to be an expert on values or even to be acquainted with the market value of such property; instead, his qualification to give estimates of his property's value is based on his relationship to the property as owner. *Arkansas State Highway Commission* v. *Mullens*, 255 Ark. 796, 502 S.W.2d 626 (1973). If the landowner's values are shown on cross-examination to be founded on a questionable basis, that fact bears on the weight to be given to his testimony. *Id.* Here, the structural value of the flea market buildings was only one element of the value the landowner assigned to the entire property before the taking. Although Mr. Pakis' testimony that he did not believe the flea market buildings enhanced the market value of the property should be considered in determining the weight to be given his overall evaluation of his property's value, the trial court was not required to strike his testimony. *See Person, supra.*

Affirmed.

COULSON and JENNINGS, JJ., agree.

Billy J. BLAKEMORE *v.* STATE of Arkansas

CA CR 88-48 758 S.W.2d 425

Court of Appeals of Arkansas
Division I
Opinion delivered October 19, 1988

Hubert W. Alexander, for appellant.

Steve Clark, Att'y Gen., by: *Lynley Arnett*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was convicted in the Municipal Court of Jacksonville of driving while intoxicated, first offense. The appellant appealed to circuit court, where, after a *de novo* bench trial, he was again found guilty and he was sentenced to seven days in the county jail, with six days suspended; fined $150.00; and his driver's license was suspended for ninety days. The appellant argues three points on appeal: that the court erred in finding that he was in control of a vehicle; that the trial court erred in finding that there was reasonable suspicion to justify the police officer's detention of him; and that the trial court erred in finding that he was intoxicated. We affirm.

The record reveals that the appellant was arrested on March 15, 1987. Dwight Rushing, a deputy with the Pulaski County Sheriff's office, testified that, at 3:00 a.m., he was routinely checking businesses located in his patrol area when he saw a red pickup truck sitting in the parking lot of the Dixie Food and Fun Bar. He observed that the motor was running and the lights were on. After checking the building to make sure there had not been a break-in, he approached the car and saw the appellant either

"asleep or passed out" in the front seat of the truck and woke him up. Deputy Rushing stated that it was difficult to wake the appellant and he "had to beat on the door and window for a while."

When the appellant got out of his truck, Deputy Rushing noticed that he smelled of alcohol and stumbled. Deputy Rushing gave the appellant a field sobriety test which the appellant failed.

Testifying in his own behalf, the appellant explained that he was a truck driver and had just gotten in from California that day and that he went by the Dixie Bar to see a friend. The appellant stated that he got to the bar at 9:00 p.m. and that he had three to four drinks before leaving at 11:00 p.m. The appellant explained that he had tried to get his girlfriend to come and get him, but that she was unable to and that because he was too tired to drive he went out to his truck to sleep for awhile. The appellant testified that the motor was on so that he could run the heater. He denied that the headlights were on when the officers arrived and testified that they were turned on by the police officers. The appellant refused to take a breath test.

The appellant's first and third arguments are challenges to the sufficiency of the evidence. On appeal we are required to view the evidence in the light most favorable to the State and affirm if there is substantial evidence to support the verdict. *Holt* v. *State*, 15 Ark. App. 269, 692 S.W.2d 265 (1985). Substantial evidence is evidence which is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other; it must force or induce the mind to pass beyond a suspicion or conjecture. *Jones* v. *State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984). The appellant first argues that he was not in actual control of the truck, and cites *Dowell* v. *State*, 283 Ark. 161, 671 S.W.2d 740 (1984), in support of his argument. In *Dowell* it was held that an occupant of a car was not shown to be in actual control of the car in which he was found asleep. An important factor in *Dowell* was that the keys to the vehicle were found on the seat at the time of arrest. *See Roberts* v. *State*, 287 Ark. 451, 701 S.W.2d 112 (1985). We disagree that *Dowell* is applicable to the appellant's case and are persuaded by the State's contention that the facts in this case more closely resemble those in *Roberts, supra*, and *Wiyott* v.

State, 284 Ark. 399, 683 S.W.2d 220 (1985). In *Wiyott*, the occupant of the car was found asleep, and when he was awakened by police officers, he reached for his keys which were in the ignition and then attempted to start the car. In the present case, not only were the keys in the ignition, but the truck's motor was running. As the Supreme Court noted in *Wiyott*, the person convicted could have awakened at any moment and started the car, and that he was in as much control of the vehicle as an intoxicated person can be. 284 Ark. at 402.

The appellant further contends that there are three methods by which it can be proven that a person is in physical control of a vehicle and that none of these methods were used in his trial. In *Azbill* v. *State*, 285 Ark. 98, 685 S.W.2d 162 (1985), the Supreme Court listed the methods: (1) observation by the officer; (2) evidence of intent to drive after the moment of arrest; or (3) a confession by the defendant that he was driving. However, *Azbill* is distinguishable because in that case the driver was found outside the car, not in it. The Court also stated in *Azbill* that control of the vehicle can by shown by circumstantial evidence. 285 Ark. at 101. Here the deputy directly observed the appellant in his truck, with the keys in the ignition and the motor running. We hold that the evidence was sufficient to establish that the appellant was in control of his vehicle.

For his third point for reversal, the appellant argues that the trial court erred in finding that he was intoxicated. The appellant refused to take a breath test so there was no evidence at trial as to the level of alcohol in the appellant's system. Arkansas Statutes Annotated § 75-2502(a) (Supp. 1985) states:

> "Intoxicated" means influenced or affected by the ingestion of alcohol, a controlled substance, or a combination thereof, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians.

Now codified at Ark. Code Ann. § 5-65-103 (1987).

We hold that there was sufficient evidence to find that the appellant was intoxicated. Deputy Rushing testified that

when the appellant got out of his truck he detected the odor of alcohol and the appellant stumbled getting out of the truck. In the field sobriety test, the appellant was asked to touch his nose and he missed and touched his moustache area. The appellant could not stand on one leg without using his arms to balance himself and he failed the eye gaze nystagmus test. Furthermore, the appellant admitted that he had been drinking. We do not find it significant that Deputy Rushing, on cross-examination, admitted that the appellant's actions could have been the result of having just been awakened from a deep sleep, because the officer also stated that he did not believe that was so in the appellant's case.

The appellant's second argument, which we are addressing last, concerns whether Deputy Rushing had a reasonable suspicion which justified his detaining the appellant. Arkansas Rules of Criminal Procedure Rule 3.1 allows an officer to "stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation or danger to property." It is the appellant's contention that Deputy Rushing did not have reasonable suspicion that the appellant was involved in criminal activity at the time he knocked on the window of the appellant's car. He asserts that it was not until he stepped out of his car that the suspicion arose that he was intoxicated.

We do not agree that this case involves the authority of a police officer to make an investigatory stop based on reasonable suspicion in accordance with A.R.Cr.P. Rule 3.1, but involves the question of the extent of permissible interruption a citizen must bear to accommodate a law officer who is investigating a crime under A.R.Cr.P. Rule 2.2. In *Baxter* v. *State*, 274 Ark. 539, 626 S.W.2d 935 (1982), the Arkansas Supreme Court stated:

> The practical necessities of law enforcement and the obvious fact that any person in society may approach any other person for purposes of requesting information make it clear the police have authority to approach civilians.
>
> There is nothing in the Constitution which prevents the police from addressing questions to any individual. However, the approach of a citizen pursuant to policeman's investigative law enforcement function must be reasonable

> under the existent circumstances and requires a weighing of the government's interest for the intrusion against the individual's right to privacy and personal freedom. To be considered are the manner and intensity of the interference, the gravity of the crime involved, and the circumstances attending the encounter.

274 Ark. at 543 (citations omitted); *see also McDaniel* v. *State*, 20 Ark. App. 201, 726 S.W.2d 688 (1987). Arkansas Rules of Criminal Procedure Rule 2.2 outlines the authority of a police officer to request cooperation. Rule 2.2 provides in part:

> (a) A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reasonable request.

When we weigh the facts and circumstances in this case we find that the police officer's actions were reasonable. Deputy Rushing stated that he was in the area at 3:00 in the morning to check the businesses located there for possible break-ins. When he first saw the appellant's truck, he noticed that the motor was running and the headlights were on. He testified that he first thought that the bar had been broken into and went to check the building. Finding no evidence of a break-in, he went over to the appellant's truck, and that is when he first noticed the appellant laying in the front seat of the truck. Deputy Rushing said that he thought the appellant was "asleep or passed out." Although he did not see any blood or physical injuries, Deputy Rushing did not know if the appellant was ill, drunk, or merely asleep. Given these circumstances we believe that Deputy Rushing, as part of his community caretaking function, was justified in knocking on the appellant's window to question him and make an inquiry. *See Lipovich* v. *State*, 265 Ark. 55, 576 S.W.2d 720 (1979).

Affirmed.

COULSON and JENNINGS, JJ., agree.

Ted Martin AKIN and Gloria D. Akin *v.* The FIRST NATIONAL BANK of Conway

CA 87-377 758 S.W.2d 14

Court of Appeals of Arkansas
En Banc
Opinion delivered October 19, 1988
[Rehearing denied November 23, 1988.*]

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

Wright, Lindsey & Jennings, for appellants.

Henry & Henry, for appellee.

JOHN E. JENNINGS, Judge. This suit was brought by First National Bank of Conway, the appellee here, against Ted Akin, appellant here, and William Yarbrough to foreclose a mortgage on a home in Guy, Arkansas. The lawsuit also sought reformation of a guaranty executed by Akin and a note to the bank executed by Yarbrough. Yarbrough failed to answer the bank's complaint. The chancellor reformed both the guaranty and the note, and awarded judgment to the bank as against Akin.

On appeal Akin argues that the court erred in reforming the guaranty, erred in reforming the note, and erred in exercising personal jurisdiction over him. Because we find merit in the second argument only, we affirm the chancellor's decree, as modified.

The only two witnesses at trial were Tommy Sanson, a vice-president for the bank, and Larry Grady, an attorney for the bank. Neither Akin, a resident of Dallas, nor Yarbrough, apparently a resident of Mesquite, Texas, testified. Sanson

testified that he made a loan to Yarbrough in 1980. The loan was to enable Yarbrough to buy the house at Guy from a Mr. and Mrs. Stephens. A loan application was admitted into evidence, signed by both Akin and Yarbrough. Sanson said that Yarbrough signed it in his presence, but that the application was mailed to Akin in Texas for his signature. Akin submitted a personal financial statement to the bank showing a substantial net worth. The application itself indicated that the property would be held in Yarbrough's name. Sanson testified that he talked with Akin on the telephone about the loan and Akin told him that he was going to "co-sign" and be a "co-owner" with Yarbrough. Akin told him they were in the dog business down in Texas and that they wanted the property in Guy for raising dogs. He said that Akin also told him he did not want the property in his name.

Sanson testified that he required a loan guaranty agreement to be signed by Akin and that his secretary prepared it. He said that he and Akin had discussed this by telephone. The guaranty agreement was apparently received by Akin in Texas, signed by him, and returned to the bank in Conway. It was also signed by David M. Voyles, Molly Bisson, and J.H. Yarbrough. These three parties were never served and the chancellor dismissed the lawsuit as to them.

In the instrument of guaranty, Akin, and the others, agreed to guarantee the debt of *Akin* to the bank. Sanson's testimony was that the instrument was intended to guarantee the debt of William Yarbrough and that it failed to do so only because Sanson's secretary had made a mistake. The guaranty was dated August 26, 1980.

On September 26, 1980, William Yarbrough executed a note and mortgage in favor of the bank, on the Guy property. Yarbrough also took title to the property in his name alone. Yarbrough subsequently failed to make the payments on the note to the bank and, on December 14, 1982, deeded the Guy property to Akin.

Sanson testified that he went to Dallas with the lawyer, Grady, to talk to Akin about the debt, in 1984. He said that Akin told them that he was going to pay the debt. Apparently, at this time Akin had filed for reorganization under Chapter 11 of the Bankruptcy Act. Grady corroborated Sanson's version of the

1984 meeting with Akin in Dallas. He also testified that Akin had listed this debt in his bankruptcy pleadings, showing the bank as the creditor. By the time of trial, the Guy property had been released from the bankruptcy proceeding.

At the conclusion of the testimony counsel for Akin conceded that the bank was entitled to foreclose its mortgage, but argued that the court should not enter a personal judgment against Akin.

Reformation of a written instrument is permitted in equity to show the true intent of the parties where there is a mutual mistake. *Bicknell* v. *Barnes*, 255 Ark. 697, 501 S.W.2d 761 (1973). Reformation is an equitable remedy which is available when the parties have reached a complete agreement but, through mutual mistake, the terms of their agreement are not correctly reflected in the written instrument purporting to evidence that agreement. *Delone* v. *USF&G*, 17 Ark. App. 229, 707 S.W.2d 329 (1986). The parties seeking reformation, however, must present evidence which "clearly and convincingly" warrants a finding that a mutual mistake occurred. *Bicknell, supra; Turner v. Pennington*, 7 Ark. App. 205, 646 S.W.2d 28 (1983). However, the proof need not be undisputed in order to obtain reformation. *Winkle* v. *Grand Nat'l Bank*, 267 Ark. 123, 601 S.W.2d 559 (1980). *Bicknell, supra; Turner, supra.* Although we continue to hear chancery cases *de novo*, "the test on review is not whether we are convinced that there is clear and convincing evidence [to support the] judge's findings, but whether we can say that the . . . judge was clearly wrong in his findings." ARCP Rule 52; *A.B.* v. *Arkansas Social Services*, 273 Ark. 261, 620 S.W.2d 271 (1981) (Hickman, J., dissenting). We have said that in such a case, the question we must answer on appeal is whether the chancellor's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous. *Freeman* v. *Freeman*, 20 Ark. App. 12, 722 S.W.2d 877 (1987); *Turner, supra.* Even in reformation cases, where the burden of proof is by clear and convincing evidence, we defer to the superior position of the chancellor to evaluate the evidence. *Bicknell, supra; Turner, supra.*

When all of the evidence in the case is considered we think it reasonably clear that Akin agreed with the bank to

guarantee the debt of Yarbrough and that through the error of Sanson's secretary the instrument did not reflect the parties true intention. In *Kohn* v. *Pearson*, 282 Ark. 418, 670 S.W.2d 795 (1984), the court said, "[t]he mistake of a draftsman, whether he is one of the parties or merely a scribner, is adequate grounds for relief, provided only that the writing fails to reflect the parties true understanding," citing D. Dobbs, *Remedies* § 4.3 (1973). The fact that it was a bank employee who drafted the instrument wrong, does not render the mistake a unilateral one in a legal sense. Certainly, a guaranty agreement can be reformed. *Scott* v. *Citizens Bank of Batesville*, 245 Ark. 235, 431 S.W.2d 832 (1968). We cannot say the chancellor was clearly wrong in finding that a mutual mistake had been established by clear and convincing evidence.

However, the evidence to support the chancellor's decision to reform the note itself is clearly insufficient. Once it is accepted that Akin understood he was guaranteeing the note signed by Yarbrough, Akin's subsequent acknowledgment of the debt provides no support for an argument that the note should be reformed. Although Sanson was apparently in charge of the preparation of the note and mortgage, he offered no testimony that his secretary or any other bank employee had made a mistake in their preparation. Sanson's insistence that Akin guarantee Yarbrough's debt is inconsistent with a contention that Akin was a co-debtor.

Finally, Akin contends that the trial court erred in exercising *in personam* jurisdiction over him. Ark. Code Ann. § 16-4-101 provides that a court may exercise personal jurisdiction over a person as to a cause of action arising from that person's "transacting any business in this state." The supreme court has held that the purpose of the statute is to expand this state's personal jurisdiction over non-residents, within the limits permitted by the due process clause of the United States Constitution. *See S.D. Leasing, Inc.* v. *Al Spain and Assoc., Inc.*, 277 Ark. 178, 640 S.W.2d 451 (1982); *Nix* v. *Dunavant*, 249 Ark. 641, 460 S.W.2d 762 (1970). In order for a valid judgment to be rendered against a non-resident not served within the forum state, due process requires that certain minimum contacts exist between the non-resident and the state, such that the maintenance of the suit does not offend traditional notions of fair play and substantial

justice. *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). The contacts with the forum state must be such that the non-resident defendant should reasonably anticipate being "haled" into an Arkansas court. *Jagitsch* v. *Commander Aviation Corp.*, 9 Ark. App. 159, 655 S.W.2d 468 (1983) (citing *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980)). A single contract can provide the basis for the exercise of jurisdiction over a non-resident defendant if there is a substantial connection between the contract and the forum state. *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957). Whether the "minimum contacts" requirement has been satisfied is a question of fact. *Wisconsin Brick & Block Corp.* v. *Cole, Judge*, 274 Ark. 121, 622 S.W.2d 192 (1981).

In *Jagitsch, supra*, we said that although there was no exact formula for deciding what is reasonable and fair under the circumstances five factors should be considered: The nature and quality of the contacts with the forum state; the quantity of contacts with the forum state; the relation of the cause of action to the contacts; the interest of the forum state in providing a forum for its residents; and the convenience to the parties. *Jagitsch*, 9 Ark. App. at 163, citing *Arkansas-Best Freight System, Inc.* v. *Youngblood*, 359 F. Supp. 1115 (W.D. Ark. 1973).

In the case at bar it is clear that Akin was a resident of the State of Texas. Sanson's testimony was that Akin never came to Conway and that their discussions were all by mail or phone. There was also evidence, however, that Akin signed a loan application, a financial statement, and a personal guaranty and delivered them to the bank in Conway to induce the bank to loan Yarbrough the money to buy land in Guy, Arkansas. The evidence was undisputed that Akin intended to go into business on that property and he subsequently took a deed to the property from Yarbrough. The evidence in the case, taken as a whole, provides some support for Sanson's contention that Yarbrough was merely acting as a "front" for Akin. We find no error in the trial court's factual determination that Atkin "transacted business" within the State of Arkansas. Nor do we think that the due process clause is violated by the court's exercise of *in personam* jurisdiction. Appellant could reasonably have anticipated that issues involving both the mortgage and the guaranty might

properly be litigated in the State of Arkansas, rather than the State of Texas, and we affirm the trial court on this issue.

Because we hold that it was error for the court to reform the note, we remand this case to the chancellor for the entry of an order consistent with this opinion.

Affirmed as modified.

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

MELVIN MAYFIELD, Judge, dissenting. I cannot agree with the majority decision in this case. To explain my view, it will be necessary to consider three points: (1) the law relative to reformation, (2) the standard by which we review the trial judge's factual determination, and (3) the evidence presented to the trial judge.

The law relative to reformation

The majority decision states that parties seeking reformation "must present evidence which 'clearly and convincingly' warrants a finding that a mutual mistake occurred." While this statement is not incorrect, it is not as descriptive as the language actually used by the appellate courts in Arkansas. First, we note that there are two dimensions to this statement—there must have been a *mutual* mistake and this must be established by *clear* and *convincing* evidence. Second, let us consider the actual language used in some cases. In *DeLone* v. *United States Fidelity & Guaranty Co.*, 17 Ark. App. 229, 233-34, 707 S.W.2d 329 (1986), the Arkansas Court of Appeals said:

> Reformation is an equitable remedy which is available when the parties have reached a complete agreement but, through mutual mistake, the terms of their agreement are not correctly reflected in the written instrument purporting to evidence that agreement. A mutual mistake is one shared by both parties at the time their agreement is reduced to writing and it must be shown clearly and decisively that the parties intended their written agreement to say one thing and, by mistake, it expressed a different thing. *Yeargan* v. *Bank of Montgomery County*, 268 Ark. 752, 595 S.W.2d 704 (Ark. App. 1980); *Corey* v. *Mercantile Ins. Co. of America*, 205 Ark. 546, 169 S.W.2d

> 655 (1943). An order reforming a written instrument cannot be based upon a unilateral mistake unless there is a mistake on one side and fraud or inequitable conduct on the other. *Arnett* v. *Lillard*, 245 Ark. 939, 436 S.W.2d 106 (1969).
>
> . . . Furthermore, reformation deals with the reforming of written instruments to conform to the intent of the parties at the time they are executed.

In *Birch-Brook, Inc.* v. *Ragland*, 253 Ark. 161, 165, 485 S.W.2d 225 (1972), the Arkansas Supreme Court quoted from a prior decision as follows:

> In explaining the meaning of the rule of "the proof must be clear, unequivocal and decisive," the court said in *Hicks, Special Admx.* v. *Rankin*, 214 Ark. 77 . . . "In cases of asserted mistake in written instruments, it is not denied that a court of equity has authority to reform the instrument. But such a court is very slow in exerting such an authority, and it requires the strongest and clearest evidence to establish the mistake. It is not sufficient that there may be some reason to presume a mistake. The evidence must be clear, unequivocal and decisive; not evidence which hangs equal, or nearly in *equilibrio*."

The standard of review

Rule 52(a) of the Arkansas Rules of Civil Procedure contains the statement that, in cases tried without a jury, "findings of fact shall not be set aside unless clearly erroneous (clearly against the preponderance of the evidence), and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." It is common knowledge that this language was taken from Rule 52 of the Federal Rules of Civil Procedure. However, the reporter's notes to our rule states that the rule "does not alter the fact that in some cases an issue must be proved by clear and convincing evidence." The majority decision in the case at bar recognizes that our standard of review is whether "the chancellor's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous" but, again, those words no not describe the appellate process as well as does the language actually used by the appellate courts.

In *RAD-Razorback Ltd.* v. *B.G. Coney Co.*, 289 Ark. 550, 553, 713 S.W.2d 462 (1986), the Arkansas Supreme Court adopted the language of the Untied States Supreme Court in *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364 (1947), that under Rule 52(a) of the Federal Rules

> A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.

Neither court was concerned, in the above cases, with the review of a trial judge's decision which required a finding based upon clear and convincing evidence. That situation has been before the Arkansas Supreme Court, however, and the test used on appeal was whether the trial judge's decision that the evidence was clear and convincing was clearly erroneous. *See Thompson* v. *Arkansas Social Services*, 282 Ark. 369, 669 S.W.2d 878 (1984); *Festinger* v. *Kantor*, 272 Ark. 411, 426-27, 616 S.W.2d 455 (1981). This is also the test used by the court in *Turner* v. *Pennington*, 7 Ark. App. 205, 646 S.W.2d 28 (1983), cited in the majority opinion. Thus, I see no reason why the meaning of "clearly erroneous" given in *RAD-Razorback Ltd., supra*, should not apply where the question is whether the trial judge's decision was based upon clear and convincing evidence.

The evidence presented to the trial judge

As stated in the majority opinion, the only testimony presented was from Tommy Sanson, a vice-president of the appellee bank, and Larry Grady, an attorney for the appellee bank. Sanson testified that the appellant never came to Conway; that they did business over the telephone or by mail. Sanson said that, before the receipt of the guaranty agreement, it was his "understanding" the appellant would be a co-borrower with Yarbrough. He testified as follows:

> He told me he was going to co-sign and be a co-owner with William Boyd Yarbrough, who was a friend of his. He was in the dog business, the way I recall—had poodles or something like that in Texas. And, of course, him being a judge, you know, uh, not only added to the net worth on making this loan, being a judge . . . .

The guaranty agreement was signed by the appellant on August 26, 1980. Before that, on July 20, 1980, the appellant and Yarbrough both signed a loan application. Under the line on which the appellant signed it was plainly printed "Co-borrowers Signature." Although the subsequent note and mortgage was from Yarbrough only, this was not inconsistent with Sanson's "understanding." He testified:

> Mr. Akin told me on the phone — that was seven years ago — that he was going to be a co-owner of this property. They were in the dog business together down in Texas. He wanted this property up here for him to raise dogs, but did not want the title in his name.

The appellee bank contends that the guaranty agreement, which states that its purpose is to enable "Ted Martin Akin" (appellant) to obtain credit from the appellee, was supposed to have Yarbrough's name where appellant's name appeared. The appellee contends the agreement was incorrectly typed through an error made by Sanson's secretary. However, the guaranty agreement was signed by three persons in addition to the appellant. This is not inconsistent with the "understanding" Sanson said he had that appellant would be a co-borrower and co-owner of the property with Yarbrough. This is also not inconsistent with the statement Sanson says appellant made to the effect that he did not want the title to the property in his name. There is simply no evidence in the record, and none is mentioned in the majority opinion, that the appellant made any mistake in signing the guaranty agreement. There must be clear and convincing evidence of *mutual* mistake to warrant reformation of the agreement. In *Mizell* v. *Carter*, 255 Ark. 960, 504 S.W.2d 743 (1974), the court relied upon an earlier case which stated:

> Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of the evidence, but only upon a certainty of the error.

255 Ark. at 962-63.

But even if we were to indulge in probability, it seems clear to me that we would have to assume that the appellant, who the parties agree was an appellate court judge in Texas, would know what he signed. At the time the guaranty agreement was signed, it

was contemplated that appellant would be a co-borrower. There is no evidence to the contrary. All the evidence up to that point is consistent with that situation. If there was a mistake in the name of the person whose debt was to be guaranteed, there is no evidence to show it was made by the appellant.

Reformation deals with the reforming of a written agreement to make it conform to the intent of the parties at the time the agreement is executed. *DeLone* v. *United States Fidelity & Guaranty Co., supra.* Therefore, what occurred after the guaranty agreement was signed in this case is immaterial unless it sheds some light on what the agreement between the parties was at the time the guaranty agreement was signed. The appellee relies upon a conversation that Sanson and the bank's attorney, Grady, had with appellant in Dallas in 1983, about three years after the guaranty agreement was signed. They say that appellant told them that he was going to pay the debt to the appellee bank. But they also testified that the appellant told them that he had a deed to the property from Yarbrough and that he might want to retire to the property. The appellee also relies upon the fact that appellant had listed the debt to the bank when he filed a Chapter 11 bankruptcy.

Appellant's intention to pay the debt was consistent with having acquired the deed from Yarbrough. There was a debt to the appellee bank made by Yarbrough and a mortgage by him on the property to secure the debt. If appellant wanted his deed to be good, the mortgage debt would have to be paid. Likewise, appellant was required to list all claims, even potential claims, against his estate, which included the property deeded to him by Yarbrough. *See* 11 U.S.C. §§ 521, 541 and 11 U.S.C. §§ 1101 *et seq*. So, neither his statement that he was going to pay appellee nor the fact that he listed appellee's debt in his bankruptcy proceedings is inconsistent with the "understanding" Sanson had from the first—that appellant was going to be a co-borrower.

We do not need to speculate on why appellant did not sign the notes to appellee with Yarbrough. We know, however, that he did not. The majority opinion correctly reversed the trial judge's reformation of the notes because there was no agreement with appellee that appellant would sign the notes. The trial judge correctly granted judgment against Yarbrough who did not

answer and correctly foreclosed the mortgage against the property. But I would reverse the judgment against the appellant because, after reviewing the entire evidence, I am left with a definite and firm conviction that the trial judge made a mistake (was clearly erroneous) in holding that there was clear and convincing evidence that the guaranty agreement should be reformed.

CORBIN, C.J., and COOPER, J., join in this dissent.

Forrest G. KNIGHT *v.* STATE of Arkansas

CA CR 87-86 758 S.W.2d 12

Court of Appeals of Arkansas
Division I
Opinion delivered October 19, 1988

Allen Law Firm, by: *Arthur L. Allen*, for appellant.

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

JOHN E. JENNINGS, Judge. After a bench trial, Forrest Knight was convicted of terroristic threatening in the first degree and was sentenced by the court to two years in prison. His sole argument on appeal is that the evidence was insufficient to support his conviction. We agree and reverse.

When the sufficiency of the evidence is challenged in a criminal case, we will affirm the trial court's decision if it is supported by substantial evidence. *Jimenez* v. *State*, 12 Ark. App. 315, 675 S.W.2d 853 (1984). Substantial evidence has been defined as evidence which is of sufficient force that it will compel a conclusion one way or the other—it must amount to more than mere suspicion or conjecture. *Jones* v. *State*, 269 Ark. 119, 598 S.W.2d 748 (1980). In determining whether there is substantial evidence to support a verdict, we view the evidence in the light most favorable to the State. *Pope* v. *State*, 262 Ark. 476, 557 S.W.2d 887 (1977).

On March 13, 1987, Edgar Householder was a Pulaski County Deputy Sheriff, working at the county jail. He and several other deputies were returning a number of inmates to their cell after their "activity time." An altercation arose between several deputies and some of the inmates, and blows were struck. Appellant was present but was not involved in the altercation. After all the inmates were finally returned to their cells, Householder left and went into a part of the jail called the "control room." From the control room, he listened through an intercom system to the inmates in the cell and heard appellant say, "Don't worry about it, man. You'll read about some of those [deputies] in the obituary and they won't die of natural causes because I'll be out of this pen someday." He testified that he considered this a death threat and that he felt terrorized.

Appellant denied making the statement and his testimony was corroborated by that of several other inmates. The trial judge expressly stated that he did not believe this testimony, and he was not required to do so. Decisions on credibility belong to the trier of fact. *Core* v. *State*, 265 Ark. 409, 578 S.W.2d 581 (1979). Appellant also testified as follows:

> Q: Were you aware while you were in maximum security that your conversations in there were subject to being heard through a microphone system?
>
> A: Yes, sir.
>
> Q: You did know that they could listen in on you?
>
> A: Well, I knew that they talked to us and I heard other inmates.

Q: And what now?

A: They would talk to us over the intercom. I've never talked on it personally.

Q: I'm not sure if I'm understanding you right. You knew they could talk to you on an intercom?

A: Right.

Q: But my question to you was did you know that they could listen to what you were saying in the cell?

A: No, sir. There's occasions when somebody would rap on the window and he would, you know, get on the intercom and say something.

Terroristic threatening is defined by Ark. Stat. Ann. § 41-1608(1)(a) (Supp. 1985) (now Ark. Code Ann. § 5-13-301 (1987)) as follows:

> A person commits the offense of terroristic threatening in the first degree if with the purpose of terrorizing another person he threatens to cause death or serious physical injury or substantial property damage to another person.

Ark. Stat. Ann. § 41-203(1) (Repl. 1977) (now Ark. Code Ann. § 5-2-202 (1987)) defines "purposely" as follows:

> A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

We agree with the State that the gravamen of the offense of terroristic threatening is communication, not utterance. The statute does not require that the threat be communicated by the accused directly to the person threatened. *Richards* v. *State*, 266 Ark. App. 733, 585 S.W.2d 375 (1979). There is no requirement that the terrorizing continue over a prolonged period of time. *Warren* v. *State*, 272 Ark. 231, 613 S.W.2d 97 (1981). Nor does the statute require that it be shown that the accused has the immediate ability to carry out the threats. *See Commonwealth* v. *Ashford*, 268 Pa. Super. 225, 407 A.2d 1328 (1979). We do agree, however, with the statement of the court in *State* v. *Morgan*, 128 Ariz. 362, 625 P.2d 951 (1981), that to be found guilty of threatening the defendant must intend to fill the victim

with intense fright. Under our statute it is an element of the offense that the defendant act with the purpose of terrorizing another person, i.e., it must be his "conscious object" to cause fright.

When we view the evidence in the light most favorable to the State, we find that the State established that appellant made the threatening statement, that the statement was perhaps sufficiently specific to constitute a threat to Householder, that appellant was aware that it was possible that his statement might be overheard, and that Householder was, in fact, put in fear. While we are aware that one's purpose, like any other state of mind, is not ordinarily subject to proof by direct evidence, and must frequently be inferred from other facts, we do not think that the evidence in this case is sufficient to establish that appellant made the statement with the conscious object of terrorizing Deputy Householder, even if he was aware that he might be overheard. Statutes in other states impose criminal liability for threats made in reckless disregard of the risk of causing terror. *See, e.g., State* v. *Schweppe*, 184 Minn. 25, 237 N.W.2d 609 (1975). Our statute does not.

Reversed and dismissed.

COOPER and COULSON, JJ., agree.

[redacted]