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Benjamin Dewayne SCOTT *v.* STATE of Arkansas

CA CR 88-181 764 S.W.2d 625

Court of Appeals of Arkansas
Division II
Opinion delivered February 15, 1989

Angela Yvette Baxter, for appellant.

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

JAMES R. COOPER, Judge. This appeal arises from the revocation of the appellant's probation. On July 27, 1987, the appellant pled guilty to theft of property and theft by receiving. He was placed on five years probation for each charge. One condition of the appellant's probation was that he not violate any federal or state law. On November 13, 1987, the prosecuting attorney filed a petition to revoke appellant's probation alleging that the appellant had committed robbery. After a hearing on January 25, 1988, the appellant's probation was revoked and he was sentenced to five years in the Arkansas Department of Correction on the theft of property and five years on theft by receiving. The trial court ordered the appellant to serve the

sentences consecutively. The appellant argues on appeal that the evidence is insufficient to support the revocation; that the trial court's sentence was excessive; and that the appellant's rights to due process and equal protection were violated to the degree that it shocks the conscience and sense of justice.

To revoke a probated sentence the State must prove by a preponderance of the evidence that the defendant violated a condition of his probation. We will not reverse a decision of the trial court to revoke a suspended sentence unless we find it clearly against the preponderance of the evidence. *Brewer* v. *State*, 274 Ark. 38, 621 S.W.2d 698 (1981); *Smith* v. *State*, 9 Ark. App. 55, 652 S.W.2d 641 (1983). A person commits robbery if, with the purpose of committing a theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another. Ark. Code Ann. § 5-12-102(a) (formerly Ark. Stat. Ann. § 41-203 (Repl. 1977)). Our review of the record reveals the trial court's decision is not clearly against the preponderance of the evidence.

At the revocation hearing, James Dial, a security officer for K-Mart, testified that on November 5, 1987, he saw the appellant enter the K-Mart store, go to the menswear department, take a coat and tie and place the tie in the pocket of the coat. The appellant then walked to the service desk and asked the clerk to page Thomas Terry. According to Dial, the appellant then began walking towards the front door. Dial stopped him in the foyer and asked him to go to the back of the store to discuss the situation. The appellant began walking with Dial, but stopped and stated that he had to go tell his mother where he was. Dial indicated that he wanted to speak with the appellant first. Dial testified that at that point, the appellant broke away from him and swung his right arm, striking Dial with enough force to knock him down. The appellant then ran out the front door with the coat and tie, jumped into a car, and sped away. The police were called, and after the appellant was apprehended, he was identified in a lineup by Dial.

Collette Dockett, the clerk at the service desk, identified the appellant as the person who asked her to page Thomas Terry, and stated that she witnessed the incident. Her testimony was essentially the same as Dial's, with the exception that she believed

that the appellant was stopped inside the store rather than in the foyer.

The appellant, testifying in his own behalf, stated that he went to the front of the store with the jacket to ask a friend's opinion about it, and when he could not find the friend, he asked that he be paged. He stated that he broke and ran when Dial apprehended him because he was afraid he would not be believed and would be sent to jail. However, the trial court was not required to believe the appellant's testimony especially in light of the fact that the appellant was the one most interested in the outcome. *Fitzpatrick* v. *State*, 7 Ark. App. 246, 647 S.W.2d 480 (1983).

The appellant relies on the case of *Jarrett* v. *State*, 265 Ark. 662, 580 S.W.2d 460 (1979), for the proposition that the appellant's actions in resisting apprehension did not amount to the force necessary to be convicted of robbery. In *Jarrett*, the appellant was apprehended while attempting to steal meat from a store. In resisting apprehension, a fight broke out between the appellant and the security officer, and eventually the officer's gun discharged. While in the present case, the altercation between the appellant and the security officer was not as violent as the one in *Jarrett*, we hold that striking the security officer with enough force to knock him to the ground constitutes physical force as defined in Ark. Code Ann. § 5-12-102 (1987). The Code defines physical force as any bodily impact, restraint, or confinement or the threat thereof.

The appellant's last two arguments are concerned with the alleged severity of his sentences.

If a sentence is within the limits set by the legislature, it is legal. *Parker* v. *State*, 290 Ark. 94, 717 S.W.2d 197 (1986). Both of the appellant's convictions for theft of property and theft by receiving were class C felonies, with the sentencing range being from three to ten years. Ark. Code Ann. § 5-4-401(a)(4) (1987) (formerly Ark. Stat. Ann. § 41-901 (Supp. 1985)), and whether multiple sentences are to be served concurrently or consecutively is a matter within the sound discretion of the trial judge. *Chancellor* v. *State*, 14 Ark. App. 64, 684 S.W.2d 831 (1985). Furthermore, punishment authorized by a statute is never cruel or unusual or disproportionate to the nature of the

offense unless it is a barbarous one unknown to the law or so wholly disproportionate to the nature of the offense as to shock the moral sense of the community. *Parker*, *supra*; *Hinton* v. *State*, 260 Ark. 42, 537 S.W.2d 800 (1976). In light of the fact that the appellant committed robbery less than four months after pleading guilty to theft of property and theft by receiving, we do not find the appellant's sentences to be either excessive or shocking to the conscience.

Affirmed.

CORBIN, C.J., and ROGERS, J., agree.

William Edward WENSEL *v.* Bill FLATTE and Patricia Flatte

CA 88-211 764 S.W.2d 616

Court of Appeals of Arkansas
Division II
Opinion delivered February 22, 1989

[redacted]

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Mitchell and Roachell, by: *Michael W. Mitchell*, for appellant.

William R. Wisely, for appellee.

JAMES R. COOPER, Judge. In this appeal from the Garland County Chancery Court the appellant, William Wensel, contends that the chancellor erred in finding that the deed and note he gave to the appellees did not create an equitable mortgage. The appellant also argues that the chancellor erred in finding that the thirty-day grace period contained in the note was not applicable and in finding that he had waived his right to foreclosure. We affirm.

The appellant was building a 6500 square foot home on Lake Hamilton in Hot Springs, Arkansas. He had spent approximately $78,000.00 for the lot and building materials. When the suppliers began enforcing their materialmen's liens, the appellant borrowed $100,000.00 from the appellees. The appellant executed a note and mortgage in return for the loan, and, when the appellant defaulted, the appellees filed a foreclosure action.

On December 11, 1987, five days before the scheduled judicial sale of the house, the appellant delivered to the appellees a warranty deed and an instrument dated December 11, 1987, titled "Note Secured by Real Estate" in the amount of $121,862.94. The note described the property contained in the first mortgage and in the deed to the appellees and provided that the entire amount was due on January 31, 1988. The appellant did not pay the note.

On February 1, 1988, the appellees took possession of the house and changed the locks. The appellant filed a complaint requesting access to the house and that ownership be returned to him. After a hearing, the chancellor found that the deed and note did not constitute an equitable mortgage. The appellant argues, in his first point for reversal, that this finding was erroneous.

The presumption arises that a deed is what it purports to be and, to establish its character as a mortgage, the evidence must be clear, unequivocal, and convincing. *Ehrlich* v. *Castleberry*, 227 Ark. 426, 299 S.W.2d 38 (1957). If there is a debt existing and the conveyance was intended by the parties to secure its payment, equity will regard and treat an absolute deed as a mortgage. *Newport* v. *Chandler*, 206 Ark. 974, 178 S.W.2d 240 (1944). The party claiming that the deed was a mortgage has the burden of showing that the deed was a mortgage, that there was an indebtedness, and that the deed was intended to secure the debt. *Id.* Since the equity upon which the court acts arises from the real character of the transaction, any evidence, written or oral, tending to show the real nature of the transaction is admissible. *Newport*, 206 Ark. at 979.

The appellee, Bill Flatte, testified that the first mortgage was to have been paid off in October 1987, and that the appellant made a payment on the interest but did not reduce the principal. He also stated that in September 1987 he had to pay the insurance, which the appellant was required to pay. According to Flatte, he and J. Sky Tapp, his attorney, were unable to contact the appellant until October 15, 1987, when they had a three-way telephone conference. The appellant requested an extension until December 15, 1987, but, because the appellant was in default and had not made any payments on the principal amount of the note, the appellee was reluctant to delay foreclosure. Flatte stated that he informed the appellant that he was going to foreclose.

On December 11, 1987, Flatte again talked with the appellant and told the appellant that he would extend the note until January 31, 1988, if he would sign a deed as they had discussed in October 1987. Flatte stated that he told the appellant he wanted him to deed the property to him, and that if the total debt was paid by January 31, 1988, he would deed the house back to the appellant. The deed and a new note were executed.

At trial, the appellant testified that when he delivered the deed in question to the appellees' attorney, J. Sky Tapp, it was his belief that Tapp was to hold the deed until he had paid the debt and then return the deed to him. He stated that, during the term of the note, he intended to arrange a loan with a bank to pay off the note. However, he was not able to obtain financing by January 31,

1988.

Tapp testified that two deeds were drafted. One deed conveyed the property to the appellees and listed the appellant as the grantor, and the other deed conveyed the property back to the appellant. He stated that he kept the deed conveying the house from the appellant to the appellees until they retrieved it from his office and filed it on January 12, 1988, and that the only deed being held in escrow by him with the one which conveyed the property back to the appellant. Tapp stated that the purpose of the deed being held in escrow was to convey the house back to the appellant if he fulfilled the condition that the indebtedness be paid in its entirety by January 31, 1988.

A letter written by Tapp was introduced into evidence which stated that its purpose was to conform the oral agreement reached by the parties on October 15, 1987. The letter comported with what Tapp testified to with regard to the intention of the parties. Tapp testified that he sent a copy of the letter to the appellant and requested that the appellant sign it and return it to him. The appellant testified that he received a copy of the letter, but that he did not sign it because, according to him, the letter did not reflect the agreement of the parties.

We are not convinced that the chancellor was clearly erroneous in finding that the appellant had not shown by clear, unequivocal evidence that the deed was intended to be a mortgage. In the original transaction, the appellant signed a mortgage and he therefore had notice that the second transaction differed since there was no new mortgage. Furthermore, the appellees testified that they did not intend for the deed to operate as a mortgage, but that the house was to be deeded to them outright, with the condition that it would be deeded back to the appellant if the debt was paid. It is unquestionably within the power of two individuals, capable of acting for themselves, to make a contract for the purchase of land, with a reservation to the vendor of a right to repurchase the property at a fixed price and at a specific time. If the transaction is security for a debt, then it is a mortgage; otherwise it is a sale. *Monaghan* v. *Davis*, 16 Ark. App. 258, 700 S.W.2d 375 (1985); *Newport* v. *Chandler, supra.* There is evidence from which the court could find that the parties intended for the deed in question to constitute a sale with the purchase

price being the outstanding indebtedness (including costs of the foreclosure), and that this sale was conditioned upon the appellant having the right to repurchase the house for the same amount by January 31, 1988.

Furthermore, the appellant is not entitled to have the deed declared an equitable mortgage, since "he who seeks equity must do equity." *Byars* v. *Byars*, 270 Ark. 874, 606 S.W.2d 595 (Ark. App. 1980). The appellant made only one payment on the original loan, he procrastinated until the last possible minute to arrange an extension on the original loan, he received several extensions over the life of the loan, and he admitted that he had not attempted to arrange alternate financing until after December 11, 1987. A person asserting an equitable mortgage must have paid the accompanying debt or tender such payment. *Byars, supra.* No payment has been made or tendered.

The appellant's second argument concerns a term in the note which, he alleges, gave him a thirty day grace period to pay the debt. The note states:

> In the event of default in the payments for a period of thirty days . . . holder of the indebtedness shall have the option to declare the entire indebtedness to be immediately due and payable. . . .

The chancellor found that this provision was intended to apply in a situation where there are periodic payments, and because this note was to be paid entirely in one payment, the thirty day provision did not apply. It is the appellant's contention that the chancellor erred in this finding.

We concur with the chancellor's finding. The paragraph immediately preceding the thirty day provision clearly states that the entire amount of the note is due on January 31, 1988. The thirty day provision provides that, if the debtor remains in default for more than thirty days, then the total amount of the payments can be accelerated and the entire debt called due. Where clauses in a contract are irreconcilable with a former clause and repugnant to the general purpose and intent of the the whole instrument, it is not error for the chancellor to disregard the irreconcilable clause. *Mitchell* v. *Mitchell*, 236 S.W.2d 812, 368 S.W.2d 284 (1963).

It is clear that the intent of the whole instrument was to grant the appellant additional time, until January 31, 1988, to pay the entire indebtedness and allow him to recover the property. Interpreting the note to provide for an additional thirty days, with the appellees' remedy being acceleration of a debt that was already past due in its entirety, is unreasonable and repugnant to the purpose of the instrument.

Lastly, the appellant argues that the chancellor erred in ruling that the appellant had waived his right to foreclosure because waiver is an affirmative defense which the appellees did not plead in accordance with Ark. R. Civ. P. 8(c). It is not necessary to address this argument in light of our holding that the transaction was not an equitable mortgage.

Affirmed.

MAYFIELD and JENNINGS, JJ., agree.

Larry K. LEE, et ux. *v.* MERCANTILE FIRST NATIONAL BANK of Doniphan

CA 88-283 765 S.W.2d 17

Court of Appeals of Arkansas
Division I
Substituted Opinion delivered February 22, 1989*
[Rehearing denied March 22, 1989.]

*REPORTER'S NOTE: Original opinion delivered February 15, 1989.

Scott Manatt, for appellant.

Riffel, King & Smith, for appellee.

MELVIN MAYFIELD, Judge. The first question in this appeal involves the right of a mortgagee to require that other mortgaged property be sold and the proceeds applied to the indebtedness due, before a mortgaged homestead is sold.

On June 6, 1977, Larry Lee and his wife executed to Corning Savings and Loan Association a note in the amount of $38,500.00 secured by a mortgage upon commercial property owned by them. On November 13, 1981, Larry Lee and his wife executed to Corning Savings and Loan a note in the amount of $43,500.00 secured by a mortgage upon residential property owned by them.

On October 23, 1984, Lee's National Pump & Supply Co., Inc., an Arkansas corporation owned by Larry Lee and his wife, executed to the Mercantile First National Bank of Doniphan (Missouri) a note in the amount of $256,800.00 secured by a deed of trust on the same commercial property which secured the $38,500.00 note to Corning Savings and Loan. Also, on the same day, Lee's National Pump & Supply executed to the Bank of Doniphan a note in the amount of $100,000.00 secured by the same deed of trust which secured the bank's $256,800.00 note.

On February 4, 1987, Corning Savings and Loan assigned its notes and mortgages to the Bank of Doniphan. In July of 1987, the bank filed suit against Larry and Sonia Lee, and against Lee's National Pump & Supply, seeking judgment for the amounts due on the notes executed and assigned to it and seeking foreclosure of the mortgages and deed of trust securing the notes.

The appellants, Larry and Sonia Lee, filed an answer to the complaint alleging that their personal liability had been discharged in bankruptcy. They also alleged that the residential property described in the mortgage which secured the $38,500.00 note to Corning Savings and Loan was their homestead, that this property was exempt, and that it had been claimed as exempt in the bankruptcy proceedings. Appellants further alleged that this property was exempt from foreclosure by the Bank of Doniphan and alleged that the bank could not better its position in that regard by the purchase and assignment of the notes and mortgages from Corning Savings and Loan. Appellants affirmatively alleged they were entitled to marshal the two properties mortgaged to Corning and assigned to the Bank of Doniphan, so that the commercial property would be sold first and any sum received in excess of the indebtedness due on the notes secured by the mortgages executed to Corning be delivered to appellants.

Judgment was entered finding the amount due on the June 6, 1977, note to Corning, secured by mortgage on commercial property, to be $26,390.13; the amount due on the November 13, 1981, note to Corning, secured by mortgage on residential property, to be $50,071.42; and the total amount due on the notes of October 23, 1984, to the Bank of Doniphan to be $236, 346.03. The judgment was filed on December 15, 1987, with the amounts due calculated as of November 13, 1987, and interest at 10% to

run on those amounts from that date. The appellee's personal obligation having been discharged in bankruptcy, judgment for the amounts due were in rem against the mortgaged property.

Both tracts (commercial and residential) were ordered sold and the proceeds applied on the amounts due. The judgment also provided:

> That should there be any overplus above $50,071.42 [the amount due on the note secured by the residential property] from the sale of [the residential property] all such overplus shall be applied to the use and benefit of Defendants Larry K. Lee and Sonia Lee herein, being the homestead of said parties.

On appeal, the appellants point out that there was only one mortgage on the residential property; that Larry Lee testified this was his and his wife's homestead; and that the trial court found this property was their homestead. Therefore, appellants contend, the commercial property should have been ordered sold first with the proceeds therefrom to be applied first against the amount due on the obligations secured by the mortgages executed in favor of Corning Savings and Loan. We agree.

[redacted] Except for items not involved in this case, the Arkansas Constitution exempts a homestead from forced sale to collect debt. A rural homestead of less than 80 acres is exempt regardless of its value. Ark. Const. art. 9, § 4. In this case, the trial court obviously found that all the residential property mortgaged by appellants was homestead property. There is no appeal from that finding. The mortgage executed by appellants was, of course, a waiver of their homestead exemption as to the debt secured by that mortgage. *See Ragsdell* v. *Gazaway Lumber Co., Inc.*, 11 Ark. App. 188, 668 S.W.2d 60 (1984). However, because of the exempt status of the homestead, it is generally held that "if the obligation is secured by the homestead premises and also by other property of the debtor, the latter may require the creditor to satisfy his demand by resort to the other property before having recourse to the homestead land." 40 Am. Jur. 2d *Homestead* § 91 (1968).

This is also the rule in Arkansas. In the early case of *Littell* v.

Jones, 56 Ark. 139,[1] 19 S.W. 497 (1892), the court's ruling on this point is summarized in headnote 4 as follows:

> Where minor children claim a homestead in a part only of the land left by their mother, all of which was subject to a mortgage executed by her, the part not claimed should first be sold to satisfy the lien to which the right of the children was subject.

Grimes v. *Luster*, 73 Ark. 266, 84 S.W. 223 (1904), relied upon *Littell* v. *Jones* and summarized the holding of that case in these words:

> In *Littell* v. *Jones*, 56 Ark. 139, an action was brought by next friend of minors to select and set apart to them a homestead in a tract of 240 acres, and to require a creditor holding a mortgage upon the whole to be limited to the part not selected as homestead. The selection was held proper to be made, and the mortgage, which was subject to their rights, enforced only against the surplus over the homestead.

73 Ark. at 269. In *Bank of Hoxie* v. *Graham*, 184 Ark. 1065, 44 S.W.2d 1099 (1932), the court held that a widow and children, who claimed a homestead in part of a tract which was subject to a mortgage, were entitled to have the remaining land sold first in satisfaction of the mortgage. In reaching that decision, the court summarized its reliance upon the *Grimes* v. *Luster* interpretation of *Littell* v. *Jones*, in the following conclusion:

> As we have already seen, the whole theory of our homestead laws is based upon the idea of giving a family home to debtors, which is exempt from the liens of judgments and executions levied upon them except in certain specified cases. The policy of the statute is to preserve the home to the family, and we think the interpretation put upon the case of *Littell* v. *Jones*, 56 Ark. 139, 19 S.W. 497, in the later case of *Grimes* v. *Luster, supra*, is applicable to this case, and should govern.

184 Ark. at 1071. The *Bank of Hoxie* v. *Graham* case was cited in

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[1] In some volumes of 56 Ark., this case appears at page 130.

Sims v. *McFadden*, 217 Ark. 810, 233 S.W.2d 375 (1950), for the holding that "one whose homestead is mortgaged along with other property is entitled to demand that the mortgagee proceed first against the other property." 217 Ark. at 813. And in *McMillan* v. *Palmer*, 198 Ark. 805, 131 S.W.2d 943 (1939), the opinion concludes by stating: "The homestead property may not be sold unless the other or remaining property be insufficient to pay the indebtedness." 198 Ark. at 811. Finally, all of the above cases are cited with approval in *Alston* v. *Bitely*, 252 Ark. 79, 477 S.W.2d 446 (1972), at 252 Ark. 99-100.

Under the authority of the cases cited above, we think the appellants were entitled to have the commercial property sold first and the proceeds applied first to the indebtedness due on the mortgages executed in favor of Corning Savings and Loan. However, the decree entered by the trial court ordered both the commercial and the homestead properties sold. This is not what the cases cited above hold. The decree in this case should have required that the *commercial* property be sold *first* and the proceeds therefrom be applied first to the indebtedness due to Corning.

The second question in this appeal is raised by assuming that the sale of the commercial property does not produce enough money to pay the amount due Corning on its mortgages. Obviously, the homestead property would then be sold. The question is—what if that sale produces more than enough to pay the indebtedness due on the mortgages to Corning? We think the answer is—the balance would go to appellants as proceeds of the sale of exempt homestead property. The trial court's decree is, at least, unclear in this regard.

In some situations, the doctrine of marshaling assets would allow the balance assumed in the above paragraph to go to the Bank of Doniphan. That doctrine is defined in 53 Am. Jur. 2d *Marshaling Assets* § 1 (1970) as follows:

> Marshaling is an equitable principle, in accordance with which assets and securities of a debtor are resorted to or apportioned in such a manner as to secure protection to the rights of each of two or more creditors, or of a creditor and some person other than a creditor having an interest in such assets and securities.

The court in *Bank of Bentonville* v. *Swift & Co.*, 233 Ark. 808, 348 S.W.2d 881 (1961), quoted this definition with approval. However, in the instant case, the Bank of Doniphan cannot rely on this doctrine. The reason for this is clearly explained in the following quotation from *Sims* v. *McFadden*, 217 Ark. 810, 233 S.W.2d 375 (1950).

> This decree would ordinarily be a proper marshaling of the assets, since the general rule is to require a secured creditor to proceed first against that part of his security that the common creditors cannot reach. But when a homestead is involved there is a well recognized exception to this rule. *One whose homestead is mortgaged along with other property is entitled to demand that that mortgagee proceed first against the other property. Bank of Hoxie* v. *Graham*, 184 Ark. 1065, 44 S.W.2d 1099. In this situation a common creditor cannot invoke the ordinary rule that requires the secured creditor to look first to that part of his security that the other creditors cannot reach. *Bank of Luverne* v. *Turk*, 222 Ala. 549, 133 So. 52; *Mounce* v. *Wightman*, 29 Ariz. 567, 243 P. 415. *The law is so solicitous of the homestead right that the secured creditor will be required to exhaust his non-exempt security first, even though this procedure entails a loss to the common creditors. Nolan* v. *Nolan*, 155 Cal. 476, 101 P. 520; *Kerens Nat. Bank* v. *Stockton*, 120 Tex. 546, 40 S.W.2d 7.

217 Ark. at 813 (emphasis added).

The appellee, Bank of Doniphan, contends that the rule in *Sims* does not apply to it since it is not a common creditor. The case of *Marr* v. *Lewis*, 31 Ark. 203 (1876), holds otherwise. There, Herbert Marr had mortgaged several tracts of land to James Lewis and afterward mortgaged some of the same land to Lorinda Marr. Herbert Marr died and his widow and children continued to occupy as a homestead some of the land described in the first mortgage, but this homestead property was not included in the second mortgage. Because of the widow's homestead exemption claim, the Arkansas Supreme Court held the doctrine of marshaling assets was not available to the holder of the second mortgage. The court said this doctrine was an equitable doctrine that was not available when it would operate inequitably on the

interests of others. To require the property covered by the first mortgage to be sold before the property covered by the second mortgage would have deprived the widow of her homestead claim, the court said, and "for this reason" the application of the second mortgage holder to marshal the assets should have been refused. *See also* Hughes, *Arkansas Mortgages* § 411 (1930). This is also the general rule. *See* 53 Am. Jur. 2d *Marshaling Assets* § 25 (1970). Thus, the rule against marshaling assets when it would cause a homestead to be sold, applies when the second creditor holds a mortgage that does not include the homestead as well as when he is a common creditor.

Neither are we impressed with the appellee's contention that its assignment of Corning's mortgages gives appellee the right to prevail over appellants' claim of homestead exemption. The assignment certainly cannot give the appellee greater rights than Corning had. Moreover, in regard to equitable considerations, we note that an assistant vice-president for the appellee, Bank of Doniphan, testified that when the bank purchased the notes and mortgages from Corning it was aware that one note and mortgage covered appellants' residential property and that appellants' homestead exemption claim had been previously made in the bankruptcy proceedings.

We reverse and remand this case for further proceedings not inconsistent with this opinion.

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

B. Gene BILO *v.* ACME OUTDOOR ADVERTISING COMPANY

CA 88-80 765 S.W.2d 12

Court of Appeals of Arkansas
Division II
Opinion delivered February 22, 1989

[redacted]

James B. Bennett, for appellant.

Shackleford, Shackleford & Phillips, P.A., by: *Robert D. Trammell*, for appellee.

JUDITH ROGERS, Judge. This case involved the disputed ownership of two outdoor advertising signs that are located on appellant's property, but which were placed on the property by the appellee. The appellant, B. Gene Bilo, appeals the decision of the Union County Circuit Court in favor of appellee, Acme Outdoor Advertising Company, which instituted this action in replevin for the recovery of the two signs. The trial court, sitting without a jury, found that the signs were the personal property of the appellee by virtue of a lease agreement entered into between appellee and appellant's predecessor in title. We agree with the trial court, and affirm.

The two advertising signs in question stand on a lot located at 714 North West Avenue in El Dorado, Arkansas. On October 6, 1965, appellee and the owner of the property at that time, James R. Mitchell, entered into a lease agreement whereby appellee was given exclusive permission to erect and maintain advertising signs on the property. Ownership of the property changed several times, until it was purchased by Dr. D.R. Vyas. On April 21, 1986, Dr. Vyas and appellant, as purchaser, executed a real estate contract for the sale of this lot.

This dispute arose over the ownership of the signs when J. C. Billingsley, president of the appellee company, contacted the appellant in August of 1986 regarding the renewal of the lease which was due to expire in October. Billingsley was told that the lease would not be renewed. It was apparent from their conversations that each claimed ownership of the signs, thus giving rise to the filing of this lawsuit.

At trial, appellant maintained that the signs were annexed to the freehold as fixtures, and thus ownership of the signs passed to

him upon acquiring title to the property. The appellant denied having actual or constructive knowledge of the lease agreement, and the nature of the appellee's interest in the signs. However, the record reflects that appellant was advised by Dr. Vyas, his grantor, that there was a lease agreement with appellee who was paying $600 a year in rent, that the lease was subject to annual renewal in October, and that there was a "30 day notice" provision in the agreement. The real estate contract itself makes reference to the signs as indicated in handwritten additions to the contract. While there was testimony that Dr. Vyas was uncertain as to the specific terms of the lease agreement, appellant claimed that he assumed the signs were included in the purchase of the property, and he made no inquiry into the details of the agreement.

Conversely, the appellee claims ownership of the advertisement signs as personal property pursuant to the 1965 lease agreement, which provides:

> All advertising sign boards placed on the premises under this agreement shall remain the property of the individual or company to which permission is granted, and may be removed by it at any time. It is agreed that, after the first year, the grantor of this permission may order the advertising signboards removed at any time by giving the grantee 30 days notice in writing, in case the grantor sells the premises or improves same by erecting a building on said premises, and upon consummation of said sale, or improvement thereon, the grantor shall refund to the grantee, the rent paid in advance, prorata, from the time of the removal of the boards.

In support of its claim, appellee presented evidence that it had paid personal property taxes for the signs, and that it had applied for and received an outdoor advertising permit from the State of Arkansas. Appellee also showed that the lease had been renewed with the various owners of the property over the years, including Dr. Vyas.

In holding that the advertising signs were the personal property of the appellee, the trial court found that the appellant had notice of the existence of the subsisting lease agreement, and thus was not an innocent purchaser. The trial court further found

that the appellant's failure to ascertain the terms of the agreement did not deprive appellee of its ownership of the signs as reserved in the lease.

For reversal, appellant contends that the evidence was insufficient to sustain a finding of notice of the lease agreement concerning the signs, and that the trial court misconstrued certain handwritten portions of the real estate contract between appellant and Dr. Vyas. Upon review, the findings of the trial court will not be reversed unless they are clearly against the preponderance of the evidence. *Smith* v. *Flash TV Sales & Service, Inc.*, 17 Ark. App. 185, 706 S.W.2d 184 (1986); Ark. R. Civ. P. 52(a).

The primary issue on appeal is whether the appellant took title to the property subject to the terms and conditions of the lease agreement. According to the decision of *Hankins* v. *Luebker*, 224 Ark. 425, 274 S.W.2d 356 (1955), the law is well settled that parties by agreement may treat as personal property machinery and improvements which would otherwise be part of the realty, and thus convert it into personal property. Where fixtures have been severed from the land by agreement, a subsequent purchaser with notice takes subject to the agreement. *Id.* Guidance can also be found in the decision of *Cochrane* v. *McDermott Advertising Agency*, 6 Ala. App. 121, 60 So. 421 (1912), rendered by the Alabama Court of Appeals. There it was held that agreements severing fixtures from the realty are personal covenants as between the parties that do not run with the land, unless there is anything reasonably calculated to put the purchaser on notice or that would cause inquiry that would lead to notice or knowledge.

The lease agreement at hand discloses the intent to sever the advertising signs from the land and treat them as personal property. As indicated in the *Hankins, supra*, and *Cochrane, supra*, decisions, notice, either actual or implied, is the key element in binding subsequent purchasers to the terms of the agreement.

The trial court found, and we agree, that appellant had notice of a lease agreement concerning the signs. Appellant was told by Dr. Vyas prior to purchasing the property that appellee had a lease for which $600 per year in rent was paid, and which

was subject to annual renewal. He was also advised that there was a 30 day notice provision in the agreement, and the real estate contract by which appellant purchased the property makes specific reference to the signs, and provides that the buyer will honor all lease agreements. Furthermore, the signs themselves have the name "ACME" displayed on them.

[redacted] Appellant's contention that he was not made aware of the specifics of the lease agreement and the nature of the appellee's interest in the signs has no merit. We hold that appellant was aware of sufficient facts concerning the lease agreement, and therefore had a duty to inquire into the nature and terms of the agreement. Notice of facts putting a man of ordinary prudence on inquiry is tantamount to knowledge of the facts to which the inquiry might lead. *Affiliated Laundries* v. *Keeton, et al.,* 270 Ark. 841, 606 S.W.2d 370 (1980).

Appellant further argues that the appellee failed to put him on notice as to his claim of ownership by not recording the lease agreement. The trial court was aided by the expert testimony of Gibson Sims, who had considerable experience in the area of outdoor advertising. Sims related that it was customary for outdoor advertisers to approach owners of potential advertising sites and to request permission to build and maintain advertising signs on the owner's property. To facilitate this, Sims stated that a ground lease would be obtained in which ownership of the signs would be reserved in the advertisers along with the right of removal, and then space on the signs would be subleased to the advertiser's customers. According to Sims, the standard practice is to obtain a ground lease, erect the signs and sublease the space on the signs to customers. He testified that automatic renewal is accomplished by payment and acceptance of rent rather than redrawing yearly leases and recording them. He further stated that leasing of space on signs owned by a landowner as well as yearly written and recorded leases are not the standard in the industry because these practices are unprofitable.

Appellant's second argument for reversal is based on the trial court's construction of the handwritten portions of the real estate contract entered into by appellant and Dr. Vyas. The appellant argues that the court erred by reading three separate handwritten additions of items as referring to one another, when

they were intended to be read separately. Specifically, the trial court found in paragraph C of the letter opinion that "Dr. Vyas knew of the lease and the same was noted on the Real Estate Contract between Dr. Vyas and Mr. Bilo. It was recorded in pencil or pen '. . . no rent on the signs on the property will be paid 5-30-86—Buyer will handle the existing lease agreement.' "

The appellant contends that the "5-30-86" notation and the "buyer will handle the existing lease agreement" were added to separate paragraphs of the contract, and did not pertain to the clause referring to the rent on the advertising signs. We note that the contract uses the word "honor" rather than "handle," but the appellant ignores the fact that the contract expressly makes reference to the signs and the rent to be paid on them, and that in a fourth handwritten addition to the contract in paragraph 16, entitled "Other Conditions," the contract specifically provides that the "[b]uyer will honor all existing lease agreements." We cannot say that the trial court's finding that appellant was not an innocent purchaser and that he should have been put on notice by the express terms of the contract itself is clearly erroneous. Therefore, we hold that the decision of the trial court finding that the advertising signs were the personal property of the appellee is not clearly against the preponderance of the evidence.

AFFIRMED.

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

Willie B. JONES *v.* STATE of Arkansas

CA CR 88-201 765 S.W.2d 15

Court of Appeals of Arkansas
Opinion delivered February 22, 1989

Steve Inboden, for appellant.

Steve Clark, Att'y Gen., by: *Jeannette Denhammcclendon*, Asst. Att'y Gen., for appellee.

PER CURIAM. The appellant in this criminal case was originally charged with aggravated assault, resisting arrest and criminal mischief. On August 18, 1987, he entered a guilty plea to all three charges and was placed on supervised probation for a period of three years. The judgment, commitment order, and the "guilty plea statement" recited various conditions of the probation and further stated that violation of the conditions could result in imprisonment for a period of from 0 to 6 years and a fine of $10,000.00. On May 17, 1988, the trial court revoked the appellant's probation and sentenced him to 10 years on the aggravated assault charges. His retained attorney, Steve Inboden, has filed a brief and motion to be relieved as counsel, citing *Anders* v. *California*, 386 U.S. 739 (1967), and Rule 11(h) of the

Rules of the Supreme Court and Courts of Appeals, stating that he believes the appeal to be without merit. An abstract of the proceedings, a statement of the case, and an affidavit of no-merit were filed by Mr. Inboden. However, he has failed to properly abstract the record and has failed to brief matters in the record that may arguably support an appeal, as required by the Arkansas Supreme Court and Court of Appeals Rules of Appellate Procedure, Rule 11(h). The Attorney General's Office has supplied a list of the appellant's objections, properly abstracted the record, and submitted a brief concurring with Mr. Inboden's opinion that the appeal was without merit.

However, a no-merit appeal brief written almost entirely by the State does not comport with the constitutional requirements of equal protection and due process set out in *Anders* v. *California*, 386 U.S. 739 (1967), and *Evitts* v. *Lucey*, 469 U.S. 387 (1985), or with the requirements of Rule 11(h). *House* v. *State*, 20 Ark. App. 28, 722 S.W.2d 886 (1987). In *Anders*, the United States Supreme Court stressed the importance of the attorney in his role as an advocate.

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae.

386 U.S. at 743-744. Furthermore, the procedure for handling no-merit appeals applies in the case of both retained and appointed counsel. *House, supra; Roberts* v. *State*, 705 S.W.2d 803 (Tex. App. 1986). Because it is arguable that affirming a conviction wholly on the strength of a brief drafted by the State would constitute a denial of the due process right to effective assistance of counsel, we direct that Mr. Inboden comply with the requirements of *Anders* and Rule 11(h), by filing a proper brief.

We also direct that this case be rebriefed by both Mr. Inboden and the State on an issue not mentioned by either side. As noted earlier, the appellant pled guilty to aggravated assault and was placed on probation for three years. When the trial court revoked the appellant's probation, it sentenced the appellant to ten years. However, aggravated assault is a class D felony, Ark. Code Ann. § 5-13-204 (1987) (formerly Ark. Stat. Ann. § 41-1604 (Repl. 1977)), and the maximum sentence for a class D

felony is six years. Ark. Code Ann. § 5-4-401(a)(5)(1987) (formerly Ark. Stat. Ann. § 41-901(1)(e) (Supp. 1985)).

Recently the Arkansas Supreme Court has reviewed cases involving illegal sentences despite the absence of an objection below. In those cases, the Court has compared the illegal sentence issue to one involving subject matter jurisdiction, which may be raised at any time. *Howard* v. *State*, 289 Ark. 587, 715 S.W.2d 440 (1986); *Lambert* v. *State*, 286 Ark. 408, 692 S.W.2d 238 (1985). We wish to emphasize that a circuit court acting in excess of its authority in sentencing is not a matter of subject matter jurisdiction. *Banning* v. *State*, 22 Ark. App. 144, 737 S.W.2d 167 (1987). However, when a court has imposed an illegal sentence on a defendant, then we will review it regardless of whether an objection was raised below. An illegal sentence is one which is illegal "on its face." *Abdullah* v. *State*, 290 Ark. 537, 720 S.W.2d 902 (1986). Therefore, we could raise the issue on our own. However, since the case must be rebriefed, we choose to obtain the benefit of *both* counsel's arguments as to the propriety of the sentence imposed.

The appellant is directed to file a new brief on or before March 15, 1989, with the State's brief being due on or before April 1, 1989, and the appellant's reply brief due April 12, 1989.

Rebriefing ordered.

Lee THOMAS *v.* ALLSTATE INSURANCE COMPANY

CA 88-182 766 S.W.2d 31

Court of Appeals of Arkansas
Division II
Opinion delivered March 1, 1989

[redacted]

David Hodges; Josh E. McHughes, for appellant.

Huckaby, Munson, Rowlett and Tilley, P.A., by: *Beverly A. Rowlett*, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Pulaski County Circuit Court, Second Division. Appellant, Lee Thomas, appeals from a judgment entered March 10, 1988, which dismissed his cause of action against appellee, Allstate Insurance Company. We affirm.

Appellant purchased an insurance policy from appellee insuring a dwelling at 3312 Short Spring Street in Little Rock, Arkansas, against a loss by fire. The house was insured in the amount of $18,000. The house was damaged by fire on May 29, 1987, and appellant made demand upon appellee for the benefits under the policy. Appellee admitted the validity of the policy but denied liability under a provision which excluded loss caused by intentional acts of the insured. Appellant brought suit for the policy limit of $18,000, plus damages, attorney fees, and costs. As a defense to appellant's claim, appellee contended that the fire in question was incendiary in origin and occurred at the insistence of appellant and was, therefore, excluded under the policy. A jury trial was held on March 9, 1988, and a verdict was returned for appellee. A judgment was rendered on the jury verdict dismissing appellant's claim for benefits under the policy. From this judgment, this appeal arises.

Appellant raises the following five points for reversal: 1) The trial court erred in denying the motion for a directed verdict; 2) the jury verdict was not supported by substantial evidence; 3) the trial court erred in denying the motion for summary judgment, motion for new trial and/or motion for judgment notwithstanding the verdict; 4) the trial court erred in permitting Gary Jones to testify as to his opinion that the property was overinsured; 5) the trial court erred in permitting hearsay testimony.

In cases in which it is contended that the evidence was insufficient to support the appellee's claim, and in which this court is also being asked to review the denial of a motion for a directed verdict, the evidence, along with all reasonable inferences deducible therefrom, is examined in the light most favorable to the party against whom the motion is sought. *McWilliams* v. *Zedlitz*, 294 Ark. 336, 742 S.W.2d 929 (1988). If there is any substantial evidence to support the verdict, we will affirm the trial court. *Storthz* v. *Commercial Nat'l Bank*, 276 Ark. 10, 631 S.W.2d 613 (1982). As to the substantiality of the

evidence, we will not disturb the jury's conclusion unless we can say there is no reasonable probability in favor of appellee's version and then only after giving legitimate effect to the presumptions in favor of a jury's finding. *Haynes* v. *Farm Bureau Mut. Ins. Co. of Ark.*, 11 Ark. App. 289, 669 S.W.2d 511 (1984).

In this case, a review of the evidence most favorable to appellee convinces us that the jury verdict dismissing appellant's cause of action is supported by substantial evidence. We agree with appellant that a mere showing of arson does not relieve the insurer from liability under a fire policy. It is also necessary to prove by direct or circumstantial evidence that the insured set the fire or caused the house to be burned. *Id.*

While there were no eyewitnesses to the setting of the fire, the deliberate burning of an insured's building by its owner is usually accomplished alone and in secret. However, any material fact in issue may be established by circumstantial evidence. The fact that evidence is circumstantial does not render it insubstantial as the law makes no distinction between direct evidence of a fact and circumstances from which it can be inferred. *Farmer's Ins. Exch.* v. *Staples*, 8 Ark. App. 224, 650 S.W.2d 244 (1983). The circumstances may be such that different minds can reasonably draw different conclusions from them without resort to speculation. Where there are facts and circumstances in evidence from which reasonable minds might reach different conclusions, the matter is an issue of fact which must be submitted to the jury for determination. *Id.*

A review of the evidence in the light most favorable to appellee reveals that the fire was of incendiary origin. Gary Jones, an inspector and cause and origin investigator for the Little Rock Fire Department, testified that he investigated the fire at appellant's property at approximately 1:00 a.m. on May 29, 1987. He testified that he determined the fire was arson based on the physical appearance of the scene as well as the presence of a strong odor of gasoline inside the dwelling. Mr. Jones testified that he did not need to use the hydrocarbon detector to detect a possible accelerant because the odor of gasoline was so prevalent. His testimony further revealed that a hole was burned through the floor in the kitchen indicating that an accelerant was introduced because a fire burns up and out, not down. Mr. Jones

opined that approximately two gallons of gasoline were applied at the scene. He also testified, without objection, that he submitted a one gallon can of ash and debris to the crime lab for analysis and the report came back positive for gasoline.

Jack Kinney, a private investigator specializing in fire investigation, testified that he also investigated the fire in issue. His testimony revealed that the major burn damage occurred around the kitchen sink. Mr. Kinney stated that the hole in the kitchen floor revealed a burn through the top flooring, subflooring, and the floor joists beneath. He testified that the downward burning was unnatural and a "clear indication of the use of a flammable liquid." Mr. Kinney's testimony disclosed other indications that the fire was incendiary in origin.

The above evidence presents sufficient evidence from which the jury could determine that the fire was of incendiary origin. The issue for resolution, therefore, becomes whether the evidence supports the conclusion that appellant set the fire or caused the house to burn.

Appellant testified that he bought the house in 1986 for $7,000, paying $400 down and $100 per month. At the time of purchase the house was insured for $18,000 and appellant assumed the insurance. He testified that he later inquired if appellee would increase the coverage on the house; however, appellee denied his request.

Collectively, the testimony of the fire investigators Jones and Kinney revealed that the fire was not the type set by juveniles or transients. Their testimony further revealed that indications of arson include fires started between 8:00 p.m. and 4:00 a.m., presence of flammable liquids, unoccupied or vacant houses and overinsured property. Here, the fire occurred after midnight, a flammable liquid was present, the house was vacant and insured for $11,000 more than the purchase price.

There was also evidence presented that appellant was experiencing financial difficulties at the time of the fire. Appellant was behind on his bills and was indebted to his brother. Further, the Internal Revenue Service had a lien against him for collection of money due. With appellant's permission, Lawrence Cromwell and his family moved into the Short Spring Street house around

the first of May of 1987. The Cromwell family moved out of the house a day or two before the fire at appellant's request. Although appellant testified he partially lived in the house until Cromwell moved in, the evidence indicated that he resided with Ruby Lewis at another address. The electrical power was disconnected at the Spring Street address in July of 1986 and was not reconnected prior to the fire. Also, there was no water service at the house until the Cromwell family moved in the first of May. There was evidence from which the jury could infer that appellant had a motive for the arson and that he set the fire or caused the house to be burned. The evidence was in conflict; however, we cannot conclude that reasonable minds could not reach the jury's conclusion or that its finding is not supported by substantial evidence.

Finding substantial evidence to support the verdict negates appellant's next contention that the trial court erred in denying his motion for a judgment notwithstanding the verdict because a trial court can enter such a judgment only if there is no substantial evidence to support the verdict. *McCuistion* v. *City of Siloam Springs*, 268 Ark. 148, 594 S.W.2d 233 (1980). Alternatively, appellant argues that the court erred in not granting his motion for a new trial. It is well settled that the matter of granting or denying a new trial lies within the sound discretion of the trial judge whose action will be reversed only upon a clear showing of abuse of that discretion or manifest prejudice to the defendant. *Newberry* v. *State*, 262 Ark. 334, 557 S.W.2d 864 (1977). From all evidence of record, we find no abuse of discretion in the trial court's refusal to grant a new trial or no manifest prejudice to appellant by the court's actions in this regard.

Appellant also argues that the trial court erred in denying his motion for summary judgment. It is well settled that a summary judgment under Rule 56 of the Arkansas Rules of Civil Procedure, is appropriate only when the pleadings, depositions, answers to interrogatories, requests for admissions, together with the supporting affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Farmer's Ins. Exch.* v. *Staples*, 8 Ark. App. 224, 650 S.W.2d 244 (1983). It is also well settled that any facts submitted by an affidavit with a motion for summary judgment must be viewed in the light most favorable to the party

against whom the motion is made, with all doubts and influences being resolved against the movant. *Jackson* v. *Petty Jean Elec. Co-op*, 268 Ark. 1076, 599 S.W.2d 402 (Ark. App. 1980).

In this case, the evidence established that the house was deliberately burned. Additionally, there was evidence presented that appellant either set the fire or caused the house to be burned and we agree with the trial court that there was a genuine issue as to a material fact presented on that point. Therefore, we conclude that the trial court did not err in refusing to grant appellant's motion for summary judgment.

Next, appellant argues that the trial court erred in permitting Gary Jones to testify as to his opinion that the property was overinsured. During appellee's direct examination of Mr. Jones, he testified about factors surrounding a fire which indicate arson. During the course of this testimony, Mr. Jones stated: "Another indicator is a vacant or unoccupied house. And then another to me, in this case, like I said, is this house, in my opinion, was way overinsured. When I found out how much it was insured for, I couldn't believe it." Appellant's attorney objected to this statement based upon lack of proper foundation and requested the court strike it from the record. The court sustained the objection, struck the portion of the statement involving Mr. Jones' opinion that the house was overinsured and admonished the jury. Mr. Jones then continued with his testimony relating that he spoke with appellant after the fire regarding basic information pertaining to the property and the insurance coverage. Mr. Jones generally related that appellant told him how much the property was insured for, and that Jones investigated the scene of the fire and was familiar with the condition of the house.

At the time, appellee's attorney requested that the court reconsider its ruling because he felt the proper foundation had been laid for the admission of the opinion. The court held as follows:

> I'm going to allow his opinion to stand and allow that opinion he had about the value to remain purely as to the basis of his opinion, but it doesn't prove a thing as to whether or not it was overvalued. It just goes to show that's why he believed what he did but that doesn't prove it was overvalued in insurance because this gentleman is not

> qualified to state that. I'm allowing it just merely as a basis for his opinion only.

During this time, appellant failed to renew his motion or to lodge a new objection that the subsequent testimony of Mr. Jones still was inadequate to form the proper foundation.

Because appellant failed to object or to renew his previous objection based upon lack of foundation, the trial court was not apprised that appellant still deemed the foundation inadequate. *See* A.R.E. 103(a). This court does not consider matters which were not before the trial court. *Dillard* v. *State*, 20 Ark. App. 35, 723 S.W.2d 373 (1987).

Lastly, appellant argues the trial court erred in allowing John P. Kinney to testify that he took samples at the scene to determine if a flammable liquid had been used. Further, he testified that he submitted the sample to the laboratory and they determined gasoline was used. Appellant's attorney objected to the latter remark upon the basis of hearsay. The court then required the witness to restrict his testimony to what he actually found. Specifically, appellant argues that the laboratory finding was hearsay. However, where the defendant allows other witnesses to offer the same testimony without objection, he has failed to demonstrate any prejudice from the alleged error, and this court will not reverse absent demonstrated trial error. *Biniores* v. *State*, 16 Ark. App. 275, 701 S.W.2d 385 (1985). Here, before Mr. Kinney testified, Gary Jones was allowed to testify, without objection, that he too took samples of debris from the scene and presented the samples to the State Crime Laboratory for analysis. Additionally, he testified that the report came back from the laboratory reflecting that the sample submitted tested positive for gasoline. Therefore, appellant failed to demonstrate any prejudice from Mr. Kinney's statement, as he allowed Mr. Jones to offer the same testimony without objection.

Affirmed.

COOPER and ROGERS, JJ., agree.

EAGLE INTERNATIONAL, INC. *v.* The CITY OF CROSSETT PORT AUTHORITY, CROSSETT, ARKANSAS

CA 88-285 766 S.W.2d 28

Court of Appeals of Arkansas
Division I
Opinion delivered March 1, 1989

Smith Law Firm, Ltd., by: *Richard L. Smith* and *Martha G. Hunt*, for appellant.

Arnold, Hamilton & Streetman, by: *Thomas S. Streetman*, for appellee.

JAMES R. COOPER, Judge. This appeal follows the entry of an

injunction against the appellant, Eagle International, Inc., by the Ashley County Chancery Court in an action brought by the City of Crossett Port Authority to force the appellant to move its two boats berthed in the Crossett Harbor turning basin.

At trial, the appellant asserted that a lease entered into between the parties permitted the berthing of the boats at the south side of the turning basin alongside the leased property and that a permit issued by the United States Army Corps of Engineers also provided the necessary authorization. On appeal, the appellant has abandoned its argument that the lease entitled it to berth the boats in the turning basin. Instead, it argues that, because the turning basin is part of the navigable waters of the United States, the only authorization required for it to berth its boats in the turning basin was granted by the United States Army Corps of Engineers in its permit. The Port Authority concedes that the Crossett Harbor turning basin is part of the navigable waters of the United States but asserts that it has concurrent authority over the turning basin.

The Port Authority owns approximately 130 acres along U.S. Highway 82 where it intersects the Quachita River, and it has constructed a ship channel and turning basin off the Quachita River. The Port Authority was created by an ordinance of the City of Crossett for the purposes of acquiring, equipping, and operating a port on the Quachita River at this site, which is five to six miles west of Crossett. At the eastern edge of the ship channel and turning basin is a five-lane concrete boat ramp which is owned by the Port Authority and is used for access to the Quachita River. Also located on the 130 acres is an elevated field area, seven to eight acres in size, on which the Port Authority is in the process of constructing a warehouse, public scales, and a wharf or dock in pursuit of its plan to operate a public port at the harbor. The Port Authority is also in the process of entering into a lease for the operation of a commercial marina at the harbor and has indicated that, after the marina is developed, people will be permitted to berth their boats there for a fee. With rare exception, the shoreline of the Quachita River in Ashley and Union Counties is under the management of the United States Fish and Wildlife Service, which does not allow boats to be berthed on the Ouachita River except with special permits of limited duration. At the time the complaint was brought, the United States Army Corps of

Engineers was in the process of constructing recreational improvements on lands owned by the Port Authority.

In late 1985 or early 1986, Jim Garner, an owner and vice president of the appellant, requested permission from the Port Authority to temporarily moor the appellant's boat, the Second Wind," referred to as a "party barge" by the Port Authority, at the harbor. The Port Authority gave the appellant permission to temporarily berth the boat at the harbor. The appellant later brought a second boat, the "Wimico," into the harbor and moored it alongside the other boat without permission from the Port Authority, which then notified the appellant that it must remove the boats from the harbor; after several requests, the appellant removed the boats for a few months in the fall of 1987 but brought them back to the harbor in 1988. Throughout the history of this dispute, the Port Authority has had a policy of not permitting any type of pleasure craft to be located on a permanent basis in the ship channel and turning basin.

On February 19, 1988, the Port Authority brought this action against the appellant and Glad Industries, Inc., for an injunction requiring them to remove the boats from the turning basin. Glad Industries was dismissed from the action after it was determined that it had no interest in the boats.

On May 23, 1988, the United States Army Corps of Engineers granted the appellant a permit to "place mooring dolphins and a floating dock" at the south side of the turning basin. The permit also granted after-the-fact authorization for an existing fifty-foot-long floating dock utilized by the appellant at the site. The permit stated, "[t]his permit does not obviate the need to obtain other Federal, state, or local authorizations required by law" and was expressly issued pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. Section 403 (1986).

A decree was entered on June 13, 1988, granting an injunction directing the appellant to immediately remove the boats from the turning basin and restraining the appellant from bringing the boats into the turning basin in the future unless "it is in accordance with the rules and regulations adopted by the Crossett Port Authority for the general public use of those facilities." In the decree, the chancellor stated:

> Eagle also contends that the Crossett Port Authority has no jurisdiction over the waters of the turning basin and ship channel. Eagle has submitted a brief citing numerous cases but those cases are not applicable to the facts in this case. The Crossett Port Authority has jurisdiction over the turning basin. The deed from the United States Army Corps of Engineers to the Port Authority, plaintiff's Exhibit 2C, specifically grants the Port Authority jurisdiction over the turning basin. However, the deed reserves unto the Corps of Engineers exclusive jurisdiction over the ship channel itself and provides that the Port Authority shall not impede public use of the ship channel. The Crossett Port Authority does not have jurisdiction over the ship channel. Only the United States Army Corps of Engineers has jurisdiction over the ship channel. However, the boats in question are berthed in the turning basin and not in the ship channel.

At trial, the chancellor stated that he did not consider the turning basin to be part of the "navigable stream of the Quachita River." The appellant has urged, and the Port Authority has conceded on appeal, that this finding is incorrect. The appellant argues that, therefore, the Port Authority cannot enjoin its berthing of the boats in the turning basin after the issuance of the permit by the United States Army Corps of Engineers. The Port Authority asserts that, although the turning basin is indeed part of the navigable waters of the United States, that fact does not warrant reversal of the chancellor's decision. The Port Authority argues that it still retains some power to regulate the use of the turning basin and has the authority to order the appellant to remove its boats. We agree. If the decision of the trial judge is correct for any reason, we will not reverse his decision. *Lyons* v. *Lyons*, 13 Ark. App. 63, 679 S.W.2d 811 (1984).

33 U.S.C. Section 403 (1986), under which the permit in the case at bar was issued, provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead,

> jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

In Ark. Code Ann. Section 14-186-206 (1987), it is provided that "[t]he jurisdiction of a municipal port authority in any harbors, ports, or river-rail and barge terminals within the state shall extend over the waters and shores of the harbors or ports."

The permit issued by the United States Army Corps of Engineers gives appellant permission to place mooring dolphins and a floating dock at the south side of the turning basin. It does not give appellant permission to moor two boats in the turning basin, nor is it evidence that the United States Army Corps of Engineers has complete authority over the turning basin. The permit specifically states "[t]his permit does not obviate the need to obtain other Federal, state, or local authorization required by law."

In *Cummings* v. *Chicago*, 188 U.S. 410 (1903), the United States Supreme Court was asked to decide the question whether the appellants could proceed with the work on a dock in disregard of a Chicago ordinance requiring a permit because the plans for the dock were approved by the United States Engineer stationed at Chicago, and the permit was subsequently granted by the Secretary of War pursuant to Section 10 of the Rivers and Harbors Act of 1899. The Court stated:

> We come now to the merits of the suit as disclosed by the bill. The general proposition upon which the plaintiffs base their right to relief is that the United States, by the acts of Congress referred to and by what has been done

> under those acts, has taken "possession" of Calumet River, and so far as the erection in that river of structures such as bridges, docks, piers and the like is concerned, no jurisdiction or authority whatever remains with the local authorities. In a sense, but only in a limited sense, the United States has taken possession of Calumet River, by improving it, by causing it to be surveyed, and by establishing lines beyond which no dock or other structure shall be erected in the river without the approval or consent of the Secretary of War, to whom has been committed the determination of such questions. But Congress has not passed any act under which parties, having simply the consent of the Secretary, may erect structures in Calumet River without reference to the wishes of the State of Illinois on the subject.

188 U.S. at 426-27. In *Cummings*, the Court acknowledged that, if the power of the state and that of the federal government come in conflict, the power of the federal government will control.

Again, in *Wisconsin* v. *Illinois*, 278 U.S. 367 (1929), the Court, citing its earlier decision in *Cummings* v. *Chicago, supra*, stated: "[Section 10 of the Rivers and Harbors Act of 1899] was not intended to override the authority of the State to put its veto upon the placing of obstructing structures in navigable waters within a State and both State and Federal approval were made necessary in such case." 278 U.S. at 412.

The power of Congress over the navigable waters of the United States is clearly paramount whenever Congress has definitely spoken on the subject. We do not, however, agree with appellant's assertion that, having obtained the United States Army Corps of Engineers' permit, it can dispense with the need for the permission of the Port Authority in berthing its boats within the Crossett Harbor turning basin. The permit herein is only a finding that appellant's proposed mooring dolphins and floating dock will not interfere with or be detrimental to navigation, and it is not equivalent to a declaration that the appellant may proceed with mooring its boats in the Crossett turning basin without first obtaining the consent of the Port Authority. *Accord Cobb* v. *Lincoln Park Comm'rs*, 202 Ill. 427, 67 N.E. 5 (1903).

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

Janie M. PIGG *v.* AUTO SHACK

CA 88-279 766 S.W.2d 36

Court of Appeals of Arkansas
Division II
Opinion delivered March 1, 1989

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

David Hodges, for appellee.

JAMES R. COOPER, Judge. In this appeal from the Workers' Compensation Commission the appellant, Janie M. Pigg, contends that the Commission erred in denying her benefits. We affirm.

The facts are not in dispute. Mrs. Pigg was employed by Auto Shack and was in a management training position. On November 10, 1985, two women and a man entered the Auto Shack store and began arguing with the store's assistant manager, Mike Ernst. One of the women was Ernst's estranged wife and the other two were her relatives.

Mrs. Pigg testified that while the argument was occurring, she was working the cash register and that she did not speak to any of the people. When Mrs. Ernst began getting loud and knocking things off the shelves, Mr. Ernst yelled for someone to call the police. At that point, the man pointed to Mrs. Pigg and stated that she was the one who had come to Russellville.

Mr. Ernst testified that he and his wife had separated and that shortly before the assault at Auto Shack, he asked Mrs. Pigg if she would go to Russellville with him to pick up his daughter. After conferring with her husband, Mrs. Pigg agreed to go on the condition that she would wait in the car. Mrs. Pigg testified that she had seen the man who pointed her out in Auto Shack when she

accompanied Mr. Ernst to Russellville.

After the man identified Mrs. Pigg, one of the women came through an opening in the counter and pulled Mrs. Pigg's hair with enough force to pull her to the floor. Mrs. Pigg stated that the next thing she knew she was on the floor and was being hit and kicked by Mrs. Ernst and her two relatives.

As a result of the assault, Mrs. Pigg was injured, incurred medical expenses, and she filed a claim for benefits with the Workers' Compensation Commission. The administrative law judge found that her injuries did not arise out of or in the course of her employment, and that the assault was personal. The full Commission concurred and adopted the opinion of the administrative law judge. On appeal, the appellant does not contend that her injuries arose out of her employment. She argues that the Commission should have awarded her benefits by applying the "positional risk" doctrine, because she would not have been assaulted had she not been at work.

In the case of assaults, the general rule is that injuries resulting from an assault are compensable where the assault is causally related to the employment, but such injuries are not compensable when the assault arises out of purely personal reasons. *Burks* v. *Anthony Timberlands, Inc.*, 21 Ark. App. 1, 727 S.W.2d 388 (1987). A case in which an assault was found to be compensable is *Townsend Paneling, Inc.* v. *Butler*, 247 Ark. 818, 448 S.W.2d 347 (1969). In that case, Butler refused to wager with a co-worker that the co-worker had at least $3.00 of change in his pocket, and Butler indicated that he wanted to work. The co-worker walked off, returned, and hit Butler on the side of the face with an oak board. Citing the general rule, the Supreme Court affirmed the Commission's award of compensation. The court held that the sole reason for the assault was Butler's refusal to depart from his duties and therefore, the assault was held to be causally related to the employment.

A claimant before the Workers' Compensation Commission must prove that the injury sustained was the result of an accident arising out of and in the course of employment, *J & G. Cabinets* v. *Hennington*, 269 Ark. 789, 600 S.W.2d 916 (Ark. App. 1980), but the positional risk doctrine provides a method of satisfying the "in the course of" requirement where the source of

the injury is *unexplained. Bagwell* v. *Falcon Jet Corp.*, 8 Ark. App. 192, 649 S.W.2d 841 (1983) (Cooper, J., concurring).

> An important and growing number of courts are accepting the full implications of the positional risk test: An injury *arises out of* the employment if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed claimant in the position where he was injured. . . . This theory supports compensation, for example, in cases of stray bullets, roving lunatics, and other situations in which the only connection of the employment with the injury is that its obligations placed the employee in the particular place at the particular time when he was injured by some neutral force, meaning by "neutral" neither personal to the claimant nor distinctly associated with the employment.

1 Larson, *Workmen's Compensation Law*, § 6.50 (1985) (emphasis in original).

The doctrine does not provide a new ground for recovery, but allows a presumption to arise in favor of compensation where the accident causing the injury was unexplainable. For example, in *Parrish Esso Service Center* v. *Adams*, 237 Ark. 560, 374 S.W.2d 468 (1964), the claimant was at work when a storm arose and the gas station lost electricity. While securing a sign outside, a gust of wind picked the claimant up, carried him 75 feet and dropped him on a concrete apron. Although the court did not use the words "positional risk" doctrine in awarding benefits, *Parrish* represents the type of fact situation where the presumption arises.

In the cases of assaults, the positional risk doctrine applies only when the risk is neutral. 1 Larson, *Workmen's Compensation Law*, §11.21. Neutral means that the risk which caused the injury was neither personal to the claimant nor distinctly associated with the employment. *Adkins* v. *Teledyne, Exploration Co.*, 8 Ark. App. 342, 652 S.W.2d 55 (1983). In other words, before the doctrine will be applied there must be no evidence that the assault was personal and no evidence that the assault was work related. *See, Morris* v. *Soloway*, 170 Mich. App. 312, 428 N.W.2d 43 (1988); *Chala* v. *OK Tire Store*, 112 Idaho 1020, 739 P.2d 319 (1987); *Devault* v. *General Motors*

Co., 149 Mich. App. 765, 386 N.W.2d 671 (1986).

In the case at bar, the positional risk doctrine clearly cannot apply because there was evidence from which the fact finder could find that the assault committed on the appellant was personal in origin. Therefore, we affirm the Commission's denial of benefits.

Affirmed.

CORBIN, C.J., and ROGERS, J., agree.

Roger Dale SIMS *v.* STATE of Arkansas

CA CR 88-276 766 S.W.2d 20

Court of Appeals of Arkansas
Division I
Opinion delivered March 1, 1989

Richard B. Adkisson, for appellant.

Steve Clark, Att'y Gen., by: *Lynley Arnett*, Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. On February 23, 1985, Roger Dale Sims shot and killed Charlie Parker in Kelley's Bar at the Morgan Interchange. Both men had been drinking; Parker, heavily. There was evidence from which the jury could find that the shooting was intentional. Sims was convicted of manslaughter and sentenced to ten years in prison.

Sims testified in his own behalf that he pulled the gun in self-defense and that it discharged accidentally. There was evidence that Parker had a reputation for violence, and that Sims knew it. On cross-examination the state asked Sims if he had been convicted of felony DWI. The court held that the probative value of the prior conviction outweighed its prejudicial effect and permitted the question. Sims admitted the conviction.

The sole issue on appeal is whether the trial court abused its discretion in admitting evidence of the prior conviction. *See Washington* v. *State*, 6 Ark. App. 85, 638 S.W.2d 690 (1982). We find no abuse of discretion and affirm.

Ark. R. Evid. 609 provides in pertinent part:

> Impeachment by evidence of conviction of crime. (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one [1] year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or a witness, or (2) involved dishonesty or false statement, regardless of the punishment.

Sims' argument is that because a prior DWI conviction has no logical relevance as to credibility, the probative value of such conviction cannot outweigh its obvious prejudicial effect. This argument overlooks the fact that the principle embodied in Rule 609(a)(1) is based on an assumption that one who commits a

serious offense is, to some extent, less worthy of belief. *See Campbell* v. *State*, 264 Ark. 372, 571 S.W.2d 597 (1978); *Washington* v. *State, supra.* Offenses involving dishonesty are admissible under 609(a)(2) regardless of whether they are felonies or misdemeanors. Felony convictions may be admissible under 609(a)(1) regardless of their logical relation to dishonesty. *See, e.g., Washington* v. *State*, 6 Ark. App. 85, 638 S.W.2d 690 (1982) (prior murder convictions admissible in murder case); *Williams* v. *State*, 6 Ark. App. 410, 644 S.W.2d 608 (1982) (prior rape case conviction admissible in rape case); *Smith* v. *State*, 277 Ark. 64, 639 S.W.2d 348 (1982) (prior convictions of burglary and rape admissible in rape case).

The supreme court has held that these matters must be decided on a case by case basis. *Smith* v. *State, supra.* We have said that some of the factors that should be considered by the trial court are: (1) the impeachment value of the prior crime; (2) the date of the conviction and witness's subsequent history; (3) the similarity between the prior conviction and the crime charged; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *Washington* v. *State, supra; Bell* v. *State*, 6 Ark. App. 388, 644 S.W.2d 601 (1982). In the case at bar, the offenses are dissimilar, the prior conviction is recent, and the credibility issue is central. We cannot say the trial court abused its discretion in admitting evidence of the prior conviction.

Affirmed.

CRACRAFT and MAYFIELD, JJ., agree.

Ricky L. WEST *v.* STATE of Arkansas

CA CR 88-145 766 S.W.2d 22

Court of Appeals of Arkansas
Division I
Opinion delivered March 1, 1989

William R. Simpson, Jr., Public Defender, by: *Bret Qualls*, Deputy Public Defender, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant, Ricky L. West, was convicted in a jury trial of rape and was sentenced to ten years in the Arkansas Department of Correction. He argues on appeal that the trial court erred in failing to direct a verdict in his favor because the prosecution failed to prove "forcible compulsion," and that the court erred in refusing to allow him to question the victim about a prior misdemeanor conviction for hindering apprehension. We affirm.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Glick* v. *State*, 275 Ark. 34, 627 S.W.2d 14 (1982). A trial court should grant a directed verdict only when there is no evidence from which the jury, without resorting to surmise and conjecture, could have found the defendant guilty. *Nichols* v. *State*, 280 Ark. 173, 655 S.W.2d 450 (1983). We must affirm the jury's verdict if it is supported by substantial evidence. *Robinson* v. *State*, 291 Ark. 212, 723 S.W.2d 818 (1987). Substantial evidence has been defined as evidence of sufficient force and character that it will compel a reasonable mind to reach a conclusion one way or the other. *Honea* v. *State*, 15 Ark. App. 382, 695 S.W.2d 391 (1985). There must, however, be substantial evidence to support every element of the offense. *Norton* v. *State*, 271 Ark. 451, 609 S.W.2d 1 (1980).

At trial, the victim testified she had been to the Central Baptist Hospital and was walking home when appellant stopped his car and asked where she was going. Thinking she recognized appellant, she began talking to him before realizing she did not know him. However, she accepted a ride from appellant and he took her home. She testified she asked appellant if he would drive her downtown and he agreed, so after going into her house for a minute, she then got into appellant's car again, but instead of going directly downtown, they decided to have a beer and smoke a "joint." They stopped at a liquor store, where appellant bought a 40-ounce beer and two cups, then drove out Arch Street Pike.

Under the Interstate 30 bridge over Arch, the appellant pulled off the road and the car got stuck. He got out, taking the beer with him, and sat down under the bridge where the victim joined him. After sharing the beer and a marijuana cigarette, appellant became aggressive. According to the victim, appellant

held her by the arm, struck her on the shoulder several times with his fist, then raped her. She testified that she was very frightened and felt if she did not do what he told her, "He probably would have killed me. I don't know. All kinds of things just ran through my head." The victim described in some detail the activity in which she was forced to engage, including both oral and vaginal sex. She said she finally got loose, ran to the road and flagged down a car. The lady driving the car opened a door and the victim got into the car. Shortly thereafter, a sheriff's car stopped, and the officer was told that a rape had occurred. He then arrested the appellant who was seen running from under the bridge.

Appellant first argues that a directed verdict should have been granted because the prosecution failed to prove forcible compulsion. It is argued that the doctor who examined the victim testified he did not find any bruises on her or other evidence of trauma and that she appeared calm, although bewildered.

In *Spencer* v. *State*, 255 Ark. 258, 499 S.W.2d 856 (1973), the Arkansas Supreme Court stated:

> As long ago as 1878, this court, in *Bradley* v. *State*, 32 Ark. 704, said:
>
> > It is often a matter of great difficulty in trials for rape, and of assaults with intent to commit rape, to determine whether the act complained of was done with or without force, and whether with or without the consent of the party complaining, and this arises from the peculiar character and surroundings of the offense charged.
> >
> > Force is an essential element in the crime of rape. The term is general, and in its application the quantum of force is not to be taken into consideration, *provided the act be consummated against the will of the female.*

255 Ark. at 261-62 (emphasis in *Spencer*). More recently in *Canard* v. *State*, 278 Ark. 372, 646 S.W.2d 3 (1983), the court said:

> Forcible compulsion is defined in Ark. Stat. Ann. § 41-1801(2) (Repl. 1977) [now codified as Ark. Code Ann. § 5-

> 14-101(2) (1987)]: " 'Forcible compulsion' means physical force, or a threat, express or implied, of death or physical injury to or kidnapping of any person." In *Spencer* v. *State*, 255 Ark. 258, 499 S.W.2d 856 (1973) we stated that the quantum of force need not be considered as long as the act is committed against the will of the victim.

278 Ark. at 374.

[redacted] It has repeatedly been held that a rape victim's testimony satisfies the requirement that there be substantial evidence that the defendant committed the crime. *Houston* v. *State*, 293 Ark. 492, 739 S.W.2d 154 (1987). Also, the victim's testimony that she was forcibly compelled, against her will, to submit to the rapist constitutes substantial evidence on which to base a conviction. *Taylor* v. *State*, 296 Ark. 89, 752 S.W.2d 2 (1988); *Lewis* v. *State*, 295 Ark. 499, 749 S.W.2d 672 (1988). It is the province of the jury to decide the credibility of the witnesses. *Taylor; Lewis*. We find ample evidence to support the jury's verdict.

Appellant also argues that the court erred in refusing to grant his motion in limine and allow him to impeach the credibility of the victim by questioning her about her conviction for hindering apprehension. Ark. R. Evid. 609(a) provides: "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) . . . or (2) involved dishonesty or false statement, regardless of the punishment." Appellant contends that hindering apprehension involves dishonesty or false statement.

Hindering apprehension, as defined in Ark. Code Ann. § 5-54-105(a) (1987) may be committed in six different ways. Only one involves giving false information. Appellant's counsel stated to the court in chambers, prior to convening in the courtroom, that he had a "motion *in limine*," and explained he had discovered that the victim had been convicted in Little Rock Municipal Court of a misdemeanor for hindering apprehension. Counsel told the court that the victim had helped someone evade arrest and he wanted to ask the victim about that. When the court inquired whether the victim had made a verbal or physical deceitful response to a question or whether she had physically hindered apprehension, counsel stated, "It's not clear." Although counsel did state to the

court that he knew no way "I can get into that other than to just start asking," we see nowhere in the record as abstracted where counsel called any witness to ask about the factual circumstances involved in the victim's conviction. Moreover, we do not see any place in the record where the court refused to let counsel ask a witness questions about this conviction. During the conference in chambers, the court told counsel:

> But just the fact that she was convicted of hindering apprehension in and of itself does not prove or I cannot take judicial notice of the fact that in and of itself it is a deceitful act because there are several ways that you can be guilty and be convicted of hindering apprehension . . . . So, the burden is on you and if you want to use it, get busy and show me that it's relevant and show me that you can prove that she was deceitful and that it has something to do with her credibility. If you can't do that, I'm not going to let you get it in.

Since there was no offer of proof as to the factual circumstances involved in the victim's conviction for hindering apprehension, we are unable to determine whether the conviction would have been admissible. *See* Ark. R. Evid. 103(a)(2).

Appellant does argue in his brief that it would be a mistake to require evidence of how the offense was committed before admitting the conviction into evidence. 3 Weinstein & Berger, *Weinstein's Evidence* § 609[04] at 609-84, 85 (1988) is cited for authority; however, that statement in *Weinstein* is made in face of the fact that *Weinstein* admits "a number of courts" have held otherwise. *See, e.g., United States* v. *Livingston*, 816 F.2d 184 (5th Cir. 1987), where the court said:

> Harrison, however, did not explain the nature of Collins' crime or whether it involved the element of intent to defraud. Thus, Harrison did not show that Collins' conviction involved "dishonesty or false statement."

816 F.2d at 190. *See also State* v. *Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981), where the court said:

> The defendant, in his offer of proof, having failed to show that the petit larceny offense of which the witness had been convicted involved deceit or deception so as to be classified

> as "crimen falsi," the District Court was correct in prohibiting its introduction into evidence.

303 N.W.2d at 752. We believe that under the Arkansas statute on hindering apprehension, providing for six different ways in which the offense can be committed with only one involving dishonesty or false statement, evidence of a misdemeanor conviction for that offense was not admissible in this case for impeachment purposes until it was shown that the conviction was based upon an act of dishonesty or false statement.

Affirmed.

COOPER and JENNINGS, JJ., agree.

Mark A. JOHNSON *v.* STATE of Arkansas

CA CR 88-189 766 S.W.2d 25

Court of Appeals of Arkansas
Division II
Opinion delivered March 1, 1989

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

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

JUDITH ROGERS, Judge. The appellant, Mark A. Johnson, appeals his conviction of possession of a controlled substance with intent to deliver. He received a sentence of five years and was fined

$25,000.

The circumstances leading to appellant's arrest and eventual conviction were a result of a consensual search of his vehicle given after he had been stopped for speeding. Appellant sought to exclude evidence found based on the alleged illegality of the search. A suppression hearing was held on appellant's motion in which he contended that the consent to search was involuntary, and that the arresting officer had no reasonable suspicion to request permission to search the car. Finding that appellant's consent was voluntary, the trial court denied the motion to suppress.

On appeal, appellant again raises the arguments that the consent to search was not voluntary, and that there was no reasonable cause to request a search of the car. In addition, appellant contends that the trial court erred in excluding a proposed jury instruction. We find no error and affirm.

On December 17, 1986, appellant was stopped for speeding on Interstate 40 by State Trooper Blake Wilson. Wilson noticed that appellant had a California driver's license, while the car he was driving displayed Wisconsin tags. When Wilson asked for an explanation, appellant replied that the car was a rental which he was driving one way to Florida to visit his parents for Christmas. He also stated that he planned to return to California by plane.

Wilson had appellant sit in the police car while the ticket was being written, as it was cold outside, and he engaged appellant in conversation. Wilson observed that appellant avoided eye contact with him, and seemed nervous and in a hurry to be out of Wilson's presence.

Wilson then asked appellant for permission to search the car. When asked what Wilson would be looking for, Wilson informed appellant that he would be looking for drugs, large quantities of money, stolen property or firearms. Appellant agreed to allow the search and signed a standardized consent form. Appellant offered to let Wilson look in the trunk, and while doing so, Wilson discovered a small quantity of what he believed to be marijuana in appellant's shaving kit. Wilson placed appellant under arrest, at which time the appellant volunteered that the wrapped Christmas packages in the trunk also contained marijuana. It was later

determined that the packages held 46.1 pounds of marijuana.

All searches without a valid warrant are unreasonable, unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant. *Campbell* v. *State*, 294 Ark. 639, 746 S.W.2d 37 (1988). Consent is a justification for a warrantless search. *Scroggins* v. *State*, 268 Ark. 261, 595 S.W.2d 219 (1980). The state has the burden of proving by clear and positive testimony that consent to a search was freely and voluntarily given, and that there was no actual or implied duress or coercion. *McIntosh* v. *State*, 296 Ark. 167, 753 S.W.2d 273 (1988). In reviewing a trial court's ruling with respect to a motion to suppress, the appellate court makes an independent determination based on the totality of the circumstances, and reverses only if the ruling was clearly against the preponderance of the evidence. *Campbell* v. *State, supra.*

In contending that the consent to search was not voluntary, appellant makes three arguments in connection with this issue. First, he argues that the consent was a product of coercion by Trooper Wilson. Appellant alleges that the consent was obtained while he was sitting in the front of the police car, where Wilson intimidated him by calling him "boy," and by stating "that he could make it easy or hard on himself." Appellant claims that he was under the impression that he was not free to leave and that the search would have been conducted even in the absence of his consent. Appellant also contends that he was unaware of his right to refuse or limit the search.

It has been held that the burden of proof on the issue of a voluntary consent cannot be discharged by the state merely by showing acquiescence to the search; the state must show that there was no actual or implied coercion. *Malone* v. *State*, 292 Ark. 243, 729 S.W.2d 167 (1987).

In assessing the totality of the circumstances, the knowledge of the right to refuse is only one factor to take into account. *Alford* v. *State*, 291 Ark. 243, 724 S.W.2d 151 (1987). In this case, the consent form signed by appellant expressly provides that the appellant had the right to refuse and to revoke the consent at any time.

Wilson testified that appellant consented to the search by

stating he "wouldn't mind," even after Wilson told him that he would be looking for drugs. Wilson stated that appellant signed the consent form after having read it over, and after Wilson offered to explain any provision that appellant may not have understood. Furthermore, appellant gave his assistance by retrieving the keys, permitting a search of the trunk first, and by opening the trunk for Wilson. These circumstances indicate cooperation on the part of the appellant, and not acquiescence or coercion.

Appellant's cooperation is further demonstrated in that after he was arrested and read the Miranda warnings, he told Wilson that this was his fourth such trip and that he was being paid $2,000, plus expenses. Appellant further stated that this arrangement provided him the means to visit his parents in Florida. Under these circumstances, we cannot say that appellant was coerced into consenting to the search of the car.

Secondly, appellant argues that the consent form itself demonstrates implied coercion because it speaks of an "investigation." He claims that the usage of this term implies that the person is being detained for some violation, indicating that the person is in trouble. However, other express provisions of the form provide that no promise, threat or coercion of any kind has been made, and it states that consent may be refused and revoked. Thus, read in its entirety, the interpretation appellant seeks to place on the form is not warranted.

In appellant's final argument as to the lack of voluntary consent, appellant asks this court to pass on the credibility of the appellant's testimony as compared to that of Trooper Wilson. While we note that the appellant's testimony was diametrically opposed to that of Trooper Wilson, we decline to address this argument. It is not the function of an appellate court to assess the credibility of witnesses. *Jones* v. *State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984).

In sum, based on a review of all the circumstances, we cannot say that the trial court's finding that appellant's consent was freely and voluntarily given is clearly against the preponderance of the evidence.

Appellant's next point for reversal concerns the refusal of the

trial court to suppress evidence due to the lack of reasonable suspicion to request the consent to search. The basis for this argument is found in *Garrett* v. *Goodwin*, 569 F. Supp. 106 (E.D. Ark. 1982).

The appellant's argument must fail because reasonable suspicion is not required in order to request the consent to search. The question raised by appellant was recently addressed and rejected by the supreme court which declined to extend this requirement beyond roadblock situations. *See McIntosh* v. *State, supra.*

As his last issue, appellant claims as error the trial court's refusal to allow a proffered jury instruction. The instruction appellant sought to have the jury consider was based on the above-mentioned argument concerning reasonable suspicion and requesting consent to search. Since it is not the law for requests to search to be made upon reasonable suspicion, it was not error for the court to disallow the instruction. *David* v. *State*, 295 Ark. 131, 748 S.W.2d 117 (1988).

AFFIRMED.

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

Alfred CHADWELL and Helen Chadwell *v.* E.T. PANNELL and City of Prairie Grove

CA 88-228 766 S.W.2d 38

Court of Appeals of Arkansas
En Banc
Opinion delivered March 8, 1989

[redacted]

Putman & Maglothin Law Offices, by: *E.E. Maglothin, Jr.*, for appellant.

Everett & Gladwin, by: *Robert J. Gladwin*, for appellee E.T. Pannell.

Boyce R. Davis Associates, by: *Boyce R. Davis*, for appellee City of Prairie Grove.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Washington County Circuit Court. Appellants, Alfred and Helen Chadwell, appeal from an order granting summary judgment in favor of appellees, E.T. Pannell and the City of Prairie Grove. We reverse and remand.

Appellants purchased three lots in the Border Street Addition of Prairie Grove from appellee Pannell. Appellants contend that Pannell, acting both as owner/developer of the subdivision and as city building inspector, promised to complete improvements including installation of water and sewer lines, construction of paved streets and guttering, and construction of a cul-de-sac in conjunction with the contract and in exchange for their promise to purchase. The only writing evidencing the contract is the deed, executed in April of 1980, which makes no reference to the alleged promise to make the specified improvements. Appellants built a house and another structure on the property, after having obtained all necessary building permits from appellee Pannell, the city building inspector at the time. Appellants initiated this action in 1985 because the improvements were never made. Appellees set up both the statute of limitations and the statute of frauds as affirmative defenses and moved for summary judgment. By order filed April 19, 1988, the trial court granted

summary judgment on both defenses. From that order comes this appeal. For reversal appellant raises the following points:

I.

THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTIONS FOR SUMMARY JUDGMENT BASED UPON FINDING APPELLANTS' CLAIMS WERE BARRED BY THE STATUTE OF FRAUDS.

II.

THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTIONS FOR SUMMARY JUDGMENT BASED UPON A FINDING APPELLANTS' CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS.

III.

THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTIONS FOR SUMMARY JUDGMENT BASED UPON A FINDING THAT NO GENUINE ISSUES OF MATERIAL FACTS EXISTED TO BE DETERMINED BY THE TRIER OF FACT.

First, appellants argue that the court erred in finding their claims were barred by the statute of frauds. We agree. The trial court found that appellants' claims were barred because the alleged oral promises could not be performed within one year from the making thereof.

Arkansas Code Annotated Section 4-59-101(a)(6) (1987) provides:

> (a) Unless the agreement, promise, or contract, or some memorandum or note thereof, upon which an action is brought is made in writing and signed by the party to be charged therewith, . . . no action shall be brought to charge any:
>
> . . . .
>
> (6) Person, upon any contract, promise, or agreement, that is not to be performed within one (1) year from the making of the contract, promise, or agreement.

This provision has consistently been interpreted to include only

contracts which are incapable of performance within one year. In *Township Builders, Inc.* v. *Kraus Construction Co.*, 286 Ark. 487, 696 S.W.2d 308 (1985) (quoting *Railway Co.* v. *Whitley*, 54 Ark. 199, 15 S.W. 465 (1891)), the court stated "It is not sufficient to bring a case within the statute that the parties did not contemplate the performance within a year, but there must be a negation of the right to perform it within the year." A contract does not come within the statute of frauds where the testimony shows it could be performed within a year, although there was a possibility or even a probability that it might require a longer time. *Id.* Here, there was no evidence that the contract could not be performed within a year. Although it may have been improbable, there was no evidence negating the right to install the water and sewer lines and construct the streets, guttering and cul-de-sac within one year. In any event, a question of fact existed as to the possibility of performing the contract within a year.

Appellees argue that the promises were part of a contract for the sale of realty and therefore were required to be in writing to be valid. Contracts affecting an interest in real property must be in writing to be enforceable. Ark. Code Ann. § 4-59-101(a)(4) (1987). However, partial or full payment of consideration together with taking of possession by the purchaser is sufficient to remove an oral contract from the statute of frauds. *Langston* v. *Langston*, 3 Ark. App. 286, 625 S.W.2d 554 (1981). We therefore find appellees' argument unpersuasive.

The purpose of summary judgment is not to try the issue but to determine if there are issues to be tried. *Trace X Chemical, Inc.* v. *Highland Resources, Inc.*, 265 Ark. 468, 579 S.W.2d 89 (1979). Accordingly, the trial judge erred when he held that the oral contract could not have been performed within one year.

Next, appellants argue that the court erred in finding that the cause of action was barred by the statute of limitations for an oral contract. Actions founded upon any contract not under seal and not in writing shall be commenced within three years after the cause of action accrues. Ark. Code Ann. § 16-56-105(1) (1987).

The contract or agreement in question was entered into April of 1980, and suit was filed in 1985. However, the period of limitations runs from the point at which the cause of action

accrues rather than from the date of the agreement. The nature of the agreement here is such that determining when the cause of action accrues is not without difficulty. Appellants argue that the limitation period began to run in 1984 because until then they had been repeatedly reassured by appellees that the improvements promised and contracted for would be made. Appellees argue that if the contract could have been performed within one year, the limitation period would have begun to run at the end of that period or alternatively at the time demand for performance was made and refusal to perform was expressed.

[redacted] This is not a case in which one party to an agreement is in default of an obligation due at a specified time, or has breached a duty on a certain date. In *Rice* v. *McKinley*, 267 Ark. 659, 590 S.W.2d 305 (1979), the court stated that where the parties have entered into an agreement which requires a series of mutual acts, some unilateral, some bilateral in character and have left the time of those acts open-ended, the cause of action does not accrue until one party has by word or conduct indicated to the other a repudiation of the agreement. We believe the holding in *Rice* is applicable to the agreement at bar. Here the agreement was both bilateral, wherein one party agreed to buy and the other to sell, and unilateral, as to appellees' promise to make improvements. The agreement left open-ended the time of performance for making the improvements. Thus, we believe the limitations period began to run when appellees by word or conduct repudiated the agreement. However, on the record before us, the date on which the alleged repudiation occurred is unclear. Under these circumstances, the date the limitations began to run is a question of fact. Where a question of fact remains to be resolved, the granting of summary judgment is inappropriate. *Ollar* v. *Spakes*, 269 Ark. 488, 601 S.W.2d 868 (1980). We therefore find that the trial court erred in granting summary judgment on the basis that the claim was barred by the statute of limitations.

[redacted] Finally, appellants argue that the trial court erred in finding that no genuine issue of material fact exists for determination by the trier of fact. Summary judgment is an extreme remedy which should be granted only when there is no genuine issue of material fact before the court. *Township Builders, Inc.* v. *Kraus Constr. Co.*, 286 Ark. 487, 696 S.W.2d 308 (1985). The evidence

must be viewed in the light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Leigh Winham, Inc.* v. *Reynolds Ins. Agency*, 279 Ark. 317, 651 S.W.2d 74 (1983).

Based upon our disposition of the previous points, issues of fact remain to be resolved with regard to appellees' affirmative defenses of statute of frauds and statute of limitations. If those facts are resolved in a manner which does not preclude recovery, factual issues remain as to the merits of the claim. It must be determined whether the alleged promises or representation were made by appellee Pannell. Because appellants have joined the City of Prairie Grove, it must be determined whether an agency relationship existed between appellee Pannell and the City. Ordinarily, agency is a question of fact to be determined by the trier of fact. *Evans* v. *White*, 284 Ark. 376, 682 S.W.2d 733 (1985). Our law is well settled that an agent acting within the apparent scope of his authority, even though in violation of actual authority, may bind his principal if the one with whom he deals does not have notice of these restrictions. *Walker* v. *Stephens*, 3 Ark. App. 205, 626 S.W.2d 200 (1981). The question of whether or not an agent is acting within the scope of his actual or apparent authority has always been held to be a question of fact for the jury or trier of fact to determine. *Id. See also Babbitt* v. *Gordon*, 251 Ark. 1112, 476 S.W.2d 795 (1972).

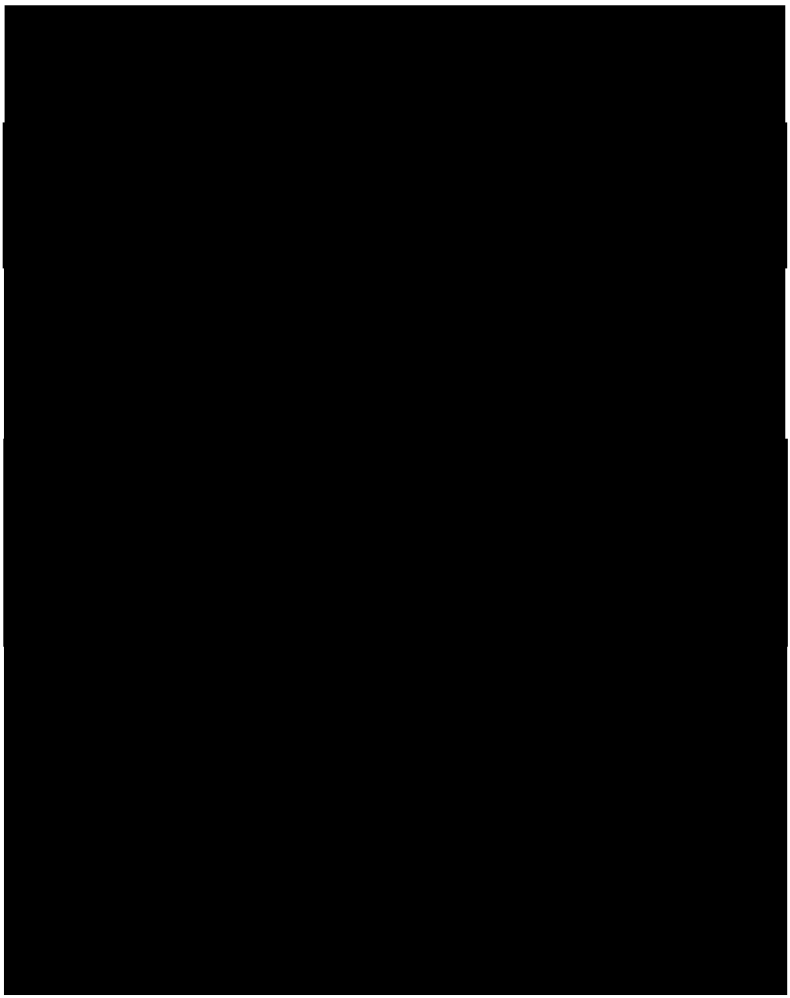
Based upon the above conclusions, we find that the trial court erred in granting summary judgment and, therefore, we reverse and remand for a trial on the merits.

Reversed and remanded.

LINDELL SQUARE LIMITED PARTNERSHIP, et al. *v.* SAVERS FEDERAL SAVINGS AND LOAN ASSOCIATION

CA 88-234 766 S.W.2d 41

Court of Appeals of Arkansas
Division II
Opinion delivered March 8, 1989
[Rehearing denied May 24, 1989.]



David Orsini, and *Friday, Eldredge & Clark*, by: *Bill S. Clark*, for appellant.

Hoover, Jacobs & Storey, by: *Lawrence J. Brady* and *O.H. Storey III*, for appellee.

JAMES R. COOPER, Judge. The appellee in this civil case brought an action to accelerate a note made by Lindell Square Limited Partnership and to establish liability under a bond guaranty executed by Richard L. Grant, the general partner of Lindell Square, and E.M. Bush, a limited partner. The trial court found Grant and Bush individually liable under the bond guaranty agreement. From that decision, comes this appeal and cross-appeal.

The record shows that Lindell Square obtained a $1,100,000.00 loan from Central Business Improvement District No. 1 of Hot Springs to finance renovation of an office building. The Improvement District obtained the funds loaned to Lindell Square by the sale of revenue bonds, and Lindell Square executed a promissory note in the amount of $1,100,000.00 to evidence the loan. The promissory note was secured by a mortgage, assignment of leases, and equipment security agreement. The Improvement District assigned the promissory note and its interest in the security instruments pertaining to the note to First National Bank of Hot Springs as trustee under a trust indenture agreement. The trustee bank received payments from Lindell Square for disbursement to the bondholders. Lindell Square also obtained from Savers Federal Savings and Loan Association, in connection with the bond issue, an irrevocable letter of credit in an amount sufficient to pay the principal and interest on the bonds in the event of default by Lindell Square. Finally, Grant and

Bush, in their individual capacities, entered into a bond guaranty agreement with the trustee bank in which they severally guaranteed to the trustee full payment of principal, premium, and interest on bonds which should become due as a result of maturity, acceleration, or redemption.

Lindell Square defaulted by failing to pay an installment due on December 1, 1986. On December 8, 1986, the trustee bank drew $93,905.25 under the letter of credit, which Savers paid. Savers subsequently directed the trustee bank to take the steps necessary to effect redemption of the bonds prior to maturity. In a public notice published on January 9, 1987, the trustee bank announced that the bonds were to be redeemed on February 13, 1987. On February 11, 1987, the trustee drew $1,064,442.85 on Savers' letter of credit to obtain the funds necessary to effect redemption of the bonds. The bond guaranty and other collateral subject to the trust indenture were assigned by the trustee to Savers on February 12, 1987. Savers' subsequent failure to obtain reimbursement from Grant and Bush as guarantors gave rise to the case at bar.

The appellants first contend that the chancellor erroneously extended the terms of the guaranty by: 1) failing to strictly construe the guarantors' undertaking; 2) holding the guarantors liable beyond the strict terms of the guaranty; and 3) failing to accord the guarantors their favored status under the law by extending their liability beyond the express terms of the bond guaranty agreement. The essence of this argument is that the guarantors' liability under the bond agreement terminated on payment or redemption of the bonds; that Savers elected to pay and redeem the bonds; and that the guarantors' liability under the bond guaranty agreement had thus been discharged before the trustee assigned the bond guaranty to Savers.

The chancellor found Grant and Bush to be personally liable on the bond guaranty under §302 of the trust indenture, which provides that, in the event of default under the letter of credit agreement, Savers may direct the trustee to take the steps necessary to redeem the bonds prior to maturity. Section 302 states that after the trustee notifies the bondholders of the call for redemption,

> [Savers] shall deposit with the trustee such funds as are

> necessary to effect the redemption of the bonds at least one business day prior to the date specified for the redemption. Upon such redemption, *notwithstanding any other provision of the Indenture to the contrary*, the trustee shall deliver to [Savers] the bonds so tendered for redemption without cancellation or other notation, together with all other matured and unmatured interest coupons attached thereto or otherwise tendered for payment, and shall assign to [Savers] all right and title to all properties and interests which are subject to this Indenture, *including the Bond Guaranty, and the Indenture may thereafter be enforced by [Savers] in the place and stead of the trustee, as if [Savers] were the trustee.* If an event of default under the letter of credit agreement shall have occurred and be continuing, [Savers] shall not be required to elect a redemption of all outstanding bonds, and may choose to make payments under the letter of credit . . . and shall be entitled to enforce all available remedies available at law or in equity *whether by the right of subrogation herein granted*, or otherwise, to recover from the Developer all sums due and owing under the Letter of Credit Agreement.

[Emphasis supplied]. The appellants contend that §302 of the trust indenture does not permit Savers to enforce the bond guaranty where, as here, Savers opted to redeem the bonds rather than leave the bonds outstanding. They argue that their obligations under the bond guaranty agreement terminated when Savers provided the trustee with funds for the redemption of the bond issue and that, although Savers may be entitled to recover under the note, mortgage, security agreement, and lease agreement, the personal liability of Grant and Bush was extinguished by redemption of the bond issue. This argument is based primarily on §2.2 of the bond guaranty agreement, which provides that:

> The obligation of the Guarantors under this Guaranty shall be absolute and unconditional, and shall remain in full force and effect until the entire principal of, premium, if any, and interest on the Bonds shall have been paid or provided for under the Indenture . . . .

The appellants assert that, because paragraph 8(c) of the bond

provides that the bonds should no longer be considered outstanding or subject to protection under the indenture after redemption from the proceeds of the letter of credit, the principal, premium, and interest on the bonds were "provided for" under §2.2 of the bond guaranty agreement, and the personal liability of Grant and Bush under the bond guaranty was therefore discharged before the bond guaranty was assigned to Savers. Because the trustee had no rights under the bond guaranty after funds for redemption of the bonds were provided by Savers, they argue, Savers acquired no rights by virtue of assignment of the bond guaranty.

Where, as here, the agreement of the parties is embraced in two or more instruments, all of the instruments must be considered together to determine the intent of the parties. *Integon Life Ins. Co.* v. *Vandergrift*, 11 Ark. App. 270, 669 S.W.2d 492 (1984). A construction which neutralizes any provision of the contract can not be adopted if the contract can be construed in a way which gives effect to all its provisions. *North* v. *Philliber*, 269 Ark. 403, 602 S.W.2d 643 (1980). Under the definition section of the trust indenture, the word "bonds" is defined in terms of the entire bond issue. Section 302 of the indenture clearly provides that Savers may, upon default, elect to redeem all of the bonds by depositing with the trustee the funds necessary for redemption, and that Savers would subsequently be assigned all properties and interest subject to the indenture, which could be enforced by Savers. The bond guaranty is explicitly included in the category of properties and interests enforceable by Savers after assignment. The appellants urge us to adopt a construction which would render meaningless the provision for assignment of the bond guaranty to Savers after funds for redemption of the bond issue had been deposited with the trustee, because, under the appellants' construction, liability under the bond guaranty would be extinguished before the bond guaranty was assigned. Although it is true that a guarantor is entitled to have his undertaking strictly construed and cannot be held liable beyond the strict terms of his contract, *Shamburger* v. *Union Bank of Benton*, 8 Ark. App. 259, 650 S.W.2d 596 (1983), a guarantor is nevertheless bound by the clear wording of his agreement. *See Vogel* v. *Simmons First National Bank*, 15 Ark. App. 69, 689 S.W.2d 576 (1985). In the case at bar the bond indenture clearly provides for the assignment of the bond guar-

anty to Savers after funds for redemption of the bond issue have been delivered to the trustee, and for the subsequent enforcement of the bond guaranty. We may not adopt an interpretation which neutralizes this provision if the contract is susceptible to a construction that will make the provision valid. *RAD-Razorback Ltd. Partnership* v. *B.G. Coney Co.*, 289 Ark. 550, 713 S.W.2d 462 (1986). Section 302 of the bond indenture makes reference to "the right of subrogation herein granted," and under the rules of construction cited above, we find that the intent of the parties was to grant Savers a right of subrogation in the trustee's rights under the trust indenture, including the bond guaranty agreement. The appellants contend that the doctrine of subrogation is inapplicable because the written contract implicitly forbids the application of the doctrine under these circumstances. We disagree, for we find that the written agreement both expressly and implicitly requires the application of the doctrine under the facts of this case. *See Southern Cotton Oil Co.* v. *Napoleon Hill Cotton Co.*, 108 Ark. 555, 158 S.W. 1082 (1913). Subrogation is an equitable doctrine which:

> rests upon the maxim that no one shall be enriched by another's loss, and may be invoked whenever justice and good conscience demand its application in opposition to the technical rules of law, which liberate securities with the extinguishment of the original debt. This equity arises when one not primarily bound to pay a debt, or remove an incumbrance, nevertheless does so; either from his legal obligation, as in case of a surety, or to protect his own secondary right; or upon the request of the original debtor, and upon the faith that, as against the debtor, the person paying will have the same sureties for reimbursement as the creditor had for payment.

Id., 108 Ark. at 559. Savers' obligation to pay was not primary, but rather was secondary in that the obligation arose only in event of Lindell Square's default. Moreover, the guarantors were not strangers to the transaction, but instead were partners in Lindell Square, and they executed a bond guaranty specifically stating that the guaranty was for Savers' benefit, and it was executed as an inducement to Savers to extend its letter of credit. Finally, the trust indenture reflects an intent that Savers should have recourse to the bond guaranty upon Lindell Square's default and redemp-

tion of the bond issue. Under these circumstances, we find that both equity and the written agreement require that Savers be subrogated to the trustee's rights under the bond guaranty agreement, and that Savers' rights under the bond guaranty survived extinguishment of the original debt. *See Southern Cotton Oil Co* v. *Napoleon Hill Cotton Co., supra*; 73 Am. Jur. 2d *Subrogation*, §110 (1974). We hold that the chancellor did not err in finding that §302 provided for the personal liability of the guarantors after Savers provided the trustee with funds for the redemption of the bond issue.

The appellants next contend that the chancellor erred by failing to construe §302 of the trust indenture in a manner which would give effect to all the documents which comprise the parties' agreement. The thrust of this argument is that Savers had several options upon default; that these options were inconsistent; and that, under the option selected, Savers was precluded from proceeding against the guarantors on the bond guaranty. We do not agree, because we find that Savers' options under the letter of credit agreement and under the bond guaranty were not inconsistent. Section 8.05 of the letter of credit agreement specifically provides that Savers will not be precluded from exercising any right under the letter of credit agreement, "or the exercise of any other right, power or privilege," by acting or failing to act upon its rights under the letter of credit agreement. Likewise, the bond guaranty agreement explicitly recites that the parties intended that the remedies available under the guaranty were not to be exclusive of any other available remedy at law or in equity. Moreover, as we have noted, §302 of the trust indenture provides that the bond guaranty would be assigned to Savers for enforcement in the event of default and provision of funds for redemption of the bond issue. We find that Savers' remedy under the bond guaranty was cumulative to the remedies provided for in the letter of credit agreement.

Next the appellants contend that the promissory note was the final expression of the parties' agreement and that, because the promissory note did not provide for personal liability, the note modified the agreement to preclude personal liability under the bond guaranty in an action to enforce the promissory note. The loan agreement is dated December 1, 1981, and the promissory note is dated January 26, 1982. However, from our

review of the record it is clear that, although many of the instruments which comprise the contract are dated December 1, 1981, (the date the bonds began to accrue interest), the final closing on the bond issue did not take place until January 26, 1982. Moreover, the bond guaranty itself was not delivered to the trustee until January 26, 1982. Under these circumstances, we find no significance in the disparity in the dates on which the loan agreement and promissory note were executed, and hold that the note did not modify the loan agreement so as to preclude personal liability under the bond guaranty.

Finally, the appellants contend that the chancellor erred in refusing to rule on the trustee's assertedly improper disbursement of fire insurance proceeds. The record shows that the project was damaged by fire while work was in progress, and that approximately $219,000.00 in fire insurance proceeds were paid by the insurer and deposited with the trustee. The appellants assert that the insurance funds were improperly disbursed by the trustee, that these proceeds should have been paid to Bush Construction Company, and that the appellant, E.M. Bush, as alter ego of Bush Construction Company, is entitled to set-off or credit for the amount of the proceeds. Under the loan agreement, the fire insurance proceeds received by Bush Construction Company were to be delivered to the trustee, and applied by the trustee to the cost of repair either on completion or as the repair work progressed, as directed by Lindell Square, the developer. The appellants contend that the trustee failed to set aside the fire insurance proceeds in a separate fund to be used for the sole purpose of satisfying the cost of repair as required by the agreement. We find no reversible error because, even if it is assumed that the fire insurance proceeds were not disbursed in the manner provided for in the agreement, it is nevertheless clear that all of the fire insurance proceeds were in fact disbursed. The record shows that Bush Construction Company was paid through monthly pay requests directed to Grant as general partner of Lindell Square. This procedure was used with respect to both regular construction and fire damage construction. Grant testified that Bush's pay requests were sent by Grant to the trustee, were paid by the trustee, and that all funds held by the trustee were ultimately paid out. Moreover, the claim for set-off was not advanced by Bush Construction Company, or by Bush individu-

ally, but instead was pled in an amended answer and was asserted on behalf of all the appellants. The chancellor's letter opinion clearly reflects that he considered the asserted right to set-off as a joint claim advanced on behalf of the appellants in general. Under these circumstances, we find that the appellants were not damaged by the trustee's asserted failure to disburse the fire insurance proceeds in the specific manner provided for in the agreement, because all the proceeds were ultimately used to pay requisitions submitted by Lindell Square. Therefore, no prejudice resulted from the chancellor's refusal to rule on the trustee's allegedly improper disbursement of those proceeds, and any error which may have occurred was harmless. Ark. R. Civ. P. 61.

On cross-appeal, the appellee contends that the chancellor erroneously limited liability under the guaranty to a percentage of the deficiency remaining on the note after application of the proceeds of foreclosure. The chancellor found that the principal and interest due on the notes totalled $1,316,274.14. From this he subtracted foreclosure proceeds of $599,206.15, and determined the liability of the guarantors to be $717,067.99. He found Bush liable for 20% of $717,067.99, and Grant liable for 80% of $717,067.99. This finding was based on §2.4 of the bond guaranty which limits the liability of Bush and Grant to 20% and 80%, respectively, of the amount due under the note.

The cross-appellant concedes that its total recovery is limited to the $717,067.99 deficiency which remains unsatisfied after application of the foreclosure proceeds to the amount of the judgment, but argues that the ceiling of each guarantor's liability should be calculated on the basis of the amount due under the note prior to foreclosure, rather than on the basis of the deficiency remaining after partial satisfaction of the judgment. Under the formulation advanced by the cross-appellant, Bush and Grant are personally liable under the bond guaranty for 20% and 80% of $1,316,274.14, although the cross-appellant's recovery after application of the foreclosure proceeds is limited to $717,067.99 from all sources.

The question for this Court to resolve is whether the parties intended for the guarantors' liability to be computed as a percentage of the amount due on the bonds *at the time of default*, or instead as a percentage of the deficiency remaining after

resorting to other security. Under the bond guaranty, Bush and Grant guaranteed the full and prompt payment of principal, premium, and interest of any bond *when it became due.* Section 2.2 of the bond guaranty provides that the guarantors' obligations are unconditional and absolute, and are to remain in effect until the principal, premium, and interest of the bonds has been paid or provided for under the trust indenture. These obligations are unaffected by:

> the taking or the omission of any of the actions referred to in the Indenture and of any actions under this Guaranty . . . [or by] any failure, omission, delay or lack on the part of the District, the Trustee, or [Savers] to assert or exercise any right, power or remedy conferred . . . in this Guaranty, the Indenture or the Letter of Credit Agreement. . . .

Section 2.3 of the bond guaranty provides that:

> No set-off, counterclaim, reduction, or dimunition of any obligation, other than payment, or any defense of any kind or nature which the Developer or the Guarantors have or may have against the District, the Trustee or [Savers] shall be available hereunder to the Guarantors against the Trustee.

The trustee is given the right, under §2.4 of the bond guaranty, to:

> proceed first and directly against the Guarantors under this Guaranty without proceeding against any other person or exhausting any other remedies which it may have *and without resorting to any other security.* . . .

[Emphasis supplied]. These provisions show that the parties clearly intended for the guarantors' maximum liability to be calculated as a percentage of the amount due on the bonds at the time of default. First, the bond guaranty recites that the guarantors' liability is absolute. Under an absolute guaranty, the liability of the guarantor becomes fixed upon the debtor's default. *Bank of Morrilton* v. *Skipper, Tucker & Co.*, 165 Ark. 49, 263 S.W. 54 (1924). Next, we note that, under the unambiguous language of the contract, the bond guaranty can be enforced directly, without regard to the availability of other remedies or the existence of other security. We think this provision indicates

that the guarantors' liability was intended to be independent of and in addition to other security, and independent of any actions taken with respect to other security. *See Crown Life Ins. Co. v. LaBonte*, 111 Wis. 2d 26, 330 N.W.2d 201 (1983). Finally, in keeping with the weight of precedent established in similar cases, we hold that the chancellor erred in applying the foreclosure proceeds to reduce the guarantor's contractual limit of liability, rather than merely to reduce the indebtedness. *See Southern Bank & Trust Co.* v. *Harley*, 292 S.C. 340, 356 S.E.2d 410 (1987); *see also Woodruff* v. *Exchange National Bank*, 392 So. 2d 285 (Fla. App. 1981); *Telegraph Savings & Loan Ass'n* v. *Guaranty Bank & Trust*, 67 Ill. App. 3d 790, 24 Ill. Dec. 330, 385 N.E.2d 97 (1978); *Crown Life Ins. Co.* v. *LaBonte, supra.* We find that the contractual liability of Bush under the guaranty is 20% of $1,316,274.14, and the contractual liability of Grant is 80% of $1,316,274.14, Savers' recovery being limited to the outstanding deficiency of $717,067.99.

Affirmed on direct appeal; reversed on cross appeal.

CRACRAFT and MAYFIELD, JJ., agree.

Billy Don KIBLER *v.* Tamarie (Tammy) A. KIBLER (now Hulett)

CA 88-266 766 S.W.2d 938

Court of Appeals of Arkansas
Division II
Opinion delivered March 15, 1989

Kirkpatrick and Horan, by: *Neal Kirkpatrick*, for appellant.

Parker Law Firm, by: *Patrick McCarty* and *Douglas W. Parker*, for appellee.

JAMES R. COOPER, Judge. For his appeal, the appellant, Billy Don Kibler, contends the chancellor erred in finding him in contempt for failing to pay child support for the month of December 1987 and in awarding the appellee judgment against him in the amount of $7,076.00, which was the indebtedness remaining on the appellee's Ford Bronco at the time it was traded on a 1986 Subaru. We affirm the trial judge's finding on the issue of child support, but we reverse and remand the $7,076.00

judgment awarded to the appellee.

The parties were divorced in August 1986, the appellee was awarded custody of the parties' minor daughter, and the appellant was ordered to pay child support of $175.00 per month. On February 3, 1988, the appellee filed a petition seeking to have the appellant held in contempt for his failure to make child support payments as ordered by the court and seeking to have her support increased. The appellant responded and counterpetitioned, denying that he had violated the court's order and seeking reimbursement for the monthly payments of $286.00 that he made toward the purchase of a 1986 Subaru for the appellee. After a hearing on the petitions, the chancellor found the appellant in contempt for nonpayment of child support for three weeks during the month of December 1987 and awarded the appellee judgment of $131.25. The chancellor also found the appellant in contempt for his failure to pay the sum of $7,076.00 to the appellee, the balance of the debt owed on the Ford Bronco at the time it was traded in on the Subaru, and gave the appellee judgment against the appellant for that amount. The judge further found the parties entered into an agreement to purchase a 1986 Subaru; that the Subaru had been repossessed; and that both parties were jointly and severally liable for any deficiency which might result from the foreclosure on the Subaru, over and above the $7,076.00 judgment the appellee has been awarded against the appellant.

On the issue of child support, the parties' divorce decree provides:

> [The appellant] shall be required to pay ONE HUNDRED SEVENTY FIVE DOLLARS ($175.00) per month in child support and shall in addition be responsible for the payment of extraordinary medical, hospital and dental expenses for the minor child. Child support payable on the 1st and 15th of each month. When the minor child is with the [appellant] for one week or more, child support shall be reduced to one-half, the same being EIGHTY SEVEN and 50/100 DOLLARS ($87.50). In the event [the appellee] wife should remarry, then child support shall be held in abeyance at any time that the [appellant] father has the minor child in his custody for one week or more.

The appellant asserts the trial court erred in finding him in contempt for nonpayment of child support during three weeks in December, and he relies on his interpretation of the divorce decree for this proposition. The appellant contends that, since the appellee had remarried and he had custody of the parties' daughter for one week during December of 1987, he was relieved of his obligation to pay child support for that entire month.

[redacted] One seeking reversal of a chancellor's decree has the burden of demonstrating error in the chancellor's findings; and we will not reverse such findings unless they are clearly against the preponderance of the evidence. *Weber* v. *Weber*, 256 Ark. 549, 508 S.W.2d 725 (1974). The appellant did not offer any evidence in support of his interpretation of the decree, he only argues that the chancellor's interpretation is in error. The chancellor's finding was that the appellant's obligation to pay child support was only abated for each weekly period in which he had actual custody of the parties' child and not for the remainder of the month. There is no evidence in the record demonstrating that the chancellor's interpretation of the decree is clearly erroneous; therefore, his decision is affirmed. *See Pinkston* v. *Pinkston*, 278 Ark. 233, 644 S.W.2d 930 (1983).

The appellant also asserts that the trial judge erred in finding him liable for the payment of $7,076.00 to the appellee. The parties' divorce decree ordered the appellant to pay off the indebtedness due upon the Ford Bronco. In February 1987, the parties, apparently contemplating reconciliation, agreed to trade the 1985 Bronco toward the purchase of a 1986 Subaru vehicle, for which they both cosigned on the note. At the time of the trade $7,076.00 remained to be paid on the Bronco. The appellant made some of the monthly payments on the Subaru, but it was later repossessed by the finance company.

The appellant contends the parties' decision to buy the Subaru was an oral modification of their property settlement agreement and the chancellor was bound by the terms of the oral modification. We do not agree with this contention. This is not a situation in which the chancellor attempted to modify a property settlement agreement entered into by the parties and which was incorporated into the decree, nor is it a situation where the chancellor was attempting to interpret the parties' existing

property settlement agreement. There is no evidence in the record that a property settlement agreement was entered into by the parties; in fact, the appellee testified they did not enter into an agreement but that the divorce decree required the appellant to pay off the Bronco. Furthermore, the appellee disputes the appellant's contention that the parties agreed to a modification of this provision in the decree. The appellee testified that it was the appellant's idea to buy the Subaru, that it was to be a gift to her, and that the appellant was going to make the payments.

[redacted] The divorce decree clearly ordered the appellant to pay off the indebtedness represented by the Ford Bronco. The divorce decree provided that "[appellee] shall further receive the 1985 Bronco vehicle and the [appellant] shall pay the indebtedness due upon said motor vehicle." There is no evidence in the record to suggest that the chancellor's intent was other than to order the appellant to be responsible for a marital debt. We do not agree with the appellant that this marital debt was extinguished when the Ford Bronco was traded on the Subaru, but we find that the debt was merely transferred to another vehicle. We agree with the appellant's contention, however, that he should be given credit against the $7,076.00 debt for the amount of payments he has made toward reducing the debt on the 1986 Subaru.

[redacted] We hold that the chancellor was correct in finding the appellant liable for payment of a marital debt, which was secured by the Ford Bronco, but we also hold he erred in not offsetting that debt by the payments the appellant has made toward the 1986 Subaru. Because the record before us is not sufficiently developed so that we can determine that amount, we reverse and remand for a determination of this amount and a finding that the appellant is liable to the appellee in monthly payments of $278.00 until the $7,076.00 marital debt, less the amount of payments the appellant has made toward the Subaru, is paid in full.

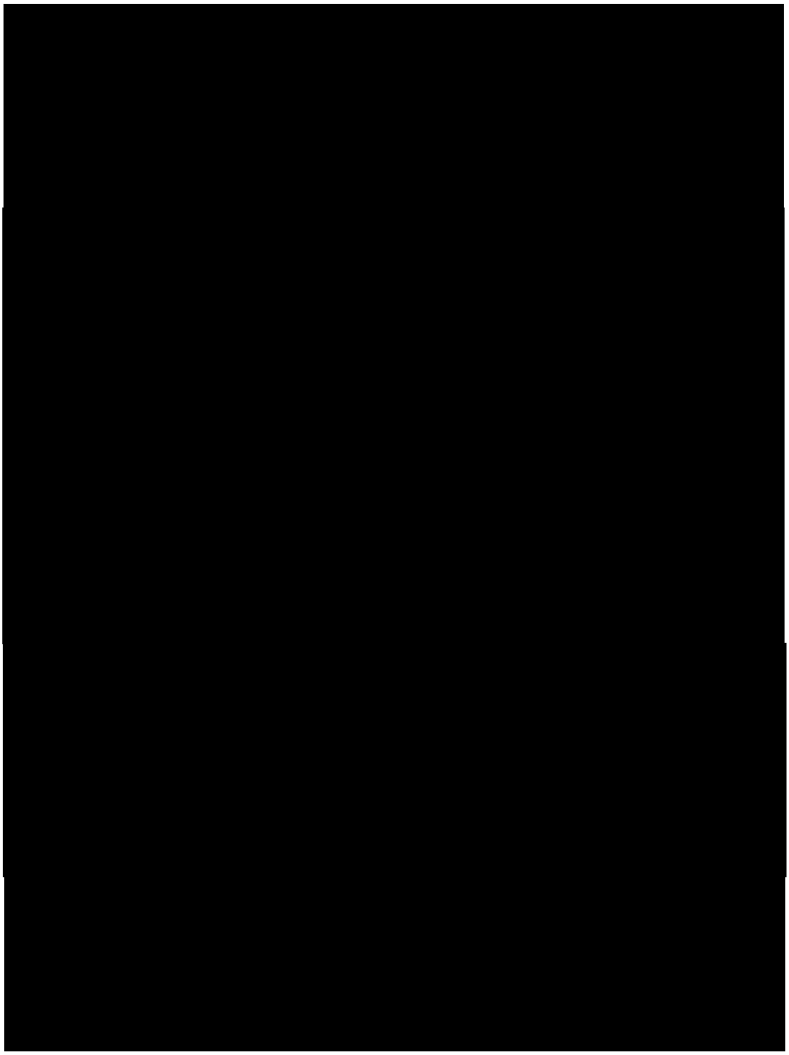
Affirmed in part; reversed and remanded in part.

CORBIN, C.J., and ROGERS, J., agree.

Rondal CAMPBELL *v.* STATE of Arkansas

CA CR 88-214 766 S.W.2d 940

Court of Appeals of Arkansas
Division II
Opinion delivered March 22, 1989
[Rehearing denied May 3, 1989.]



Young & Finley, by: *Dale W. Finley*, for appellant.

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

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Boone County Circuit Court. Appellant, Rondal Campbell, appeals his conviction of possession of a controlled substance with intent to deliver, a violation of Arkansas Code Annotated Section 5-64-401(a) (1987), and the sentence and fine imposed therefor. We affirm.

Appellant was charged by information filed February 19, 1988, with the offenses of possession of a controlled substance and theft by deceiving. The theft charge was severed, and appellant was tried by a jury and convicted on the drug count. Appellant was sentenced to fifteen years in the Arkansas Department of Correction and fined $35,000.00. From the judgment of conviction and the fine comes this appeal.

For reversal, appellant raises the following two points: (1)

The initial search was improperly conducted; and (2) the court erred in refusing the request for scientific tests.

The evidence reveals that a warrant to search appellant's home was issued upon an affidavit by Terry Bruce who was previously arrested for burglary of a residence. Mr. Bruce informed the police that he sold three of the items taken in the burglary to appellant for $40.00 cash and a bag of marijuana. Mr. Bruce also stated that appellant knew the items were stolen. Based upon this information, a warrant was issued to search appellant's residence for one Montgomery Ward color television, one Emerson video cassette recorder, and one Sanyo microwave oven. On February 11, 1988, nine or ten officers searched appellant's residence pursuant to the warrant. The VCR and the microwave oven were found soon after the search was initiated; however, the portable television was never found. The search of appellant's two-story home with basement was conducted over a two to three hour period. In the search, the police seized items not listed on the warrant in the belief that they were illegal or stolen; however, none of the items was introduced into evidence against appellant except the marijuana contained in a safe found in the course of the search. The officers testified that while searching the basement, a gun safe was discovered from which the smell of marijuana emanated. The officers involved in the search of that area testified that they smelled the marijuana and the safe was seized and removed from appellant's home. A warrant was obtained the following day to search the safe which resulted in the discovery of 21.8 pounds of marijuana packaged inside 64 Ziploc plastic bags contained in 11 grocery sacks. Subsequently, the police obtained a third warrant to search the contents of appellant's lock box.

Appellant filed a motion to suppress all evidence taken in the three searches. The motion was based upon appellant's contentions that the affidavits and search warrants were improper, that there was no probable cause for any of the searches, that the second and third searches were based upon information improperly obtained in the first, and that the time and scope of the search was improper. After a hearing on the motion, the court denied appellant's motion to suppress and found that the searches were lawful.

Appellant challenges the propriety of the initial search and argues that Officer Rodney Combs' participation in the search renders it illegal. At the suppression hearing, Officer Combs generally testified that he understood that a search, pursuant to warrant, was going to be made of appellant's home and that he went along as an assistant in the belief that there might be some illegally possessed controlled substances in the home. His testimony further revealed that he was told that appellant kept drugs in a safe in his home, but he was not told where the safe was located. Officer Combs testified that his primary impression was that methamphetamines were in appellant's home. As a narcotics officer, Combs related that he wanted to "get" appellant because during processing narcotics intelligence for the last five years, appellant's name had been mentioned to him many times as being a dealer. Appellant challenges the scope of the search. He alleges it was a "full-blown search" rather than one limited to the items set out in the search warrant.

Appellant cites Arkansas Rule of Criminal Procedure 13.3(c) as the governing authority for conducting a search. Appellant asserts that under this rule, the scope of the search shall be such as is authorized by the warrant and is reasonably necessary to discover the persons or things specified therein. We agree with appellant that Rule 13.3(c) governs the scope of a search and, therefore, we set out below the latter portion of that rule not relied upon by appellant.

> Upon discovery of the persons or things so specified, the officer shall take possession or custody of them and search no further under authority of the warrant. If in the course of such search, the officer discovers things not specified in the warrant which he reasonably believes to be subject to seizure, he may also take possession of the things so discovered.

Arkansas Rule of Criminal Procedure 10.1(i) defines "reasonable belief" to mean a belief based on reasonable cause to believe. "Reasonable cause to believe" means a basis for belief in the existence of fact which, in view of the circumstances under purposes for which the standard is applied, is substantial, objective and sufficient to satisfy applicable constitutional standards. Ark. R. Crim. P. 10.1(h).

Here, although numerous items not listed on the warrant were seized, only evidence of the marijuana was used against appellant. Because appellant can show no prejudice with regard to any items seized except the marijuana, we understand his argument to be that the trial court erred in denying his motion to suppress the 21.8 pounds of marijuana found in his safe.

When this court reviews a trial court's ruling on a motion to suppress evidence, it makes an independent determination based upon the totality of the circumstances and reverses only if the trial court's ruling was clearly against the preponderance of the evidence. *Cook* v. *State*, 293 Ark. 103, 732 S.W.2d 462 (1987). A determination of preponderance of the evidence turns heavily on questions of credibility and weight to be given the testimony, and the court of appeals defers to the superior position of the trial court on those questions. *Phillips* v. *State*, 25 Ark. App. 102, 752 S.W.2d 301 (1988).

In this case, the officers were legally inside appellant's home pursuant to a search warrant. Under Rule 13.3(c), the officers were required to discontinue the search when the persons or things specified in the warrant were found. Therefore, although the search was lengthy, it was not unreasonable based upon the totality of the circumstances because the evidence reveals that the portable television listed on the warrant was never found. Additionally, the rule allows for further search outside the warrant if what transpires during the search gives the officers reasonable cause to believe that the items are subject to seizure.

Collectively, the undisputed testimony of Officers Jerry Smith, Jerry Jones, Rodney Combs, and Robert Hicks revealed that they were experienced officers trained to detect the odor of marijuana. Further, each officer testified that he smelled the odor of marijuana emanating from the safe found in the basement of appellant's home during the course of the search. Their testimony further reveals that after the odor of marijuana was detected, the safe was seized for subsequent search. The court stated that Officer Combs had little regard for the fourth amendment and recognized that if Combs had been in charge of the search, there was a likelihood that the searches would be declared improper. However, there is no indication that the court did not believe the numerous officers' testimony regarding smelling the marijuana

emanating from the safe.

[redacted] Deferring to the superior position of the trial court to assess the credibility of the officers' testimony, we find that based on the totality of the circumstances, the court's denial of appellant's motion to suppress the marijuana was not clearly against the preponderance of the evidence. Furthermore, even if the trial court disbelieved the officers' testimony that they smelled the marijuana, their actions would have been justified in any event since the safe was found while the officers were still conducting their search for the television and the television could have been concealed inside the safe. Therefore, the officers would have been justified in seizing an item that they suspected contained contraband. *See Arkansas* v. *Sanders*, 442 U.S. 753 (1979).

Secondly, appellant argues that the court erred in denying his pre-trial motion for scientific tests. Appellant contends that it was impossible for the police officers to have detected the smell of marijuana from within the safe as their testimony indicated. To affect the credibility and weight to be given the officers' testimony, appellant sought approval from the court to obtain at least two other identical safes, put the marijuana back in one of the safes in the condition in which it was found, leave it there for any time suggested by the state, and let one or more of the officers identify the safe in which the marijuana was located. The test was to be supervised by an independent party.

[redacted] With regard to this issue, the Arkansas Supreme Court stated in *Carr* v. *Suzuki Motor Co.*, 280 Ark. 1, 655 S.W.2d 364 (1983):

> It is well settled that when a test or experiment is an attempt to reenact the original happening, the essential elements of the experiment must be substantially similar to those existing at the time of the accident. *Hubbard* v. *McDonough Power Equipment*, 83 Ill. App. 3d 272, 404 N.E.2d 311 (1980); *Payne* v. *Greenberg Construction*, 130 Ariz. 338, 636 P.2d 116 (1981). We applied this same rule in *Dritt* v. *Morris*, 235 Ark. 40, 357 S.W.2d 13 (1962) where we held that although it was not necessary that conditions of an experiment be identical to those existing at the time of the occurrence, there must be a substantial

similarity, and the variation must not be likely to confuse and mislead the jury.

The trial judge has discretion in deciding evidentiary issues and his decision will not be reversed on appeal unless he has abused his discretion. *Baumeister* v. *City of Fort Smith*, 23 Ark. App. 102, 743 S.W.2d 396 (1988).

In denying appellant's motion, the court generally stated that it found all the officers' testimony credible regarding being able to detect the smell of marijuana. Additionally, discussion was had that the test proposed by appellant could not validly or substantially duplicate the condition as it existed in the basement of appellant's home on the night of the search. We cannot say that the trial court's failure to allow the proposed test was an abuse of discretion.

Affirmed.

COOPER, J., agrees.

ROGERS, J., concurs.

JUDITH ROGERS, Judge, concurring. I reluctantly concur in the decision of the court. I do so only because the search in question ultimately led to the seizure of a gun safe, which could have contained the television. It strains my credulity to conclude that the search of the appellant's home was reasonable under the circumstances. This particular search took place over a three-hour period with the participation of nine or ten police officers, who were ostensibly looking for three conspicuous items said to be located in the home. Although two of the items were found immediately, the police spent considerable time rummaging through cabinets, drawers and small containers in an attempt to discover the sole remaining item, a television, which could not possibly have been found in such places.

I am aware that some evidence found as a result of this search was not utilized, and that appellant has civil remedies that he can pursue, if he feels aggrieved by the circumstances surrounding the search. Yet, taken as a whole, given the extent of the search, the number of officers and the total man-hours involved, it is my view that this search violated the spirit of the Fourth Amendment. Rule 13.3(c) of the Arkansas Rules of

Criminal Procedure begins by stating "[t]he scope of the search shall be only such as is authorized by the warrant and is reasonably necessary to discover the persons or things specified therein." It becomes apparent, when other items were found in small containers or spaces that could not contain the television, that the search went beyond what is reasonably necessary to discover the things specified. In addition, I agree that the trial court is in a better position to assess the credibility of the officers' testimony regarding the smell of marijuana "emanating" from such a tightly-built safe. It does give me pause though to question the statements of some of the law enforcement personnel, when police officers state they can smell marijuana wrapped in 64 Ziploc plastic bags placed in grocery sacks from an air-tight, steel safe.

I feel that it is the duty of a reviewing court to ensure that the scope of searches is limited within reason, so as to not completely abridge the guarantees of the Fourth Amendment. I see no evidence in the record to disagree with the trial court's assessment of Officer Rodney Combs as having little regard for the Fourth Amendment; however, I am not convinced that the distinction made based on whether he was in charge of the search is controlling.

No matter how laudable the goals of law enforcement officers in combating crime, the Constitution should not be sacrificed in this pursuit, and officers should refrain from using excessive zeal to that end. I can understand the frustration of law enforcement officials and citizens, many of whom perceive the criminal justice system as being cumbersome and ineffective, but in our quest to effectuate the goals of the system, we must not allow our individual rights to be disregarded. For this reason, I would like to express that searches such as this should not be condoned in the future.

HOPE BRICK WORKS *v.* Freddie WELCH, Deceased

CA 88-291 768 S.W.2d 37

Court of Appeals of Arkansas
Division II
Opinion delivered March 22, 1989

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

Robert B. Buckalew, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Arkansas Workers' Compensation Commission. Appellant, Hope Brick Works, appeals from an order of the Commission filed June 17, 1988. Appellee, Freddie Welch, now deceased, cross-appeals from only the portion of the Commission's opinion which concerns the legal and factual effect of the Occupational Safety and Health Administration (OSHA) reports. For reasons stated below, we dismiss.

Appellee filed a claim for benefits in 1984 alleging that he contracted silicosis during the twenty-two year scope and course of his employment with appellant. Appellant controverted the

claim and on September 7, 1984, the case proceeded to a hearing before the Administrative Law Judge. By an opinion dated November 29, 1984, appellee's claim was denied upon the finding that he failed to show by clear and convincing evidence that there was a causal connection between his silicosis and employment with appellant. In a letter to the Administrative Law Judge dated December 3, 1984, appellee's attorney requested that an OSHA report based upon inspections of appellant's plant bearing on the issue of presence of silica dust be included in the record. The evidence indicated that the report was not available at the time the hearing was held on appellee's claim.

On appeal, the Commission allowed the OSHA report into the record. Its order filed October 7, 1985, set aside and vacated the opinion of the Administrative Law Judge, and remanded the case to allow appellant the opportunity of cross-examination on the OSHA report. During the pendency of the appeal, appellee died in July of 1985.

On remand, the Administrative Law Judge accorded the OSHA report no probative value because of appellant's inability to cross-examine the OSHA employee who conducted the inspection and prepared the report. In its second opinion filed January 7, 1987, the Administrative Law Judge again found that appellant failed to show a causal connection between his illness and death and his employment with appellant. A second appeal was brought before the Commission by the dependents of appellee. On June 17, 1988, the Commission agreed that the OSHA report was entitled to no weight because of appellant's lack of an opportunity under applicable federal regulations to cross-examine the OSHA employee who prepared the inspection report. However, the Commission reversed the Administrative Law Judge and found there was clear and convincing evidence to support appellee's decedents' claim without consideration of the OSHA report. In concluding its opinion, the Commission held:

> [T]he Opinion and Order of the Administrative Law Judge filed January 7, 1987 is hereby reversed. This case is remanded to the Administrative Law Judge with directions to hold a hearing and to take evidence as to the benefits to which Welch's dependents are entitled and to enter an order and award accordingly.

We do not address appellant's allegations of error because we agree with appellee's argument on cross-appeal that appellant's appeal is premature. We conclude that the order of the Commission is not a final order and, therefore, is not appealable.

For an order to be appealable it must be a final order. Ark. R. App. P. 2. To be final, an order must dismiss the parties from the court, discharge them from the action, or conclude their rights as to the subject matter in controversy. *Epperson* v. *Biggs*, 17 Ark. App. 212, 705 S.W.2d 901 (1986). This rule applies to appeals from the Workers' Compensation Commission. *See, Samuels Hide & Metals Co.* v. *Griffin*, 23 Ark. App. 3, 739 S.W.2d 698 (1987) and *Cooper Indus. Prod.* v. *Meadows*, 269 Ark. 966, 601 S.W.2d 275 (Ark. App. 1980).

It is the general rule that orders of remand are not final, appealable orders. *Samuels*, 23 Ark. App. at 4, 739 S.W.2d at 699; *Lloyd* v. *Potlatch Corp.*, 19 Ark. App. 335, 721 S.W.2d 670 (1986). In *Samuels*, the court cited with approval 3 Larson, *Workmen's Compensation Law*, § 80.11 (1983), which states:

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

Adhering to the court's holding in *Samuels*, the Commission's remand in the instant case is not a final determination but merely remands the case for an additional hearing to receive further evidence; therefore, it falls within the general rule as set out above and is not a final, appealable order.

Dismissed.

COOPER and JENNINGS, JJ., agree.

George J. HODGE *v.* STATE of Arkansas

CA CR 88-165 766 S.W.2d 619

Court of Appeals of Arkansas
Division I
Opinion delivered March 22, 1989

Scott Adams, for appellant.

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

GEORGE K. CRACRAFT, Judge. George J. Hodge appeals from his conviction of driving while intoxicated, fourth offense, for which he was sentenced to a term of one year in the Arkansas Department of Correction and fined $900.00. We find sufficient merit in one assignment of trial error to warrant a new trial.

Appellant first challenges the sufficiency of the evidence to support his conviction. We decide that issue before considering any alleged trial error for the reasons stated in *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984). In reviewing the sufficiency of the evidence, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the jury's verdict, without weighing it against conflicting evidence that may be favorable to the accused, and will affirm the jury's verdict if it is supported by substantial evidence. *Westbrook* v. *State*, 286 Ark. 192, 691 S.W.2d 123 (1985).

The evidence most favorable to the State shows that at approximately midnight a police officer observed a vehicle parked on the side of the road with smoke pouring out from under its hood. Upon investigation, he observed that the key was in the ignition, that the motor was running, and that the appellant was positioned with his feet on the driver's side and his body "keeled over" towards the passenger side. When the officer pulled appellant from the vehicle, appellant could not tell him his name and had no driver's license. There was a smell of alcohol about his

person and other indications that the appellant was intoxicated. The officer then placed him under arrest for driving while intoxicated.

Arkansas Code Annotated § 5-65-103 (1987) (formerly Ark. Stat. Ann. § 75-2503 (Repl. 1985)) declares it to be unlawful for an intoxicated person to operate or be in actual physical control of a motor vehicle. The object of this legislation is to prevent intoxicated persons from not only driving on the highways, but also from having such control over a motor vehicle that they may become a menace to the public at any moment by driving it. This statute does not require that the police officers actually see an intoxicated person drive the vehicle or exercise his control over it. In a prosecution for driving while intoxicated, actual control of the vehicle by the defendant may be proved by circumstantial evidence. *Altes* v. *State*, 286 Ark. 94, 689 S.W.2d 541 (1985); *Azbill* v. *State*, 285 Ark. 98, 685 S.W.2d 162 (1985). In *Roberts* v. *State*, 287 Ark. 451, 701 S.W.2d 112 (1985), the court held that evidence that an intoxicated appellant was found asleep behind the wheel of a car with the ignition key turned on is sufficient to sustain a conviction of being in control of the vehicle. Here, appellant concedes that he was intoxicated, and, as the officer testified that the appellant was found in the driver's position with the engine actually running, the jury could properly have concluded that he was in actual physical control of a motor vehicle.

Arkansas Code Annotated § 5-65-111(3) (1987) (formerly Ark. Stat. Ann. § 75-2511 (Supp. 1985)) provides that a person who is found guilty of driving or being in control of a vehicle while intoxicated may be sentenced to a term of not less than one nor more than six years for the fourth offense occurring within three years of the first offense. Here, there was introduced into evidence three certified copies of municipal court judgments tending to prove previous convictions of committing the offense of driving while intoxicated within the last three years. Also introduced was a certified copy of a judgment of the circuit court of Conway County, entered after the municipal court judgments, showing that appellant had appeared with his attorney and entered a plea of guilty to "fourth offense DWI." We cannot conclude from our review of the record that the evidence was not sufficient to support a finding of guilt of the underlying charge of

operating or being in control of a motor vehicle while intoxicated or that appellant had previously committed the same offense on three prior occasions within three years of the offense for which he was being tried.

Appellant's defense was based on testimony that a companion, not he, had driven the vehicle to the location where the officer found it. The companion testified that, although the vehicle was owned by appellant, appellant had not driven it but was passed out on the backseat when the automobile became inoperable and "would not move" due to transmission problems. The companion testified that he left the car on the side of the road and went for help approximately an hour before the police officer made the arrest.

Over appellant's objection, the trial court instructed the jury as follows:

> If you find that the defendant was located behind the wheel of a motor vehicle, operable or not, with the keys in the ignition and the motor running, then you *will* find that he is in actual physical control of a motor vehicle.

(Emphasis added). Appellant argues on appeal that the issue of whether he had driven the vehicle or was or had been in control of it within the meaning of the act was a question of fact for the jury to determine from the circumstantial evidence it had before it. He contends that it was error for the court to remove that issue from the consideration of the jury by a binding instruction. We agree that this was prejudicial error for which a new trial is warranted.

When a binding instruction contains an erroneous statement of the law or ignores an essential issue of the case, it constitutes prejudicial error. *Moore* v. *State*, 252 Ark. 526, 479 S.W.2d 857 (1972). As previously stated in this opinion, it is not necessary for there to be direct evidence that the accused actually drove or attempted to drive the vehicle. The fact finder may infer actual physical control from circumstantial evidence that the accused was behind the wheel with the keys in the ignition. *See Roberts* v. *State, supra; Altes* v. *State, supra; Azbill* v. *State, supra; Wiyott* v. *State*, 284 Ark. 399, 683 S.W.2d 220 (1985). None of those cases, however, hold that proof of those circumstances establishes that element of the offense as a matter of law.

They hold only that proof of such facts constitutes substantial evidence to support such a finding, i.e., that a jury may infer from those facts that the accused person was in actual physical control of the vehicle. Nor do any of those cases hold that a vehicle's operability is irrelevant to the issue of actual physical control, as this instruction informed the jury, and we think it possible for a vehicle to be so incapable of operation that subsequent control over it would fall outside the purview of the statute. Whether the State had established that appellant was in actual physical control in this case was a matter for the jury to determine based on all the facts and circumstances before it, and we conclude that it was error for the court to instruct the jury that it must find against appellant on this element of the offense if it found that circumstances existed from which an inference of this element could be drawn.

We find no merit in the State's argument that appellant's argument that the instruction was faulty was not properly preserved by objection in the trial court. While the record does sustain the State's argument that the appellant initially objected to the instruction on the ground that it was abstract because there was no evidence to establish that the appellant was actually behind the wheel, we think it clear from the entire discussion between the court and counsel on that instruction that the issue was properly preserved. Subsequent to his initial objection, appellant objected on the ground that "I think it should be left up to the jury, and whether—and using their common, every day sense. Is a person in control of a vehicle, just because he's sitting in it or layin' down in it and the thing is running?" Counsel also pointed out to the court in this argument that, although the engine was running, there was evidence that the vehicle could not have been operated, and that he did not think the jury should be instructed that it could not consider that issue.

After the jury returned its verdict of guilt on the underlying offense, the trial court told the jury that appellant had four prior convictions for the same offense:

> So, your finding of the conviction was actually a conviction of a fifth offense, but fourth offense is as high as you go. From fourth on—fourth, fifth, sixth, seventh is—the punishment is the same.

Appellant now argues for the first time that the judge erred in informing the jury that there were four prior convictions because this deprived him of a jury trial on the issue of that element of the offense. As we do not consider issues raised for the first time on appeal, we do not base our reversal of this case on this issue. *Hughes* v. *State*, 295 Ark. 121, 746 S.W.2d 557 (1988). However, due to the likelihood that this error could occur again on retrial, we note that the fact of prior convictions is an element of the crime of driving while intoxicated, fourth offense, and is to be determined by the jury. *Peters* v. *State*, 286 Ark. 421, 692 S.W.2d 243 (1985). The court must determine the admissibility of the evidence of prior convictions, but it is up to the jury to determine that the evidence in fact establishes that element of the offense.

Appellant next contends that the trial court erred in sustaining the prosecutor's objection to a question asked of the arresting officer on cross-examination. We do not address this issue because, as the record neither reflects a proffer of what the officer's answer would have been nor makes the substance of the excluded testimony apparent, we cannot determine whether its rejection was prejudicial. *See Teas* v. *State*, 23 Ark. App. 154, 744 S.W.2d 739 (1988); Ark. R. Evid. 103(a)(2).

Although the appellant alleges other trial errors, we do not address them because we do not think it likely that the issues will arise on retrial.

Reversed and remanded.

JENNINGS and MAYFIELD, JJ., agree.

IN THE MATTER OF THE ADOPTION OF
Elizabeth Ann MILAM
John D. Milam and Devonia Marie Milam *v.*
James David Evans and Donna Johnson

CA 88-301 766 S.W.2d 944

Court of Appeals of Arkansas
Division II
Opinion delivered March 22, 1989

[redacted]

Phyllis J. Lemons, for appellant.

Stuart Vess, for appellee James David Evans.

Central Arkansas Legal Services, by: *Willie E. Perkins, Jr.*, for appellee Donna Johnson.

JAMES R. COOPER, Judge. On May 12, 1987, the appellants, John and Devonia Milam, filed a petition to adopt Elizabeth Ann Milam alleging that the natural mother, Donna Johnson, had given her consent and that the consent of the natural father, James Evans, was not necessary. The probate court entered a temporary decree granting the adoption on July 19, 1987. On August 3, 1987, Donna Johnson attempted to withdraw her consent to the adoption. On September 17, 1987, James Evans filed a petition to set aside the adoption and on November 10 Donna Johnson also filed a similar petition. After a hearing on November 24, 1987, attended by all parties and their attorneys, the court granted temporary custody of the child to the Milams and ordered liberal visitation rights in the appellees under the supervision of the Arkansas Department of Social Services. Further, the court set a hearing on the merits for February 23, 1988. Following the February 23, 1988, hearing, the probate court found that, although it would be in the best interests of the child to be adopted by the appellants, the consent of the natural father was necessary and that the court could not grant the adoption over the natural father's objection. An order was entered placing custody of the child in the appellants, and both the natural mother and father were given visitation privileges. On appeal, the appellants raise three points for reversal and the appellees have filed cross appeals. We affirm.

The appellants first argue that James Evans had failed significantly to provide support for the child for a period of one year and that the probate court therefore erred in holding that his consent was necessary. We disagree.

Under Arkansas law, a petition to adopt a minor may not be granted without written consent of the parents, unless that consent is not required. Arkansas Code Annotated § 9-9-207 (1987), provides in part that consent to adoption is not required of:

> A parent of a child in the custody of another, if the parent

> for a period of a least one (1) year has failed significantly without justifiable cause (i) to communicate with the child or (ii) to provide for the care and support of the child as provided by law or judicial decree.

The party seeking to adopt a child without the consent of a natural parent must prove by clear and convincing evidence that the failure to support the child not only continued for at least one year but also that it was willful, intentional, and without justifiable cause. *Manuel* v. *McCorkle*, 24 Ark. App. 92, 749 S.W.2d 341 (1988); Ark. R. Civ. P. 52(a). On appellate review, we will reverse the probate judge's findings of fact only if they are clearly erroneous or against the preponderance of the evidence. *Id.*

The record reveals that the appellees were divorced in April 1985 and that they had two children. According to the terms of the divorce decree, custody of their son was awarded to James Evans's parents, and the daughter, Elizabeth, who is the subject of this litigation, was placed in the custody of the appellant Donna Johnson. No child support was requested or ordered as to either party. Although James testified that he had not paid child support for Elizabeth, he explained that it was his understanding that he was to totally support the son, and that Donna was to totally support Elizabeth. He also stated that prior to entering the military he visited Elizabeth frequently and sent her gifts. According to James, he entered the Army in October 1986, and was stationed in Korea until October 1987. He stated that he found out about the adoption proceedings and returned to the United States to prevent the adoption. At the time of the hearing he was stationed in Little Rock. Devonia Milam stated that when she and Donna discussed the adoption of the child, Donna told her that Elizabeth's natural father had left before her birth, that he had never seen the child, and that she did not know his whereabouts.

We find that, under the facts and circumstances of this case, the probate court did not err in finding that the father's consent was necessary. Although a parent cannot simply turn a child's care and support over to another and be excused from the duty of providing support for the child, we cannot say that the probate judge erred in finding that, where James relied on the court order, his failure to support Elizabeth was willful or

unjustified. *See In re Adoption of Glover*, 288 Ark. 59, 702 S.W.2d 12 (1986); *Loveless* v. *May*, 278 Ark. 127, 664 S.W.2d 261 (1983).

For their second argument, the appellants assert that the trial judge erred in denying the petition for the adoption in spite of the fact that he found that it would be in the child's best interest for the adoption to be granted. The appellants are essentially arguing that the trial court should have granted the appellants' petition to adopt because James withheld his consent unreasonably.

Arkansas Code Annotated § 9-9-220(c)(3) (1987) provides that the relationship of parent and child may be terminated when, in the case of a parent not having custody of a child, consent to an adoption is being unreasonably withheld contrary to the best interests of the child. However, while the primary consideration is the welfare of the child, this does not mean that the court can sever the parental rights of nonconsenting parents and order the adoption merely because the adoptive parents might be able to provide a better home. *Lindsey* v. *Ketchum*, 10 Ark. App. 128, 661 S.W.2d 453 (1983). In both *Lindsey* and *In re Adoption of Titsworth*, 11 Ark. App. 197, 669 S.W.2d 8 (1984), the conduct of the noncustodial parents amounted to child abuse and there was expert testimony that the treatment of the children resulted in social maladjustment. In the case at bar there is no evidence that James mistreated or abused Elizabeth. To the contrary, the probate judge found that James gave Elizabeth presents and visited her. Furthermore, the record shows that when James learned of the adoption proceedings, he returned from Korea to prevent it, and exercised his visitation rights in the interim period. He testified that he loved his daughter. In light of this evidence, we cannot say that the probate judge was clearly erroneous in denying the adoption. *See Wineman* v. *Brewer*, 280 Ark. 527, 660 S.W.2d 655 (1983). We hold that James did not unreasonably withhold his consent to the adoption.

For their third argument, the appellants contend that the probate court erred in denying the adoption because a temporary order of adoption entered in July 1987 had not been withdrawn. Citing Ark. Code Ann. §§ 9-9-215 and 9-9-213 (1987), the

appellants argue that the interloctory decree of adoption had the same force and effect as a final decree of adoption, and therefore the appellees' parental rights had already been severed.

In *McCluskey* v. *Kerlen*, 278 Ark. 338, 645 S.W.2d 948 (1983), the Arkansas Supreme Court held that once an interlocutory decree of adoption is entered, it is to be construed as a final decree if no subsequent hearing is required by the terms of that decree. (No further hearing was provided for in the case at bar.) Furthermore, consent cannot be withdrawn after the entry of such a decree unless the natural parent seeking to withdraw the consent has made a proper showing of fraud, duress, or intimidation.

Therefore, concerning this particular petition for adoption, the appellants' argument is correct as to the natural mother, Donna. Absent a showing of fraud, which will be discussed in a subsequent point, Donna's attempt to withdraw her consent was not timely made. However, we disagree with the appellants as the argument applies to the natural father, James.

James filed a motion to set aside the temporary order of adoption on September 17, 1987. In the motion he alleged that at the time the temporary order was entered he was in Korea, that Donna knew how to contact him, that he had visited with the child, and that Donna "did not truthfully state matters which pertained to Movant, James David Evans." He further alleged that he had not been served constructively. On November 24, 1987, a hearing was held at which all of the parties were present. The probate court issued a temporary order granting custody to the Milams and stating that all of the matters pertaining to the adoption would be litigated on February 23, 1987, at which time all the parties were to have their pleadings filed. There is no transcript of this hearing in the record before us and there is nothing in the pleadings which indicates that the appellants asserted the finality of the July 1987 temporary order of adoption as a defense to James' motion to set aside that order. We therefore decline to address this issue as it pertains to James because we do not consider issues raised for the first time on appeal.

On cross appeal, James Evans argues that the trial court erred in granting custody of the child to the Milams because there was no finding that he was an unfit parent. We disagree with his

argument.

Although there is a preference for a natural parent above all other custodians, the paramount consideration in child custody cases must always be the welfare and best interest of the child. *McKee* v. *Bates*, 10 Ark. App. 51, 661 S.W.2d 415 (1983). While we review adoption cases *de novo*, we will not reverse the probate court's decision unless it is clearly erroneous or clearly against the preponderance of the evidence. *Id.* Furthermore, in cases involving child custody a heavier burden is cast upon the court to utilize to the fullest extent all its powers of perception in evaluating the witnesses, their testimony, and the child's best interests. This Court has no such opportunity, and we know of no case in which the superior position, ability, and opportunity of the trial court to observe the parties carry as great a weight as one involving minor children. *Id.; Calhoun* v. *Calhoun*, 3 Ark. App. 270, 625 S.W.2d 545 (1981).

In this case the probate court specifically found that it would be in the best interests of the child to grant the adoption but that it must be denied because of the father's objection. At trial James testified that he had been incarcerated in Kansas in 1981 or 1982 for burglary. He also stated that he had given custody of his son to his parents and that if he were given custody of Elizabeth in this proceeding she would live with them until he remarried. Furthermore, he admitted that he did not communicate with Elizabeth for the entire ten-month period that he was in Korea, and that he did not send her a birthday card or write to her. James and Donna were separated before Elizabeth was born and at the time of the divorce she was six months old. The last time he visited with Elizabeth was immediately before he went into training in October 1986.

Although the probate court found that James' conduct toward Elizabeth was not sufficient to sever his parental rights, he did find that the appellants were the proper custodians for her, and we cannot say that the probate court erred.

On cross appeal, Donna Johnson argues that the probate court erred in not permitting her to withdraw her consent although she had not shown fraud. We find no merit in her argument.

At trial, Donna testified that she had permitted the Milams to take care of Elizabeth while she was getting on her feet financially. She stated that the Milams wanted her to sign a paper which would allow them to seek medical treatment for Elizabeth in case of an emergency, and that she believed she signed a document which granted the Milams guardianship of the child. She stated that she did not understand the difference between adoption and guardianship and that she assumed they were the same thing.

However, Devonia Milam testified that Donna told her that she could not take care of Elizabeth and that she believed the Milams could do a better job providing for her. She also stated that she made it clear to Donna that the only way that she and her husband would take Elizabeth would be through adoption, and that Donna agreed to their terms. The record shows that when Donna and the Milams went to the attorney's office to sign the adoption consent, Donna brought the child's shot record and birth certificate and gave them to the Milams. Devonia stated that it was made clear to Donna that her rights to the child would be terminated if an adoption was granted, and that she would have no visitation rights.

Debbie Bates, a legal secretary, testified that she typed the consent and listened while it was read to Donna. She stated that the attorney explained the consent to Donna, Donna signed it, and that she notarized it. The consent itself clearly states that it is consent to adoption.

Donna tried to withdraw her consent in August 3, 1987, after the entry of the temporary decree of adoption in July, 1987. In order to withdraw her consent, it was necessary to show fraud, duress or intimidation. *Dale* v. *Franklin*, 22 Ark. App. 98, 733 S.W.2d 747 (1987), *McCluskey* v. *Kerlen*, 278 Ark. 338, 645 S.W.2d 948 (1983). We affirm the probate court's finding that Donna's consent was valid, and its refusal to allow her to withdraw it. After giving due regard to the probate court's opportunity to determine the credibility of the witnesses, we cannot say that the probate judge's decision was clearly against the preponderance of the evidence. *Chrisos* v. *Egleston*, 7 Ark. App. 82, 644 S.W.2d 326 (1983).

Donna Johnson's last argument on cross-appeal con-

cerns whether the trial court erred by applying the best interests of the child standard. It is her contention that the probate judge should have considered whether or not she had failed without justifiable cause to communicate with the child for one year, or failed to support her for one year. Ark. Code Ann. § 9-9-207 (1987). The argument is without merit because, as explained earlier, the issue concerning Donna's consent was limited to the question of whether her signed consent was procured by fraud. The question of whether her consent was or was not necessary is irrelevant in light of our holding that the probate court correctly ruled that her consent was validly given.

Affirmed.

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

Leroy POAGE and Judy Poage *v.* STATE of Arkansas

CA CR 88-66 766 S.W.2d 622

Court of Appeals of Arkansas
Division I
Opinion delivered March 22, 1989

Paul Johnson and *Mark F. Cooper*, for appellants.

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

MELVIN MAYFIELD, Judge. This appeal was taken pursuant to Arkansas Rule of Criminal Procedure 24.3(b) which provides:

> With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of an adverse determination of a pretrial motion to suppress evidence. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

On November 19, 1987, the appellants, Leroy and Judy Poage, entered pleas of guilty to manufacturing a controlled substance. Leroy Poage was sentenced to ten (10) years in the Arkansas Department of Correction, with five (5) years suspended, and ordered to pay a fine of $15,000.00 plus court costs. Judy Poage was sentenced to six (6) years in the Arkansas Department of Correction but the sentence was suspended and she was placed on supervised probation; she was also ordered to pay a fine of $8,000.00 plus court costs. On appeal, they argue that the trial court erred in refusing to suppress the evidence discovered at their home as a result of an alleged illegal search.

In March of 1987, four officers of the Baxter County Sheriff's Office and three civilians went to the home of the appellants to levy an execution on their property to satisfy an Oklahoma judgment against them in the amount of $320,511.62 and a Conway County, Arkansas, judgment against them for $78,583.30. At the suppression hearing, there was testimony that the reason so many men were involved was the anticipation that an extensive amount of property would have to be seized to satisfy the large judgments. Specific property listed to be searched for and seized, if found, included a three-office portable building, microwave oven, trash compactor, bathroom fixtures and mirrors, air conditioner compressor, dump truck, Lincoln Continental, assorted trailers, tanks, business band radio equipment,

tractors, trucks, truck parts, machinery, 4200 feet of 6-inch water pipe mounted on trailer, assorted nipples, valves, tees and ells, four fifth-wheel plates for trucks, 16 trailer house rims, a set of car ramps, a 3-inch Bowie gear pump and a Cummins turbo for a 290 engine.

Major McPherson, a criminal investigator for the Baxter County Sheriff's Office, testified that upon their arrival at the Poage residence located near Mountain Home, Arkansas, Leroy Poage came outside and Deputy Sheriff Chuck Lovette read the execution documents to him. Poage immediately pointed out one of the dump trucks and the portable building they were looking for, and Judy Poage told one of the men that the Lincoln was behind the house. McPherson, Deputy Sheriff Phil Frame and another man went into the house while others went to the barn. Deputy Frame was searching the master bedroom for small items that would mount quickly in value. Under the bed he found two jewelry boxes, and when he opened them, he discovered marijuana. In the meantime, the men who had gone to search the barn found marijuana growing in a room in the barn. Major McPherson was made aware of these discoveries and he immediately ordered that the search cease. McPherson, with some other men, then went to Mountain Home where they obtained a search warrant from the municipal judge. McPherson, Officer Phil Frame, and a man named James Wylia signed the affidavit for the search warrant.

James Wylia, who was employed by the Arkansas judgment holder and was from Conway County, testified that he was aware that the appellant, Leroy Poage, had previously been suspected of being involved with drugs in Conway and Perry Counties but admitted he did not know whether Poage had been convicted of a drug violation. Wylia also admitted that he had exaggerated Poage's previous drug record in the affidavit for the search warrant. McPherson testified that the men had discussed Poage's Conway County drug activities before proceeding with the execution. However, he was emphatic that the only reason for going to the appellant's house that day was to serve the executions.

The appellants concede that the officers were properly serving a judicial execution when they discovered the contraband.

They contend, however, that the officers had no right to conduct a general, comprehensive search of their house and property in an effort to find items of value. They say there can be no argument that they had an "expectation of privacy" in the boxes under the bed and in a closed room in the barn. *See Katz* v. *United States*, 389 U.S. 347 (1967). The question, as they frame it, is "whether the service of a judicial execution by the Sheriff overcomes the expectation of privacy protected by the Fourth Amendment." Appellants contend it does not, arguing that allowing an execution to provide the basis for a general search "opens the door" for authorities to use executions as excuses for "pretextual" searches which are illegal.

It does not appear that appellant's argument has been considered in Arkansas. However, in *United States* v. *Dadurian*, 450 F.2d 22 (1st Cir. 1971), cert. denied, 405 U.S. 1044, 92 S.Ct. 1329, 31 L.Ed.2d 586 (1972), the argument was rejected. In that case, the court stated that when a law officer "inadvertently discover[s] evidence while acting in his capacity as an officer of the court in a civil action, he cannot be said to have conducted an illegal search and seizure." 450 F.2d 24. This view seems in harmony with that expressed by the Arkansas Supreme Court in *Webb* v. *State*, 269 Ark. 415, 601 S.W.2d 848 (1980):

> It is not every search and seizure that is forbidden by the Fourth Amendment, but only the unreasonable ones. *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Hosto* v. *Brickell*, 265 Ark. 147, 577 S.W.2d 401 (1979); *Milburn* v. *State*, 260 Ark. 553, 542 S.W.2d 490 (1976). The central inquiry is the reasonableness, in all the circumstances, of the particular governmental invasion of a citizen's personal security and that inquiry becomes a dual one—whether the officer's action was justified at the inception and whether it was reasonably related in scope to the circumstances which justified the interference in the first place. *Terry* v. *Ohio, supra.*

269 Ark. at 420.

In the instant case, the officers had the legal right to be in the house and the barn searching for anything of value to satisfy the judgment of over $400,000.00. At the first discovery of

contraband, the search was halted and a search warrant was obtained. In determining whether the officers' conduct was reasonable, we view the totality of the circumstances and make an independent determination of the validity of the search and seizure; however, we do not reverse the trial court's finding unless it is clearly against the preponderance of the evidence. *Webb* v. *State, supra.* We find that the trial court did not err in refusing to suppress the evidence seized under the search warrant in this case.

Affirmed.

CRACRAFT and ROGERS, JJ., agree.

HERITAGE BAY PROPERTY REGIME *v.* Kent JENKINS and Paula V. Jenkins

CA 88-254 766 S.W.2d 624

Court of Appeals of Arkansas
Division II
Opinion delivered March 22, 1989

Wright, Lindsey & Jennings, for appellant.

Everett & Gladwin, by: *John C. Everett*, for appellee.

JUDITH ROGERS, Judge. The appellant, Heritage Bay Horizontal Property Regime, hereinafter "Heritage Bay," appeals the trial court's decision awarding summary judgment in favor of appellees, Kent and Paula V. Jenkins. On appeal, Heritage Bay contends that the trial court erred in granting appellees' motion for summary judgment because the facts upon which that motion was predicated did not entitle appellees to judgment as a matter of law. We find that there is a remaining factual issue to be resolved, and reverse.

On May 12, 1987, the appellees purchased a condominium unit in Heritage Bay, which is located in Benton County, Arkansas. Heritage Bay's by-laws and master deed were duly filed of record with the Circuit Clerk of Benton County in accordance with the Horizontal Property Act, found in Ark. Code Ann. §§ 18-13-101 to -120 (1987). Pursuant to its by-laws, Heritage Bay is governed by a board of administration. At the time of appellees' purchase, the board of administration had enacted certain rules and regulations. Article III, § 3 of these

rules and regulations provides:

> No commercial activities of any kind whatever shall be conducted in any building or on any portion of the Properties except activities intended primarily to serve residents in the Properties.

Upon assuming occupancy, appellee Kent Jenkins, a manufacturer's representative doing business under the name of Kent Jenkins Sales, Inc., began using his condominium as an office. A complaint was lodged with the board of administration by another owner who objected to appellees' conducting commercial activities out of their condominium. Thereinafter appellees became the subject of various board meetings, where it was determined that this use of their property was in violation of the above-mentioned regulation.

Appellees filed suit against Heritage Bay and others in the Chancery Court of Benton County, seeking among other things a declaratory judgment that the regulation was inapplicable as to them, and disputing the enforceability of the regulation prohibiting this use of the property. The case was submitted to the chancellor on cross motions for summary judgment. In requesting the chancellor to make a ruling as to which party was entitled to judgment as a matter of law, based on the conflicting theories advanced by each, the parties agreed that there were no factual issues in dispute. In granting appellees' motion for summary judgment, the chancellor, in reliance upon Ark. Code Ann. § 18-12-103 (1987), found that the regulation in issue, as a restrictive covenant, was unenforceable against appellees because it had not been filed of record.

Heritage Bay filed a motion for a new trial. In its motion and accompanying brief, it was argued that appellees were not entitled to judgment as a matter of law because appellee Kent Jenkins had admitted to having advance notice of the regulation. Authority for this proposition is found in *Jones* v. *Cook*, 271 Ark. 870, 611 S.W.2d 506 (1981). *See also Harbour* v. *Northwest Land Co.*, 284 Ark. 286, 681 S.W.2d 384 (1984). The chancellor denied the motion for a new trial. It is from the conclusion of law reached by the chancellor in granting summary judgment and the denial of the motion for a new trial that Heritage Bay brings this appeal.

Summary judgment is an extreme remedy, and is only proper whenever the pleadings and proof show that no genuine issue exists as to a material fact and that the moving party is entitled to judgment as a matter of law. *Talley* v. *MFA Mutual Ins. Co.*, 273 Ark. 269, 620 S.W.2d 260 (1981). In considering a motion for summary judgment, a judge may consider pleadings, depositions, answers to interrogatories and admissions of fact, 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). Summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable men might differ. *Walker* v. *Stephens*, 3 Ark. App. 205, 626 S.W.2d 200 (1981). The object of summary judgment proceedings is not to try the issues, but to determine if there are issues to be tried, and if there is any doubt whatsoever, the motion should be denied. *Id.*

Upon review, the question to be answered is whether the trial court was correct in concluding that there remained no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, based on the pleadings, discovery documents, admissions of fact and affidavits, if any, showing what the proof will be. *Selby* v. *Burgess*, 289 Ark. 491, 712 S.W.2d 898 (1986).

On appeal, Heritage Bay contends that the lack of recordation is not determinative of the enforceability of the regulation. Heritage Bay argues that appellee Kent Jenkins' admission as to having had notice of the regulation vitiates the lack of recordation, and thus the failure to record is not an absolute bar to enforceability. We agree with Heritage Bay's contention to the extent that it raises a genuine issue of fact that remains unresolved.

Heritage Bay propounded to appellees certain Requests for Admission of Fact. Request Number Eight reads:

> Admit or deny that you had knowledge, prior to your purchase of the above described unit within the Horizontal Property Regime, of the rules and regulations concerning

> the use and personal conduct of the co-owners of the Heritage Bay Horizontal Property Regime prior to the time you purchased the above described unit.

Appellee replied:

> It is admitted that the Plaintiff had information about the rules and regulations; it is denied that the information available to plaintiff was such that he could not do on his property the actions that he is now doing.

[redacted] In view of this admission made by appellee, we conclude that a material factual issue existed, which made the granting of judgment as a matter of law to appellee improper. In addition, the issue of appellees' notice is consonant with the allegations of misrepresentation stated in appellees' complaint. In reversing the decision of the chancellor, we hold only that summary judgment was improper in that there remains a genuine issue of material fact yet to be determined. In so holding we express no opinion on the merits of this case or on any ancillary questions that may arise when this matter goes to trial.

[redacted] We are cognizant of the posture of the case as it was presented, in that it was submitted to the chancellor for decision based on cross motions for summary judgment where it was agreed that there were no factual issues in dispute. However, we find no inconsistency in Heritage Bay now asserting a factual question after it had received an adverse decision. The chancellor was obviously well briefed on the facts and law of this case, but was mistaken as to the rule that one can take an inconsistent factual position after submitting the case for summary judgment. The fact that both parties move for summary judgment does not establish that there is no issue of fact, for a party may concede there is no issue if his legal theory is accepted, and yet subsequently maintain there is a genuine dispute as to material facts if his opponent's theory is adopted. *Wood* v. *Lathrop*, 249 Ark. 376, 459 S.W.2d 808 (1970). *See also Dickson* v. *Renfro*, 263 Ark. 718, 569 S.W.2d 66 (1978); *Hood* v. *Welch*, 249 Ark. 1159, 463 S.W.2d 362 (1971).

REVERSED and REMANDED.

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

J.A. WOMACK and W.A. Beaver *v.* NEWMAN FIXTURE COMPANY

CA 88-325 766 S.W.2d 949

Court of Appeals of Arkansas
Division I
Opinion delivered March 22, 1989
[Supplemental Opinion on Rehearing
January 31, 1990.[1]]
[Rehearing denied February 28, 1990.[2]]

[1] Cracraft and Rogers, JJ., dissent.
[2] Rogers, J., would grant rehearing.

Tim A. Womack, P.A., for appellants.

Ball & Bird, by: *William K. Ball,* for appellee.

JUDITH ROGERS, Judge. This case involves a question of priority between two creditors who each held a security interest in certain restaurant equipment. Appellants, J.A. Womack and W.A. Beaver, appeal the decision of the trial court in favor of appellee, the Newman Fixture Company. Although the appellants' financing statement was recorded prior to that of the appellee, the chancellor found that appellee's security interest was superior because the financing statement relied upon by appellants failed to adequately describe the collateral.

Appellant urges the following points for reversal: (1) that the

chancellor erred in ruling that the description found in appellants' financing statement failed to give reasonable notice as to the appellee because appellee had actual notice of the lien, and that appellee was not barred by the doctrines of clean hands and laches; and (2) that the chancellor erred in reinstating the case after it had been dismissed twice for want of prosecution. We find no error and affirm.

In early 1983, Larry Stafford began making plans to open a restaurant, which was later named the Chick-N-Shack, in Camden, Arkansas. In furtherance of this plan, Stafford contacted Tommy Newman, vice president of appellee, which is in the business of selling restaurant equipment. On April 7, 1983, Stafford and Newman, along with Jim Lusby, a friend of Stafford's who had experience with chicken restaurants, met for the purpose of discussing the equipment that would be required to operate the restaurant. Newman submitted an estimate in the form of an invoice, which contained a proposed list of equipment at a cost of $33,730.90.

On July 23, 1983, appellants leased Stafford the property where the restaurant was to be located. Stafford and his wife obtained a $30,000 loan from Merchants & Planters Bank of Camden to finance the purchase of equipment, and in turn gave the bank a promissory note in that amount. Stafford gave the bank the proposal with estimated costs for the equipment to be installed in the restaurant after the building was constructed. As collateral for the note, the bank retained a security interest in the restaurant's equipment. A security agreement and financing statement were executed. The financing statement alone was filed on August 3, 1983, with the County Clerk of Ouachita County, as well as with the Secretary of State on August 5, 1983. In the financing statement, the collateral was described as "[a]ll equipment used in the business known as."

Appellants obtained financing from Merchants & Planters Bank for the construction of the restaurant building. Appellants also agreed with the bank to guarantee payment of the Staffords' note.

Construction of the restaurant began sometime in September of 1983. Appellee supplied and installed equipment during the course of construction of the building, and upon completion,

Newman compiled a final invoice of the equipment that he actually sold to Stafford. The final invoice differed from the original estimate both in terms of the equipment that was listed and the cost, which was $23,117.92. Appellee took a security interest in the equipment that was sold. The financing statement and security agreement were filed with the County Clerk of Ouachita County on February 17, 1984, and with the Secretary of State on February 21, 1984. In describing the collateral, appellee's financing statements made reference to attachments, which were copies of the final invoice.

The restaurant closed six months after it had opened in November of 1983, and the Stafford defaulted on their obligation to Merchants & Planters Bank. Appellants were obliged, pursuant to their guarantee agreement with the bank, to satisfy the remaining indebtedness on the note, totalling $31,135.99 in principal and interest, whereupon the bank made an assignment of the note, as secured by the equipment, to appellants on May 24, 1984.

In 1984, appellants originally filed suit in the Ouachita County Chancery Court, First Division, No. E-84-216. The case, which included appellee's counterclaim, was dismissed for want of prosecution. On February 7, 1986, appellee filed a complaint in chancery seeking the recovery of $4,617.92, plus interest, which remained due and owing on the purchase of the equipment. The chancellor granted appellee judgment *in rem* against the property for $5,896.88, representing the unpaid purchase price plus interest and costs, and ordered the equipment to be sold by public sale. In so holding, the chancellor declared that appellee's security interest was superior because the description contained in appellants' financing statement failed to reasonably identify the equipment.

In their first point on appeal, appellants contend that the chancellor erred in ruling that the description contained in the appellants' financing statement failed to give reasonable notice as it relates to appellee. Ark. Code Ann. § 4-9-402(1) (1987) provides:

> A financing statement is sufficient if it gives the names of the debtor and secured party, is signed by the debtor, gives an address of the secured party from which information

> concerning the security interest may be obtained, gives the mailing address of the debtor, *and contains a statement indicating the types or describing the items, of collateral.* (emphasis supplied)

Pursuant to Ark. Code Ann. § 4-9-110 (1987), any description of the personal property or real estate is sufficient, whether or not it is specific, if it reasonably identifies what is described. The commentary to this section states, "[T]he test of the sufficiency of a description laid down in this section is that the description do the job assigned to it—that it make possible the identification of the thing described." Commentary, § 85-9-110 (1961) (now codified as Ark. Code Ann. § 4-9-110).

In the instant case, the financing statement described the collateral as "[a]ll equipment used in the business known as." The chancellor found that this description fell short of the minimum requirement as found in Ark. Code Ann. § 4-9-110. The chancellor stated in his letter opinion filed June 15, 1988, that "had the description contained an address where the collateral was located then perhaps a person searching the records could at least be given notice of what the collateral might be."

Although chancery cases are tried *de novo* on appeal, the chancellor's findings of fact will not be reversed unless they are clearly against the preponderance of the evidence. *Reves* v. *Reves*, 21 Ark. App. 177, 730 S.W.2d 904 (1987); Ark. R. Civ. P. 52(a).

A description is sufficient if it reasonably identifies or makes possible the identification of the collateral. The statement purports to cover "[a]ll equipment used in the business known as," which is not a complete sentence. As such, there is nothing in the description which would provide a key to the identity of the collateral. The description neither indicates where the equipment could be located, nor does it disclose the name of the business where the equipment was to be used. We cannot say that the finding of the chancellor on this issue was clearly erroneous.

Nevertheless, appellants argue that appellee had actual notice of the equipment in which appellants claimed a security interest, because appellee supplied and installed the equipment. Despite this contention, however, Tommy Newman testified that

he not only did not know which bank Stafford was dealing with, but that he also was unaware of the specifics of the arrangements Stafford had made to obtain financing. The record reveals that there was conflicting testimony in this regard given by Stafford. However, disputed facts and the credibility of witnesses are within the province of the fact finder to resolve. *France* v. *Nelson*, 292 Ark. 219, 729 S.W.2d 161 (1987).

[redacted] Appellants also argue that appellee is precluded from gaining priority based on the equitable maxim of clean hands. This maxim provides that he who comes into equity must come with clean hands, and it acts as a bar to relief to those guilty of improper conduct in the matter to which they seek relief. *Marshall* v. *Marshall*, 227 Ark. 582, 300 S.W.2d 933 (1957). In support of this argument, appellants allege that appellee, in collaboration with Stafford, inflated the cost of the equipment when he provided the initial estimate. Appellants contend that this was done to enable Stafford to mislead the bank and obtain a higher loan, thereby increasing appellants' exposure pursuant to their agreement to guarantee payment of the note. As evidence of this, appellants point to the differences between the price and the equipment as listed in the original proposal and the final invoice. The chancellor found that there was no convincing proof presented to substantiate this allegation.

[redacted] Stafford testified in reference to the estimate that it was "rough scratched." There was testimony given by Newman that changes were made to tailor the equipment and furniture to the building as it was being constructed. For instance, Newman related that the restaurant's seating space was smaller than anticipated which required adjustments to be made. He also testified that Stafford provided some of the equipment that was listed on the estimate on his own, and consequently was not on the final invoice. The credibility of witnesses and the weight to be given their testimony are matters for the determination of the trial court, and the appellate court is not at liberty to disregard any testimony which the trial court has accorded some weight. *Herrick* v. *Robinson*, 267 Ark. 592, 595 S.W.2d 647 (1980) (supplemental opinion denying rehearing). Based on the record before us, we cannot say that the chancellor's finding was clearly wrong.

The appellants also assert laches as a bar to appellee's claim. Appellants argue that this matter was pursued by appellee in a counterclaim in the original suit that was dismissed for want of prosecution, and that the instant suit instituted by appellee was also dismissed, although reinstated, due to inaction. Appellants also contend that in the interim there have been four owners of the business where the equipment was located, and that witnesses to the loan transaction to Stafford had become unavailable.

The doctrine of laches does not apply unless there is an unreasonable delay, coupled with some change of position which makes it inequitable to enforce the claim. *Beeson* v. *Beeson*, 11 Ark. App. 79, 667 S.W.2d 368 (1984). The length of time after which inaction constitutes laches is a question to be answered in light of the facts and circumstances of each case. *Briarwood Apartments* v. *Lieblong*, 12 Ark. App. 94, 671 S.W.2d 207 (1984). We cannot say that under the facts and circumstances of this case, the chancellor erred in finding that the delay was not so unreasonable as to preclude appellee from asserting its claim. Appellants are not in a position to complain because the original suit brought by them, their counterclaim in this case, was also dismissed due to their inaction.

In appellants' final argument, it is argued that the chancellor erred in reinstating this action after it had been dismissed for want of prosecution. The case was dismissed without notice to either party, and the chancellor set aside the order of dismissal. Appellants contend that according to Rule 41 of the Arkansas Rules of Civil Procedure, this was a second dismissal as the original suit, which included appellee's counterclaim, had also been dismissed. Thus, pursuant to Rule 41, appellant contends that the second dismissal served as an adjudication on the merits, and thus should not have been reinstated. We need not reach this issue because it does not appear that this argument was raised below. The record does not reveal that this argument was made at trial, and it does not appear the appellant filed a motion to set aside the order reinstating the case. An issue not raised in the trial court may not be raised for the first time on appeal. *Ark. Burial Ass'n* v. *Dixon Funeral Home, Inc.*, 25 Ark. App. 18, 751 S.W.2d 356 (1988). We do note, however, that pursuant to Rule 60 of the Arkansas Rules of Civil Procedure, to correct any error or mistake or to prevent the miscarriage of

justice, a decree or order of a circuit, chancery or probate court may be set aside, with or without notice, within ninety days of its having been filed with the clerk. Dismissal of a case without notice to all attorneys of record is not valid under Rule 10 of the Uniform Rules of Circuit and Chancery Courts. *Peek* v. *Pulaski Federal Savings & Loan Ass'n.*, 286 Ark. 147, 690 S.W.2d 120 (1985).

AFFIRMED.

CRACRAFT and MAYFIELD, JJ., agree.

SUPPLEMENTAL OPINION ON REHEARING
JANUARY 31, 1990

___ S.W.2d ___

Tim A. Womack, P.A., for appellant.

Ball and Bird, by: *William K. Ball*, for appellee.

MELVIN MAYFIELD, Judge. The court issued an opinion in this case on March 22, 1989, affirming the trial court's decision holding the appellee's security interest in certain restaurant equipment superior to the appellants' security interest. *See Womack* v. *Newman Fixture Co.*, 27 Ark. App. 117, 766 S.W.2d 949 (1989). That decision was based upon the finding that appellants' financing statement did not adequately describe the collateral.

In the original brief filed by appellants they argued that the description of their collateral was sufficient; that the appellee was guilty of laches and unclean hands; and that the appellee's claim having been previously dismissed two times should not have been reinstated by the trial court. Appellants filed a petition for rehearing confined to the issue of the adequacy of the description. Specifically, the petition argues that our original opinion overlooked the appellants' contention that the adequacy of the description should be considered in the light of the actual knowledge appellee had about the collateral involved in this case. We agree that our opinion did not fully address this important point, and it is proper for the petition for rehearing to call this matter to our attention. *See* Rule 20 of the Rules of the Supreme Court and Court of Appeals. After careful study, we have concluded that the petition for rehearing should be granted.

This case arose out of the installation of equipment in a restaurant which was to be operated in a new building owned by the appellants J.A. Womack and W.A. Beaver in Camden, Arkansas. The restaurant was to be operated by Larry D. Stafford. The equipment was purchased by Stafford from the appellee Newman Fixture Company. Before making the purchase, Stafford contacted Tommy Newman who was vice-president of the appellee company and Newman made a list of the individual pieces of equipment, and the price of each, that he and Stafford thought would be needed in the restaurant. Stafford took this list to The Merchants & Planters Bank of Camden, Arkansas, and arranged for a loan to finance the purchase of the equipment. This resulted in a note signed by Stafford, which

incorporated a lien on the equipment to be purchased, and a financing statement was also signed by Stafford.

In August of 1983, the financing statement was properly filed with the Circuit Clerk in Camden and the Secretary of State in Little Rock. The financing statement shows the debtor's name as "Larry D. Stafford d/b/a Chick-N-Shack" and lists the debtor's address as "314 North Adams, Camden, Ark. 71701." The bank's name and mailing address are shown on the statement and it is signed for the bank by an assistant vice-president. The statement describes the collateral as "All equipment used in the business known as," and on the back of the statement the description continues by stating "and all replacements thereof and all accessories, parts and equipment now or hereafter affixed thereto or used in connection therewith . . . ."

At this point, it should be noted that Stafford's note to the bank was guaranteed by the appellants Womack and Beaver who signed the note for that stated purpose. Newman Fixture Company began installing the restaurant equipment in Womack and Beaver's building even before the building was completely finished. Eventually Newman submitted an invoice to Stafford and was paid all but $4,617.92 of the purchase price and Newman had Stafford sign a financing statement and security agreement to secure this balance due. This instrument was filed with the Circuit Clerk in Camden and the Secretary of State in Little Rock. The debtor's name is shown as "Stafford, Larry d/b/a Chick-N-Shack," and the address listed is "310 Adams Avenue, Camden, AR 71701." Attached to the instrument is a copy of the Newman invoice. It is undisputed that this instrument was filed more than six months after the bank's financing statement was filed. And it is undisputed that the bank called upon the appellants, Womack and Beaver, to pay Stafford's note in accordance with their guarantee and that they made the payment and took an assignment of the bank's rights under its security agreement and financing statement.

Before proceeding to the issue of the sufficiency of the description in the bank's financing statement, we briefly review the law that gets us to that issue. Actually, the bank and Newman Fixture Company both assert a purchase money security interest in the restaurant equipment purchased by Stafford. Ark. Stat. Ann. § 85-9-107 (Add. 1961) (now Ark. Code Ann. § 4-9-107

(1987)), provides:

> A security interest is a "purchase money security interest" to the extent that it is
>
> (a) taken or retained by the seller of the collateral to secure all or part of its price; or
>
> (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

Under Ark. Stat. Ann. § 85-9-203(1) and (2) (Supp. 1985) (now Ark. Code Ann. § 4-9-203(1) and (2) (1987)), the bank's security interest "attached" when (a) the debtor signed a security agreement which described the collateral, (b) value had been given by the bank, and (c) Stafford had rights in the collateral. No one disputes the fact that the bank gave value by making Stafford a loan of $30,000.00 to be used to purchase the equipment; that Stafford signed the bank's note and security agreement; that Stafford applied most of that money to the purchase price of the equipment; and that the equipment was delivered to Stafford for him to use. In 8 Anderson, *Uniform Commercial Code* § 9-203:48 (1985), it is stated:

> The Code does not require that all three conditions for attachment be satisfied at the same time. Likewise, the order in which they are satisfied has no significance.
>
> While the debtor must have rights in the collateral before the interest attaches, there is no requirement that he have such interest when the security agreement is made. The security agreement may be executed before any of the other elements are satisfied and that fact does not invalidate or impair the security agreement. Subject to certain limitations, the parties may agree that the security interest shall attach to described goods not yet owned by the debtor.

[redacted] However, Newman also had a purchase money security interest in the equipment under Ark. Stat. Ann. § 85-9-107(a), *supra*, because it obtained a security agreement from Stafford on the equipment to secure that part of the purchase not paid when the equipment was delivered. Ark. Stat. Ann. § 85-9-312(4)

(Supp. 1985) (now Ark. Code Ann. § 4-9-312(4) (1987)), provides:

> (4) A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within twenty-one (21) days thereafter.

A security interest is perfected by the filing of a financing statement. *See* Ark. Stat. Ann. § 85-9-302 (Supp. 1985) (now Ark. Code Ann. § 4-9-302 (1987)). (There are some exceptions, one of which is when the collateral is in possession of the secured party, but none of the exceptions apply here.) So, since both the Bank and Newman had purchase money security interests, perfected by the filing of financing statements, section (4), *supra*, does not tell us which purchase money security interest had priority, but under the provisions of section (5) of Ark. Stat. Ann. § 85-9-312 (Supp. 1985) (now Ark. Code Ann. § 4-9-312), it would appear to go to the party who first filed a financing statement. Section (5), as it pertains to this case, provides:

> (5) In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4) of this section), priority between conflicting security interests in the same collateral shall be determined according to the following rules:
>
> (a) Conflicting security interests rank according to priority in time of filing or perfection.

In 2 White and Summers, *Uniform Commercial Code*, § 26-5 at 516 (3rd ed. 1988), it is stated:

> If one does not meet one of the conditions in (3) or (4), he "does not qualify," but is the same true if he *and* his competitor do meet the test of (3) or (4)? We believe so. If Bank lends the down payment, seller lends the rest and each file within ten days [this would be 21 days in Arkansas], both (and therefore neither) are "entitled to the special priority" in subsection (4). Although one might argue that such creditors should share pro rata and neither receive priority, we believe that the proper rule is to go to

> the subsection (5) residuary clause and award priority to the winner there.

The rationale of the above statement is explained in 2 White and Summers, *Uniform Commercial Code*, *supra*, as follows:

> Because the drafters chose to permit perfection by possession and by other non-filing acts, they could not simply give priority to the first to file. However, they went as far as possible in that direction and 9-312(5)(a) is the result: the first to file wins if both perfect by filing. Since filing is a public act the timing of which can be proved with accuracy from public records, it is the most certain and satisfactory of the measuring points for priority.

See § 26-4 at 498. In the instant case, the bank perfected its lien by filing its financing statement first. Thus, under the undisputed evidence, the bank's security interest has priority over Newman's security interest. This gets us back to the sufficiency-of-description issue.

The trial court found the bank's description insufficient and our original opinion agreed. However, neither the trial court nor this court fully discussed the appellants' contention, made in briefs filed in both courts, that the adequacy of the description should be considered in the light of the appellee's actual knowledge. The appellants' brief in this court cited the case of *United States* v. *Riceland Foods*, 504 F.Supp. 1258 (E.D. Ark. 1981), which states that the Commercial Code provides that any description is sufficient "whether or not it is specific if it reasonably identifies what is described." *Id.* at 1262. *See* Ark. Stat. Ann. § 85-9-110 (Add. 1961) (now Ark. Code Ann. § 4-9-110 (1987)), which makes this specific provision. *Riceland* also points out that the official comment to this section states: "The test of sufficiency of a description . . . is that the description do the job assigned to it—that it make possible the identification of the thing described." 504 F.Supp. at 1262. *See* "Comment to Uniform Commercial Code" following Ark. Stat. Ann. § 85-9-110, which makes the same statement. (The comment is not included following Ark. Code Ann. § 4-9-110.) Also, in oral argument, the appellants cited the case of *Security Tire & Rubber Co.* v. *Hlass*, 246 Ark. 1113, 441 S.W.2d 91 (1969), which refers to an Arkansas Law Review article written by Mr.

Harry Meeks wherein he cites authorities that "point out that the description need not be such as would enable a stranger to select the property and that a description of collateral is sufficient if it will enable third persons, aided by inquiries which the instrument itself suggests, to identify the property." 246 Ark. at 1117.

There are two points to note in regard to the *Hlass* case. First, the collateral in that case is described as the "Company owned inventory of Stephens Tire Company, 2517 Alma Highway, Van Buren, Arkansas," and the court said:

> When we consider that the term "inventory" is defined in Ark. Stat. Ann. § 85-9-109(4), we believe that a fact issue was made by which the goods involved here could possibly be identified under the agreement given.

246 Ark. at 1117-18. So, the Arkansas Supreme Court in *Hlass* reversed the trial court's grant of summary judgment made because the trial court found the description of the collateral insufficient as a matter of law.

In the second place, we note that the court in *Hlass* made no apparent distinction between the sufficiency of the description of the collateral required in the security agreement as compared to that required in the financing statement. Some commentaries take the position that the description in a financing agreement may be less specific than the description in a security agreement since the financing statement is intended only to give notice while the security agreement operates as a statute of frauds between the parties and must be sufficient to identify the collateral. *See, e.g.*, 8 Anderson, *Uniform Commercial Code*, § 9-110:6, at 602 (1985). However, a recent case, which has been favorably viewed in the commentaries, holds otherwise. *See Nolin Production Credit Ass'n* v. *Canmer Deposit Bank*, 726 S.W.2d 693 (Ky. App. 1986), which states:

> [T]he present test to be applied in circumstances such as those now involved is, in effect, an "inquiry test" under which a description of collateral is sufficient for either a security agreement or a financing statement if it puts subsequent creditors on notice so that, aided by inquiry, they may reasonably identify the collateral involved.

726 S.W.2d at 697.

Certain collateral was described in *Nolin* as "all farm machinery and equipment including but not limited to tractor and all property similar thereto." The trial court had held this description too general. In B. Clark, *The Law of Secured Transactions Under the Uniform Commercial Code* § 2.9[5][c] at 2-45 (1980), the author states that "the weight of judicial authority upholds general descriptions of equipment in the financing statement" and that "these decisions seem clearly correct." The author points out, however, that some courts require more specificity than the generic term "equipment," and the case of *Mammoth Cave Production Credit Ass'n* v. *York*, 429 S.W.2d 26 (Ky. 1968) is cited as an example of this; but the author of the commentary says that case "seems dead wrong." *See* § 2.9[5][c] at 2-46. In a supplement to Clark's commentary, the *Nolin Production Credit Ass'n* case is said to have rejected the *Mammoth Cave* case which was "criticized sharply in the main volume" and that *Nolin* "has it all over the court in *Mammoth Cave* in terms of Article 9 analysis." *See* B. Clark, *The Law of Secured Transactions Under the Uniform Commercial Code* § 2.9[5][c] at S2-67 (1987 Cumulative Supplement No. 3). *See also United Bank of Bismarck* v. *Selland*, 425 N.W.2d 921 (N.D. 1988), which relied upon the *Nolin* case to hold "All Equipment, Machinery and Farm Products" sufficient as a description of collateral.

In the instant case, there is no issue raised on appeal as to the sufficiency of the security agreement. While Newman did plead that neither the security agreement nor the financing agreement contained a sufficient description, the transcript shows no objection to the introduction of the security agreement between the bank and Stafford, and there was no argument to the trial court that the description of the collateral in the bank's security agreement was insufficient. Actually, the bank's note states the purpose of the loan is to "purchase equipment" and states the note is secured by the equipment. The note incorporates a security agreement, which is signed by Stafford, and which states the security includes "all my property specifically listed and, if a general description is used . . . all of my property fitting the general description." So, even if the security agreement were at issue, the description would be sufficient under Ark. Stat. Ann. § 85-9-110 (now Ark. Code Ann. § 4-9-110) which provides that

"any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described." There is, however, no argument about the security agreement description and the trial court based its decision solely on a finding that the description of the collateral in the financing statement was not sufficient.

As to the law with regard to the description required under section 85-9-402 (now Ark. Code Ann. § 4-9-402 (1987)), which deals with the filing of financing statements, 9 Anderson, *Uniform Commercial Code* § 9-402:6 (1985), contains the following discussion at 447-48:

> The objective of filing a financing statement is to give notice of the existence of the security interest of the creditor in the described collateral.
>
> The main purpose of the "notice filing" provisions of the Code is to provide a public record with sufficient content to alert an interested party that there may be a prior security interest.
>
> Further inquiry beyond the financing statement is contemplated by the Code as "the financing statement's purpose is to merely alert the third party as to the need for further investigation, never to provide a comprehensive data bank as to the details of prior security arrangements."
>
> The notice system of the Code places the burden of further inquiry upon anyone seeking additional information. The fact that the financing statement is not intended to be all-informative is borne out by the fact that the statement must contain "an address of the secured party from which information concerning the security interest may be obtained . . . ."
>
> When a proper filing is made, third persons are presumed to have notice of and are subject to the provisions of the security agreement. A person is charged with possessing the information that could have been discovered had he made the inquiry suggested by the filing.
>
> The sufficiency of a financing statement must be appraised in the light of the objective of the Code system of merely giving notice. The provisions of UCC § 9-402 are

> designed to repudiate the highly specific disclosures that were required under former chattel mortgage statutes. If the statement gives notice that a third person may have a security interest in the collateral, and the source from which additional information may be obtained, the statement is sufficient. All that is required is a short, simple, and concise financing statement. A court should sustain a financing statement as sufficient if sufficient information can reasonably be gleaned from it to enable those desiring to reach the secured party to do so.

Many cases are cited to support the above statements. For example, the first case cited is *Associates Capital Corp.* v. *Bank of Huntsville*, 274 So.2d 80 (Ala. App. 1973), which held that a financing statement is sufficient if it gives notice that "there is need for investigation" as to the scope of the security interest. That court further stated:

> The purpose of filing the financing statement is notice to any third party. The requirement of the description of the collateral is not for the purpose of informing such third party that the exact item which he is considering taking as security is already subject to a prior security interest, without further inquiry, ... The requirement of "a description that reasonably identifies" is satisfied if it reasonably informs third parties that a certain identifiable item, . . . belonging to or in the possession of a debtor may be subject to a prior security interest and that further inquiry is necessary to determine if it is the same [item] being offered them as collateral. Such is known as "notice filing." It merely places other parties on notice that there is need for investigation before taking as security for a loan items of the same type belonging to the debtor or which he intends to purchase.

274 So.2d at 83. *See also In re King-Porter Company*, 446 F.2d 722 (5th Cir. 1971), where the court said: "The financing statements here disclosed sufficient information to enable any concerned creditor to contact the bank or claimant. The Code helps only those who help themselves." *Id.* at 729.

In the instant case, Tommy Newman, vice-president of appellee, Newman Fixture Company, testified he knew that

Larry Stafford was going to get a loan from a bank to pay for the equipment sold to Stafford by Newman Fixture Company; that Stafford paid all but $4,617.92 of the $23,117.92 invoiced price of the equipment; and that Newman's invoice was made to "Chick-N-Shack, 310 Adams Ave., Camden, Ark."

Tommy Newman also testified that he personally made several trips to Camden to deliver the equipment to Stafford and that it was installed in a restaurant in a building under construction. Newman Fixture Company filed a financing statement on the balance due for the equipment delivered. The statement shows that the debtor is "Stafford, Larry DBA Chick-N-Shack," and the address for the debtor is listed "310 Adams Avenue, Camden, AR 71701." This is also the name of the debtor listed on the bank's financing statement, although the address listed on the bank's statement is "314 North Adams, Camden, Ark. 71701." (Stafford testified the Chick-N-Shack was at either 312 or 314.) The property listed as covered by the bank's statement was "All equipment used in the business known as," and although no name was given after the word "as," the debtor listed on the bank's financing statement was "Larry D. Stafford d/b/a Chick-N-Shack" and that business was in the very building to which Newman was delivering the equipment to be used in the operation of the restaurant located in that building. Cases cited above hold that a description is sufficient if it "make[s] possible identification of the thing described," *Riceland*, *supra*, and that "the description need not be such as would enable a stranger to select the property" but is sufficient if it "will enable third parties, aided by inquiries which the instrument itself suggests, to identify the property," *Hlass*, *supra*.

The description in the instant case surely gave notice of the existence of the bank's security interest just as much as did the language in the *Hlass* case. There the collateral was described as the "Company owned inventory of Stephens Tire Company" and the address of the company was given. Here, the collateral is described as "All equipment used in the business known as," and the name and address of the business are listed at the top of the financing statement. We have cited authority stating that general descriptions of equipment will be upheld. *See also* 2 *White and Summers*, *supra*, § 24-18 at 380, stating "Numerous cases generally uphold, as not overbroad, descriptions formulated in

terms of Code categories: accounts, general intangibles, consumer goods, *equipment*, farm products, inventory, and so on." (Emphasis added.) The word "equipment" is defined in Ark. Stat. Ann. § 85-9-109(2) (Ark. Code Ann. § 4-9-102(2)), just as the word "inventory" is defined in that statute (as the *Hlass* opinion noted). Moreover, Ark. Stat. Ann. § 85-9-402(8) (Supp. 1985) (Ark. Code Ann. § 4-9-402(8)), provides: "A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading." So, even though the address of Larry Stafford d/b/a Chick-N-Shack is listed as 310 Adams Ave. in Newman's invoice and is listed as 314 North Adams in the bank's financing statement, Tommy Newman, vice-president of the appellee Newman Fixture Company, was not misled (regardless of which address was correct) because Tommy Newman knew where he delivered and installed the equipment which he sold to Larry Stafford d/b/a Chick-N-Shack, and it is clearly proper to consider what Tommy Newman knew. The *Hlass* case applied a test that said, in part, that a description "need not be such as would enable a stranger to select the property." And in *E-B Grain Company* v. *Denton*, 325 S.E.2d 522 (N.C. App. 1985) at 527, the court held the "debtors' mailing address . . . not so incomplete as to be misleading," and added: "We are cognizant of the fact that defendant Stephenson had regular business dealings with the debtor, and so was in a position to directly inquire about plaintiff's security interest had defendant wished to do so."

Therefore, under the facts known by Newman at the time its financing statement was filed, the bank's financing statement already on file would have given Newman notice of the bank's lien on "all the equipment" that Newman delivered to the Chick-N-Shack restaurant on Adams Street in Camden, Arkansas. Tommy Newman admitted he did not search the records in the circuit clerk's office in Camden before filing his company's financing statement, but had he looked he would have known, even without further inquiry, that the bank claimed a security interest in the equipment he was installing for use in the restaurant. Under the law and the evidence in this case, we think the bank has a lien that is superior to the lien of the appellee, and that the trial court's finding to the contrary is clearly erroneous. Ark. R. Civ. P. 52(a).

It might be helpful to add a note about the case of *Corning Bank* v. *Bank of Rector*, 265 Ark. 68, 576 S.W.2d 949 (1979), which was cited in the brief of each party and discussed in our conference. (That case cites some Commercial Code statutes which were found at that time in the 1977 Supplement to the Arkansas Statutes Annotated. Those statutes may now be found in the 1985 Supplement.) The case involved grain bins found, under Ark. Stat. Ann. § 85-9-313(1)(a) (Supp. 1977) (now Ark. Code Ann. § 4-9-313(1)(a) (1987)), to be so related to the land on which they were located as to be fixtures and therefore a part of the real estate. A security interest may be created in fixtures, *see* Ark. Stat. Ann. § 85-9-313(2) (Supp. 1985) (now Ark. Code Ann. § 4-9-313(2)), by a "fixture filing" in the office where a mortgage on real estate would be filed or recorded, Ark. Stat. Ann. § 85-9-313(1)(b) (Supp. 1985) (now Ark. Code Ann. § 4-9-313(1)(b)). The *Corning Bank* case pointed out that under Ark. Stat. Ann. § 85-9-402(5) (Supp. 1977) (now Ark. Code Ann. § 4-9-402(5) (1987)) a financing statement filed as a "fixture filing" had to recite that it was filed in the real estate records and contain "a description of the real estate sufficient if it were contained in a mortgage of the real estate to give constructive notice of the mortgage under the law of this state."

The court in *Corning* said the financing statement in that case "contained no description of any real property and no indication whether the property described [the grain bins] was located on, or to be located on, any real estate." 265 Ark. at 71-72. Under this evidence, the appellate court affirmed the trial court's finding that the financing statement involved did not give notice of the appellant's security interest.

This holding in *Corning*, however, has nothing to do with the case at bar. Here, we are not dealing with fixtures and no "fixture filing" was required. The above provisions relating to "fixture filing" were part of Act 116 of 1973 which amended Article 9 of the Commercial Code enacted by Act 185 of 1961. That these changes with respect to fixtures did not change the law involved in the case at bar is made clear by the case of *Ward* v. *First National Bank*, 292 Ark. 21, 728 S.W.2d 149 (1987), which did not involve fixtures and which cited and relied upon *Hlass* and *Riceland Foods*, *supra*, for the law that is also applicable to the case at bar.

We are also aware of the recent decision of the Arkansas

Supreme Court in the case of *Affiliated Food Stores, Inc.* v. *Farmers and Merchants Bank of Des Arc, Arkansas*, 300 Ark. 450, 780 S.W.2d 20 (1989), holding that the security interest of the party who first filed its financing statement in the proper place was entitled to priority over the security interest of the party whose financing statement was not filed in the proper place. That issue, however, has nothing to do with the issue here. In this case both parties filed in the proper place. In the *Affiliated Food Stores* case, the language "first to file correctly" was directed toward "place of filing" not "description of collateral."

That opinion also holds that the word "knowledge" as used in Ark. Code Ann. § 4-9-401(2) (1987), means "actual rather than constructive knowledge" because that section says the filing of a financing statement "in good faith in an improper place" is effective against any person who has "knowledge of the contents of such financing statement." That is specific knowledge statutorily required in order to excuse the failure to file in the proper place. Here, the issue is whether the description in the financing statement "will enable third persons, aided by inquiries which the instrument itself suggests, to identify the property," and is a completely different issue from the one involved in the *Affiliated Food Stores* case.

The trial court's decree is reversed and this matter is remanded for further proceedings consistent with this opinion.

ROGERS and CRACRAFT, JJ., dissent.

JUDITH ROGERS, Judge, dissenting. In this opinion, the majority at least tacitly recognizes that the description contained in the bank's financing statement is inadequate. Yet, it is being held that this description should be deemed adequate because of certain facts presumed to have been known by appellee's agent, Newman. Assuming for the moment that "actual knowledge" is relevant to a determination as to whether a description is sufficient, it is unclear to me whether the majority is holding that Newman actually knew of the bank's prior security interest, or whether he was possessed of sufficient knowledge such that he should have had constructive notice of the bank's lien. Nevertheless, neither proposition is supported by the facts, and for this court to make such assumptions based on this record is beyond the realm of our appellate review, even when our review is *de novo*.

In order to demonstrate my point, further elaboration on the "facts" is necessary. In April of 1983, Newman met with Stafford who was then only considering going into the chicken restaurant business. At this time, Stafford was seeking an idea of the estimated cost of this type of undertaking, and in response Newman prepared an estimate listing the necessary equipment and its cost. In speaking of this proposal, Stafford testified that it was "rough-scratched." The site of the business was not determined until some three months later, and actual construction was not begun until September. There is no evidence in the record that Stafford and Newman had ever had any business dealings together prior to this instance, or afterwards.

In the meantime, Stafford obtained a loan from the bank using the estimate, which was referenced as an attachment to the security agreement entered into by those parties. The security agreement was not filed along with the bank's financing statement in August. According to Newman's testimony, he did not know that the estimate he provided would be used to obtain a loan. He further testified that he was unaware of the particular financing arrangements Stafford had made.

This testimony was obviously credited by the trial court in its denial of the appellants' defense of unclean hands. The appellants contended that the actual cost of the equipment supplied was much lower than that reflected in the original estimate. Appellants thus argued that Stafford and Newman had colluded to inflate the cost of the equipment in the proposal in order for Stafford to obtain a higher loan. In our original opinion in this matter, we said that the credibility and the weight to be given the testimony are matters for the determination of the trial court, and the appellate court is not at liberty to disregard any testimony which the trial court has accorded some weight, *citing Herrick* v. *Robinson*, 267 Ark. 592, 595 S.W.2d 647 (1980).

Yet, the majority has now concluded that the appellee had "actual knowledge," based upon the facts that Newman delivered the equipment, and the financing statement named the debtor as "Stafford, Larry d/b/a Chick-N-Shack." The question of actual knowledge was addressed in our original opinion where we deemed this to have been a question of fact resolved by the trial court in appellee's favor, and we found that we could not say that the finding of the trial court was clearly erroneous. Ark. R. Civ. P.

52(a).

The determination of whether a description in a financing statement is adequate is a question of fact. *Security Tire & Rubber Co. Inc.* v. *Hlass*, 246 Ark. 1113, 441 S.W.2d 91 (1969). The Code provides that any description of the personal property or real estate is sufficient, whether or not it is specific, if it reasonably identifies what is described. Ark. Code Ann. § 4-9-110 (1987). In *United States* v. *Riceland Foods, Inc.*, 504 F. Supp. 1258 (E.D. Ark. 1981), it was pointed out that the test is that the description do the job assigned to it — that it make possible the identification of the thing described.

It cannot be said of the description in this case, which purports to cover "[a]ll equipment used in the business known as," that it reasonably identifies the collateral, or that it makes possible the identification of the thing described. As found by the trial court, there is nothing in the description to provide a key to the identity of the collateral. And, as was stated in the original opinion in this case, this "description neither indicates where the equipment could be located, nor does it disclose the name of the business where the equipment was to be used." The problem with this description then lies in its being an incomplete sentence and its failure to state the name of the business where the equipment could be located, and not necessarily with the usage of the general term "equipment." Being so incompletely stated, this description cannot possibly put anyone on notice as to the collateral covered. As such, it does not provide even constructive notice because it suggests nothing to provoke further inquiry (unless the majority would also hold that a subsequent creditor has a duty to inquire at all times when faced with a wholly inadequate description).

Yet, the majority has attempted to cure this deficiency by stating that the financing statement also named the debtor, the business and the address, and this was known to Newman because of his delivery of the equipment to that location. Of course, the Code requires every financing statement to include the name and address of the debtor, *in addition to a description of the collateral. See* Ark. Code Ann. § 4-9-402(1) (1987) (emphasis supplied). Simple reference to the name of a debtor listed in a separate part of the financing statement says nothing of the collateral which also must be described. Moreover, the majority's logic concerning the curative function of so naming the debtor is

faulty because it does not always, or necessarily, follow that the name and business address of the debtor designated is actually where the collateral can be located or is to be used, as fortuitously happened in this case. Thus a description should be judged by its own terms, and not by cross-reference to another part of the financing statement.

I am also not convinced that the principles gleaned from the cases and authorities cited by the majority support the view that "actual knowledge" is determinative when considering the adequacy of a description in a financing statement. The issue here is whether, based on the adequacy of the description, the appellant's security interest takes precedence over that of the appellee. None of the cases cited hinged upon the actual or presumed knowledge of the subsequent creditor as a test for determining the adequacy of a description, which consequently worked to cure a description which was deficient on its face. Certainly none of the cases cited deal with an analogous fact situation, and in each of the cases cited, there was something in the description itself which formed the basis for its being deemed adequate. For example, in *Security Tire and Rubber Co., Inc.* v. *Hlass*, *supra*, the collateral was described as "Company owned inventory of Stephens Tire Company, 2517 Alma Highway, Van Buren, Arkansas." In reversing the trial court's conclusion that the description of the collateral as "inventory" was insufficient as a matter of law, the court considered it important that the *description* also named the business and the address where the inventory could be located. There is no such qualifying language describing the "equipment" in the instant case.

At this point, I should mention something about the case of *Affiliated Food Stores, Inc.* v. *Farmers & Merchants Bank of Des Arc, Arkansas*, 300 Ark. 450, 780 S.W.2d 20 (1989), which is discussed in the majority opinion. There the court held that the bank's security interest could not prevail over the subsequent creditor because the bank had not filed its financing statement in the proper place. The court found that Ark. Code Ann. § 4-9-401(2) (1987) was inapplicable under the facts of that case because there was no evidence that the subsequent creditor had "actual knowledge of the bank's interest." Arkansas Code Annotated § 4-9-401(2) provides in part that a filing which is made in good faith in an improper place . . . is effective with regard

to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement. The majority points out that the issue here, the adequacy of the description, is different from the issue addressed in *Affiliated Food Stores*, where under that Code provision one's security interest may prevail despite an improper filing as against another who has actual knowledge of the contents of a financing statement. I agree with the majority that the two situations are distinguishable, but the difference is precisely my point. There is no concomitant code provision with respect to the description requirement, or any of the requirements found in Ark. Code Ann. § 4-9-402(1) (1987), the code section at issue here, regarding "actual knowledge." Had the drafters of the Code intended that "actual knowledge" play a role in determining the adequacy of a description in a financing statement, as it does in situations involving improper filing, they certainly could have so provided. In sum, the majority's emphasis on "actual knowledge," which is the sole basis for granting the petition for rehearing, is strained and arguably inapplicable to the question at hand, even if the facts of this case supported such a conclusion.

While I can agree with the majority that "notice filing" was all that was contemplated by the drafters of the Code, in my view, the facts here do not support a finding of either actual or constructive notice, particularly when such findings are based on the presumed knowledge of facts which were contrary to those found by the trial court. The majority has ignored the reality that this issue is a question of fact, and seems to have construed the evidence based on their own interpretation of relevant facts without giving due regard to the perspective of the trial court. I cannot so readily attribute such apparent or presumed knowledge to Newman as this court has done. Appellate courts should let judges and juries find facts, and we should refrain from assuming the trial court's function or second guessing them.

Furthermore, from a commercial standpoint, it is impractical to attribute such knowledge to a businessman who has many such dealings, when the description provides no reference or warning as to the intended collateral. The Code may not require a high degree of specificity, but it does envision some commercially practical minimum standard which is diminished and relaxed beyond recognition by the holding in this case. As the majority

has pointed out, "[t]he Code helps only those who help themselves." *In re King-Porter Co., Inc.*, 446 F.2d 722 (5th Cir. 1972). I submit that this statement can be applied in this instance against sustaining the description found here. It is neither onerous, nor unreasonable to require a financing statement to make clear its intended collateral.

CRACRAFT, J., joins in this dissent.

CLIFF PECK CHEVROLET, INC. *v.* Delois BROWN

CA 88-249 766 S.W.2d 953

Court of Appeals of Arkansas
Division II
Opinion delivered March 29, 1989

Andrew L. Clark, for appellant.

John W. Walker, P.A., by: *R.S. McCullough*, for appellee.

JAMES R. COOPER, Judge. Cliff Peck Chevrolet, a Little Rock automobile dealer, sold the appellee, Delois Brown, a used 1982 Camaro on January 5, 1984. The appellee filed suit in Pulaski County Circuit Court seeking damages and alleging fraud, deceit and breach of contract. The complaint alleged that the vehicle sold to her was represented to be a Berlinetta model when in fact it was a Camaro Sport Coupe, a less expensive model. The complaint also alleged that the vehicle had been wrecked and that fact had not been disclosed to her. The jury found in favor of the appellee and awarded her $5,500.00 in damages. The only issue on appeal is whether the evidence at trial supports the jury's award of damages. We reverse and remand.

The measure of damages for misrepresentation is the difference between the market value of the automobile as represented and the actual value of the automobile at the time of the sale. *Southern Equipment & Tractor Co.* v. *K & K Mines, Inc.*, 272 Ark. 278, 613 S.W.2d 596 (1981). Viewing the evidence in the light most favorable to the appellee, we find that evidence of the actual value of the automobile at the time of sale is insufficient. *See Walt Bennett Ford, Inc.* v. *Brown*, 283 Ark. 1, 670 S.W.2d 441 (1984).

At the trial, the appellee testified that she paid $10,980.56 for a car which was represented to her to be a Berlinetta. The emblem on the car indicated that the car was a Berlinetta, and the salesman told her it was a Berlinetta. She stated that she had contacted the salesman several times specifically requesting a 1982 blue Berlinetta. When the appellee attempted to a get a part

for the car, she was told by a mechanic employed by the appellant that the car was actually a Sport Coupe. She also stated that she still owed $5,400.00 on the car and that she had not been able to sell the car because she was "upsided down in value" on it.

Two other witnesses testified that the car had been wrecked and a document was introduced into evidence which indicated the car had been sold as salvage. The car has been reconstructed by Larry Case, who is not a party to this appeal, and sold to Cliff Peck.

Bobby Ray Flint, an employee of Twin City Motors in North Little Rock, testified that he had been in the car business for thirty years and was presently employed as sales manager and buyer. He stated that in his opinion the difference in value in 1984 between a 1982 Berlinetta and a 1982 Sport Coupe was at least $2,000.00. He based his opinion on the 1987 "black book," which indicated a difference in value of $1800.00. He stated further that the difference in value in 1984 would have been greater than the difference in value in 1987.

Hal Hampton, the used car manager employed by the appellant, testified that he has bought and sold cars for sixteen years in his employment. He opined that the difference in retail value in 1984 between the two 1982 model automobiles was between $1,000.00 and $1,500.00. In forming his opinion he referred to the 1984 Southwest version of the NADA official used car guide, which reflected a difference in value of $875.00.

The missing element in the evidence in the record is the actual value of the automobile the appellee purchased at the time she purchased it. All of the expert witnesses agreed that the fact that the automobile had been wrecked would increase the difference in value that they had testified to, but not one witness testified as to the value of the wrecked 1982 Sport Coupe purchased by the appellee in 1984. *Southern Equipment and Tractor Co., supra; See Union Lincoln Mercury, Inc.* v. *Daniel*, 287 Ark. 205, 697 S.W.2d 888 (1985). On this record, it was impossible for the jury to determine whether the vehicle purchased by the appellee did or did not have a market value less than the purchase price paid.

In her brief, the appellee urges us to accept the fact that

the automobile she purchased had no value whatsoever at the time of trial. This argument is without merit. First, no witness so testified, and second, as noted earlier, the difference in value at the time of purchase, if any, rather than at trial, was the critical issue in the case.

The appellant requests that the damages be reduced to $2,000.00. However, because there is a lack of proof as to the value of the automobile at the time of purchase, the evidence will not support an award of $2,000.00. Because there has been a simple failure of proof, justice requires that this court remand the case to allow the appellee an opportunity to supply the defect. Only where the record affirmatively shows that there can be no recovery on retrial should the case be dismissed. *Crisp* v. *Brown*, 4 Ark. App. 208, 628 S.W.2d 596 (1982). In the present case we cannot say that the record affirmatively shows there could be no recovery and we therefore reverse and remand for a new trial.

Reversed and remanded.

CORBIN, C.J., and ROGERS, J., agree.

R.S. McCULLOUGH *v.* Jack L. LESSENBERRY, Circuit Judge, Pulaski County Court, Fifth Division

CA 89-51 769 S.W.2d 420

Court of Appeals of Arkansas
En Banc
Opinion delivered March 29, 1989

Jerry L. Malone, for appellant.

No response.

PER CURIAM. This case is an appeal from an order finding the appellant, an Arkansas attorney, in contempt of court while serving as an attorney in an otherwise unrelated case. The appellant filed this motion to transfer the case to the Arkansas Supreme Court, asserting that jurisdiction is properly in the Supreme Court under Ark. Sup. Ct. Rule 29(1)(h) because the case involves the discipline of an attorney-at-law. We agree. The Arkansas Supreme Court stated, in *Rosenzweig* v. *Lofton*, 295 Ark. 573, 751 S.W.2d 573 (1988), that contempt cases involving attorneys are matters within their jurisdiction under Rule 29(1)(h).

Motion granted.

Deborah L. ROGERS *v.* DIRECTOR OF LABOR

E 87-111 767 S.W.2d 319

Court of Appeals of Arkansas
Division I
Opinion delivered April 5, 1989

Dan J. Kroha, for appellant.

Allan Pruitt, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Arkansas Board of Review holding that the claimant, Deborah L. Rogers, was ineligible for unemployment compensation benefits because she was discharged from her last work for misconduct connected with the work.

Appellant was a radio dispatcher and jailer for the Sherwood Police Department. She was terminated effective February 27, 1987, for writing "hot" checks for which an arrest warrant had been issued. Appellant's employment record showed she had been

counseled in April 1985 for the same problem.

The evidence in the record also shows that in August 1985 appellant had been suspended for ten days for conduct unbecoming an officer; that in October 1986 she was suspended for three days for failing to report to work on time; and that in January 1987 she was suspended for twenty days for neglect of duty, inattention to duty, and making a false official report. Lowell Kincaid, Sherwood Chief of Police, testified that at the time of the last suspension he warned appellant it would be her last one and that any future violation of departmental rules and regulations would result in her termination.

In regard to the incident for which she was discharged, the record shows that appellant wrote two checks to Sears for which there were insufficient funds in her checking account. Sears turned the checks over to the municipal court for prosecution, and a warrant was issued for appellant's arrest on January 21, 1987. The two checks totaled $76.00 and when appellant was notified by her employer that a warrant had been filed for her arrest, she paid $40.00 on the checks. A court date was set but a continuance was granted, and appellant paid the balance on the checks and her case was dismissed without trial. Appellant testified that she was unaware that the funds in her checking account were not sufficient to cover the checks when she wrote them and that she had not received the ten-day notice the Hot Check Division of the Sherwood Municipal Court usually sends out to allow the maker of the check to pay it before an arrest warrant is issued.

The agency denied the appellant benefits, the appeal tribunal reversed and allowed benefits, and the Board of Review reversed the appeal tribunal. The Board found that the appellant's actions were a willful or wanton disregard of the employer's interests and of the standards of behavior which the employer has a right to expect of its employees.

When reviewing a decision of the Board of Review, the Board's findings of fact are conclusive, if supported by substantial evidence. Ark. Code Ann. § 11-10-529(c)(1) (1987); *Terry Dairy Products Co., Inc.* v. *Cash*, 224 Ark. 576, 275 S.W.2d 12 (1955). Substantial evidence has been defined as valid, legal, and persuasive evidence; such relevant evidence as a reasonable mind might accept as adequate to support a conclu-

sion. *Victor Industries Corp.* v. *Daniels*, 1 Ark. App. 6, 611 S.W.2d 794 (1981). Whether the findings of the Board of Review are supported by substantial evidence is a question of law; this court may reverse where the Board's findings are not supported by substantial evidence. *St. Vincent Infirmary* v. *Arkansas Employment Security Division*, 271 Ark. 654, 609 S.W.2d 675 (Ark. App. 1980).

Appellant first argues on appeal that the finding of the Board of Review that she was discharged for misconduct is not supported by substantial evidence. She contends she did not willfully violate the rules or regulations of the department because she did not know that her checking account did not contain sufficient funds to cover the checks. In support of her contention, appellant relies upon *Brewer* v. *Everett*, 3 Ark. App. 59, 621 S.W.2d 883 (1981), in which the court held that there was no evidence in the record to show that the appellant in that case had the requisite intent necessary for his actions to constitute misconduct; and *Cody* v. *Everett*, 8 Ark. App. 14, 648 S.W.2d 508 (1983), where the court found that a police officer who had fired shots into the walls and doors of his home while off duty had not violated the rules of his employer. In the instant case, appellant argues she had no intention of not paying Sears and was not on duty when the checks were written.

Appellant was denied benefits under Section 5(b)(1) of the Arkansas Employment Security Law, Ark. Code Ann. § 11-10-514(a)(1) (1987), which provides in pertinent part:

> If so found by the director, an individual shall be disqualified for benefits if he is discharged from his last work for misconduct in connection with the work.

In *Nibco, Inc.* v. *Metcalf*, 1 Ark. App. 114, 118, 613 S.W.2d 612 (1981), we reviewed the case law and said while the language used was not always the same, the cases held that misconduct involved disregard of the employer's interests, violation of the employer's rules, disregard of the standards of behavior which the employer has a right to expect of his employees, and disregard of the employee's duties and obligations to his employer. We further stated:

> To constitute misconduct, however, the definitions

> require more than mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good faith error in judgment or discretion. There must be an intentional or deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design.

[redacted] Considering the evidence in this case in light of the criteria set out in *Nibco*, we believe the decision of the Board of Review should be affirmed. When Sears obtained the issuance of the warrant for the arrest of appellant, the Sherwood Chief of Police wrote appellant advising her that the warrant had been issued and that she had violated the following policies of the department:

#6 Violation of any criminal law.

#26 Neglect to pay within a reasonable time just indebtedness incurred while in service.

#40 Violation of any section of the rules and regulations and ordinances of the City of Sherwood.

The police chief also advised appellant that she was terminated and of her right to request a hearing before the Civil Service Commission. In view of the prior violations of department rules and regulations, which the appellant admitted were in a booklet that each employee was given, we think the Board of Review could find that the check incident was the last in a series of violations, the total of which constituted substantial evidence to support the Board's finding that the appellant's "actions were a willful or wanton disregard of the employer's interests and of the standards of behavior which the employer has a right to expect of its employees." *See Exson* v. *Everett*, 9 Ark. App. 177, 656 S.W.2d 711 (1983) (recurring errors constituted a substantial disregard of the employer's best interests and appellant's own duties and obligations). Since the evidence of appellant's misconduct is not confined to the hot check incident, we do not think the case of *Cody* v. *Everett, supra*, cited by appellant is applicable to this case. In *Cody* a policeman was terminated for a single

incident which occurred in his own home while he was off duty.

The appellant also argues that the Board of Review erred because it "refused to allow appellant an opportunity to rebut the employer's testimony." This contention grows out of the fact that no representative of the Sherwood Police Department appeared at the hearing before the appeal tribunal. The appellant and her attorney did appear and the referee took appellant's testimony. After the referee's decision was mailed (it was adverse to the department-employer) the employer filed an appeal to the Board of Review and requested a "new" hearing. Acting under the authority of Ark. Code Ann. § 11-10-525(a)(2) (1987), the Board granted the request and notified both parties of the time and place of the hearing to take additional evidence. The Board also sent a copy of a cassette containing the tape recording of the testimony of the appellant to both parties.

At the beginning of the second hearing, the appellant's attorney first objected to the hearing on the basis that the employer did not have any justifiable excuse for not attending the first hearing. When that objection was overruled, counsel moved that the employer not be permitted to cross-examine the appellant because it waived that right by failing to appear at the first hearing. That motion was overruled and counsel then asked that the hearing be adjourned after any witnesses for the employer testified, that counsel be given a tape recording of that testimony, and that counsel then be afforded an opportunity to cross-examine the employer's witnesses at another hearing after counsel had a chance to review the taped testimony of the employer's witnesses. This motion was denied.

We see no prejudice to appellant. Her counsel heard her testimony at the first hearing and was furnished a copy of it. Ark. Code Ann. § 11-10-525(a)(2) authorized the second hearing. After appellant's counsel put her on the stand and elicited some evidence in addition to that given by her at the first hearing, counsel for the employer asked approximately thirty questions on cross-examination. We see no indication that counsel gained any advantage by time to prepare for these few short questions. Appellant called no other witnesses.

As for appellant's counsel having time to prepare for cross-examination of the employer's witnesses, only the police chief

testified, and counsel did not renew the motion after the chief finished his testimony. Thus, it would appear that time to prepare for cross-examination was not so important to counsel after he heard the chief's testimony. Moreover, most of the testimony was undisputed.

Under Ark. Code Ann. § 11-10-525(a)(2) [formerly Ark. Stat. Ann. § 81-1107(d)(3) (Supp. 1983)], it is within the discretion of the Board to direct that additional evidence be taken, but it is not required to do so as long as each side has notice and opportunity to rebut the evidence of the other party. *See Maybelline Company* v. *Stiles*, 10 Ark. App. 169, 174, 661 S.W.2d 462 (1983). Administrative agencies are "generally permitted a wide discretion and latitude in procedural details." 73A C.J.S. *Public Administrative Law and Procedure* § 115 at 14 (1983). We find no error in the taking of testimony in the second hearing.

Affirmed.

CRACRAFT and ROGERS, JJ., agree.

DEAN LEASING, INC. *v.* VAN BUREN COUNTY and Bobby Woodard

CA 88-365 767 S.W.2d 316

Court of Appeals of Arkansas
Division I
Opinion delivered April 5, 1989

Young & Finley, by: *Dale W. Finley*, for appellant.

No brief filed.

JUDITH ROGERS, Judge. Dean Leasing, Inc., appeals a summary judgment entered by the Van Buren County Circuit Court for appellees, Van Buren County and Bobby Woodard, former Van Buren County Judge. On appeal, appellant does not appeal the summary judgment for the county, but argues that the trial judge erred in granting summary judgment to Woodard. We disagree and affirm.

In 1984, Woodard signed a lease-purchase agreement with appellant for a copier and copier stand on behalf of the county. Woodard signed the agreement in his representative capacity as county judge and in his personal capacity as guarantor of the agreement. The total of the installment payments amounted to over $6,000.00, and the county was to make sixty monthly payments. Although the agreement was entitled "Lease Agreement," it made no provision for the return of the equipment to appellant. Appellant does not dispute that the lease was actually a lease purchase agreement. The county never advertised bids for a copy machine before this agreement was entered into, nor did it pass an appropriation ordinance or resolution for the purchase or lease of the equipment. Additionally, no order of the county court was passed or signed authorizing the county judge to enter into this transaction. The county used the equipment for approximately ten months; it then stopped making payments and notified appellant to pick up the equipment.

On April 1, 1986, appellant sued the county and Woodard for the remaining payments due under the contract. Although

Woodard was served with process, he did not file an answer or appear. In its answer, the county denied that it entered into a valid agreement and asserted that the agreement was void *ab initio* because the parties did not comply with state law concerning such transactions. On November 2, 1987, the county moved for summary judgment on the ground that the lease-purchase transaction was invalid because the county did not advertise for bids or pass an appropriation ordinance or resolution for the equipment obtained from appellant. In its motion for summary judgment, the county also relied on the fact that the county court did not authorize Woodard to enter into the transaction. The county filed an affidavit of the Van Buren County Clerk in which he stated that no county court order, appropriation ordinance or resolution was prepared and filed regarding the transaction, and that there was no record made of any competitive bidding regarding the transaction.

On July 19, 1988, the circuit judge issued a letter opinion in which he found that the contract was illegal and that the defenses raised by the county were applicable to Woodard. Summary judgment was then entered for the county and Woodard in which the circuit judge found that the the lease purchase contract is invalid and unenforceable for the reasons stated in the county's motion for summary judgment and that the issues and defenses raised in the pleadings by the county are applicable to and inure to the benefit of Woodard.

On appeal, appellant does not dispute the circuit judge's finding that the lease purchase agreement is invalid or that the county did not comply with the state laws regarding such transactions. Although appellant does not argue that Woodard should have been found in default for failure to file an answer or appear, we will briefly address this question. In this case, the county's answer clearly inures to the benefit of Woodard because the county's defense goes to the merits of the whole case and answers allegations directed at and common to Woodard. *See Firestone Tire & Rubber Co.* v. *Little*, 269 Ark. 636, 599 S.W.2d 756 (Ark. App. 1980). Here, appellant simply argues that, although the principal obligation between appellant and the county is invalid and unenforceable, Woodard is not relieved of his personal guaranty obligation. We disagree.

Summary judgment is governed by Ark. R. Civ. P. 56, which provides in part that summary judgment may be rendered where the pleadings, depositions, answers to interrogatories and admissions on file, along with supporting affidavits, 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 and should only be allowed 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).

As we stated above, there is no dispute that the parties did not comply with Arkansas law regarding such transactions when they entered into this agreement, or that the agreement is invalid with respect to the county. Ark. Code Ann. Section 14-20-106 (1987) [formerly Ark. Stat. Ann. Section 17-416 (Repl. 1980)] provides:

> No county court or agent of any county shall make any contract on behalf of the county unless an appropriation has been previously made therefor and is wholly or in part unexpended. In no event shall any county court or agent of any county make any contract in excess of any appropriation made, and the amount of the contract shall be limited to the amount of the appropriation made by the county quorum court.

Ark. Code Ann. Sections 14-22-102 and 14-22-104 (1987) [formerly Ark. Stat. Ann. Sections 17-1601 and 17-1603 (Supp. 1985)] provide that it is unlawful for any county official to make any purchases with county funds in excess of $5,000.00 unless, with certain exceptions not applicable here, prescribed bidding procedures are followed. Ark. Code Ann. Section 14-22-112 (1987) [formerly Ark. Stat. Ann. Section 17-1609 (Repl. 1980)] provides that "[n]o contract shall be awarded or any purchase made until it has been approved by the county court, and no contract shall be binding on any county until the court shall have issued its order of approval."

Generally, a guarantor is not liable to the creditor unless the debtor is also bound under the principal contract:

> The guaranty promise is a promise to answer for the debt or the default of the principal debtor under his contract with

the creditor. Therefore, unless the debtor is bound under the principal contract, there is no obligation which is guaranteed and the guarantor is not liable to the creditor if the debtor fails to perform. Applying this principle, the guarantor is not liable to the creditor if there has been a total failure of consideration as to the underlying obligation, and a guarantor is partially discharged to the extent that there has been a partial failure of such consideration.

There are some instances in which the creditor cannot enforce the principal obligation against the debtor because the principal obligation is either illegal or impossible of performance. A problem then arises as to whether a guarantor of such an obligation (rendered illegal or impossible of performance) will be required by the law to perform his secondary or collateral promise. Generally, a promise of guaranty will not be enforced when the obligation which it secures is either illegal or impossible of performance. The reason for such nonenforcement may lie in the nature of the guaranty promise—that is, it may be that the guarantor promised to respond only if the principal debtor was legally required to perform and did not. However, when the defense of illegality is involved, the reason given for not enforcing the guaranty is that enforcement would, in large measure, defeat the intention of the legislature or the policy of the law which declared the obligation illegal. Therefore, enforcement of the guaranty will be refused when it appears that the principal obligation is violative of law, or contrary to public policy or precepts of morality.

. . . If usury has the effect of invalidating the principal contract, the guarantor may set up the fact of usury as a defense to a suit on a guaranty of the principal contract; but if usury does not make the principal contract invalid, the guaranty promise is binding on the guarantor.

38 Am. Jur. 2d *Guaranty* Section 51 (1968).

In *Ryder Truck Rental, Inc.* v. *Kramer*, 263 Ark. 169, 563 S.W.2d 451 (1978), the supreme court held that a guarantor on an installment note may assert the defense of usury in the obligation guaranteed and that, if the principal obligation is

declared void on the ground of usury, the guaranty is also void: "[i]n other words, if the debt which the guarantor has guaranteed is declared void and a nullity, the guarantee is also void, especially when, as here, the principal obligation and the guaranty thereof are parts of one entire transaction so that there is a matter of fact only one contract." 263 Ark. at 176, 563 S.W.2d at 454.

Appellant inappropriately relies on the following quotation from 38 Am. Jur. 2d *Guaranty* Section 52 (1968) in support of its position:

> If the principal obligation is not void (as it is where there is no consideration or mutual assent or where the principal contract is illegal or contrary to law), but is merely unenforceable against the debtor because of some matter of defense which is personal to the debtor, the guarantor may not successfully set up this matter to defeat an action by the creditor or obligee seeking to hold the guarantor liable on the contract of guaranty. Accordingly, the guarantor may not successfully defend an action brought on the contract of guaranty on the basis that the principal obligation was obtained through fraud practiced on the debtor, that the principal obligation was not in writing (and, therefore, did not conform to the requirements of the statute of frauds), that the principal obligation was subject to the defense of usury (where usury does not have the effect of rendering the obligation invalid), that the creditor was guilty of a breach of warranty, or that the debtor was under a disability, such as coverture, infancy, or incompetency. Again, the guarantor may not successfully defend the creditor's action on the ground that the guaranteed debt or obligation, being the contract of a corporation, was ultra vires and for this reason is not enforceable by an action against the corporation.

We disagree with appellant, however, that this quotation supports its assertion that Woodard should not be relieved of his guaranty obligation. From the language quoted above, it is obvious that, where the principal contract is contrary to law, void or invalid, the guarantor is not liable on the contract of guaranty. In the case at bar, there is no dispute that the principal obligation between appellant and the county is invalid and contrary to

Arkansas law. Further, the supreme court held in *State Use of Prairie County* v. *Leathem & Co.*, 170 Ark. 1004, 282 S.W. 367 (1926), that warrants issued under a contract of the county court for an amount in excess of the available appropriation are absolutely void. *See also Lyons Machinery Co.* v. *Pike County*, 192 Ark. 531, 93 S.W.2d 130 (1936); *American Disinfecting Co.* v. *Franklin County*, 181 Ark. 659, 27 S.W.2d 95 (1930).

Since Arkansas law treats county contracts that are not in compliance with the Arkansas Code sections regarding such transactions as void, 38 Am. Jur. 2d *Guaranty* Section 52, cited above, and relied on by appellant, does not apply. Instead, we find the principles expressed in Section 51 of that source, quoted above, to control. As we stated, a promise of guaranty will not be enforced when the obligation which it secures is invalid or illegal. If this contract, which is admittedly not in compliance with state law and is invalid as to the county, were to be enforced against the county's guarantor, the intention of the legislature in declaring such contracts invalid would be defeated.

We therefore hold that the circuit judge correctly entered summary judgment for appellee Woodard.

Affirmed.

CRACRAFT and MAYFIELD, JJ., agree.

Cecil SHOPTAW and Lucille Shoptaw, Husband and Wife
v. Robert Allen SHOPTAW and Rita Darlene Shoptaw

CA 88-370 767 S.W.2d 534

Court of Appeals of Arkansas
En Banc
Opinion delivered April 12, 1989

Mobley & Smith, by: *William F. Smith*, for appellant.

Young & Finley, by: *James K. Young*, for appellee Rita Darlene Shoptaw.

DONALD L. CORBIN, Chief Judge. Cecil Shoptaw and Lucille Shoptaw appeal a decree of the Pope County Chancery Court finding appellees, Robert Shoptaw and Darlene Shoptaw, husband and wife, to be the owners of a parcel of real property in Atkins, Arkansas. We disagree with appellants' contention that the trial court's decision is not supported by the evidence and affirm.

This action originated with appellee Robert Shoptaw's complaint for divorce against appellee Darlene Shoptaw. Darlene filed an answer and a counterclaim for divorce and later filed a third party complaint against appellants, Robert's parents. In her third-party complaint, Darlene alleged that appellants had conspired to defraud her of her interest in a house and lot in Atkins, Arkansas, and that the property was originally purchased by Robert and herself from Cecil's father, W.L. Shoptaw, but that the deed actually transferred the property to Lucille. Darlene also alleged in her third-party complaint that this failure to transfer the property to Robert and herself was part of a scheme to defraud her of her interest in the property.

At trial, the evidence was in sharp conflict. Darlene testified that the property was purchased in 1969 from Robert's grandfather, W.L. Shoptaw, for $1,000.00; that the property was put in Lucille's name without Darlene's knowledge; that Robert told her the property was put in Lucille's name because a lawsuit had been

filed against him; that she and Robert had built the house with money borrowed from Cecil, and that this money was fully repaid; that she and Robert paid taxes on the land to Cecil; and that there was never any question as to whom the house belonged.

Robert testified that he had not paid his grandfather for the property; that the property was purchased in 1970 because Robert and his family were living with Cecil and Lucille at the time and Cecil wanted them out of the house; that Cecil paid for the material to build the house; that W. L. Shoptaw, Robert and Cecil built the house; that he had never paid Cecil any money for taxes on the property; and that the arrangement with Lucille was that she provide a roof over the heads of Robert and his family but that the property actually belonged to Cecil and Lucille.

Cecil Shoptaw testified that Lucille had always paid taxes on the property; that Robert and Darlene did not pay him anything for the purchase of the land or the materials to build the house; and that the house was put in Lucille's name simply because she is a better business person than he (Cecil).

Lucille Shoptaw testified that the property was put in her name because Cecil's mother, Mae Shoptaw, did not want the land to get out of the family's ownership; that Cecil, Robert and W. L. Shoptaw helped build the house but that Cecil paid for it; that she (Lucille) paid taxes on the property every year; and that there was never an agreement that anyone else would own the property. On cross-examination, Lucille admitted that Cecil took care of the business and that she did not consider herself to be a good business person.

Defendant's Exhibit "A," which is a copy of the tax record regarding the property, indicates that the house on the property belongs to Robert Shoptaw and that it is on land which is leased and listed in the name of Lucille Shoptaw.

On August 11, 1988, the chancellor entered a decree in which he denied both petitions for divorce and found that Robert and Darlene are the owners of the property as tenants by the entirety. On appeal, appellants argue that the trial court's decision is not supported by the evidence.

It is the province of the trier of fact to determine the credibility of the witnesses and resolve any conflicting testimony.

First State Bank of Crossett v. *Phillips*, 13 Ark. App. 157, 681 S.W.2d 408 (1984). Cases on appeal from the chancery court are tried *de novo*, but we do not reverse unless the findings of the chancellor are clearly erroneous or clearly against the preponderance of the evidence, giving due deference to the trial judge's superior position to determine the credibility of the witnesses and the weight to be given to their testimony. *Day* v. *Day*, 20 Ark. App. 48, 723 S.W.2d 378 (1987).

In the case at bar, the chancellor obviously believed Darlene's testimony that appellees provided the money for the purchase of the property and that the property actually belonged to appellees. We, therefore, defer to the chancellor's opportunity to personally observe the witnesses and to evaluate their credibility and the weight to be given their testimony. Accordingly, we hold that the chancellor's finding that Robert and Darlene are the owners of the property is not clearly erroneous.

Affirmed.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I think the majority opinion errs in two respects. In the first place, it fails to recognize the burden of proof required of the appellee, Darlene Shoptaw, to prove the allegation in her third-party complaint that the deed to the land involved was obtained by her mother-in-law in a scheme to defraud appellee of her interest in the property. In *Lipe* v. *Thomas*, 269 Ark. 827, 600 S.W.2d 921 (Ark. App. 1980), cited in the appellants' brief, Mrs. Lipe filed suit to set aside a conveyance to her daughter. It was alleged that the conveyance was gained by fraud, undue influence and duress. The court said:

> Here it is contended that the deed was obtained by duress or fraud. Under such circumstances, the law requires that the proof be clear, cogent and convincing before the deed can be set aside. *Duncan* v. *Hensley*, 248 Ark. 1083, 455 S.W.2d 113 (1970); *Davidson* v. *Bell*, 247 Ark. 705, 447 S.W.2d 338 (1969).

269 Ark. at 831.

The appellee in the present case tacitly agrees she had the burden set out in *Lipe* v. *Thomas* but says "when the burden of

proving disputed facts in chancery is by clear and convincing evidence and the chancellor then finds *that such proof has been shown*, the question on appeal is whether the chancellor's finding is clearly erroneous." (Emphasis added.) The case of *Freeman* v. *Freeman*, 20 Ark. App. 12, 722 S.W.2d 877 (1987), is cited in support of this statement, but the matter is more fully discussed in *Akin* v. *First National Bank*, 25 Ark. App. 341, 758 S.W.2d 14 (1988), where the court relied, at least in part, on the dissenting opinion in *A.B.* v. *Arkansas Social Services*, 273 Ark. 261, 620 S.W.2d 271 (1981), which stated:

> But the test on review is not whether we are convinced that there is clear and convincing evidence of the probate judge's findings, but whether we can say that the probate judge was clearly wrong in his findings.

273 Ark. at 268.

It seems obvious that evidence must be stronger to meet the requirement of proving a matter by clear and convincing evidence than is necessary to prove a matter by a preponderance of the evidence. The *Akin* opinion makes it clear that in deciding whether the chancellor's decision was clearly wrong—or clearly erroneous — we take into consideration the standard by which the chancellor had to consider the evidence before him. That is because "we continue to hear chancery cases *de novo.*" *See Akin*, 25 Ark. App. at 345.

While the majority opinion concludes that the chancellor's finding was not clearly erroneous, it totally fails to find, as the appellee concedes is necessary, that the chancellor was not clearly erroneous in finding that the evidence before him was clear and convincing. When it is recognized that on our de novo review of the evidence, we must consider that the appellee in this case had the burden of proving by clear and convincing evidence that the deed was obtained by her mother-in-law in a scheme to defraud appellee of her interest in the property and that we must determine whether the chancellor was clearly wrong—or clearly erroneous—in holding that burden had been met, I think we must reverse the chancellor's decision.

This brings me to the second respect in which I think the majority opinion is in error. In order to review the chancellor's

decision by the proper standard, we must consider *all* the evidence, but the majority opinion does not do this. For example, the opinion states that the appellee testified that when the property was purchased in 1969, the deed was put in her mother-in-law's name without the appellee's knowledge. This has to be confined to the point in time when the deed was executed, because appellee admitted that her husband told her it was put in his mother's name, that she saw the deed, that she and her husband never got a deed from anyone, and that she has known "all along" that title to the land has been in her mother-in-law's name.

In addition, the majority opinion states that "Defendant's Exhibit 'A,' which is a copy of the tax record regarding the property, indicates that the house on the property belongs to [appellee's husband] and that it is on land which is leased and listed in the name of [appellee's mother-in-law]." A witness who was employed in the tax assessor's office testified that prior to the reappraisal in 1982, the land was in the mother-in-law's name, and in 1986 the house was put on the card which showed the land owned by the mother-in-law. The witness also testified that "we just put down what people tell us. We do not go out to check to see if the house is on leased property." Appellee's husband testified than when the whole county was reassessed the people who were doing that asked who lived in the house and his daughter (while he was at work) said her parents lived there. The husband also testified that in 1986 he and his dad got it straightened out and put the property back in his mother's name. Thus, I do not think the evidence that indicated the house was on land *leased* by appellee and her husband helps prove appellee's case.

The effect of the testimony of appellee's husband and his parents is that in November of 1969 the appellee and her husband, who had been working in Texas, came back to Arkansas and, with their two children, moved into the home of the husband's parents. It was then that the husband's father bought the land, had the deed made to his wife, and helped his son build a house on the land. The husband and his parents testified that the parents paid for all the materials that went into the house, and that they let their son and the appellee live in the house rent free. They also testified that they had done the same thing for another son.

The appellee claimed her husband bought the land and the materials that went into the house. She admitted she had no records to prove this, that her husband had a poor working record and she did not know where he got the money, that they never had an insurance policy on the house, and that the title to the house was in her mother-in-law's name for 17 years before appellee ever raised any question about it.

I simply have to say that my de novo review of the evidence convinces me the chancellor was clearly wrong—or clearly erroneous—in finding that the appellee established by clear and convincing evidence that the deed to her mother-in-law was obtained in a scheme to defraud appellee of her interest in the property where she and her husband lived.

I dissent from the holding in the majority opinion.

Joe E. FIEGEL, Jr. *v.* CITY OF CABOT

CA CR 88-238 767 S.W.2d 539

Court of Appeals of Arkansas
En Banc
Opinion delivered April 12, 1989

Russell L. "Jack" Roberts and *"Buddy" Troxell*, by: *Russell L. "Jack" Roberts*, for appellant.

Keith G. Rhodes, Cabot City Attorney, for appellee.

JAMES R. COOPER, Judge. The appellant in this criminal case was convicted in a non-jury trial of DWI, second offense. The only issue raised in the trial court was whether law enforcement personnel adequately assisted him to obtain additional blood alcohol testing as required by Ark. Code Ann. § 5-65-204(e)(2) (1987). The trial judge, sitting as the finder of fact, found that the City of Cabot acted reasonably under the circumstances and did assist the defendant in his attempts to obtain an additional test. The results of a breathalyzer test were thereafter admitted, and the appellant was found guilty of second offense DWI. From that decision, comes this appeal.

The only argument raised on appeal is that the trial judge erred in finding that the appellee adequately assisted him in obtaining an additional test, and therefore the breathalyzer test results were inadmissible. We affirm.

Arkansas Code Annotated § 5-65-204(e) provides that:

> (e) The person tested may have a physician or a qualified technician, registered nurse, or other qualified person of his own choice administer a complete chemical test in addition to any test administered at the direction of a law enforcement officer.

(1) The law enforcement officer shall advise the person of this right.

(2) The refusal or failure of a law enforcement officer to advise such person of this right and to permit and assist the person to obtain such test shall preclude the admission of evidence relating to the test taken at the direction of a law enforcement officer.

The test result may be admitted into evidence if there was substantial compliance with the statute, *Hegler* v. *State*, 286 Ark. 215, 691 S.W.2d 129 (1985), and the officer must provide only such assistance as is reasonable at the place and time. *Williford* v. *State*, 284 Ark. 449, 683 S.W.2d 228 (1985). Whether the assistance provided was reasonable under the circumstances is a fact question for the trial judge to decide. *Girdner* v. *State*, 285 Ark. 70, 684 S.W.2d 808 (1985).

The record shows that Robert Higgs, a police officer employed by the City of Cabot, stopped the appellant's vehicle at 3:31 a.m. on July 12, 1987, after he saw the vehicle driven by the appellant cross into the oncoming traffic lane on Locust Street in Cabot. Officer Higgs informed the appellant of his rights with respect to additional testing, and a breathalyzer test was administered. The appellant then requested an additional test. Officer Higgs gave the appellant an opportunity to call a qualified person to come to the police station and draw blood for an additional test, and informed him that, as an alternative, he could have someone pick him up and take him to have a blood alcohol test performed elsewhere if he first posted bond. The appellant requested that Officer Higgs take him to a hospital for testing. Officer Higgs stated that he denied the request. He explained that, although there were normally two officers on duty at that time of night, the police department was temporarily short-handed and he was the only officer on duty: because the nearest facility able to administer an additional test at that time of night was located eight or nine miles away in Jacksonville, the City of Cabot would be without police protection had he transported the appellant for testing as requested. Higgs telephoned the Chief of Police for instructions, and he testified that the chief instructed him not to transport the appellant to the hospital in Jacksonville, and said that the appellant should instead call someone to come and take

him for testing.

The record also shows that the trial court carefully analyzed the circumstances of the case and weighed the defendant's interests against those of the State in deciding that the assistance offered was reasonable. Focusing on the unique situation presented the trial court held that Officer Higgs' actions were reasonable because compliance with the appellant's request would have left the City of Cabot without any police protection for the period of time necessary to transport the appellant to Jacksonville for testing, to accomplish the testing, and then to transport him back to Cabot. The trial court's finding that the level of assistance offered to the appellant was reasonable under the circumstances was amply supported by the evidence, and we hold that the officer's actions constituted substantial compliance with Ark. Code Ann. § 5-65-204(e)(2) (1987).

Affirmed.

CORBIN, C.J., dissents.

DONALD L. CORBIN, Chief Judge, dissenting. I dissent. Arkansas Code Annotated Section 5-65-204(e)(2) (1987) of our Omnibus DWI Act provides in part:

> The refusal or failure of a law enforcement officer to advise such person of this right and to permit and assist the person to obtain such test shall preclude the admission of evidence relating to the test taken at the direction of a law enforcement officer.

I fail to see any degree of "reasonable assistance" on the part of the law enforcement officer in the instant case. Although the officer advised appellant of his right to an additional test, the officer's testimony reveals that he did not follow through in assisting appellant to obtain the additional test as required by the above code section. The police officer testified that since he was the only officer on duty he told appellant, "here's the telephone, you call whoever [sic] you want to, to be able to come to the Cabot Police Department and take your blood or to take you to get blood drawn." The officer also testified that he offered to allow appellant to call a "medical technician or doctor or somebody to come and draw blood" at approximately 3:30 a.m.

One does not have to engage in speculation to realize that a substantial period of time would pass before the test could have been administered. This could have caused problems with the results being admissible because of the lack of timeliness. It is my opinion that the officer's refusal to transport appellant only eight miles to a facility to conduct the additional test because it would leave the city without police protection does not comply with his duty "to assist" appellant in obtaining the test. Eight miles is not on the other side of the world. A discussion of this issue in *Williford* v. *State*, 284 Ark. 449, 683 S.W.2d 228 (1985) leaves me with the inescapable conclusion that there was no reasonable assistance provided by the officer in the present case considering the time, place and circumstances. Thus, the test by the officer should have been excluded. Furthermore, proof of blood alcohol content is not necessary for a conviction of driving while intoxicated, *Wilson* v. *State*, 285 Ark. 257, 685 S.W.2d 811 (1985), and a conviction could have been obtained based upon the officer's observation of appellant's impaired reactions, motors skills and judgment. *Oliver* v. *State*, 284 Ark. 413, 682 S.W.2d 745 (1985). I respectfully dissent.

Larry GOFORTH *v.* STATE of Arkansas

CA CR 88-219 767 S.W.2d 537

Court of Appeals of Arkansas
Division II
Opinion delivered April 12, 1989

James R. Marschewski, by: *R. Paul Hughes III*, for appellant.

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

JAMES R. COOPER, Judge. In this criminal case, the appellant appeals from the revocation of his suspended sentence. On August 11, 1986, the appellant pled guilty to sexual abuse in the first degree. The imposition of his five-year sentence was suspended. A petition to revoke the appellant's suspended sentence was filed on November 19, 1987, and it alleged that the appellant had committed the offense of sexual abuse in the first degree. At the hearing to revoke, the only evidence the State put on was the testimony of Larry Deason, the deputy sheriff who investigated the complaint. On appeal the appellant argues that his constitutional right to due process was violated because he was denied the ability to confront and cross-examine witnesses against him. We find the appellant's argument to be meritorious and we reverse and remand.

Larry Deason testified that he came into contact with the

four-year-old victim at the hospital. The child had been taken to the hospital at Deason's request. Deason testified that the child told him the appellant had shown him some pictures of naked women in some magazines. According to Deason, the child then told him that the appellant had put the magazines into a white station wagon behind his property. Deason stated that the magazines were retrieved from the car indicated by the child and these magazines were entered into evidence. Deason then said that the child told him the appellant had taken down his pants, and grabbed him and "shook it till it hurt."

Although in a revocation hearing a defendant is not entitled to the full panoply of rights that attend a criminal prosecution, *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *United States* v. *Strada*, 503 F.2d 1081 (8th Cir. 1974), he is entitled to due process. Because due process is a flexible concept, each particular situation must be examined in order to determine what procedures are constitutionally required. *Id.*

In *Gagnon* v. *Scarpelli*, 411 U.S. 36 (1973), the United States Supreme Court held that in a revocation proceeding the accused is entitled to "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)". This holding has been codified at Ark. Code Ann. § 5-4-310 (c)(1) (1987) which states:

> The defendant shall have the right to confront and cross-examine adverse witnesses unless the court specifically finds good cause for not allowing confrontation.

In a probation revocation proceeding the trial court must balance the probationer's right to confront witnesses against grounds asserted by the State for not requiring confrontation. *United States* v. *Bell*, 785 F.2d 640 (8th Cir. 1986). First, the court should assess the explanation the State offers of why confrontation is undesirable or impractical. *Id.* at 643. A second factor that must be considered, and one that has been focused on by a number of courts, is the reliability of the evidence which the government offers in place of live testimony. *Id.* at 643.

As was the case of the hearsay testimony given by a probation officer in *Bell*, no finding was made by the trial court as

to why confrontation is not desirable or is not practical. Therefore, we are unable to assess whether producing the witness would have presented significant difficulty. Although the State argued that the child was only four years old, the trial court did not attempt to make an inquiry as to whether the child would be competent to testify. The trial court may well have been justified in not requiring the child to testify, but on this record we are unable to make that determination.

Furthermore, the State has not shown any particular reliability as to Deason's testimony. As noted in *Bell*, police reports are significantly less reliable evidence of whether the allegations of criminal conduct they contain are true. *Bell* at 643. We think the same can be said for hearsay testimony given by a police officer that is uncorroborated and unsubstantiated. We do not mean to impugn Officer Deason's integrity or to suggest that his testimony should be excluded or that it is insufficient to support a revocation; we are merely saying that in order to use this type of hearsay testimony the trial court must make a finding of good cause for not allowing confrontation and the State must put on some evidence that gives the statement the indicia of reliability.

We are not persuaded by the State's argument. The right to confront witnesses applies only to witnesses who testify; it does not compel the State to produce every possible witness. *Lockett* v. *State*, 271 Ark. 860, 611 S.W.2d 500 (1981). In this case, Lockett had made a confession that was used against him in his revocation proceeding. There were several witnesses to the confession who testified, but Lockett's argument was that he was denied his right to confront *all* of the witnesses to the confession. In stating that the right only applies to witnesses who testify, the Arkansas Supreme Court was distinguishing between a revocation hearing and a *Denno* hearing in which the State must show that the confession was given voluntarily.

Although we concur with the State's assertion that the rules of evidence do not apply in revocation proceedings, *Lockett, supra*, we do not believe that this rule is meant to deny a probationer his due process right to confront witnesses. In the case cited to us by the State, the right to confrontation either was not argued on appeal, *Felix* v. *State*, 20 Ark. App. 44, 723 S.W.2d

839 (1987), or was not preserved by an appropriate objection to the trial court. *Fitzpatrick* v. *State*, 7 Ark. App. 246, 647 S.W.2d 480 (1983). In the case at bar the issue was properly preserved.

We reverse and remand for a further proceeding consistent with this opinion.

Reversed and remanded.

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

Daryl (Darrell) HODGES *v.* STATE of Arkansas

CA CR 88-182 767 S.W.2d 541

Court of Appeals of Arkansas
Division I
Opinion delivered April 12, 1989

Wilson, Bell & Neal Law Office, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant, Daryl (Darrell) Hodges, was convicted by a St. Francis County jury of delivery of a controlled substance in violation of Ark. Stat. Ann. § 82-2617 (Supp. 1985) [now codified as Ark. Code Ann. § 5-64-401 (1987)]. On appeal, it is argued by counsel, who was not counsel at the trial, that the trial court erred in refusing to grant appellant a new trial on the grounds that the state's use of its peremptory jury challenges violated his constitutional rights and because of the ineffective assistance of trial counsel.

Ivan Whitfield, a Pine Bluff police officer, testified at trial that in June 1987, while helping the Arkansas state police investigate the drug trade in and around Forrest City, Arkansas, he purchased two packages of cocaine from the appellant for $25.00 each. According to Whitfield, this occurred at a night club called the Players Palace on the north side of Forrest City. Appellant's defense was mistaken identity. He claimed he had been mistaken for one of his brothers, possibly Ronnie, or another brother, Theo, who had signed the club's register the night of the alleged purchase. Appellant denied that he sold the cocaine to Officer Whitfield, and testified that he was never in the Players Club during the summer of 1987.

The jury that found appellant guilty was composed of ten white people and two blacks. However, because the prosecution used five of its six peremptory challenges to eliminate either three or four blacks from the jury, the appellant contends his constitutional rights were violated. At the hearing on the motion for new trial, appellant's trial attorney admitted that he did not object to the prosecution striking the blacks, even though appellant was black and the proportion of blacks on the jury was not comparable to the nearly 50% black population of the county.

In *Ward* v. *State*, 293 Ark. 88, 733 S.W.2d 728 (1987), the Arkansas Supreme Court discussed and followed *Batson* v. *Kentucky*, 476 U.S. 79 (1986), in which the United States Supreme Court held that a defendant could make a prima facie case of racial discrimination in jury selection by showing that the

totality of the relevant facts gives rise to an inference of discriminatory purpose; or by showing there has been a total or seriously disproportionate exclusion of members of the racial group from the jury venires; or by showing a "pattern" of strikes against members of the group; or by the prosecutor's questions or statements during voir dire examination. See summary in *Ward*, 293 Ark. at 92-93. The opinion in *Ward* said: "This does not mean black people cannot be struck from a jury. It means that if a defendant makes a prima facie case of intentional discrimination, the state must offer some explanation other than race." Merely denying a discriminatory motive or affirming good faith is not enough; the prosecutor must "articulate a neutral explanation related to the particular case to be tried." The trial judge must then conduct a "sensitive inquiry" into the direct and circumstantial evidence available to decide if the state has made an adequate explanation. *Ward*, 293 Ark. at 92-93.

Although the jury in *Ward* did not contain a black juror and there were two black jurors in the present case, the appellant contends that *Batson* "requires the total elimination of racial consideration in the selection of the jury process." See *Batson* where the Court quotes from a prior opinion that "total or seriously disproportionate exclusion of Negroes from jury venires is itself such an 'unequal application of the law . . . as to show intentional discrimination.' " 476 U.S. at 93.

So, in the present case, appellant argues that the striking of the three or four potential black jurors would raise the presumption of racial exclusion which would have required the prosecutor to make "a neutral explanation" related to the case and the court to make a "sensitive inquiry" into the prosecution's reasons for excluding those jurors. However, no objection was made by appellant's trial counsel, and no inquiry was made by the judge.

Appellant recognizes that this same situation was presented in *Hicks* v. *State*, 143 Ark. 158, 220 S.W. 308 (1920) where the court held the claim that no member of the defendant's race served, or was summoned to serve, on the jury was made too late when it was first raised in a motion for new trial. *See also Tillman* v. *State*, 121 Ark. 322, 181 S.W. 890 (1915); and *Eastling* v. *State*, 69 Ark. 189, 62 S.W. 584 (1901). But present counsel for appellant "offers for consideration of the [appellate] Court, that

the requirement of *Batson* places a burden upon the [trial] Court to make a sensitive inquiry for the protection of the Appellant's constitutional rights to a fair and impartial jury regardless of inaptitude of counsel below." Counsel urges that, if the prosecution eliminates more than one black from the jury, the trial court should inquire, *sua sponte*, about the prosecution's motives and make a sincere and reasoned effort to evaluate the genuineness and sufficiency of its explanation in the light of all the circumstances of the trial.

It has long been the rule in this state that an argument for reversal will not be considered on appeal in the absence of an appropriate objection in the trial court. *Fretwell* v. *State*, 289 Ark. 91, 708 S.W.2d 630 (1986); *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980). A defendant must object to perceived error at the first opportunity. *Young* v. *State*, 283 Ark. 435, 678 S.W.2d 329 (1984); *Earl* v. *State*, 272 Ark. 5, 612 S.W.2d 98 (1981). Moreover, we are not persuaded that the rule should be abandoned. The state's brief has called our attention to the case of *People* v. *Ortega*, 156 Cal. App. 3d 63, 202 Cal. Rptr. 657 (1984), where the court considered whether an objection, made in the form of a motion for mistrial on the grounds that the prosecution had systematically excluded all Hispanics from the jury, was untimely when not made until after the jury was sworn. The court stated five reasons for requiring an objection to be made during the jury selection process:

> First, an early objection will facilitate the moving party's counsel in making the best possible prima facie case. Second, an early objection will place the opposing party on notice so that counsel may consider whether and on what basis to continue using peremptories against cognizable group members and to prepare to make the best explanation feasible. Third, an early objection will alert the court so that it can intelligently rule on the questions of prima facie case and, if one is found, explanations. In other words, this procedure will insure that the court will pay close attention to the questions asked of and answered by the jurors and other matters bearing on the use of peremptory challenges. . . .
>
> Fourth, this procedure will promote the efficient and

> economic administration of justice by permitting the court, if it finds discrimination in the use of peremptory challenges, to dismiss the existing jury panel and obtain a new panel without having to wait until the selection process has been completed.
>
> Finally, this procedure will help the courts and parties achieve the most fair and correct result, both below and on appeal.

202 Cal. Rptr. at 661. We agree with this reasoning and also point out that it has been stated numerous times by our supreme court that Arkansas does not subscribe to the doctrine of plain error. *See Fretwell* v. *State*, and *Wicks* v. *State, supra.* And even error of constitutional dimension may be waived. *Collins* v. *State*, 271 Ark. 825, 828, 611 S.W.2d 182 (1981). We also agree with another reason stated in the brief filed for the state—that allowing defendants to raise an objection for the first time in a motion for new trial would give them "license to 'lie behind the log' waiting to see if they obtain an adverse verdict before complaining about the jury selection process." In *Dumond* v. *State*, 290 Ark. 595, 721 S.W.2d 663 (1986), the court said, "The defendant cannot wait to see the full strength of the state's case before bringing his request to the attention of the trial court." *See also Mosby* v. *State*, 249 Ark. 17, 457 S.W.2d 836 (1970), and *Underdown* v. *State*, 220 Ark. 834, 250 S.W.2d 131 (1952), which held that irregularities affecting the selection or summoning of a jury panel may constitute ground for a new trial only if timely objection is made prior to the verdict. Thus, we decline to allow the issue of the racial composition of the jury to be raised in this case on appeal without a proper objection below.

[redacted] Appellant also argues that it was error for the trial court to refuse to grant him a new trial on his claim of ineffective assistance of counsel. He contends trial counsel's failure to object to the prosecution's use of its peremptory challenges to eliminate three or four blacks from the jury panel is ample demonstration of trial counsel's incompetence. We do not agree. Trial counsel testified at the hearing on the motion for new trial that he was going to strike two of these people anyway. He said he had no problems with the racial makeup of the jury and was more concerned about the number of women on the jury than whether

the members of the jury were black or white. Second guessing an attorney's trial strategy is not sufficient to show the ineffective assistance of counsel necessary to obtain a new trial on this point. *Hicks* v. *State*, 289 Ark. 83, 709 S.W.2d 87 (1986). The defendant must show that trial counsel's performance was so deficient and the errors made so serious that the sixth amendment to the United States Constitution has been violated and that the defendant has been deprived of a fair trial; to show denial of fair trial, prejudice must be shown—that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *Hicks, supra.* We cannot say that appellant was denied a fair trial.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

Linda TILLER *v.* SEARS, ROEBUCK & COMPANY, Self-Insured Employer

CA 88-353 767 S.W.2d 544

Court of Appeals of Arkansas
Division I
Opinion delivered April 12, 1989

Kenneth E. Buckner, P.A., for appellant.

Mays and Crutcher, P.A., by: *Arkie Byrd* and *Richard L. Mays*, for appellee.

JUDITH ROGERS, Judge. The appellant, Linda Tiller, appeals the finding of the Workers' Compensation Commission that she was entitled to permanent partial disability benefits in an amount equal to fifty percent of the body as a whole. She argues that there was no substantial evidence to support the decision that she was not permanently and totally disabled. We disagree and

affirm.

Appellant suffered a compensable injury to her back in December 1982, while working for the appellee. On January 13, 1985, appellant fainted at work and fell to the restroom floor, reinjuring her shoulder, neck and back. In a hearing on August 21, 1985, the administrative law judge found that the 1985 accident was an idiopathic fall and was not related to the compensable injury of 1982. The full Commission affirmed. This Court disagreed and remanded this case for determination of the compensation to which the appellant is entitled as a result of both the 1982 and 1985 falls. *Tiller* v. *Sears, Roebuck & Company*, CA86-335 (Ark. Ct. App. July 15, 1987).

On remand, the administrative law judge found that appellant was temporarily and totally disabled from January 13, 1985, through January 27, 1986, as a result of the 1985 fall. The administrative law judge also found that as a result of both falls appellant is "permanently and totally disabled from performing gainful employment."

The duty of the Workers' Compensation Commission is to make a finding in accord with the preponderance of the evidence and not on whether there is any substantial evidence to support the findings of the administrative law judge. *Jones* v. *Scheduled Skyways, Inc.*, 1 Ark. App. 44, 612 S.W.2d 333 (1981). In the instant case, the Commission reversed the findings of the administrative law judge. The Commission found that the appellant's healing period ended on April 9, 1985, and that appellant was not permanently and totally disabled. The Commission found that appellant is entitled to permanent partial disability in an amount equal to fifty percent of the body as a whole.

Appellant argues on appeal that there is no substantial evidence to support the Commission's decision that appellant is "anything less than totally disabled." On review, in workers' compensation cases, we view the evidence in the light most favorable to the findings of the Commission. We do not reverse unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the same conclusion reached by the Commission. *Appleby* v. *Belden Corp.*, 22 Ark. App. 243, 738 S.W.2d 807 (1987).

The Commission found that appellant failed to prove by a preponderance of the credible evidence that she is permanently and totally disabled. Appellant testified that she continues to experience problems with her neck, right shoulder and back, and that she has difficulty sitting or standing for long periods of time. The Commission noted that appellant further stated that she is able to sit for twenty-five to thirty-five minutes and stand for thirty to thirty-five minutes. Appellant also related that she is able to drive a car. She stated that the medication she is taking eases her pain at times so that she can rest, but "the pain is always there." Appellant stated that she is unable to return to work.

In its opinion, the Commission stated that appellant's testimony regarding her inability to work is not consistent with the physicians' findings and opinions. The Commission noted that appellant was assigned an anatomical impairment rating equal to fifteen percent to the body as a whole as a result of her compensable injuries. In his report of January 27, 1986, Dr. Larry G. Lipscomb stated that appellant may return to work with certain restrictions:

> She may return to work but will need to avoid repetitive bending. She can work in an area between mid thigh and breast level and try to work no more than 18 inches from her body. Lifting should not exceed 25 lbs in this region. There should be no repetitive bending. She may stoop to pick up objects no greater than 10 times per hour.

[redacted] Many factors, not just medical evidence are to be considered in a determination of wage loss disability. Consideration should be given to the claimant's age, education, experience and other matters affecting wage loss, including the degree of pain he endures as a result of the compensable injury. *Arkansas Wood Products* v. *Atchley*, 21 Ark. App. 138, 729 S.W.2d 428 (1987). The Commission noted that appellant was a forty-six year old woman with a high school education. Her work experience included working as a cashier, using an adding machine, taking payments for accounts and working up deposits.

[redacted] The Commission cited *City of Fayetteville* v. *Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984). The Commission noted that appellant had shown no motivation to return to work and had not attempted to do so, and went on to state that it may lawfully

consider the claimant's lack of interest in future employment in assessing wage loss disability. A closer reading of that case, and the case of *Oller* v. *Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982), that it relies upon, reveals that where a claimant's lack of interest in employment is an impediment to the Commission's full assessment of the claimant's loss of earning power, the claimant cannot complain.

The Commission found that the evidence was insufficient to support an award of permanent and total disability. The Commission then found that after considering the various wage loss factors that appellant had suffered a wage loss disability in an amount equal to thirty-five percent of the body as a whole and had an anatomical impairment rating of fifteen percent. Therefore, the Commission found that appellant was entitled to permanent partial disability benefits in an amount equal to fifty percent of the body as a whole.

The Commission's specialization and experience make it better equipped than we are to analyze and translate evidence into findings of fact. *Second Injury Fund* v. *Robison*, 22 Ark. App. 157, 737 S.W.2d 162 (1987). We cannot state upon review of the evidence that there was no substantial evidence to support the Commission's decision.

AFFIRMED.

CRACRAFT and MAYFIELD, JJ., agree.

Bobby THOMPSON *v.* STATE of Arkansas

CA CR 88-221 768 S.W.2d 39

Court of Appeals of Arkansas
Division I
Opinion delivered April 19, 1989

William R. Simpson, Jr., Public Defender, and *Bret Qualls*, Deputy Public Defender, by: *Judy Rudd*, Deputy Public Defender, for appellant.

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

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Pulaski County Circuit Court, Fourth Division. Appellant, Bobby Thompson, appeals his conviction of criminal attempt to commit theft by deception, a violation of Arkansas Code Annotated Section 5-3-201 (1987), and the sentence imposed therefor. We affirm.

A felony information was filed December 26, 1986, alleging that on July 1, 1986, appellant purposely engaged in conduct that constituted a substantial step in a course of conduct intended to culminate in the commission of the offense of theft of property by

deception. The information was amended on September 25, 1987, to allege that appellant was an habitual offender, having previously been convicted of four or more felonies. Appellant was tried by a jury on June 6, 1988, and convicted as charged. In a bifurcated proceeding, appellant was sentenced to a term of twenty years in the Arkansas Department of Correction, as an habitual offender. From the judgment of conviction comes this appeal.

In his only point for reversal, appellant argues that he was denied his constitutional right to be free of double jeopardy. Appellant contends that the state's charge of attempt to commit theft of property by deception placed him in double jeopardy for a crime to which he pled guilty in federal court. We disagree.

Appellant was indicted in federal court on February 17, 1987. The indictment alleged that between January 26, 1986, and January 8, 1987, appellant knowingly and with intent to defraud used unauthorized access devices (credit cards) to obtain property valued in excess of $1,000.00 in interstate commerce, a violation of 18 U.S.C.A. Section 1029(a)(2) (Supp. 1989). The indictment listed, as the credit cards obtained and used, Chevron/Gulf, Sears Roebuck and Company, Radio Shack, Shuster's Home Furnishings, Texaco, and Exxon. Appellant pled guilty to the charge on March 30, 1987. In connection with the federal charge, the record reveals that appellant, Bobby *Gene* Thompson, received in the mail a credit application addressed to Bobby *Joe* Thompson and bearing Bobby Joe Thompson's social security number. The mailing essentially stated that Mr. Thompson had a good credit rating and that a credit card could be obtained by completing and signing the application. Appellant completed the application and received the credit card. The other cards were apparently received in the same manner. The cards were then used by appellant to obtain goods and services from the credit card issuers.

The state charge was initiated after appellant completed a lease application for a vehicle at Walt Bennett Ford and it was discovered that appellant allegedly used Bobby Joe Thompson's social security number and employment record on the application, and supplied, as credit references, credit cards and/or charge accounts which he obtained without authorization. One of

the four credit card accounts listed on the lease application was involved in the federal offense.

Prior to trial, appellant moved to have the state charge dismissed as a violation of his right to be free from double jeopardy. The motion was denied and a trial on the merits followed. Appellant admitted having used Mr. Thompson's social security number and employment record when completing the application. Thus, the only question before us is whether this conduct constituted the same offense as the federal offense to which he pled guilty.

Appellant urges us to employ the test of *Blockburger* v. *United States*, 284 U.S. 299 (1932), to determine if he was twice put in jeopardy for the same offense. *Blockburger* held that two offenses are not the same if each requires proof of a statutory element that the other does not. *See also* Ark. Code Ann. § 5-1-114(1)(A) (1987). However, such a comparison is not necessary in the case at bar. Had appellant been convicted in state court for attempted theft of property by deception from the credit card issuers, we would have a different case before us and such a comparison would be necessary.

The conduct for which the federal offense was prosecuted was the unauthorized use of credit cards to obtain goods and services, with the intent to defraud the issuing companies. Although the federal indictment alleged that the conduct occurred over a period of approximately one year, during which time the state offense was committed, there was uncontradicted evidence that Walt Bennett Ford was not one of the companies involved in the federal prosecution. The victims there involved were those companies from which appellant purchased goods and services valued at over $1,000.00, using the fraudulently obtained credit cards.

The state charge was directed specifically to appellant's conduct in attempting to defraud Walt Bennett Ford, which not only involved one of the credit cards listed in the federal indictment, but also involved appellant's unauthorized use of Mr. Thompson's social security number and employment record. Appellant has not been convicted twice of defrauding the credit card companies. Although appellant defrauded Walt Bennett by posing as Mr. Thompson during the same period he used Mr.

Thompson's credit cards without authorization, there were different victims and thus separate offenses. *See Madewell* v. *State*, 290 Ark. 580, 720 S.W.2d 913 (1986); *Smith* v. *State*, 283 Ark. 264, 675 S.W.2d 627 (1984); *Swaite* v. *State*, 272 Ark. 128, 612 S.W.2d 307 (1981). We find no error in the trial court's denial of appellant's motion to dismiss based upon former jeopardy.

Affirmed.

CRACRAFT and COOPER, JJ., agree.

Michael Lyn WAELTZ *v.* ARKANSAS DEPARTMENT OF HUMAN SERVICES

CA 88-252 768 S.W.2d 41

Court of Appeals of Arkansas
Division I
Opinion delivered April 19, 1989

Richard S. Hardwicke, for appellant.

Dianne C. Boyd, Ass't Gen. Counsel, Office of Gen. Counsel, Arkansas Dept. of Human Services, for appellee.

GEORGE K. CRACRAFT, Judge. Michael Lyn Waeltz appeals from an order of the probate court terminating his parental rights and ties to his three children, and appointing the Arkansas Department of Human Services as guardian of their persons and estates with authority to consent to their adoption. The natural mother of the children entered her consent to such an order and is not involved in this appeal. We find no error and affirm.

At the hearing, the Arkansas Department of Human Services presented evidence of continued physical and sexual abuse of the children by their father, for which they had been removed from his custody and placed in foster care on at least two occasions. According to the two minor daughters, age ten and nine respectively, the appellant had been sexually abusing them for some period of time. There was evidence from a foster parent that when the children were placed with her they were filthy and that one of the children had head lice and impetigo "from the top of her head to her ankles." She stated that it was apparent that their teeth had not been cared for and that they required extensive dental care. Appellant testified in his own behalf and admitted that he was presently serving time in the Arkansas Department of Correction for the sexual abuse of his children. There was evidence of constant care and counselling by the Department of Human Services and proof that all of the jurisdictional requirements for the entry of an order terminating parental rights and appointment of guardian with right to consent had been complied with prior to filing of the petition. The probate judge found that those facts warranting a termination of appellant's parental rights had been proved by evidence that was more than clear and convincing.

Appellant first contends that the trial court erred in not striking the testimony of the nine-year-old child because she was not sworn before she gave her testimony. Without objection by the appellant as to the competence of this witness or an assertion that she had not been duly sworn, the child was permitted to testify to various acts of physical and sexual abuse to which she had been subjected by her father. At the conclusion of her direct examination, appellant moved to strike her testimony because "I

don't believe there was ever any indication she was under oath or under the impression that she should tell the truth until after all her testimony was finished." Although the record recites that before the witness testified she was first "duly sworn according to law," the trial judge further inquired as to her qualifications as a witness, her ability to know the difference between truths and falsity, and her moral obligation to tell the truth. She answered a number of questions, convincing him that she did know the difference between the truth and a lie, and was aware of her moral obligation to tell the truth. The judge asked her whether she understood that it was very important that she tell only the truth and whether she promised that everything she had said had been the "honest to goodness truth." The witness nodded her head affirmatively in response to both questions.

In its ruling, the court stated:

> I want the record to reflect in the case of each of these minor witnesses the Court determined after hearing their testimony and watching these children, the manner in which they testified, their reactions at various points, that the administering the oath or requiring them to take the oath was not necessary. The combination of what they said in response to the questions about truth and lies, as well as the manner in which they testified and their demeanor, I concluded the administration of the oath was not necessary or that they be formally qualified *in the sense that we ordinarily qualify witnesses.*

(Emphasis added.) We conclude that there was no error.

In *Hudson* v. *State*, 207 Ark. 18, 179 S.W.2d 165 (1944), the court, on facts peculiarly similar to those here present, stated that no prescribed form of oath is essential if the witness, with knowledge of the consequences of false testimony, understands and assents to the proposition that the testimony she gives will not be false. No particular words must be used, and any language "fairly susceptible of being construed as an acceptation of the Court's authority, coupled with an understanding of the moral aspect" should not be treated with less dignity than the "familiar words of intonation of an administering officer whose principal purpose is to see that a record is 'regular.' " *Id.* at 27, 179 S.W.2d at 170.

Here, the testimony of the child correctly stated facts concerning herself, her family, and their relationships. She had clear recollection of prior events and correctly stated the school that she attended and the names of her teachers for the past two years. We find nothing that would indicate that she did not have the ability to receive or retain accurate impressions. She demonstrated that she did have a capacity to transmit a reasonable statement of the times, places, and forms of sexual abuse to which she had been subjected by the appellant. She established that she understood her moral obligation to tell the truth and that she would be punished if she did not do so. She also affirmed to the trial judge that all of her prior testimony had been true. Moreover, on cross-examination thereafter, she reaffirmed all of her prior testimony concerning the sexual abuse. Even if we were to conclude that the recital in the record that the child was in fact sworn before testifying was incorrect, we could not conclude that the trial court's denial of the motion to strike on these grounds was erroneous.

At the trial, a representative of Suspected Child Abuse and Neglect (SCAN), who interviewed the children in 1983 and again at the time they were removed from the appellant's home immediately prior to this hearing, testified that at the time she first saw the children she was investigating bruises on one child alleged to have been caused by physical abuse. She testified that at that time appellant admitted to her that he had caused the bruises on the child by spanking her. The worker introduced four photographs which showed substantial bruising on the child's face, chest, buttocks, and legs. Although the appellant testified at this hearing that he did not cause the bruises, the SCAN worker testified that he admitted it to her at the time. Due to the extent of the bruising shown in those pictures the child was placed in foster care.

The determination of the relevance of evidence is within the sound discretion of the trial court, and that determination will not be reversed in the absence of an abuse thereof. *Hallman* v. *State*, 288 Ark. 448, 706 S.W.2d 381 (1986). Here, we cannot agree that either this testimony or the photographs were too remote in time. There was evidence that the pictures were true and accurate representations of the condition of the child at that time; that the children were placed in foster care for a

period of time as a result of that action; and that after they were returned from foster care on that occasion the abuse continued. In making a decision of whether to terminate the parental rights of a party, the trial court had a duty to look at the entire picture of how that parent discharged his duties as a parent, the substantial risk of serious harm the parent imposed, and whether or not the parent was unfit. Nor can we conclude from our examination of the photographs that they were merely inflammatory. Rather, they simply showed the extent of injury to the child's body. They were relevant to both the fitness of appellant as a parent and the risk of serious harm imposed by him. We find no abuse of discretion in the admission of this evidence.

During the interrogation of the foster mother of one of the children, she stated that the child was a bed wetter. She also stated that a physician had told her that there was no physical reason why he should not stop wetting the bed with the medication that he was taking. Appellant objected, contending that it was improper hearsay and gave rise to an inference that psychological problems had caused the bed wetting. The foster parent made no other statement or comment at that time which would give rise to any implication that the child was suffering from psychological problems caused by the appellant's actions. In other testimony, however, the foster mother of the other children was permitted to testify, without objection, that she had taken the children to a doctor to find out about their bed wetting and that "he told me it was psychological." We agree with the appellee that it is not reasonable to argue that the case should be reversed simply because hearsay testimony that might imply psychological problems was admitted in one instance where there was no objection to similar testimony in which it was directly stated that a psychological problem did exist.

For the same reason, we find no error in the court's admission of testimony that the son told a foster parent that appellant had sexually abused his children and that his stepmother had "pulled [appellant] off one of the little girls." This testimony was elicited from one of the last witnesses presented by the appellee. The record is replete with testimony of social workers who, prior to that time and without objection, were permitted to relate in detail statements of the children as to the sexual and physical abuse by their father. The hearsay statement

about which appellant now complains was merely cumulative of prior statements already in the record without objection.

Affirmed.

MAYFIELD and ROGERS, JJ., agree.

George M. ANGLIN and Tammy R. Anglin
v. CHRYSLER CREDIT CORPORATION

CA 88-374 768 S.W.2d 44

Court of Appeals of Arkansas
Division I
Opinion delivered April 19, 1989

Swindell & Bradley, by: *Benny E. Swindell*, for appellant.

Faber D. Jenkins, for appellee.

JAMES R. COOPER, Judge. The appellants, Tammy Anglin and George Anglin, appeal from an order of the circuit court of Johnson County granting a deficiency judgment against them of $2,832.93 plus interest and court costs. The appellants contend

that, because the notice of the sale that was sent to them did not adhere to the provisions of the Uniform Commercial Code, the appellee was not entitled to a deficiency judgment. We find no error and affirm.

In 1984, the appellants purchased a pickup truck from Casey Motor Company, Inc., by a retail installment contract which was later assigned to the appellee, Chrysler Credit Corporation. After the appellants defaulted on their payments, the truck was repossessed by the appellee. Notice that the truck would be sold by a private sale beginning August 25, 1986, was sent to and received by the appellants. The notice erroneously specified that the truck would be sold by the dealer, Casey Motor Company, but at the time the notice was sent, Casey Motor Company was no longer in business and the truck was sold by the appellee.

Kent Bradford, employee of the appellee, testified that, at the time the notice was sent, Casey Motor Company had ceased operation and the appellee was the only party who could sell the repossessed truck. He stated that the appellee was not accustomed to the dealer not being in business and mistakenly checked the box on the notice form which indicated the dealer would sell the vehicle. Bradford also testified that four bids were taken for the truck and it was sold to the highest bidder for $2,200.00. After applying the sale proceeds to the balance owed, there remained a deficiency of $2,832.93.

Appellant George Anglin testified that, after receiving notice of the sale, he went to Casey Motor Company to talk to them about the truck but discovered they were no longer in business. He admitted that he did not attempt to contact the person who sent the notice or take any other action to contact someone regarding the vehicle.

The appellants do not contend that they did not receive notice. They argue the notice they received was inadequate because it stated the truck would be sold by the dealer, Casey Motor Company. They rely on *First State Bank of Morrilton* v. *Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987), for the proposition that, when a creditor repossesses collateral without sending the debtors the proper notice as required by the Uniform Commercial Code, the creditor is not entitled to a deficiency judgment.

We do not agree that the notice in the case at bar failed to meet the requirements of the Uniform Commercial Code. That section of the Code is codified at Ark. Code Ann. Section 4-9-504(3) (1987), which provides in part:

> Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale.

Here, the notice stated that the truck would be sold at private sale and the time after which the sale would take place. The notice was sent by the secured party, the appellee, as required by this section, and bore the appellee's address, phone number, and the name and signature of its customer services supervisor. While the Code requires that, when disposition is to be made by public sale, notice of the place of the sale must be given to the debtors, no such requirement exists for disposition by private sale. In their treatise, *Uniform Commercial Code*, James White and Robert Summers note that:

> [N]otice of a public sale must contain different information from that announcing an intent to sell privately. In the latter case, the notice need only state "the time after which" the collateral is to be sold; in the case of a public sale, it must state "the time and place" at which the sale will occur.

J. White & R. Summers, *Uniform Commercial Code*, Section 26-10, at 1113 (2d ed. 1980). The distinction between private sale and public sale was also recognized by the Arkansas Supreme Court in *Barker* v. *Horn*, 245 Ark. 315, 316, 432 S.W.2d 21, 22 (1968), where the court stated that, although the statute requires notice of the time and place of public sale, only reasonable notification of the time after which a private sale will be made is required.

"When the code provisions have delineated the guidelines and procedures governing statutorily created liability, then

those requirements must be consistently adhered to when that liability is determined." *First Nat'l Bank* v. *Hess*, 23 Ark. App. 129, 134, 743 S.W.2d 825, 827 (1988) (quoting *First State Bank* v. *Hallett*, 291 Ark. at 41, 722 S.W.2d at 557). There is no evidence here that the appellee did not adhere to the notice requirements of the Uniform Commercial Code. The appellant's argument is therefore without merit, and we affirm.

Affirmed.

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

Paul David MOLLENHOUR *v.* The STATE FIRST NATIONAL BANK of Texarkana

CA 88-309 769 S.W.2d 28

Court of Appeals of Arkansas
Division II
Opinion delivered April 19, 1989

Matt Keil, for appellant.

Smith, Stroud, McClerkin, Dunn & Nutter, by: *Winford L. Dunn, Jr.*, for appellee.

JAMES R. COOPER, Judge. This appeal follows the entry of a judgment for the appellee, State First National Bank of Texarkana, against the appellant, Paul David Mollenhour, on a promissory note and two revolving credit notes. On appeal, the appellant argues that the chancellor erred in holding him individually liable on the two revolving credit notes. We affirm.

In 1983, M. J. Rogers and the appellant agreed to go into business together. Rogers apparently sought Mollenhour's involvement in the business, Arkansas Parts and Equipment Company, Inc., so that Mollenhour could obtain financing for the business from the appellee. A substantial portion of the financing provided by the appellee to Arkansas Parts and Equipment was evidenced by the two revolving credit notes dated April 1, 1986, in the amount of $33,000.00, and February 19, 1986, in the amount of $150,000.00. The April 1, 1986, note was signed as follows:

ARKANSAS PARTS & EQUIPMENT CO., INC.

by: /s/ Mike Rogers
Mike Rogers, President

by: /s/ Mike Rogers
Mike Rogers, Individually

by: /s/ Dave Mollenhour V. Pres.
Dave Mollenhour, Vice President & Secretary

/s/ Dave Mollenhour V. Pres.
Dave Mollenhour, Individually

The signature on the February 19, 1986, note appeared as

follows:

/s/ Mike Rogers
Mike Rogers, Individually

/s/ Dave Mollenhour V. Pres.
Dave Mollenhour, Individually

ARKANSAS PARTS &
EQUIPMENT CO., INC.

by: /s/ Mike Rogers Pres. President
Mike Rogers,

by: /s/ Dave Mollenhour V. Pres.
Dave Mollenhour, Vice President
& Secretary

Both notes stated that the signing parties were obligated "jointly and severally" to the appellee. The notes were not fully repaid, and the appellee sued Arkansas Parts and Equipment, Rogers, and the appellant for the balance due, alleging that Rogers and the appellant cosigned and guaranteed the notes. The appellee sought judgment against Arkansas Parts and Equipment, Rogers, and the appellant, jointly and severally. In his original answer, the appellant admitted that he had cosigned and guaranteed the notes, but he affirmatively stated that he was fraudulently induced to execute the instruments by the appellee. The appellant did not deny that he was individually liable on the notes, nor did he assert that he had signed the notes only in a representative capacity as vice president of Arkansas Parts and Equipment. The appellant filed a counterclaim alleging that he was fraudulently induced into executing the notes. He later filed an amended answer, but again he did not raise the issue of individual capacity.

At trial, the appellant attempted to raise the issue of lack of individual capacity in the execution of the notes through the testimony of the appellee's witness, John Dalby, assistant vice president and commercial loan officer of the appellee, and through the testimony of Mike Rogers and Nell Nassoy. Each time the appellant sought to introduce evidence through these witnesses regarding his intent to sign the notes only in a representative capacity, the appellee objected, and the chancellor sustained the objection. The appellant made a proffer of evidence through the testimony of Mike Rogers. The substance of the proffer was that the appellant informed him, prior to the execution of the notes, that he did not intend to sign them in an

individual capacity. The appellant also made a proffer of evidence through Nell Nassoy to the same effect.

The appellant, over the appellee's objection, testified in a proffer of evidence that he only signed the notes in his capacity as vice president and that he did not intend to sign them in an individual capacity. The chancellor, however, continued to rule that the evidence regarding the appellant's capacity in executing the notes was inadmissible. The chancellor later reversed his ruling with respect to the appellant's testimony regarding his signatures, and allowed the presentation of further testimony on the issue. At that time, the appellee offered into evidence a portion of the appellant's deposition, dated May 2, 1987, in which he was asked whether it was his understanding that he was personally responsible for each of the loans. He responded that he "assumed they would probably be." The appellee also introduced the bank's loan renewal documents maintained by the bank regarding the loans, which indicated that the notes were signed by the appellant in his corporate and individual capacities.

On June 2, 1988, the chancellor entered judgment for the appellee against Arkansas Parts and Equipment and the appellant for $33,000.00 and $150,000.00, plus attorney's fees and costs, and denied the appellant's counterclaim. In the judgment, the chancellor found that the appellant signed the notes in his corporate and individual capacities and that his designations of his corporate capacity, which he placed after his signatures on the individual signature lines, were merely descriptive designations or terms, because he had already signed in his corporate capacity on the appropriate lines. The chancellor also found that the appellant, having failed to affirmatively deny his individual liability by pleadings, conduct, or testimony, was estopped from denying his individual liability. From those decisions comes this appeal.

For his first point on appeal, the appellant argues that the chancellor erred in holding him individually liable on the two revolving credit notes; for his second point, he argues that the chancellor erred in holding that he failed to raise the issue of lack of individual liability. Because the view we take of the case makes it unnecessary to reach the second point, and because we do not find the chancellor's decision on the first point to be clearly

erroneous or against the preponderance of the evidence, we affirm the judgment.

As to the second point raised on appeal, it is true that, until trial, the appellant did not raise his defense of lack of individual capacity in the execution of the notes. As noted earlier, the chancellor first denied the appellant's attempts to present evidence on this issue at several points throughout the trial. Later in the trial, however, the chancellor reversed his ruling excluding the proffered testimony and allowed the appellant to introduce additional evidence on this issue. It does not appear that any of the appellant's proffered evidence was excluded from the record. It is, therefore, arguable that the chancellor considered, at least at trial, that the pleadings had been amended to conform to the proof on this issue. *See Mercer* v. *Nelson*, 293 Ark. 430, 738 S.W.2d 417 (1987); *Miller* v. *Jasinski*, 17 Ark. App. 131, 705 S.W.2d 442 (1986); *Hegg* v. *Dickens*, 270 Ark. 641, 606 S.W.2d 106 (Ark. App. 1980); Ark. R. Civ. P. 15(b). The confusion arises from the holding in the judgment that the appellant was estopped from denying his individual liability. We cannot tell whether the chancellor, after trial, reversed his ruling concerning the originally excluded evidence and did not consider it, or whether, even if he considered it, he found, on all the evidence, that the appellant was individually liable. Accordingly, we have reviewed the record *de novo*, and we have considered all of the evidence proffered by the appellant, including that originally excluded by the chancellor. Even when all of the appellant's proffered evidence is considered, however, we hold that the chancellor's decision on the merits was correct.

Turning to the merits, the appellant argues that the chancellor erred in holding him individually liable on the notes because, he asserts, under Ark. Code Ann. Section 4-3-403 (1987), adding the term "V. Pres." after his signature on the line for his individual signature on the notes, established that he only signed the notes in his representative capacity. We do not agree.

In *Cleveland Chemical Co. of Arkansas, Inc.* v. *Keller*, 19 Ark. App. 7, 716 S.W.2d 204 (1986), an action was brought against the appellee based on a guaranty signed by the appellee to secure a corporate line of credit. The lower court dismissed the appellant's complaint, finding that the appellee had signed the

guaranty only in a corporate capacity and not individually. There, Keller, the primary shareholder and president of Keller Chemical Company, signed a guaranty as follows: "KELLER CHEM. CO., BY: M. G. Keller." 19 Ark. App. at 8, 716 S.W.2d at 205. We reversed on the basis of Ark. Stat. Ann. Section 85-3-403(2)(b) (Add. 1961) because there was no evidence, other than Keller's own statement, that he intended to sign the guaranty in a representative capacity. We stated:

> Additionally, the definition of a guaranty would indicate appellee signed in an individual capacity. A guaranty is a collateral undertaking by one person to answer for payment of a debt of *another* and the undertaking of the principal debtor is independent of the promise of the guarantor. *First American National Bank* v. *Coffey-Clifton, Inc.*, 276 Ark. 250, 633 S.W.2d 704 (1982). If the appellee had signed in a corporate capacity, appellant would have had the guaranty of the corporation to pay its own debt for which it was already obligated; if such were the case, there would have been no need for the guaranty, nor would it have met the standard definition of a guaranty.

19 Ark. App. at 8-9, 716 S.W.2d at 205.

In the case at bar, the facts are distinguishable from those in *Keller*, and they are not specifically addressed by the code section. Section 4-3-403(2)(b) does not control a situation where a debtor's clearly representative signature is supplemented by an additional signature designated "individually" by the lender but onto which the debtor has added his corporate title. Here, the appellant signed his name after the name of the company, in his corporate capacity, and he also signed on an additional line designated for his individual signature. On the line designated for his individual signature, he added the title "V. Pres." The appellant argues that, because under Ark. Code Ann. Section 4-3-118 (1987), handwritten terms control typewritten and printed terms, the word "individually" is not controlling. We disagree.

As in *Keller*, it is different to understand why the appellee would have loaned the money to Arkansas Parts and Equipment only after the appellant was brought into the business as an additional investor if it was not intended that he be individually

liable for the notes. Further, if it was not intended that the appellant be personally liable, there was no reason for the appellee bank to require his signature in two places on each note, once in a corporate capacity and once in an individual capacity.

We believe the case *Bank of Corning* v. *Nimnich*, 122 Ark. 316, 183 S.W. 756 (1916), is particularly helpful. In that case, the appellant bank sued the appellees, Joseph Nimnich and Earnest Hartwig, directors of Farmers Union Gin & Warehouse Company, for the balance due on a promissory note which provided:

> $5,000.00 Corning, Ark., Sept. 27th, 1911.
>
> Six months after date for value received, we promise to pay to the order of the Bank of Corning, Corning, Ark., Five Thousand Dollars.
>
> With interest at ten per cent per annum from date until paid. The makers and endorsers of this note hereby severally waive presentment and payment, notice of non-payment, protest, and consent that time of payment may be extended without notice thereof.
>
> Payable at Bank of Corning, Corning, Ark.
>
> Farmers Union Gin & W.H. Co.,
> Per Henry Brown, Sec. & Treas.
> Henry Brown, Director.
> W. T. Griffith, Director.
> Earnest Hartwig, Director.
> Porter Larkins, Director.
> G. A. Hoffman, Director.
> J. T. Montgomery, Director.
> H. D. Chappell, Director.
> Joseph Nimnich, Director.

122 Ark. at 317-18, 183 S.W. at 757. The appellees Nimnich and Hartwig answered and denied that they had executed the note individually, and the chancellor agreed. The supreme court reversed on appeal and found that:

> (1) . . . [T]he rule is established by what appears to us to be the weight of authority that where the name of the corporation itself is signed and followed by the names of

officers, giving their official title, indicating that they are signing in their official capacity for the purpose of attesting the signature of the corporation, the instrument constitutes the obligation of the corporation alone. [citations omitted]

(2) Instruments of that kind are held to be the promise of the corporation and the signatures of the officers to be official and not individual. The authorities are, as before stated, not harmonious on this subject, and appellant cites on its brief, cases which hold to the contrary. The real question in the present case is whether or not the established rule is applicable to the instrument involved in this controversy. An inspection of the instrument, as it appears in the records, shows that the name of the corporation was attested by Henry Brown, the secretary and treasurer. The additional signature of Henry Brown follows his signature as secretary and treasurer, and after it is written the word "director," and all of the other names are followed by the same word. We do not think that it can be said from the face of the instrument that those who signed as directors did so for the purpose of officially attesting the signature of the corporation, which had already been attested by the secretary and treasurer. The form of the signatures evidences an intention to add something more than a mere certification of the corporate name, and the addition of the word "director" is merely descriptive of the person who signed.

122 Ark. 318-19, 183 S.W.2d at 757.

In the case at bar, based on the wording and structure of the notes, we agree with the chancellor in his finding that the appellant's additions of the handwritten title "V. Pres." after his signatures on the lines designated "individually" were merely descriptive.

In addition to the language of the notes, the other evidence introduced at trial supports the chancellor's finding that the appellant signed his name to both notes in corporate and individual capacities. *See United Fasteners, Inc.* v. *First State Bank*, 286 Ark. 202, 691 S.W.2d 126 (1985). First, it is clear from the evidence presented that the bank would not loan the money to Arkansas Parts and Equipment or to M. J. Rogers

without the appellant's individual signature. Second, after the company defaulted on the notes, the appellant and Rogers unsuccessfully offered to pay out the indebtedness individually. Third, the bank's renewal documents clearly indicate that the loans were made on the basis of the appellant's individual and corporate signatures. Finally, in his deposition, the appellant admitted that he had considered himself individually liable on the notes. Because the chancellor's finding, that the appellant signed the notes in both his individual and corporate capacities, is neither clearly erroneous nor against the preponderance of the evidence, we affirm the judgment.

Affirmed.

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

Ron BUCKMAN d/b/a Buckman Construction Company and Tim Terry *v.* Chuck GAY and Patti Gay

CA 88-303 768 S.W.2d 547

Court of Appeals of Arkansas
Division I
Opinion delivered April 26, 1989

Curtis E. Hogue, for appellant.

Matthews, Campbell & Rhoads, P.A., by: *Edwin N. McClure*, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Benton County Chancery Court, First Division. Appellants, Ron Buckman d/b/a Buckman Construction Company (hereinafter Buckman) and Tim Terry, appeal from an order releasing their lien against property owned by appellees, Chuck and Patti Gay. We affirm.

Appellees filed a petition on October 20, 1987, seeking to have appellants' laborer's lien removed as a cloud upon their title to certain property located in Benton County, Arkansas. The petition alleged, among other things, that the lien was improper because it was filed outside the 120-day time limit prescribed by Arkansas Code Annotated Section 18-44-117 (1987). The matter was heard by the chancellor on March 28, 1988. The chancellor found, by order dated April 6, 1988, that appellants failed to meet their burden of proof that the lien was filed within 120 days from the date of the last work of labor done, and

therefore released the lien as a cloud against title to property owned by the appellees. From that order comes this appeal.

For reversal, appellants argue that the trial court's finding that there was no work performed by appellants within 120 days of their filing a mechanic's lien is against the preponderance of the evidence. We disagree.

Arkansas Code Annotated Section 18-44-101(a) (1987) provides in pertinent part:

> Every mechanic, builder, artisan, workman, laborer, or other person who shall do or perform any work to or upon . . . any building [or] erection, . . . under or by virtue of any contract with the owner, . . . upon complying with the provisions of this subchapter, shall have, for his work or labor done, . . . a lien upon the building [or] erection . . . and upon the land belonging to the owner . . . on which they are situated . . . .

The issue before the chancellor was whether there was "work or labor done" by appellants on April 23, 1987. If work or labor was done on that date the lien was valid; if not, the lien was filed 121 days after work or labor was done and was thus invalid. The chancellor found that no labor was performed on April 23, 1987 because no improvements to appellees' property were made. Although chancery cases are tried *de novo*, we will not set aside the chancellor's findings of fact unless clearly erroneous or clearly against the preponderance of the evidence. *Cuzick* v. *Lesly*, 16 Ark. App. 237, 700 S.W.2d 63 (1985).

Appellees contracted with appellant Buckman to erect a garage and addition to their home. Appellant Terry was job superintendent and had no separate contract with appellees. William Thompson was employed by appellants to do carpentry work on appellees' property. The contract between the parties was terminated by appellees on the evening of April 23, 1987, and Thompson was subsequently hired by appellees independently.

Mr. Thompson testified that he was on the job site April 23, 1987 but performed no labor. He stated that he needed additional material and a radial arm saw and was told by appellant Buckman to remain at the site until the articles arrived. He also stated that appellant Terry came to the site to look at the broken

saw and told him he would get another one or talk to appellant Buckman about it. Thompson testified that he was on the site for approximately nine hours but that the necessary articles never arrived and that he received no pay for that date because he never performed any labor.

Appellant Buckman disputed that Thompson had not been paid and introduced into evidence a time sheet which was signed by Thompson on April 23, 1987, but reflected no dates on which the work was performed. Buckman further testified that he saw Thompson working on April 23, but was unable to specifically state what work was done.

Conflicts in the testimony are to be resolved by the trier of fact and we defer to the chancellor's superior position to evaluate the credibility of the witnesses. *McCraw* v. *State*, 24 Ark. App. 48, 748 S.W.2d 36 (1988). It is clear from his order that the chancellor believed Thompson's testimony that no physical labor or improvements were performed on April 23, 1987, and we cannot say that the chancellor was clearly erroneous in that regard.

Appellants argue, however, that even if the chancellor was correct in finding that no actual physical labor was performed on that date, mental labor was performed and should be included within the definition of "work or labor done." In support of their argument, appellants state that the job supervisor, appellant Terry, went to the site on April 23, 1987, and that although Thompson did no manual labor, he worked toward completion of the contract by his presence and his mental efforts.

There is little question that physical presence on a job site without more does not fall within the definition of "work or labor done." We do not attempt to define what more is required to constitute work or labor, but merely hold that on the facts and circumstances of this case, the chancellor did not err in finding that the actions of the parties involved did not constitute work or labor done.

The record reflects that appellant Terry was at the site for only a short period of time and was unable to make any measurable contribution toward completion of contract. Likewise, the record does not reflect any mental efforts by Thompson

contributing to completion of the contract. In fact, the record reflects that the only discussion of the work in process occurred between Thompson and appellee and was actually in derogation of the contract between appellants and appellees. The discussion resulted in appellees' firing of appellants and hiring Thompson to complete the improvements independent of appellants. Under these facts, we agree with the chancellor that no work or labor was performed sufficient to support the lien.

Affirmed.

CRACRAFT and COOPER, JJ., agree.

Wali MUHAMMED *v.* STATE of Arkansas

CA CR 88-203 769 S.W.2d 33

Court of Appeals of Arkansas
Division I
Opinion delivered April 26, 1989
[Rehearing denied May 24, 1989.*]

*Rogers, J., not participating.

[redacted]

[redacted]

John Wesley Hall, Jr., for appellant.

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

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Pulaski County Circuit Court, Fifth Division. Appellant, Wali Muhammed, appeals his conviction of theft of property by deception valued over $2,500.00, a violation of Arkansas Code Annotated Section 5-36-103 (Supp. 1987), and the sentence imposed therefor. We affirm.

Appellant was charged by information filed August 3, 1987, with multiple offenses; however, this appeal concerns only appellant's conviction on the count of theft by deception. With regard to that offense, the information alleged that appellant, with the purpose of depriving the true owner of its property, knowingly obtained the property of Allstate Insurance Company by deception, such property having a value of in excess of $2,500.00. Appellant was tried by a jury and found guilty as charged and sentenced to five years imprisonment. From the judgment, this appeal arises.

For reversal, appellant raises the following three points: (1) The trial court erred in refusing to grant defendant's motion for mistrial because of the judge's comment and conduct toward defense counsel during voir dire; (2) the trial court erred in permitting the state to excuse black veniremen from the jury panel without being required to show a sufficient racially neutral basis, thereby denying appellant the equal protection of laws and a fair trial; and (3) the evidence is insufficient to support the verdict on the charge of theft by deception.

Where the sufficiency of the evidence is challenged on appeal of a criminal conviction, the appellate court is required to review the sufficiency of the evidence prior to considerations of trial errors. *McCraw* v. *State*, 24 Ark. App. 48, 748 S.W.2d 36 (1988). This court considers the evidence in the light most favorable to the appellee and if there is substantial evidence to support the jury's finding of guilt, we must affirm. *Harris* v. *State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985). Circumstantial evidence can present questions to be resolved by the trier of fact and be the basis to support a conviction. *Yandell* v. *State*, 262 Ark. 195, 555 S.W.2d 561 (1977). The fact that evidence is circumstantial does not render it insubstantial. *Shipley* v. *State*, 25 Ark. App. 262, 757 S.W.2d 178 (1988). Viewed in the light most favorable to appellee, the evidence reflects that prior to the

incident in question, a conflict existed between appellant and another individual over ownership of a 1975 Mercedes Benz automobile which involved pending civil litigation. The car was reported stolen in November of 1985 and appellant, as insured, filed a claim for the stolen vehicle with the insurance company insuring the car. Pursuant to appellant's claim, the insurance company initiated an investigation and spoke with appellant on several occasions. In February of 1986, the insurance company paid appellant $7,120.00 on the loss and appellant subsequently signed a release relinquishing all rights to the car, if found. In April of 1987, the car was found in the back yard of appellant's brother's home. Collectively, the testimony of appellant's brother and sister-in-law revealed that they did not see who parked the car in their back yard; however, they testified that appellant asked for and received permission to park the car there. Additionally, they testified that they were not sure exactly how long the car was parked in their yard prior to its discovery but it had been there possibly for months. The car was not driven or moved while in this location.

Appellant's testimony revealed that he used the insurance proceeds he received in February of 1986 from the theft of the Mercedes to purchase a 1986 Cadillac. He also testified that he became aware of the location of the Mercedes Benz in December of 1986 and arranged through his attorney for its delivery to his brother's yard because he did not have space to store it at his home. Although appellant testified that he wrote a letter in December of 1986 notifying the insurance company of the car's location and produced a copy of such a letter at trial, the insurance company's representative testified that no such information was received by the company concerning the car's location. Furthermore, the letter was not in the insurance company's file produced in court. Thus, conflicting evidence was before the jury; however, decisions regarding the credibility of the witnesses are for the trier of fact, in this instance the jury, and the jury was not required to believe the explanation given by appellant, who was the person most interested in the outcome of the trial. *Core* v. *State*, 265 Ark. 409, 578 S.W.2d 581 (1979). Furthermore, 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. *Sparks* v. *State*, 25 Ark. App. 190, 756 S.W.2d 911 (1988).

Appellant argues that the above facts are insufficient to support his conviction and that the jury engaged in surmise and conjecture in finding him guilty of theft of property by deception. A person commits this crime if he knowingly obtains the property of another person, by deception or threat, with the purpose of depriving the owner thereof. Ark. Code Ann. § 5-36-103 (Supp. 1987). The jury was instructed that the definition of deception is the failure to correct a false impression that the defendant knew to be false and that he created or reinforced. *See* Ark. Code Ann. § 5-36-101(3)(A)(iii) (Supp. 1987). The evidence revealed that appellant collected the insurance money for the Mercedes he reported stolen and relinquished all rights to the automobile at that time. Notwithstanding the above facts, appellant later found the car and arranged for it to be taken to his brother's back yard where he allowed it to remain for four or five months until the police discovered its location. The jury could have concluded from the circumstances that appellant knowingly obtained the property of another by failing to correct a false impression that he knew to be false and that he created or reinforced. Viewing all evidence in the light most favorable to appellee, we find substantial evidence from which the jury could have reached its conclusion without resorting to speculation and conjecture.

Secondly, appellant argues the trial court erred in refusing to grant his motion for a mistrial because of the judge's comment and conduct toward defense counsel during voir dire. After the state exercised two of its peremptory challenges to remove black veniremen, appellant's counsel made an objection at the bench to the state's use of the challenges. *Batson* v. *Kentucky*, 476 U.S. 79 (1986). The state gave its reasons for striking these two veniremen and pointed out that one black juror was in the panel. An exchange between the court and defense counsel then occurred at the bench regarding the objection which culminated with the court telling counsel to "stand down" and ordering him to counsel table. Voir dire continued and final jurors, including an alternate, were chosen. During this time several other conversations were had between the court and defense counsel regarding completion of the record on issues in the case. After the jury was selected, the court allowed defense counsel to complete his record with regard

to the *Batson* peremptory challenge issues. Appellant then moved for a mistrial based on the court's tone of voice denoting displeasure toward defense counsel at the initial bench conference indicating to the jury that counsel had been disrespectful. Also, it was contended that the court's remarks could be heard throughout the courtroom. Thereafter, without waiving his motion, counsel requested that the court specifically admonish the jury that remarks of the court to the defense attorney which they may have overheard were not to be held against defendant or defense counsel. The court allowed evidence on the matter in chambers and defense counsel called a bystander who testified that he could not hear all of the conversation in question but he heard the judge say "sit down"; however, he was unsure that the court was directing the remark to only one attorney. The defendant was also called and stated that he heard the remarks by the court.

In the interest of a fair trial, the court granted defense counsel's request and asked for a show of hands from the jurors regarding any remarks they may have heard him address to defense counsel during either bench conference. Five jurors responded affirmatively and the court explained to them that defense counsel's credibility was not in issue and inquired if they felt prejudiced toward defendant or counsel after overhearing the remark. The court generally explained his role and that of the attorneys in the voir dire process, as well as the role of the jurors in the trial. The court then questioned each juror who raised their hand individually in chambers. The jurors related to the judge what they heard and their impressions. Each generally related that they heard the remark by the court telling defense counsel to sit down but each stated he or she was not prejudiced by the remark and stated it would not affect their decision in the case. Defense counsel's renewed motion for mistrial was denied at that time by the court. Thereafter, in open court, the judge clarified another remark overheard by one of the jurors and admonished the jury.

The granting of a mistrial is a drastic remedy and should be resorted to only when justice cannot be served by continuing with the trial and when no other method exists by which the prejudice may be removed. *Avery* v. *State*, 15 Ark. App. 134, 690 S.W.2d 732 (1985). The trial judge is vested with

considerable discretion in acting on motions for mistrial because of his superior position to determine the possibility of prejudice. *Drew* v. *State*, 8 Ark. App. 120, 648 S.W.2d 836 (1983). The judge's exercise of that discretion will not be reversed absent manifest abuse. *Id.*

Here, appellant contends that his right to a fair trial was prejudiced by the remarks of the trial court to defense counsel. We disagree. After issue was taken with the remarks, the court diligently worked with defense counsel in allowing him to complete his record on the *Batson* issue. Additionally, the court complied with all of defense counsel's requests for admonitions and explanations, and held lengthy discussions to clarify the matter. The court granted appellant's request to question jurors both collectively and individually regarding the remarks made at the bench conference. The court denied appellant's motion after satisfying himself that no prejudice resulted from his remarks. We agree with appellant's contention under *West* v. *State*, 255 Ark. 668, 501 S.W.2d 771 (1973) that the trial judge has the ability to influence the jury, and remarks by the trial judge may tend to prejudice a litigant; therefore, the judge should preside with impartiality and be cautious in his language. However, we also note that trial judges by necessity are granted great power and discretion to preserve the order of their courtrooms and have at their command an arsenal of sanctions to see that the rules are followed, including admonishment of the attorney at the bench or before the jury. *Maulding* v. *State*, 296 Ark. 328, 757 S.W.2d 916 (1988). In any event, even if it could be argued that appellant suffered some prejudice from the trial judge's remark, reversal is not warranted in light of the convincing evidence of guilt and the judge's total compliance with the numerous requests of defense counsel, including admonitions to the jury. We will not reverse for errors which do not affect the essential fairness of a trial. *Id.* A defendant is entitled to a fair trial, not a perfect one. *Scherrer* v. *State*, 294 Ark. 227, 742 S.W.2d 877 (1988). On the record before us, we cannot say the trial judge abused his discretion in denying appellant's motion.

Lastly, we address appellant's contention that the court erred in permitting the state to excuse black veniremen from the jury panel without requiring the state to show a sufficient racially neutral basis, thereby denying appellant equal protection of the

law and a fair trial.

This court recently stated the pertinent law with regard to this issue in *Hodges* v. *State*, 27 Ark. App. 154, 767 S.W.2d 541 (1989) as follows:

> In *Ward* v. *State*, 293 Ark. 88, 733 S.W.2d 728 (1987), the Arkansas Supreme Court discussed and followed *Batson* v. *Kentucky*, 476 U.S. 79 (1986), in which the United States Supreme Court held that a defendant could make a prima facie case of racial discrimination in jury selection by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose; or by showing there has been a total or seriously disproportionate exclusion of members of the racial group from the jury venires; or by showing a "pattern" of strikes against members of the group; or by the prosecutor's questions or statements during voir dire examination. See summary in *Ward*, 293 Ark. at 92-93. The opinion in *Ward* said: "This does not mean black people cannot be struck from a jury. It means that if a defendant makes a prima facie case of intentional discrimination, the state must offer some explanation other than race." Merely denying a discriminatory motive or affirming good faith is not enough; the prosecutor must "articulate a neutral explanation related to the particular case to be tried." The trial judge must then conduct a "sensitive inquiry" into the direct and circumstantial evidence available to decide if the state has made an adequate explanation. *Ward*, 293 Ark. at 92-93.

Kidd v. State, 24 Ark. App. 55, 748 S.W.2d 38 (1988), relies on *Batson* and generally establishes that the trial court has a duty to determine whether the state has rebutted the defendant's prima facie case of purposeful discrimination and that such a finding is a question of fact turning largely on evaluation of credibility.

In the present case, the jury that found appellant guilty was composed of eleven white people and one black person. However, because the state used peremptory challenges to excuse two of the three black veniremen from the jury and appellant is black, appellant contends his constitutional rights were violated. The parties disagree as to whether appellant made out a prima facie

case of purposeful discrimination as required by *Batson.* We do not agree that appellant made a prima facie case of purposeful discrimination; however, for purposes of this appeal, we will address the issue as if a prima facie case were made.

In response to the defendant's *Batson* challenge, the court asked for a response from the state. The state responded with the following explanation regarding the basis upon which it utilized its peremptory challenges:

> In order to protect the record for the State, in all due respect to the Supreme Court opnion [sic], and the State contends that it should be reconsidered. Secondly, that the Defense has not shown any pattern and practice of disparate treatment by the State or this particular Prosecutor. Third, I would note that we did strike a white juror, also we have left a black juror on this panel. Also, in reference to things that are work product with the State, we do keep notes from past trials. And Ms. York sat on a trial before that resulted in a not guilty verdict. And I talked about this matter with co-counsel and in our discretion, we struck her because of that. As to Mr. Guy Phillips, he did state that he knew Mr. Muhammed. He thought he did from school. Neither party went any further with that. But I think that's within my discretion there.

Here, the trial judge was obviously convinced that the state gave racially neutral explanations and that it did not intentionally use its peremptory challenges to keep black people from the jury. The court required the state to explain why it excluded the two black veniremen and its determination that the challenges were made for racially neutral reasons was a permissible finding under *Batson.* Further, the evidence reveals that there was a black person on the panel, the state utilized a peremptory challenge to exclude a white person from the jury, the state had strikes remaining, and there is no indication of discrimination in the record. Therefore, deferring to the trial court's presence during voir dire and its superior position to judge the credibility of the prosecutor's statements, we conclude that appellant's argument is without merit.

Affirmed.

CRACRAFT and COOPER, JJ., agree.

Gerald LEE and Lora Lee *v.* STATE of Arkansas

CA CR 88-156 770 S.W.2d 148

Court of Appeals of Arkansas
Division I
Opinion delivered April 26, 1989

[redacted]

John Wesley Hall, Jr., and *Craig Lambert*, for appellant.

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

GEORGE K. CRACRAFT, Judge. By an information filed in Randolph County, Arkansas, appellants Gerald and Lora Lee were charged with the crimes of delivery of a controlled substance and conspiring with one William Smith to engage in a continuing series of offenses of delivery of controlled substances. The jury returned a verdict finding Gerald Lee guilty of both charges. It found Lora Lee guilty of conspiracy but not guilty of delivery. On appeal, the parties advance several points for reversal, which we will discuss separately. We find sufficient merit to warrant reversal in appellant Gerald Lee's contention that the evidence is insufficient to sustain his conviction of *delivery* of a controlled substance, but in all other respects we affirm the jury's verdict.

It was the State's theory of the case that Gerald Lee and William Smith entered into a conspiracy under which it was agreed that Lee would furnish controlled substances to Smith who would in turn sell the contraband and divide the proceeds with Lee. The State further contended that Lora Lee was either an original conspirator or later joined and participated in that conspiracy. The case was submitted to the jury on the theory that

the conspiracy contemplated that the parties would commit a continuing series of offenses, and that on at least one occasion appellants delivered a controlled substance to Smith in Randolph County.

William Smith testified that in March of 1987 he was contacted for the purpose of selling controlled substances for Gerald Lee, and that he thereafter agreed with Lee that Lee would furnish the contraband, Smith would sell it, and the proceeds would be divided. In furtherance of the conspiracy, he had sold over $30,000.00 worth of contraband delivered to him by Lee, and had divided the proceeds with the Lees. Smith stated that each time he delivered proceeds he was furnished with more contraband for sale on the same basis. According to Smith, the contraband was delivered to him by both Gerald and Lora Lee at different times and places. He had delivered the money to Gerald and Lora on some occasions, to Gerald alone on some, and to Lora alone on others. Both Lora and Gerald Lee had brought contraband to his home in Jackson County and, on at least two occasions, deliveries to Smith took place in appellants' home in Randolph County, where appellants kept a supply of contraband in a freezer.

Smith also testified to various specific incidents demonstrating the conspiracy and Gerald Lee's participation therein. Most material aspects of that testimony were corroborated by a number of witnesses.

Vivian Smith testified that her husband had sold "dope" for Lee on a large scale and obtained deliveries of it from both of the Lees in various places. She stated that the deliveries were made in Randolph County on at least two occasions in exchange for the proceeds of previous sales. She also testified that the supply of contraband was kept in a freezer in the Lees' home in Randolph County. Although she admitted going along with her husband on several trips, she denied any participation in the conspiracy.

I. DELIVERY

Appellant Gerald Lee first contends that his conviction for delivery of a controlled substance cannot be sustained because the evidence against him consisted solely of uncorroborated accomplice testimony. We agree.

Arkansas Code Annotated § 16-89-111(e)(1) (1987) (formerly Ark. Stat. Ann. § 43-2116 (Repl. 1977)) provides that a conviction cannot be had in the case of a felony on the testimony of accomplices unless that testimony is corroborated by other evidence tending to connect the defendant with the commission of the offense. It requires more than testimony sufficient to show that the offense was committed. Evidence corroborating the testimony of an accomplice must tend to connect the accused with the crime and must be independent of the evidence given by the accomplice. Such corroborating evidence may be circumstantial so long as it is substantial, but need not be of such a substantial character as to support a conviction without the testimony of the accomplice. *Bly* v. *State*, 267 Ark. 613, 593 S.W.2d 450 (1980).

Although the trial court denied appellant's motion for a directed verdict on this ground, it instructed the jury that William and Vivian Smith were accomplices to the crime of delivery as a matter of law, and that appellant could not be convicted of delivery unless their testimony relating to the delivery in Randolph County was corroborated. However, there was no evidence to corroborate the testimony of William and Vivian Smith that the alleged delivery in Randolph County ever took place, much less any tending to connect Gerald Lee to it. Other than that of the Smiths, the only evidence of any delivery came from persons who testified that they saw a delivery by Lee in the Smith home, which was affirmatively shown to be in Jackson County, and a delivery to Smith in Craighead County. Neither of these deliveries, however, was the one for which appellant was tried and convicted. Accordingly, appellant Gerald Lee's conviction for delivery of a controlled substance must be reversed and dismissed.

While we are not in agreement with the trial court's statement that one who buys a controlled substance is an accomplice of a person who sells or delivers it as a matter of law,[1] no objection was made to the instruction when given and the State

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[1] *See Sweatt* v. *State*, 251 Ark. 650, 473 S.W.2d 913 (1971); *Barnes* v. *State*, 15 Ark. App. 153, 691 S.W.2d 178 (1985); and *Brizendine* v. *State*, 4 Ark. App. 19, 627 S.W.2d 26 (1982), which hold that one who accepts delivery of a controlled substance is not an accomplice of the deliverer.

does not argue on appeal that it was incorrect.

II. CONSPIRACY

Arkansas Code Annotated § 5-3-401 (1987) (formerly Ark. Stat. Ann. § 41-707 (Repl. 1976)) provides:

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

Under this section, the State is required to prove both that there has been an agreement of the parties to commit the crimes and that one of the conspirators did at least a minimal act in furtherance of that agreement. *See Guinn* v. *State*, 23 Ark. App. 5, 740 S.W.2d 148 (1987). Due to the very nature of a criminal conspiracy, the prosecution is seldom able to present direct evidence of the criminal agreement. It is, therefore, not necessary that a conspiracy to commit an unlawful act be shown by direct evidence. It may be proved by circumstances and the inferences drawn from the course of conduct of the alleged conspirators. *Griffin* v. *State*, 248 Ark. 1223, 455 S.W.2d 882 (1970); *Shamlin* v. *State*, 23 Ark. App. 39, 743 S.W.2d 1 (1988).

The conspiracy may be inferred, even though no actual meeting among the parties is proved, if it be shown that two or more persons pursued by their acts the same unlawful object, each doing a part so that their acts that were apparently independent were in fact connected. *Griffin* v. *State*, *supra*. Where the combination of persons to do an unlawful act is shown, each of them is liable for the acts of the others acting in furtherance of the plan where it terminates in a criminal result. *Caton* v. *State*, 252 Ark. 420, 479 S.W.2d 537 (1972).

A.

Both appellants contend that their convictions for conspiracy cannot be sustained because the evidence of William and Vivian Smith was not sufficiently corroborated. However, appellants do not argue at this juncture (and appellant Gerald Lee never does) that the corroborating testimony was not sufficient to establish the crime and their connection to it. They argue only that there was no corroboration that any overt act in furtherance of the conspiracy was committed in Randolph County. This argument must fail.

Accomplice evidence of overt acts occurring within the county is not required to be corroborated. The corroboration required by § 16-89-111(e)(1) relates to the material facts that go to "the identity of the defendant in connection with the crime." *Gardner* v. *State*, 263 Ark. 739, 749, 569 S.W.2d 74, 79 (1978). The statute is directed toward proof of the criminal offense and not to venue or jurisdictional facts, for which corroboration is not required. *Id.*

Moreover, although a person accused of criminal conduct is entitled to a jury trial in the county where the offense was committed, the State is not required to offer *any* proof that the offense was committed in the county of prosecution unless the evidence affirmatively shows that it was not. Ark. Code. Ann. § 5-1-111(b) (1987) (formerly Ark. Stat. Ann. § 41-110(2) (Repl. 1977)). Lack of proof that proper venue is in the county of prosecution is not the equivalent of an "affirmative showing." *Gardner* v. *State, supra; Johnson* v. *State*, 254 Ark. 703, 495 S.W.2d 845 (1973); *Baggett* v. *State*, 15 Ark. App. 113, 690 S.W.2d 362 (1985). Under Ark. Code Ann. § 5-3-407 (1987) (formerly Ark. Stat. Ann. § 41-712 (Repl. 1977)), proper venue for a conspiracy prosecution is any county where an overt act in furtherance of the conspiracy is alleged to have occurred. Here, not only was there no affirmative showing that no overt act was committed in Randolph County, but the Smiths testified that appellants did commit overt acts there.

B.

Appellant Gerald Lee further contends that his conviction for conspiracy was contrary to the provisions of Ark. Code. Ann. §

5-1-110(a)(2) (1987) (formerly Ark. Stat. Ann. § 41-105(1)(b) (Repl. 1977)), because he could not be convicted of both conspiracy and the underlying substantive offense of delivery of a controlled substance. On the facts of this case, this argument must fail for at least two reasons.

In the first place, we conclude that the issue is moot. Appellant Gerald Lee no longer stands convicted for delivery of a controlled substance, as we have in this opinion reversed and dismissed that conviction on other grounds.

However, in any event, § 5-1-110 does not prohibit convictions for both offenses in this case. That section provides that, when the same conduct of a defendant may establish the commission of more than one offense, he may be prosecuted for all of the offenses but convicted of only one if one offense consists *only* of a conspiracy, solicitation, or an attempt to commit the other. The commentary to that section (found after Ark. Stat. Ann. § 41-105 (Repl. 1977)), which we find persuasive, states that the word "only" used in § 5-1-110(a)(2) refers to those conspiracies in which the consummated offense was the sole object of the conspiracy. It has no application to a conspiracy to commit a continuing series of offenses. The commentary states as an example: "[T]he person who agrees with others to engage in the continuing sale and distribution of drugs may be convicted of both conspiracy and a completed drug sale." Here, the evidence showed that the conspiracy contemplated the commission of a series of criminal acts, not merely the single transaction. There was testimony that, pursuant to the conspiracy, offenses involving at least $30,000.00 were committed in three or four counties over a period of time.

C.

Appellant Lora Lee contends that she could not be convicted of the crime of conspiracy because the only testimony connecting her with the conspiracy is that of William Smith and his wife, Vivian Smith, who she contends were "accomplices to the alleged conspiracy as a matter of law." We disagree.

Ordinarily, the question of whether a witness is an accomplice is a mixed question of fact and law and must be submitted to the jury where the evidence is in dispute. *Woodward*

v. *State*, 16 Ark. App. 18, 696 S.W.2d 759 (1985); *Shrader* v. *State*, 13 Ark. App. 17, 678 S.W.2d 777 (1984). Here, the jury was properly instructed on and had submitted to it the factual issue of whether or not various other witnesses were accomplices to the conspiracy. However, Vivian Smith's name was not included, nor requested to be included, in that instruction, and appellant requested neither a directed verdict on that issue nor an instruction naming Vivian Smith as an accomplice as a matter of law. Appellant contented herself by requesting a directed verdict on the "whole evidence." If she had desired an instruction or directed verdict on that issue, it was her duty to request it, and, failing to do so, she waived the issue of Vivian Smith's accomplice status and is in no position now to complain on this basis. *Trotter* v. *State*, 215 Ark. 121, 219 S.W.2d 636 (1949); *Morris* v. *State*, 197 Ark. 778, 126 S.W.2d 93 (1939).

In any event, although the evidence of William Smith establishes that he was a co-conspirator and accomplice to the alleged conspiracy as a matter of law, that of Vivian Smith stands in an entirely different posture. In view of her assertion that she did not participate in the selling of the drugs or the conspiracy, but merely accompanied her husband, the issue of whether she was an accomplice constituted at most a question of fact. On the evidence presented, the jury could have found that Vivian Smith was not an accomplice and that her testimony need not be corroborated. She testified to facts from which the jury could infer that appellant Lora Lee had been a participant in the conspiracy. Therefore, the testimony of Vivian Smith, standing alone, was sufficient to support the verdict as to appellant Lora Lee. It also served to fully corroborate William Smith's testimony.

III. ALLEGED TRIAL ERRORS

A.

Appellants called four character witnesses who gave both reputation and personal opinion evidence that appellants had good reputations in their community. The testimony was not restricted to appellants' reputations for truth and veracity but was directed at their reputations generally. On cross-examination, the State was permitted to ask these witnesses if they had heard that Gerald Lee had been convicted of burglary and theft

and had on other occasions threatened people's lives, once while holding a pistol to the person's head. The State also asked each of them if he had heard that Lora Lee had shot her husband five times. All but one of the witnesses testified that they were aware of all of those facts. The one remaining witness stated that he was aware of all but one of the facts. Appellants contend that this questioning was improper, irrelevant, and offered only for the purpose of inflaming the jury. We do not agree.

Rules 404(a)(1) and 405(a) of the Arkansas Rules of Evidence permit an accused to initiate evidence of his character or a pertinent character trait by reputation or opinion evidence. However, when he puts his character in evidence, inquiry into relevant, specific instances of conduct is allowable on cross-examination. Ark. R. Evid. 405(a). The purpose of cross-examination of a character witness is not to attack the character or credibility of the accused, but to ascertain the witness's awareness of things having a bearing on the reputation for which the witness has vouched. The only limitation this rule places on cross-examination is that the facts inquired into be relevant to the issue of character. If the witness has never heard that the accused has previously been convicted of a crime or engaged in violent misconduct, then the witness's credibility suffers. If he has heard or knows of such facts but disregards them in forming his opinion or testifying to one's reputation, that may legitimately go to the weight to be given the opinion or reputation evidence. *Reel* v. *State*, 288 Ark. 189, 702 S.W.2d 809 (1986). *See also* E. Cleary, *McCormick on Evidence* § 191, at 569 (3d ed. 1984).

The witnesses testified that the appellants' reputations in the community were good, and, in their opinions, those reputations were earned. The fact that appellant Gerald Lee had been convicted of burglary and theft would certainly be relevant to those witnesses' opinions and bases for knowledge of his reputation for truth and veracity. The fact that both appellants had been engaged in acts or threats of violence would be relevant to the witnesses' opinions and knowledge of appellants' reputations for being law-abiding citizens. We find no error.

Appellant Gerald Lee also contends, however, that the court should not have allowed the witnesses to be questioned about his conviction for burglary and theft because it was forty

years old and therefore irrelevant. We initially note that, when the questions concerning the conviction were asked and answered, appellant objected only on the grounds that the conviction was "more than ten years old." It was not until the close of the case that counsel for appellant asserted that the conviction was forty years old. While cross-examination of a witness about his own convictions that are more than ten years old is not allowed under Ark. R. Evid. 609, that rule has no application to the facts of this case. *See Reel* v. *State, supra.* This case is governed by Rule 405, which contains no such limitation but merely requires that the evidence be relevant. We cannot conclude that the character witnesses' knowledge of a conviction "more than ten years old" was irrelevant or that its probative value was substantially outweighed by the danger of unfair prejudice.

Furthermore, documentary evidence of that conviction was not introduced. The witnesses were simply asked if they knew that appellant had been previously convicted. Appellant has not pointed out to us what in the record reflects when the conviction was obtained, or any other basis for his assertion that it occurred more than forty years ago. The burden is on the appellant to bring up a record and abstract thereof sufficient to demonstrate that the trial court was in error. *Kitchen* v. *State*, 271 Ark. 1, 607 S.W.2d 345 (1980). We conclude that he has failed in that burden.

Nor do we find merit in appellants' contention that the questions were not asked in good faith. As stated in *McCormick, supra*, this provision for cross-examination "is replete with possibilities for prejudice" and might result in the asking of questions which have no foundation in fact but which implant in the minds of the jury that insinuation or innuendo is true. It further recites the practice in many courts to have an in-chambers determination that the questions have some basis in fact before they are asked. While that was not done here, appellants' argument is hardly applicable to this case, because all but one witness admitted that he was aware of all of those matters about which the inquiries were made, and this negated any basis for an argument that the inquiries were merely suggestive or based on insinuation or innuendo. While one witness testified that he was not aware of one act, it was stated by appellants' own counsel that the information about which the prosecutor inquired was con-

tained in the file. It therefore was not a product of the prosecutor's imagination.

B.

While testifying about the mechanics of the conspiracy, William Smith testified that Gerald Lee had delivered Dilaudid as well as methamphetamine to him. Appellants objected on the grounds that they were not charged with delivery of Dilaudid but only with delivery of methamphetamine. The trial court found the evidence irrelevant to the charges of delivery but relevant to the charges of conspiracy. At the request of counsel for appellants, the trial court instructed the jury that it could not consider the testimony as evidence of the delivery with which appellants were charged but only as evidence as to the conspiracy. Appellants now contend that the evidence of a delivery of Dilaudid constituted evidence of "other bad acts" in violation of Ark. R. Evid. 404(b) because they were charged with conspiracy to deliver *methamphetamine*. The view we take of the case makes it unnecessary for us to address this argument on its merits.

[redacted] This argument is based on the assumption that appellants were charged with conspiracy to deliver methamphetamine, not Dilaudid. However, a reading of the amended information shows this basic premise to be unfounded. Count One of the amended information charged appellants with conspiracy to deliver a "Schedule II controlled substance." Methamphetamine was never mentioned until the State, as required by Ark. Code Ann. § 16-89-112(b) (1987) (formerly Ark. Stat. Ann. § 43-2013 (Repl. 1977)), alleged overt acts done in furtherance of the conspiracy. Although that statute requires that a specific overt act be alleged in the information, *see Guinn* v. *State*, 23 Ark. App. 5, 740 S.W.2d 148 (1987), it also clearly states that "overt acts other than those alleged in the indictment may be given in evidence on the part of the prosecution." Here, both methamphetamine and Dilaudid (hydromorphone) are Schedule II controlled substances, and, therefore, proof that appellant Gerald Lee delivered Dilaudid to Smith pursuant to the conspiracy was properly admitted as direct evidence of the conspiracy with which appellants were charged. The delivery of Dilaudid was not "other crimes evidence" but evidence of an overt act, other than that alleged in the information, done in

furtherance of the conspiracy.

C.

During the trial, appellants objected to leading questions propounded by the State on nine occasions. Each objection was sustained, and, on the sole occasion that counsel requested that an answer be stricken, that request was granted. At no other time was there a request that an answer be stricken, that counsel be admonished with regard to leading questions, or that any other action be taken by the court. For the first time on appeal, appellants urge that the trial court's failure to impose sanctions *sua sponte*, by striking questions, refusing to allow counsel to reask, holding counsel in contempt, or declaring a mistrial, warrants reversal of the case. We disagree.

The trial court is vested with a wide latitude of discretion with regard to admission of leading questions, and its rulings will not be disturbed on appeal unless there has been an abuse of discretion. *Hamblin* v. *State*, 268 Ark. 497, 597 S.W.2d 589 (1980). We cannot agree with appellants' contention that the facts of this case are analogous to those presented in *Alexander* v. *Chapman*, 289 Ark. 238, 711 S.W.2d 765 (1986). There, a retrial was ordered because counsel repeatedly ignored the court's admonishments with regard to leading questions and the court refused to take any action on appellant's request that these prejudicial trial tactics be controlled. There were at least twenty-eight objections to questions which were framed in the form of statements of counsel and which in effect submitted his evidence to the jury rather than that of the witnesses. According to quotations from evidence contained in that opinion, there were many more leading questions asked by counsel to which no formal objection was interposed. The court constantly admonished counsel to cease the practice but to no avail. The appellant's motion that the court impose sanctions or strike the witnesses' testimony was refused, but the violations continued. The trial court conceded that it could not or would not take any action beyond the admonishment. The supreme court stated that it was presented with a unique situation in which the trial court was wholly unwilling or unable to control the improper conduct by counsel. The trial court was reversed for failing to take such action to correct this and other improper tactics of counsel, and

the matter was remanded for retrial.

Here, the leading questions did not rise to the prejudicial level of those in *Alexander*, and in most instances were not a substitution of counsel's statements for witnesses' evidence. At most, several were repetition of the witnesses' testimony or correction of it in minor details. Appellants' counsel was content with the rulings he asked for and obtained on those objections, and no requests for admonishment of counsel or any other sanctions were made. While we agree that a trial court has an obligation to control trial tactics that tend to substitute counsel's evidence for that of his witness and leave the jury with prejudicial impressions, we cannot conclude that the conduct of trial counsel or the questions asked here reached the prejudicial level found in *Alexander*, or that the trial court otherwise committed prejudicial error by not acting *sua sponte* under the circumstances of this case. See also *Ronning* v. *State*, 295 Ark. 228, 748 S.W.2d 633 (1988).

Appellant Gerald Lee's conviction for delivery of a controlled substance is reversed and dismissed. Appellants' convictions for conspiracy are affirmed.

MAYFIELD and ROGERS, JJ., agree.

Charles BROWN and Donna Bell Robertson, and Estate of Ross O. Brown *v.* Corbin Dale COLE and Peggy Cole

CA 88-311 768 S.W.2d 549

Court of Appeals of Arkansas
Division I
Opinion delivered April 26, 1989

Streett & Kennedy, by: *Alex G. Streett*, for appellants.

Robert E. Irwin, for appellees.

JAMES R. COOPER, Judge. This is an appeal from the chancery court of Pope County. The appellees filed suit against the appellants who are the heirs of Ross Brown. In their complaint they alleged that they had purchased forty acres with Ross Brown, now deceased, and that they had signed a quitclaim deed in favor of Ross Brown in order to secure financing to repair their home. The appellees testified that Ross Brown subsequently became ill, and that they entered into an agreement with Brown to care for him during his illness, and he agreed to extinguish the debt if they did so. The chancellor found the quitclaim deed to be a mortgage and that the indebtedness was satisfied in full. Title to the disputed 18-acre tract was quieted in the appellees. The appellants argue on appeal that the trial court erred in finding that the quitclaim deed was not an absolute conveyance because the evidence to establish that the deed constituted a mortgage was not clear, satisfactory and convincing. We affirm.

On appeal, chancery cases are reviewed *de novo*, but the chancellor's findings of fact and conclusions of law will not be reversed unless they are clearly erroneous. *McDonald* v. *McDonald*, 19 Ark. App. 75, 716 S.W.2d 788 (1986). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. *RAD-Razorback Ltd.* v. *Coney*, 289 Ark. 550, 713 S.W.2d 462 (1986). 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 wrong. *Akins* v. *First National Bank*, 25 Ark. App. 341, 345, 758 S.W.2d 14 (1988).

The presumption arises that a deed is what it purports to be and, to establish its character as a mortgage, the evidence must be clear, unequivocal, and convincing. *Ehrlich* v. *Castleberry*, 227 Ark. 426, 299 S.W.2d 38 (1957). If there is a debt existing and the conveyance was intended by the parties to secure its payment, equity will regard and treat an absolute deed as a mortgage. *Newport* v. *Chandler*, 206 Ark. 974, 178 S.W.2d 240 (1944). The party claiming that the deed is in fact a mortgage has the burden of proof, both to show that there was an indebtedness and that the deed was intended to secure the debt. *Id.* Since the

equity upon which the court acts arises from the real character of the transaction, any evidence, written or oral, tending to show the true facts is admissible. *Newport*, 206 Ark. at 979. In reviewing the decisions of chancery courts on questions of this nature, great weight should be given to the opinion of the trial court as the chancellor may be apprised of the existence of circumstances which but dimly appear to us from an examination of the record alone. *Ehrlich, supra; Ruth* v. *Lites*, 267 Ark. 752, 590 S.W. 2d 322 (1979).

The appellee, Peggy Cole, testified that in 1979 she, her husband, the appellee Corbin Cole, and Ross Brown purchased forty acres of land as tenants in common, with one half belonging to Ross Brown and the other half belonging to her and her husband. A warranty deed dated November 6, 1970, was introduced evidencing the transaction. According to Mrs. Cole, a mortgage in the amount of $7,900 was executed to secure financing for the purchase. Although she and her husband were listed as mortgagors in the mortgage, Mrs. Cole testified that Mr. Brown was to pay for the land and the appellees agreed to repay Mr. Brown. Mrs. Cole testified that in 1975 she and her husband attempted to obtain a loan to repair their mobile home located on the forty acres but the bank refused to accept a mortgage on the land because it was already mortgaged. According to Mrs. Cole, Mr. Brown agreed to pay off the land in order to clear the title, but he wanted some security and he agreed to accept a quitclaim deed to their twenty acres. He then deeded back to them the two acres surrounding the mobile home.

In March 1984, Mr. Brown became ill with cancer. Mrs. Cole stated that shortly after the illness was discovered, she and her husband sat down with Mr. Brown and they all agreed that the debt would be extinguished in return for the appellees caring for him. Although there is some dispute in the record as to exactly how much care was involved, it is clear that the appellees did care for Mr. Brown frequently in his last months and did chores for him such as housekeeping, shopping, and assisting him with personal grooming and hygiene.

Shortly before his death, Mr. Brown sold twenty of the forty acres to a third person not a party to this case. We find it to be relevant that Mr. Brown sold only twenty of the forty acres

because it indicates that he did not claim any ownership to the other twenty acres. Although the appellees presented a witness who testified that Mr. Brown had offered to sell him 38.6 of the forty acres, there was nothing in writing, no offer was made, and apparently no price discussed. The witness stated that he did not pursue the matter because he only had about $200.00 in cash. To rebut the assertion that the Coles were unable to obtain financing due to an existing mortgage on the land, the appellants introduced into evidence a letter from the mortgagee bank which indicated that Mr. Brown had paid off the mortgage in 1971.

Deferring to the chancellor's judgment concerning the credibility of the witnesses, as we must, we find sufficient evidence to support the chancellor's finding that the deed was in fact intended as a mortgage, and we hold that the chancellor's decision was not clearly erroneous.

Affirmed.

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

Sylvia JOHNSON *v.* STATE of Arkansas

CA CR 88-143 769 S.W.2d 37

Court of Appeals of Arkansas
Division I
Opinion delivered April 26, 1989

Law Offices of Ronald L. Griggs, by: *Ronald L. Griggs*, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant, Sylvia Johnson, appeals from her conviction of criminal solicitation to commit capital murder. She was charged on July 1, 1986, and tried on March 10, 1988. She contends the charge should have been dismissed for failure to grant her a speedy trial. Ark. R. Crim. P. 28.1(c) was amended by a Per Curiam issued July 13, 1987, but as it existed at the time of appellant's arrest it provided:

> Any defendant charged with an offense in circuit court and held to bail, or otherwise lawfully set at liberty, . . . shall

> be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within eighteen (18) months from the time provided in Rule 28.2 . . . .

Under Rule 28.2(a) the time for trial begins to run from the date the charge is filed except, if prior to that time the defendant has been continuously held in custody or on bail, the time begins to run from the date of arrest. Here, the trial court found the date of arrest to have been June 19, 1986, and it is agreed that appellant was on bail from that date until trial on March 10, 1988. This period of time is obviously more than 18 months, but the state contends there were two periods excluded under Rule 28.3(a) which provides:

> The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on the competency of the defendant and the period during which he is incompetent to stand trial, hearings on pretrial motions, interlocutory appeals, and trials of other charges against the defendant. No *pretrial motion* shall be held under advisement for more than thirty (30) days, and the period of time in excess of thirty (30) days during which any such motion is held under advisement shall not be considered an excluded period. [Emphasis added.]

The state argues there were two periods excluded under the above rule. One period relates to a continuation granted because a witness was unavailable, and the other period relates to the time for examination and hearing on the competency of the defendant to stand trial. Although the appellee contends that the language in Rule 28.3(a) providing that "no pretrial motion shall be held under advisement for more than thirty (30) days" means that the period of time to be excluded from pretrial proceedings is limited to only 30 days, no authority is cited to support that contention, and we think appellant is clearly wrong in that regard.

■ However, once the defendant has made a prima facie showing that the speedy trial rule has been violated, the burden shifts to the prosecution to show the delay was legally justified. *Horn* v. *State*, 294 Ark. 464, 743 S.W.2d 814 (1988); *Duncan* v. *State*, 294 Ark. 105, 740 S.W.2d 923 (1987); *Harwood* v. *Lofton*, 288 Ark. 173, 702 S.W.2d 805 (1986); *Glover* v. *State*, 287 Ark.

19, 695 S.W.2d 829 (1985); and *Williams* v. *State*, 275 Ark. 8, 627 S.W.2d 4 (1982). We find the state has made that showing in this case and we affirm the appellant's conviction.

The record shows that on October 2, 1986, in response to a letter dated September 16, 1986, from defense counsel stating that he intended to defend on the basis of mental disease or defect, the prosecution filed a motion asking that appellant be committed to the Arkansas State Hospital for mental examination. A response to this motion was filed on October 7, 1986, admitting that appellant had notified the prosecution that she would raise a mental defense and pointing out that under Ark. Stat. Ann. § 41-605(2) [now codified as Ark. Code Ann. § 5-2-305(b) (1987)] the court had four alternatives: (1) direct a mental examination at a regional mental health center, (2) appoint a qualified psychiatrist to examine appellant and make a report to the court, (3) direct the Arkansas State Hospital to examine appellant and make a report, or (4) commit the appellant to the Arkansas State Hospital for a period of thirty days or longer. Appellant's response also stated that either of the first three alternatives would be satisfactory but she would strenuously object to any commitment to the Arkansas State Hospital. The transcript of the hearing on appellant's motion to dismiss reveals that appellant's attorney mailed a copy of the appellant's response to the deputy prosecuting attorney and stated in the cover letter that appellant's attorney thought they should get in touch with the judge for a hearing on the motion for mental examination. That letter concluded, "I assume that at this point in time a continuance is likely." At that time, the case was set for trial on November 13, 1986.

The record shows that on November 10, 1986, the court issued an order committing the appellant to the Southeast Arkansas Mental Health Center at Pine Bluff, Arkansas, for a period not to exceed 30 days and directing the center to report back to the court in writing. The transcript of the hearing on the motion to dismiss further reveals that two appointments were made at the Southeast Arkansas Mental Center for appellant, but she did not keep either appointment and the Center wrote the judge stating that it preferred not to reschedule an examination. The discussion at the hearing also revealed that defense counsel wrote the Center apologizing for the failure of his client to appear for the examinations and asking that the decision not to evaluate

his client be reconsidered. The next pertinent date referred to in the hearing is December 29, 1986, the date of a letter the court received containing the result of the Center's mental examination of appellant.

Under Ark. R. Crim. P. 28.3(a), the period of time required for the examination and evaluation of the defendant's competency to stand trial is excluded. In *Nelson* v. *State*, 297 Ark. 58, 759 S.W.2d 215 (1988), the court excluded a 223-day period for mental examination. *See also Scott* v. *State*, 286 Ark. 339, 691 S.W.2d 859 (1985), where 32 days were excluded. At the hearing in the instant case, appellant's attorney conceded that the period from the date of the order for the examination, November 10, 1986, to the date of the examination, December 15, 1986, should be excluded. The trial court, however, excluded the period from September 16, 1986, the date of the letter from appellant's counsel requesting mental examination, to December 29, 1986, the date the court received the Center's report of its examination. Under the circumstances in this case, we do not believe the court erred. The examination at the Pine Bluff facility was ordered at the appellant's request. It is clear that appellant's counsel thought this request would result in a hearing and a continuance. Then, it was appellant's failure to keep the appointments that caused the examination to be delayed until December 15, 1986, and the report was not received by the court until December 29, 1986. Thus, we think the trial court properly excluded the period from September 16, 1986, to December 29, 1986. This is slightly more than three months. Eighteen months from the date of arrest on June 19, 1986, would be December 19, 1987. When we add the excluded period of three months, the eighteen months for trial is extended to March 19, 1988. Appellant was tried on March 10, 1988, and therefore, her right to a speedy trial was not denied. Thus, we see no need to discuss the continuation granted because of witness unavailability.

In her brief to this court, the appellant argues that there was no written order entered setting out the excluded period as required by Ark. R. Crim. P. 28.3(i). However, we have found no place in the transcript where this matter was called to the trial court's attention. This same situation was before the Arkansas Supreme Court in *Gooden* v. *State*, 295 Ark. 385, 749 S.W.2d 657 (1988), and the court said the point would not be considered

on appeal since it was not presented to the trial court. *See* 295 Ark. at 390.

Affirmed.

CRACRAFT and ROGERS, JJ., agree.

INA/CIGNA INSURANCE COMPANY and Simpson Logging Company *v.* Delton SIMPSON

CA 88-315 772 S.W.2d 353

Court of Appeals of Arkansas
Division I
Opinion delivered April 26, 1989

Friday, Eldredge & Clark, by: *C. Tab Turner* and *Guy A. Wade*, for appellants.

Wright, Chaney & Berry, P.A., by: *Dan P. Chaney*, for appellee.

JOHN E. JENNINGS, Judge. Delton Simpson, the claimant in

this workers' compensation case, began hauling wood on a contract basis with International Paper Company in 1982. Simpson did business as Simpson Logging Company, an unincorporated sole proprietorship. International Paper required workers' compensation insurance, and referred Simpson to Davis-Garvin Insurance Agency in Columbia, South Carolina. A workers' compensation insurance policy was issued by appellant, INA/Cigna Insurance Company. Thereafter, certificates of insurance were forwarded to Simpson each year although he never received the policy itself. Premium payments for the policy were withheld by International Paper and forwarded to Davis-Garvin, which deducted its brokerage fee and sent the balance to the carrier, INA.

Simpson Logging Company employed from three to five workers during the period in question. Delton Simpson managed the logging operation and drove the truck that hauled the timber. In 1986, he was injured when his truck overturned. INA paid benefits under the policy for approximately one year before taking the position that it had no liability because of Simpson's failure to file written notice under Ark. Stat. Ann. § 81-1302(b) (Supp. 1985), now Ark. Code Ann. § 11-9-102(2) (1987), which provides in pertinent part:

> The term "employee" shall also include a sole proprietor or a partner who devotes full time to the proprietorship or partnership and who elects to be included in the definition of "employee" by filing written notice with the Workers' Compensation Commission.

The form established by the Commission regulations for such a filing is called an "A-18."

The administrative law judge held that the claim for compensation was not precluded by the failure to file an A-18. The full Commission affirmed and adopted the ALJ's conclusions and findings. On appeal, INA contends that the claim is barred. We disagree and affirm.

The question whether a sole proprietor must file an A-18 form to be eligible for coverage under the act was discussed in *Gilbert* v. *Gilbert Timber Co.*, 292 Ark. 124, 728 S.W.2d 507 (1987), but the supreme court in *Gilbert* found it unnecessary to

decide the issue. We too find it unnecessary to decide the question because we agree with the Commission that INA is estopped to raise the issue.

The certificate of insurance issued to Simpson Logging stated:

> This policy for Worker's Compensation protects all members of this organization, both employer, sole proprietor, a partner or bona-fide officer of the corporation and all employees. There is no exclusion, including contract labor.

The administrative law judge noted that although the carrier had collected premiums for four years, it had failed to produce the insurance policy itself in response to a request in discovery.

Although neither the administrative law judge nor the Commission used the word "estoppel," it is clear that this was a basis for their decisions.

Estoppel is an equitable doctrine which is invoked in appropriate circumstances to prevent a party from prevailing on purely technical grounds after having acted in a manner indicating that the opposing parties' strict compliance with the technicality would not be required. *Snow* v. *Alcoa*, 15 Ark. App. 205, 691 S.W.2d 194 (1985). We have applied the doctrine in workers' compensation cases. *Snow, supra.* We hold that, under the circumstances presented, the Commission was correct in holding that INA may not rely on Simpson's failure to file an A-18 form to defeat coverage.

INA relies on *Carter* v. *Associated Petroleum Carriers*, 235 S.C. 80, 110 S.E.2d 8 (1959) and *Eaves* v. *Contract Trucking Co.*, 55 N.M. 463, 235 P.2d 530 (1951). In *Carter*, as in the case at bar, no written election was filed with the Commission, but in *Carter* no policy was ever issued. *Eaves* more clearly supports the appellants' position. There, the New Mexico Supreme Court seems to have required strict compliance with a statute similar to ours. It held that the filing of the policy itself as opposed to a written election was insufficient. Although it appears that the general rule is that only substantial compliance with such statutory provisions is required, *see Carter, supra*, we need not decide that issue. Here there was clearly no compliance with the

statute at all, but on these facts INA is estopped to raise the issue.

Affirmed.

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

BEVERAGE PRODUCTS CORPORATION *v.* Robbie ROBINSON

CA 88-371 769 S.W.2d 424

Court of Appeals of Arkansas
Division I
Opinion delivered May 3, 1989

Bethell, Callaway, Robertson & Beasley, by: *Edgar E. Bethell*, for appellant.

Roger T. Jeremiah, for appellee.

DONALD L. CORBIN, Chief Judge. The facts of this case are largely undisputed. Appellant commenced this action against the appellee to replevy a soft drink machine. Appellant had delivered the soft drink machine to Chet Bonar for use at his driving range. Appellant and Bonar executed a document, which recited that the arrangement by which the machine was placed at Bonar's business was a "loan" of the machine. No security agreement or financing statement was executed or placed of record with regard to the machine. Bonar ran into financial difficulties, and the assets of his driving range were at some point seized and sold at public auction in execution on a judgment against him. Appellee purchased the soft drink machine from an individual who purchased it at the sale. After appellant discovered that appellee had possession of the machine, it commenced this action. The trial court ruled that the appellee was a bona fide purchaser for value without notice and that, as such, took title clear of any claim of the appellant. Appellant contends this ruling is an incorrect application of the law. We agree and reverse and remand.

[redacted] Arkansas follows the elementary common law rule that one cannot convey a better title than that which he has; a corollary to the general common law rule is that a purchaser cannot acquire a title better than that of his vendor. In recognition of this principle, our supreme court ruled in *Superior Iron Works* v. *McMillan*, 235 Ark. 207, 357 S.W.2d 524 (1962) that one who purchases from a thief acquires no title as against the true owner absent exigent circumstances. *See generally* R. Boyer, *Survey of the Law of Property* Ch. 33 (3d ed. 1981).

The Uniform Commercial Code, codified at Ark. Code Ann. Sections 4-1-101 through 4-10-104 (1987), builds and expands upon the general common law rule. Ark. Code Ann. Section 4-2-403 (1987) provides in part as follows:

> (1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value.

. . . .

(4) The rights of other purchasers of goods and of lien creditors are governed by the chapters on secured transactions . . . , bulk transfers . . . , and documents of title . . . .

The replevied soft drink machine in this case is not the subject of a secured transaction or a bulk transfer, nor did it involve any document of title. Comment One to the above cited section of the Uniform Commercial Code states that the section is intended to continue "[t]he basic policy of our law allowing transfer of such title as the transferor has . . . ."

While we can agree with the trial court's finding that the appellee was innocent and purchased the soft drink machine in good faith, Ark. Code Ann. Section 4-2-403 controls, and the appellant must prevail. *See generally Adkins* v. *Damron*, 324 S.W.2d 489 (Ky. Ct. App. 1959); *Slaton* v. *Lamb*, 260 Ala. 494, 71 So. 2d 289 (1954). The uncontroverted evidence below was that Bonar never obtained title to the soft drink machine, nor was there any intention that title should ever pass to him. It has long been held that the rightful owner of personal property seized pursuant to judicial process may maintain an action in replevin against the officer he finds in possession thereof. *Willis* v. *Reinhardt*, 52 Ark. 128, 12 S.W. 241 (1889). Because it is undisputed that Bonar and his successors in possession to the soft drink machine never acquired title superior to that of appellant, and in light of the principles noted above, the decision is reversed and remanded for further proceedings not inconsistent herewith.

Reversed and remanded.

CRACRAFT and COOPER, JJ., agree.

Charles EVERETT *v.* STATE of Arkansas

CA CR 88-220 769 S.W.2d 421

Court of Appeals of Arkansas
Division I
Opinion delivered May 3, 1989

Bill R. Holloway, for appellant.

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

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Desha County Circuit Court. Appellant, Charles Everett, appeals from the judgment and commitment order dated Febru-

ary 24, 1988, finding him guilty of two counts of delivery of cocaine, a violation of Arkansas Code Annotated Section 5-64-401 (1987). We affirm.

A felony information was filed November 13, 1986, charging appellant with three counts of delivery of cocaine. The case proceeded to trial and appellant was found guilty by a jury on two of the counts. Appellant was sentenced to a term of twenty years in the Arkansas Department of Correction on one count, a term of ten years imprisonment on the other, and a $25,000.00 fine. The terms of imprisonment were ordered to run concurrently. From the judgment comes this appeal.

In his only point for reversal, appellant argues that the state's use of four of its six peremptory challenges to exclude blacks from the jury violated the Equal Protection Clause of the United States Constitution and denied appellant a fair trial. We find no merit in the argument and affirm the judgment of conviction.

In *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the Supreme Court of the United States held that a criminal defendant has the right to be tried by a jury whose members are selected pursuant to criteria that are nondiscriminatory. The Equal Protection Clause guarantees the accused that the state will not exclude members of his race from the jury venire on account of race or on the false assumption that members of his race as a group are not qualified to serve as jurors. The appellate courts of this state followed the *Batson* rationale in *Ward* v. *State*, 293 Ark. 88, 733 S.W.2d 728 (1987) and *Kidd* v. *State*, 24 Ark. App. 55, 748 S.W.2d 38 (1988).

Under *Batson*, a defendant who alleges improper use of peremptory challenges must establish a prima facie case of purposeful discrimination. If the defendant makes this showing, then the burden shifts to the state to give a neutral explanation for the questioned challenges. In the case at bar, we acknowledge that the trial court adhered to the better practice of requiring the state to give racially neutral explanations for the questioned challenges. However, because we find that the appellant failed to establish a prima facie case of purposeful discrimination, we find it unnecessary to determine the sufficiency of the state's explanations.

In *Batson*, the Supreme Court noted:

> [A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

Id. at 96 (citations omitted). Because the appellant and the four veniremen which were struck are black, the issue for resolution becomes whether the facts and relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on account of their race.

The United States Supreme Court stated:

> In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in a particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. The examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie

case of discrimination against black jurors.

Batson, 476 U.S. at 96-97.

The record on appeal is confined to that which is abstracted. *Sutherland* v. *State*, 292 Ark. 103, 728 S.W.2d 496 (1987). The record in the case at bar does not reveal any questions or statements made during *voir dire* supporting an inference of discriminatory purpose. Also, the record reveals that the state exercised four peremptory challenges to strike black veniremen and two to strike white veniremen. Additionally, two black veniremen were seated on the jury. As stated in *Ward* v. *State*, 293 Ark. 88, 94, 733 S.W.2d 728, 731 (1987), "The best answer the state can have to a charge of discrimination is to be able to point to a jury which has some black members."

Since there were several black persons seated on the jury, and the state did not use all of it peremptory challenges to exclude only black veniremen, and the record of *voir dire* does not imply any racial discrimination, we affirm the trial court. The appellant did not make a prima facie case of discrimination as required in *Batson* by showing such facts and circumstances to raise the inference that the prosecutor used strikes to exclude the veniremen from the petit jury solely because of their race.

Affirmed.

CRACRAFT and COOPER, JJ., agree.

Vincent Ronald VAIRO *v.* Marbea L. VAIRO

CA 88-317 769 S.W.2d 423

Court of Appeals of Arkansas
Division I
Opinion delivered May 3, 1989
[Rehearing denied June 7, 1989.]

Law Office of Victoria Ann King, P.C., by: *Victoria Ann King*; and *Barron & Barron, P.A.*, by: *Thomas L. Barron*, for appellant.

John C. Aldworth, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Searcy County Chancery Court. Appellant, Vincent Ronald Vairo, appeals from the decree of divorce entered April 11, 1988 granting custody of the parties' minor child to appellee, Marbea L. Vairo. We dismiss.

The parties were married on June 25, 1983 in Arizona and continued to live in Arizona until they separated on October 13, 1987. Appellee and the parties' minor child moved to Marshall, Arkansas, where several members of her family live. Appellant remained in Arizona. Sixty days after her arrival, appellee filed for divorce in Searcy County and sought, among other things, custody of the child. Appellant entered two special appearances to challenge the court's jurisdiction to decide the custody issue. Following a hearing on the court's jurisdiction, at which both parties testified, the court held that due to an emergency situation of actual and threatened abuse, jurisdiction was proper pursuant to the Uniform Child Custody Jurisdiction Act. The chancellor granted temporary custody in favor of appellee by order dated February 29, 1988. A decree of divorce was granted in favor of appellee on April 11, 1988 which stated that custody of the child was to remain with appellee pending further orders of the court. Appellant appeals only from that portion of the divorce decree which awarded appellee custody of the child.

For reversal, appellant argues:

I.

THE HONORABLE ANDRE E. MCNEIL ERRED IN HIS FINDING THAT THE CHANCERY COURT OF SEARCY COUNTY HAD SUBJECT MATTER JURISDICTION OVER THE ISSUE RELATING TO CUSTODY OF THE PARTIES' MINOR CHILD BASED UPON THE EMERGENCY PROVISIONS CONTAINED IN THE UNIFORM CHILD CUSTODY JURISDICTION ACT AND THE ARKANSAS ADOPTION THEREOF.

II.

THE DEFENDANT WAS DENIED PROCEDURAL DUE PROCESS BY THE ADMISSION OF EVIDENCE RELATING TO THE ISSUE OF EMERGENCY WHEN THERE HAD BEEN NO JURISDICTIONAL ALLEGATIONS OF THE EXISTENCE OF AN EMERGENCY SITUATION IN ANY OF THE APPELLEE'S PLEADINGS.

We find both issues to be moot.

The decree of divorce entered April 11, 1988, states in pertinent part:

> 3. Temporary Custody of the parties' minor child, Evan Vairo, was awarded to [appellee] on February 4, 1988. Custody shall remain in [appellee] pending further orders of this Court.

Appellant filed his notice of appeal from the decree on May 11, 1988. The abstract reflects that on August 22, 1988, the chancellor entered an order for the purpose of final disposition of all matters pertaining to custody and visitation of the minor child, which stated:

> 3. The custody of the minor child, Evan Vincent Vairo, continues with and shall finally vest in [appellee].

No notice of appeal was filed relevant to the August 22, 1988 order.

It is clear, from the series of orders by the chancellor,

that permanent custody was not vested with appellee until the final order of August 22, 1988. Although temporary custody orders are in some instances appealable despite their lack of finality, *see Sandlin* v. *Sandlin*, 290 Ark. 366, 719 S.W.2d 433 (1986); *Chancellor* v. *Chancellor*, 282 Ark. 227, 667 S.W.2d 950 (1984); *Pope* v. *Pope*, 239 Ark. 352, 389 S.W.2d 425 (1965), a temporary order is terminated upon entry of a subsequent permanent order. *See Trammell* v. *Isom*, 25 Ark. App. 76, 753 S.W.2d 281 (1988). Thus, appellant appeals from an order which was terminated and is no longer in effect. Because appellant did not appeal from the award of permanent custody, the permanent award will be unaffected by any decision rendered with regard to the temporary custody provision in the decree. It has long been established that the policy of this court is not to decide cases which, by reason of intervening facts, are of no practical application. *See Kirk* v. *North Little Rock Special School Dist.*, 174 Ark. 943, 298 S.W. 212 (1927). It is the duty of the courts to decide actual controversies which can be carried into effect, but not to give opinions upon controversies or declare principles of law which cannot be executed or which cannot have any practical effect in settling the rights under the decree rendered. *Id.* The rights of the parties in the present litigation have been settled by the final award of custody from which neither party appealed, and a decision on the merits of the temporary award would have no practical effect on the rights of the parties.

Appeal dismissed.

CRACRAFT and COOPER, JJ., agree.

COUNTY MARKET and Silvey Companies *v.* Willie THORNTON

CA 88-220 770 S.W.2d 156
Court of Appeals of Arkansas
Division II
Opinion delivered May 3, 1989
[Supplemental Opinion on Denial of Rehearing June 21, 1989.*]

*Rogers, J. dissents.

Matthews, Sanders, Liles & Sayes, by: *Marci Talbot Liles*, for appellants.

Haskins Law Firm, for appellee.

JAMES R. COOPER, Judge. The appellee in this workers' compensation case was injured on January 24, 1984, within the scope of his employment as a stocker for his employer, the appellant County Market. The employer sent him to a doctor, who referred him to Dr. Blackwell, an orthopedic surgeon, for treatment. On April 4, 1984, Dr. Blackwell recommended that the appellee return to work. The appellee returned to work on April 9, 1984, but shortly thereafter filed notice that he was changing physicians to a chiropractor, Dr. Barbaree. Dr. Barbaree treated the appellant and subsequently referred him to Dr. Saer, who performed an orthopedic examination. The appellants refused to pay for the chiropractic treatments or the referral to Dr. Saer, alleging that the treatment provided by Dr. Barbaree was unauthorized and unnecessary, and that the provision of Act 444 of 1983 (codified at Ark. Code Ann. § 11-9-514 (1987)) permitting change to a chiropractic physician without approval by the Commission was unconstitutional. The administrative law judge found Act 444 of 1983 to be constitutional. The Commission, on review, likewise found the Act to be constitutional, but

remanded the case to the administrative law judge to determine whether the change of physicians and resulting treatment were reasonable and necessary. The appellants then brought an appeal to this Court challenging the Commission's conclusion that Act 444 of 1983 is constitutional. In an opinion not designated for publication, we dismissed the appeal for lack of an appealable order. *County Market* v. *Thornton*, No. CA85-494 (May 28, 1986). On remand, the administrative law judge found the services of Dr. Barbaree and Dr. Saer to be causally related to the injury, reasonable, and necessary, and again held the Act to be constitutional. These findings and conclusions by the administrative law judge were adopted by the Commission in an opinion filed on May 9, 1988. From that decision, comes this appeal.

The appellants do not contend that the Commission erred in finding the controverted treatment to be causally related, reasonable, and necessary, but instead assert that Ark. Code Ann. § 11-9-514 (1987) is unconstitutional as special and local legislation; that § 11-9-514 violates the equal protection clauses of the United States and Arkansas constitutions; and that § 11-9-514 is void for vagueness. On cross-appeal, the appellee contends that the Commission erred in finding that he was not entitled to additional temporary total disability benefits.

We first address the threshold issue of the appellants' standing to challenge the constitutionality of Ark. Code Ann. §11-9-514, which in pertinent part provides that:

> (a)(1) If the employee selects a physician, the commission shall not authorize a change of physician unless the employee first establishes to the satisfaction of the commission that there is a compelling reason or circumstance justifying a change.
>
> (2) If the employer selects a physician, the claimant may petition the commission one (1) time only for a change of physician, and if the commission approves the change, with or without a hearing, the commission shall determine the second physician and shall not be bound by recommendations of claimant or respondent. However, if the change desired *by the claimant is to a chiropractic physician, the claimant may make the change by giving advance notice to the employer or carrier.*

> (b) Treatment or services furnished or prescribed by any physician other than the ones selected according to the foregoing, except emergency treatment, shall be at the claimant's expense.

(Emphasis supplied.) The statute in question draws a distinction between chiropractic physicians and other physicians, making it simpler for a claimant to effect a change of physicians when the desired change is to a chiropractor. Both before the Commission and on appeal, the appellants have contended that statute is invalid as an impermissible distinction between chiropractors and other physicians. We do not reach the constitutional issues, however, because the appellants — a retail store and insurance company — lack standing to raise such issues.

> Constitutional rights, including the guarantee of due process, are personal rights and may not be asserted by a third party. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973), and *Barrows* v. *Jackson*, 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953). A very narrow exception exists where the issue presented to the court would not otherwise be susceptible of judicial review and it appears that the third party is sufficiently interested in the outcome that the rights of the other party would be vigorously asserted and, thus, adequately represented.

Cox v. *Stayton*, 273 Ark. 298, 619 S.W.2d 617, 619 (1981). The *Cox* Court agreed that the appellant grandparents had standing to raise the question of their grandchildren's right to counsel in an adoption proceeding because the issue would not otherwise be susceptible to review, but held that they lacked standing to assert the parents' right to counsel because that right could be asserted by the parents themselves, and would easily be reviewable had the parents joined in the appeal to claim such a right. *Id.*, 619 S.W.2d at 619-20. Clearly, physicians other than chiropractors are capable of asserting that the "chiropractic preference" provision of § 11-9-514 violates their constitutional rights, either by joining in the present litigation or bringing an action in their own behalf, and the issue is therefore readily susceptible of judicial review outside the context of the case at bar.

[redacted] Moreover, the appellants have failed to show they

suffered an injury as a result of the alleged unconstitutionality of the Act, as required by *Stokes* v. *Stokes*, 271 Ark. 300, 613 S.W.2d 372 (1981). The injury must be concrete, specific, real, and immediate rather than conjectural or hypothetical. *Estes* v. *Walters*, 269 Ark. 891, 601 S.W.2d 252 (Ark. App. 1980).

Although there are cases in which financial injury has been sufficient to give standing to assert the rights of another, those cases are distinguishable because the financial injuries they involved were immediate and directly tied to the challenged statute. In *Stokes* v. *Stokes*, 271 Ark. 300, 613 S.W.2d 372 (1981), standing was based on a finding that the child heirs-at-law had a direct monetary interest in the outcome of the lawsuit because the estate would be substantially reduced if the widow took against the will. On the basis of this threat of "immediate monetary loss," the *Stokes* Court held that the children had standing to challenge the statute which permitted the widow to elect to take against the will. A similar threat based on the same election statute was the basis for standing in *Huffman* v. *Dawkins*, 273 Ark. 520, 622 S.W.2d 159 (1981). In *Sweeney* v. *Sweeney*, 267 Ark. 595, 593 S.W.2d 21 (1980), a husband was found to have standing to challenge the constitutionality of a statute authorizing awards of permanent maintenance where he was obligated to make such payments under a decree rendered pursuant to the challenged statute. In all of these cases, the causal relationship between the threatened financial loss and the challenged statute is clear, direct, and immediate. In *Stokes* and *Huffman*, there would be no threat of loss *but for* the election statute allowing widows to take against the will; in *Sweeney*, the threatened loss was an award based on the challenged statute.

In the case at bar, however, the award is not based on the challenged statute, which is procedural, but is instead based on Ark. Code Ann. § 11-9-508 (1987), which imposes liability for reasonably necessary medical expenses. The appellants do not contest the validity of this statute or the Commission's findings that the expenses incurred were reasonable and necessary. Instead, they argue that the rule requiring Commission approval of physician changes in § 11-9-514(a)(1) serves to filter out frivolous and non-meritorious claims and that, but for the statutory provision removing chiropractors from the rule, the Commission might have disapproved the change, in which case §

11-9-514(b) would have exempted the appellants from liability.

This theory of injury requires us to assume that Commission approval of the change of physician, an essentially discretionary act in this case under § 11-9-514(a)(2), would have been withheld. This assumption would be purely speculative on our part because the Commission did not find the medical expenses arising from the physician change to be frivolous or nonmeritorious, but instead found them to be reasonable and necessary, a finding not challenged on appeal. Under these circumstances, the appellants' theory of injury is conjectural, hypothetical, and lacking in immediacy. We hold that the appellants lack standing in this case to challenge the exemption of chiropractors from the approval requirements governing change of physicians in § 11-9-514, and we therefore do not address the constitutional arguments they advance.

Finally, it is worth noting that the standing requirements limiting the assertion of constitutional rights by a third party are not merely intended to prevent unnecessary pronouncement on constitutional issues and premature interpretation of statutes: they also have the function of insuring that the issues on appeal will be concrete and sharply presented. *Secretary of State of Maryland* v. *Joseph H. Munson Co., Inc.*, 467 U.S. 947, 955 (1984). The case at bar involves a statute drawing distinctions between physicians and chiropractors, and evidence regarding the differences in training and practice between these health-care professionals will be crucial in determining whether the statutory distinction is founded on a rational basis. However, no such evidence is of record because no health-care professionals are parties. These issues would be more focused and more capable of resolution if we were presented with evidence bearing on the statutory distinction, and our holding that the appellants lack standing to assert these constitutional issues is therefore in keeping with the purpose and underlying reasoning behind the rules governing standing.

On cross-appeal, the appellee contends that the Commission erred in finding that he was not entitled to temporary total disability benefits for a period beginning on April 10, 1984. He argues that there is no substantial evidence to support a finding that his healing period ended on April 10, 1984, and that

the denial of temporary total disability benefits subsequent to that date was thus erroneous. We disagree. Temporary total disability benefits do not, in all cases, correspond to the healing period. *Arkansas State Highway and Transportation Dep't* v. *Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). In cases controlled by Ark. Code Ann. § 11-9-519 (1987) (formerly codified at Ark. Stat. Ann. § 81-1313 (Repl. 1976)), such as the case at bar, temporary total disability is not based on the claimant's healing period, but is instead awarded where the claimant is incapacitated because of injury to earn the wages he was receiving at the time of the injury. *Breshears, supra; see* Ark. Code Ann. § 11-9-102(5) (1987). Therefore, the issue for us to determine is whether the evidence supports a finding that the appellee was not incapacitated, subsequent to April 10, 1984, to earn the wages he was receiving when injured.

In workers' compensation cases, we review the evidence in the light most favorable to the Commission's findings and affirm if those findings are supported by substantial evidence. *Basford* v. *Weyerhaeuser Co.*, 21 Ark. App. 223, 730 S.W.2d 916 (1987). We may reverse the Commission's findings only when we are convinced that fair-minded people, with the same facts before them, could not have arrived at the conclusion reached by the Commission. *DeBoard* v. *Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). Here there was evidence that Dr. Blackwell released the appellee to return to work on April 4, 1984. The appellee did return to work for a few days, but saw Dr. Blackwell again on April 11 and reported that he experienced increased pain after working. Dr. Blackwell again recommended that the appellee continue performing normal activities. Although the appellee continued to be treated for his injuries for some time, we note that none of the physicians' reports conclude that the appellee suffered a temporary total disability after April 10, 1984. We think that the Commission could fairly conclude that, although the appellee had not completely healed after that date, he was nevertheless not incapacitated, and we hold that the Commission did not err in denying the claim for additional temporary total disability benefits.

Affirmed on appeal and cross-appeal.

CORBIN, C.J., and ROGERS, J., agree.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
JUNE 21, 1989

771 S.W.2d 793

PER CURIAM. Petition for rehearing is denied.

ROGERS, J., dissents.

JUDITH ROGERS, Judge, dissenting. The petitioners have filed a timely Petition for Rehearing asking this court to reconsider the position taken by the court that they have no standing to challenge the constitutionality of the provision in Ark. Code Ann. § 11-9-514(a)(2) (1987). This statute provides that a change of physician to a chiropractor need only be preceded by advance written notice, as opposed to the situation where Commission authorization is required on a finding of a compelling reason to justify changing from one physician to another. I find their arguments persuasive, and in my view petitioners do have standing to raise this issue; therefore, I would grant their petition, and ultimately reach the question presented, which at first blush, seems to have merit.

As noted by the court in its opinion, one who possesses a financial interest can be accorded standing to challenge the constitutionality of a statute. See *Stokes* v. *Stokes*, 271 Ark. 300, 613 S.W.2d 372 (1981); *Huffman* v. *Dawkins*, 273 Ark. 520, 622 S.W.2d 159 (1981); *Sweeney* v. *Sweeney*, 267 Ark. 595, 593 S.W.2d 21 (1980). In the opinion, these cited cases were discussed, and yet distinguished on the basis that the "award" in this case was not made pursuant to the challenged statute, but pursuant to Ark. Code Ann. § 11-9-508(a) (1987) upon a finding that the chiropractic treatment was "reasonable necessary." This distinction, while technically correct, ignores the fact that the initial change to a chiropractor which was contested gave rise to the petitioner's liability under § 11-9-508(a). Thus, it is illogical for this distinction to be made controlling when there is a discernible nexus between the two statutes, and it effectively insulates this provision from judicial review.

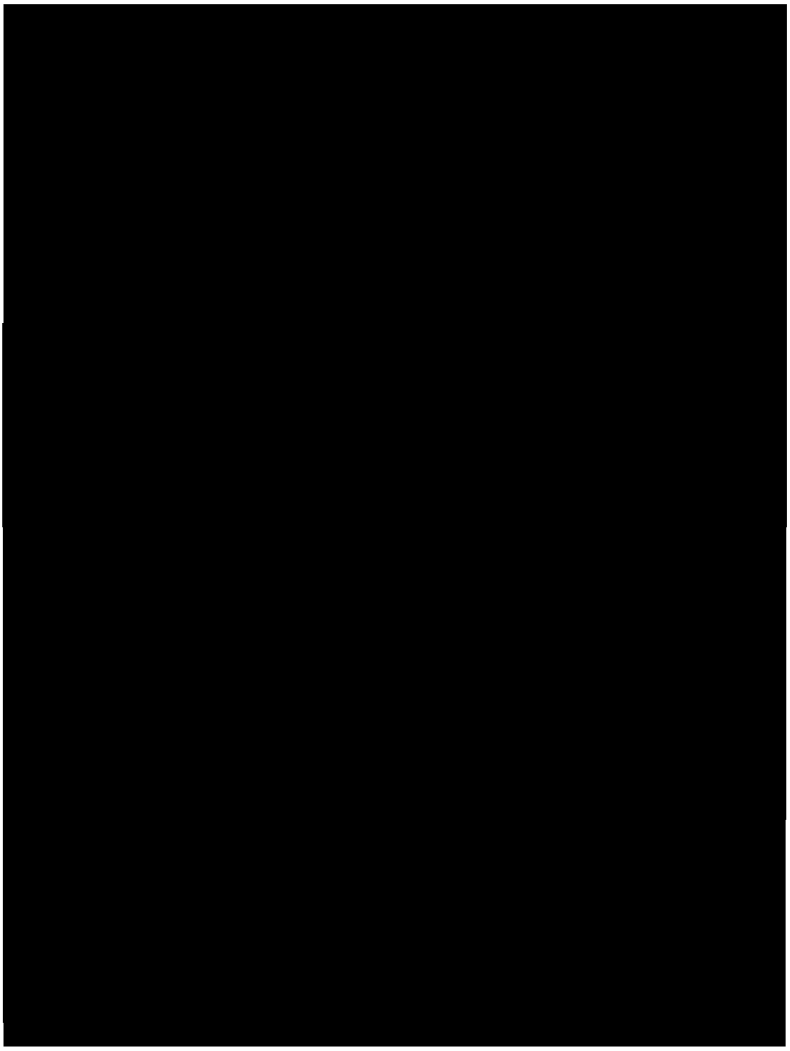
More importantly, however, this decision sweeps too broadly in its holding that the petitioners alone, without the intervention of a physician, would not in any event have standing to test the constitutionality of this provision. The petitioners are interested

parties in that the whole scheme of workers' compensation law rests upon the responsibility of employers to compensate their employees for job-related injuries. The petitioners' financial obligations, as envisioned by the statutory scheme, should give them standing to raise this issue. The petitioners' "injury" in this case is evident not only from this standpoint, but also from the fact that the respondent did take advantage of this provision resulting in the petitioners having to pay for the treatment after having to litigate this change in the first place. To say otherwise, places the petitioners and those similarly situated in the untenable position of having to pay for the treatment without question or engage in costly litigation. I would grant the petition.

Boyd T. HULS *v.* STATE of Arkansas

CA CR 88-212 770 S.W.2d 160

Court of Appeals of Arkansas
Division II
Opinion delivered May 3, 1989
[Rehearing denied May 24, 1989.]



[redacted]

John Wesley Hall, Jr. and *Craig Lambert*, for appellant.

Steve Clark, Att'y Gen., by: *Tim Humphries*, Asst. Att'y Gen., for appellee.

JUDITH ROGERS, Judge. The appellant, Boyd T. Huls, appeals his conviction of second degree murder for which he received a sentence of twenty years in the Arkansas Department of Correction. On appeal, he raises three points for reversal: (1) the trial court erred in admitting hearsay statements of the victim, Pasha Williams, made to her dentist, Dr. Allen Windberry; (2) the trial court erred in admitting into evidence photographs of the victim taken at her autopsy; and (3) the trial court erred in denying appellant's motion to suppress evidence found in a search of his residence. We disagree and affirm.

The appellant was charged with second degree murder, a class B felony, pursuant to Ark. Code Ann. § 5-10-103(a)(2), in connection with the death of Pasha Williams, which occurred early on the morning of December 10, 1986. The appellant contends that it was error for the court to have allowed Dr. Allen Windberry's testimony regarding certain statements that were made to him by Ms. Williams during a visit to his office on the basis that the testimony was hearsay. At trial, Dr. Windberry, Ms. Williams' dentist, testified that he had treated Ms. Williams

in May of 1986 for some missing and cracked teeth, which required bridgework to be done. He further testified that upon inquiry, Ms. Williams told him that this injury was caused by appellant's having thrown a lamp at her.

At a conference held on the morning of trial, appellant's counsel made an oral motion in limine with reference to and request for the exclusion of Dr. Windberry's testimony regarding the "broken teeth and the history he apparently took from the patient." The trial court denied the motion, finding that the testimony would be admissible as an exception to the hearsay rule as a statement made for the purposes of medical diagnosis or treatment.

The statement with regard to the appellant's having inflicted this injury was hearsay, in that it was offered for the truth of the matter asserted, as indicated by the prosecution's argument at trial that the testimony was relevant to show intent, motive and lack of mistake or accident. *See* Ark. R. Evid. 404(b). On appeal, the state does not argue that the statement was not hearsay, but that it was otherwise admissible pursuant to an exception to the hearsay rule. The state argues either that the statement falls into the exception noted by the trial court which is found at Ark. R. Evid. 803(4), or that it qualifies as an excited utterance pursuant to Rule 803(2). We conclude, however, that the statement falls into neither exception. Nevertheless, we affirm because of appellant's failure to make an appropriate and timely objection to the testimony at the time it was offered.

Ark. R. Evid. 803(4) provides that statements made for the purposes of medical diagnosis or treatment and describing medical history or past or present symptoms, pain or sensation, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment, are not excluded by the hearsay rule, even though the declarant is available as a witness. As stated in *United States* v. *Renville*, 779 F.2d 430 (8th Cir. 1985), the crucial question under the rule is whether the out-of-court statement of the declarant was "reasonably pertinent" to diagnosis or treatment. The Eighth Circuit in *United States* v. *Iron Steel*, 633 F.2d 77 (8th Cir. 1980), promulgated a two-part test for the admissibility of hearsay statements under this exception: (1) the declarant's motive in

making the statement must be consistent with the purposes of promoting treatment; and (2) the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis. In *Renville*, the court stated:

> Statements of identity seldom are made to promote effective treatment; the patient has no sincere desire to frankly account for fault because it is generally irrelevant to an anticipated course of treatment. Additionally, physicians rarely have any reason to rely on statements of identity in treating or diagnosing a patient. The statements are simply irrelevant in the calculus of devising a program of effective treatment.

United States v. *Renville*, 779 F.2d at 436. *See also, Stallnacker* v. *State*, 19 Ark. App. 9, 715 S.W.2d 883 (1986). Inasmuch as the statement in the present case identified the appellant as the source of the declarant's injury, we are persuaded by the reasoning in *Iron Steel, supra,* and *Renville, supra*, and conclude that the testimony was not admissible pursuant to this exception.

Nor can we conclude, based on the record before us, that the statement was admissible as an excited utterance. An excited utterance is defined as a statement relating to a startling event or condition made while the declarant was under the stress and excitement caused by the event or condition. Ark. R. Evid. 803(2). The admissibility of a statement as an excited utterance is not to be measured by any precise number of minutes, hours or days, but requires that the declarant is still under the stress and excitement caused by the traumatic occurrence. *Pennington* v. *State*, 24 Ark. App. 70, 749 S.W.2d 680 (1988). The record is devoid of any testimony tending to show that the declarant, Ms. Williams, was still under the influence of stress or excitement associated with the startling event when the statement was made. In the absence of such evidence, we cannot conclude that the statement falls within this exception. In sum, we find that the statement was hearsay and does not fall within the parameters of either Ark. R. Evid. 803(4) or 803(2).

As previously noted, appellant made what can be deemed an oral motion in limine seeking to exclude testimony from Dr. Windberry as to "the broken teeth and the history he took from the patient," Ms. Williams. Given the motion as stated, the trial

judge was correct at this juncture in his ruling that such testimony fell within the hearsay exception as a statement made for the purposes of medical diagnosis or treatment. Absent from the motion, however, was any argument made as to the inadmissibility of statements concerning identity or fault, as excepted from this exception to the hearsay rule. Appellant did not object to the testimony of Dr. Windberry identifying the appellant as the perpetrator of the injury, with the result being that appellant has broadened the scope of his earlier objection on appeal.

It is not necessary for a party to object during trial in order to preserve his pretrial objection, but his failure to object or move to strike the testimony during trial precludes him from relying on anything then disclosed which had not been brought out in the pretrial hearing. *Rowe* v. *State*, 271 Ark. 20, 607 S.W.2d 657 (1980). The trial judge should deny a threshold motion that is vague and indefinite because the motion is properly used to prohibit the mention of some *specific matter*, perhaps of an inflammatory nature, until its admissibility has been shown out of the hearing of the jury. *Smith* v. *State*, 273 Ark. 47, 616 S.W.2d 14 (1981) (emphasis supplied). It has been held that when a motion in limine is overruled, no further objection is needed. *Ward* v. *State*, 272 Ark. 99, 612 S.W.2d 118 (1982). However, as pointed out in the concurring opinion in *Ark. State Hwy. Comm'n* v. *Pulaski Investment Co.*, 272 Ark. 389, 614 S.W.2d 675 (1981), an objection should be renewed when the motion is overly broad or vague, so as to provide the trial judge with an opportunity to determine the admissibility of the specific matter that is introduced. We hold then that appellant's failure to object to this testimony when offered precludes him from asserting its admission as error on appeal.

At trial, through the testimony of Dr. Fahmy Malak, the state medical examiner, ten photographs of the victim were admitted into evidence. The appellant next argues that four of these photographs should not have been admitted on the grounds that these photographs were not relevant and were highly prejudicial. Of the four photographs in question, two portrayed Ms. Williams' exposed scalp, one showed her exposed rib cage, and the other was of her lip.

The admissibility of photographs is within the sound

discretion of the trial judge, and his decision will not be reversed absent an abuse of that discretion. *Watson* v. *State*, 290 Ark. 484, 720 S.W.2d 310 (1986). The fact that photographs are inflammatory is not sufficient reason alone to exclude them. Inflammatory photographs are admissible in the discretion of the trial judge if they tend to shed light on any issue, enable a witness to better describe the objects portrayed, permit the jury to better understand the testimony, or corroborate testimony. *Id.* Where the prejudice substantially outweighs the probative value of the photographs, it is error for the trial judge to admit them. *Berry* v. *State*, 290 Ark. 223, 718 S.W.2d 447 (1986). In *Berry*, the supreme court expressed the view that trial courts should not engage in carte blanche acceptance of graphic and repetitive pictures into evidence.

In the instant case, upon the request of appellant's counsel, the trial judge, counsel and Dr. Malak retired to chambers before the introduction of any photographs to discuss their admissibility. Dr. Malak briefly explained what the substance of his testimony would be in relation to each of the photographs or the purpose for which each of the photographs would be offered. Although two photographs of the victim's scalp were withdrawn by the state as being cumulative, the trial judge found that the remaining photographs were admissible. In making this determination, it is clear from the record that the trial judge specifically addressed the probative value of the photographs as opposed to the potential for prejudice.

The appellant was charged with second degree murder pursuant to Ark. Code Ann. § 5-10-103(a)(2). The state had the burden of proving that appellant knowingly caused the death of another person under circumstances manifesting an extreme indifference to the value of human life. Dr. Malak testified that the cause of death was a blunt trauma to the head and neck. He stated that the two photographs of the scalp were helpful in illustrating the injury to the head, and that the photographs of the rib cage and lip showed further the extent of her injuries. In addition, as the state points out, the photograph of the lip was also offered to rebut the appellant's contention that Ms. Williams' death was attributable to the negligent use of a laryngoscope, which was used in an effort to revive her at the hospital. Dr. Malak testified that the injury to the lip depicted in the photograph was a

result of a direct blow to the lip, and could not have been caused by a laryngoscope. We cannot say that the trial court abused its discretion in admitting these photographs.

As appellant's final point, he argues that the trial court erred in denying his motion to suppress evidence obtained in a search of his residence conducted at 7:00 a.m. the morning of December 10, 1986. The record reflects that Deputy Sheriff Paul Martin was called at approximately 4:45 a.m. the morning of December 10th to come to the hospital where Ms. Williams had been taken by the appellant. Officer Martin testified that he accompanied the appellant back to his home without objection, where he conducted a search of the house in which he confiscated a hammer and a blood-stained blanket, which he also photographed. Officer Martin related that the appellant cooperated with him in the investigation of the house and that the appellant allowed the search to take place. With regard to this search, the appellant testified that "he (Officer Martin) said that he was going to look through the house and I agreed." The trial court found that the appellant voluntarily consented to this search, and denied the motion to suppress.

In reviewing the trial court's ruling with respect to a motion to suppress, the appellate court makes an independent determination based on the totality of the circumstances, and reverses only if the ruling was clearly against the preponderance of the evidence. *Campbell* v. *State*, 294 Ark. 639, 746 S.W.2d 37 (1988). The state has the burden of proving by clear and positive testimony that the consent to search was freely and voluntarily given, and that there was no actual or implied duress or coercion. *McIntosh* v. *State*, 296 Ark. 167, 753 S.W.2d 273 (1988). We cannot say that the trial court's denial of the motion to suppress, upon its finding that the appellant freely and voluntarily consented to the search, is clearly erroneous.

AFFIRMED.

MAYFIELD and JENNINGS, JJ., agree.

Charlotte M. HODGES *v.* Jerry G. HODGES

CA 88-304 770 S.W.2d 164

Court of Appeals of Arkansas
En Banc
Opinion delivered May 10, 1989

[redacted]

affirmed in part; reversed and remanded in part.

Highsmith, Gregg, Hart, Farris and Rutledge, by:

Josephine L. Hart, for appellant.

James A. McLarty, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Jackson County Chancery Court. Appellant, Charlotte M. Hodges, appeals from a decree granting divorce in favor of appellee, Jerry G. Hodges, and dividing the parties' property. We affirm in part and reverse and remand in part.

Appellee filed a complaint on April 20, 1988, seeking absolute divorce from appellant on the grounds of general indignities. Appellant answered and counterclaimed for divorce. A hearing was held on June 13, 1988, and a decree of divorce was entered on June 20, 1988, granting divorce in favor of appellee and dividing the parties' property. From the decree comes this appeal.

For reversal, appellant raises two points: (1) The chancellor erred in granting a divorce to appellee on the grounds of general indignities; and (2) the court erred in its division of the property by: (a) ordering the capital stock of the business sold and by giving appellee exclusive possession of the business; (b) ordering appellant surcharged for moneys she received legally; (c) awarding possession of the marital home to appellee; and (d) awarding an automobile to a non-party to the case. We address her points in order.

First, appellant argues that the chancellor erred in granting a divorce to appellee on the grounds of general indignities. She essentially contends that appellee failed to introduce sufficient evidence to prove he was entitled to a divorce based upon general indignities. She also argues that the necessary corroboration was lacking as to residence, separation, and grounds.

Prior to the taking of testimony at the hearing, appellant's attorney indicated that grounds for divorce would not be contested. However, despite the fact that grounds were uncontested, existing statutory law does not permit a spouse to stipulate to or waive grounds for divorce. *Harpole* v. *Harpole*, 10 Ark. App. 298, 664 S.W.2d 480 (1984). Regardless of whether a divorce is contested or uncontested, the injured party must always prove his or her ground(s) for divorce as set forth in Arkansas Code Annotated Section 9-12-301 (1987). *Id.* at 302, 664 S.W.2d at

482.

[redacted] Appellee's complaint for divorce was sought based upon Arkansas Code Annotated Section 9-12-301(4) (1987) which provides that divorce may be granted where either party shall offer such indignities to the other so as to render his or her condition intolerable. Appellee testified that much of the disharmony arose over appellant's spending habits. He testified that on several occasions, appellant forged his name, without authorization, on checks drawn on a personal account held in his name only. Further testimony revealed that appellant purposely stubbed or recorded a check as $10.00, when the check had been written for $10,000 on the business account, and withdrew a total of approximately $16,200 from the business account causing overdrafts and placing a financial hardship on the family business. Other evidence was also introduced regarding irregular conduct by appellant in connection with the business. The parties' twenty-four-year-old daughter testified that appellant made accusations in her presence on numerous occasions that appellee was having an affair with a third party, and of misconduct with yet another. Appellant offered no basis for the accusations made. It has been said that the charge of sexual promiscuity or infidelity is probably the most offensive charge one spouse can make against the other, and it has been held that to make such a charge without basis is an indignity entitling the person charged to a divorce. *Relaford* v. *Relaford*, 235 Ark. 325, 359 S.W.2d 801 (1962). Although the appellate court reviews chancery cases *de novo*, it will not set aside the 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). Upon our *de novo* review, we cannot say that the chancellor was clearly erroneous in finding sufficient proof of general indignities.

[redacted] With regard to appellant's arguments concerning corroboration, as noted above, the parties agreed that grounds for divorce would not be contested. In uncontested divorce suits, corroboration of plaintiff's grounds for divorce is not necessary or required. Ark. Code Ann. § 9-12-306(a) (1987).

[redacted] Appellant also argues that because the parties continued to reside in the martial home until and after the divorce was granted, appellee's testimony that they lived separate and

apart under the same roof must be corroborated. We disagree. Corroboration of separation is not necessary in the instant case. Separation is not an element which must be affirmatively proved by the plaintiff for divorce based upon general indignities. The only grounds for divorce which require the plaintiff to make a prima facie showing of separation are found in subsections six and seven of 9-12-301. Subsection six provides as a ground for divorce, the separation without cohabitation of the parties for three consecutive years. Subsection seven has a similar requirement, but deals specifically with separation for three years caused by inexcusable insanity. None of the other grounds for divorce require a showing of separation. *See* Ark. Code Ann. § 9-12-301 (1987). Although section 9-12-306(c)(1) requires that proof of separation and continuity of separation without cohabitation be corroborated, we construe the reference to relate only to those grounds found in Arkansas Code Annotated Sections 9-12-301(6) and (7) in which separation without cohabitation is an element, or cases in which cohabitation is an affirmative defense.

[redacted] Although we have established that appellee was not required to make a prima facie showing of separation under Section 9-12-301(4), the defense of condonation could have been asserted by appellant. Condonation is a conditional rather than an absolute defense. *Coffey* v. *Coffey*, 223 Ark. 607, 267 S.W.2d 499 (1954). Cohabitation after marital misconduct is evidence of condonation but standing alone is not conclusive. *Elerson* v. *Elerson*, 6 Ark. App. 255, 640 S.W.2d 460 (1982). "[M]arital relations between litigants does not create a jurisdictional deficit, but merely creates an affirmative defense in the hands of either party *which must be raised*." *Ford* v. *Ford*, 270 Ark. App. 349, 605 S.W.2d 756 (Ct. App. 1980) (emphasis in original). Appellant neither pled the affirmative defense, nor raised it before the chancellor. Because separation without cohabitation was not an element of appellee's prima facie case, and appellant did not raise an affirmative defense based on cohabitation, corroboration of separation was not required in the case at bar.

[redacted] Finally, as to corroboration of residency, we agree that residency must be proven and corroborated in every instance, *see* Ark. Code Ann. §§ 9-12-307(a) and 9-12-306(c)(1) (1987), despite admission by a defendant. Ark. Code Ann. § 9-12-305 (1987). The purpose of the rule requiring corroboration is to

prevent the procuring of divorces though collusion, and when it is plain that there is no collusion, the corroboration required only needs to be slight. *Anderson* v. *Anderson*, 234 Ark. 379, 352 S.W.2d 369 (1961). On the record before us we find no indication of collusion.

Appellee testified that he had been a resident of Jackson County, Arkansas, for more than sixty days prior to the filing of the action and that the parties owned one hundred acres of land in Jackson County, Arkansas, upon which the marital home sat. Deeds evidencing ownership and location of the property were entered into evidence. The parties' twenty-four-year-old daughter also testified that she lived with her parents in the marital home throughout three years of disharmony, and until and after the filing of the action. The deeds showing that the parties' only real property was located in Arkansas coupled with the daughter's testimony that she resided in the marital home with both parties, was sufficient to corroborate appellee's testimony that he was an Arkansas resident. We cannot say that the chancellor was clearly erroneous in finding that residence had been proven and corroborated.

In her second point for reversal, appellant raises several issues regarding the chancellor's distribution of property. First, it is argued that the chancellor erred in ordering the capital stock of the business sold. We agree.

The record reveals that at the time of this action, each party owned fifty percent of the capital stock issued by Bill's IGA Foodliner #2, Inc., which constituted marital property. The chancellor ordered that if the parties could not mutually agree to terms and conditions privately regarding the capital stock, that it was to be sold at public sale by the court clerk.

Arkansas Code Annotated Section 9-12-315 (1987) governs the division of marital property. Subsection (a)(4) of 9-12-315 provides as follows:

> (4) When stocks, bonds, or other securities issued by a corporation, association, or government entity make up part of the marital property, the court shall designate in its final order or judgment the specific property in securities to which each party is entitled, or after determining the fair

> market value of the sureties, may order and adjudge that the securities be distributed to one party on condition that one-half (½) the fair market value of the securities in money or other property be set aside and distributed to the other party in lieu of division and distribution of the securities.

This section states that the court shall (1) designate the specific property in securities to which each party is entitled; or (2) may order and adjudge that the securities be distributed to one party and the other party receive one-half of the fair market value of the securities in money or other property. The chancellor did neither and ordered sale of the stock if the parties failed to reach an agreement. Sale of the stock is not authorized by the statute and the chancellor's decree must be reversed in that regard. On remand, the chancellor must divide the stock in one of the two authorized manners, whether that division be equal or unequal. Ark. Code Ann. § 9-12-315 (1987).

[16] Appellant also argues that the court erred in awarding appellee exclusive possession of the business because no equitable reason existed for the court to take action regarding the parties' business. We disagree. The record reflects that appellant was causing hardship upon the business by withdrawing substantial sums of cash from its account. Further, appellee testified that prior to the hearing appellant removed from the premises certain business records necessary to prepare quarterly tax returns, the business checkbook, and the records concerning sales history. We believe the chancellor's finding that appellee should be put in exclusive control of the business is amply supported by the record.

[redacted] Next, appellant argues that the chancellor erred in surcharging her for certain expenditures made from corporate funds prior to the filing of the divorce action. The chancellor has broad powers to distribute the property in order to achieve an equitable division, *Williford* v. *Williford*, 280 Ark. 71, 655 S.W.2d 398 (1983), and may order credits and set-offs as appear equitable and just. *See Marshall* v. *Marshall*, 285 Ark. 426, 688 S.W.2d 279 (1985). The record reflects that appellant withdrew approximately $16,000 from the corporate account, outside the ordinary course of business for personal use, during the two month period immediately preceding the filing for divorce.

Although each party had a fifty percent interest in the corporation, that interest also constituted marital property. While we agree that appellant had a legally recognized interest to share in the profits, and arguably to make the withdrawals, that does not mean that the funds withdrawn cannot be surcharged against the interest in the marital property to which she was entitled. The surcharge by the chancellor was an attempt to comply with his intent to make an equal distribution of the marital property. The chancellor had extensive evidence before him regarding the financial condition of the business and the other marital property. We cannot say that he was clearly erroneous in finding that the surcharge was necessary to affect an equal distribution of the parties' property.

Appellant also contends that the chancellor erred in granting possession of the marital home to appellee without stating its basis and reasons as required for an unequal division under Arkansas Code Annotated Section 9-12-315(a)(1)(B) (Supp. 1987). We cannot agree. The chancellor ordered that unless the parties mutually agreed to a sale of the home within six months from the date of the decree, the property would be sold at public sale by the court clerk. He further provided that, whether by public or private sale, proceeds from the sale were to be divided equally between the parties. Appellee was put in possession of the home pending sale. The fact that appellee was granted possession of the home does not result in an unequal division of property in the case at bar. The trial court has the discretion to award possession of the homestead to either spouse upon terms found equitable and just. *Schaefer* v. *Schaefer*, 235 Ark. 870, 362 S.W.2d 444 (1962). The award of possession made by the chancellor was a temporary measure pending sale, and we cannot say that the chancellor abused his discretion in finding that such an award was equitable.

Finally, appellant argues that the court erred in awarding an automobile to the parties' daughter because she was not a party to the action. The chancellor heard testimony from both parties and the daughter regarding ownership of the automobile in question. In support of her position, appellant sets out in her brief the following language from *Copeland* v. *Copeland*, 2 Ark. App. 55, 616 S.W.2d 773 (1981):

> We also agree with appellant that the chancellor erred in awarding disputed items of personal property to the son of the parties who was not himself a party to the action. Third parties may be brought into, or intervene in, divorce actions for the purpose of clearing or determining the rights of the spouses in specific properties. [Citation omitted]. In this case neither was done.

However, had appellant read further, the court also stated, "The court might also have simply found that the disputed property belonged to neither contending spouse."

In the instant case, the chancellor held that all property owned by the parties should be divided equally with the exception of certain property not part of this appeal, and "a Mercury automobile which, although titled in the plaintiff's name, is in truth and in fact, the property of Michelle Hodges, the adult daughter of the parties." The chancellor did not "award" the automobile to the daughter. He merely found that the property belonged to neither contending spouse. We find no merit in appellant's argument.

Affirmed in part; reversed and remanded in part.

JENNINGS, J., concurring in part and dissenting in part.

JOHN E. JENNINGS, Judge, concurring in part, dissenting in part. In my view Ark. Code Ann. § 9-12-315(a)(4) does not preclude the chancellor from ordering a sale of stock. While it is true that the statute does not specifically authorize a sale, it is just as true that § 9-12-315 does not specifically authorize the sale of any personal property. We know, of course, that chancellors order the personal property of the parties sold quite frequently — chancery certainly has the inherent authority to do so, apart from statute.

Here the court did, in language of § 9-12-315(a)(4) "designate in its final order" "the specific property and securities to which each party is entitled. . . ." It then ordered that property sold, unless the parties could arrive at an agreement on the stock. I do not understand why the court lacked the power to fashion this seemingly appropriate remedy.

I would affirm.

Joe GUINN *v.* STATE of Arkansas

CA CR 88-246 771 S.W.2d 290

Court of Appeals of Arkansas
Division I
Opinion delivered May 10, 1989

[redacted]

Mark S. Cambiano, P.A., for appellant.

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

GEORGE K. CRACRAFT, Judge. Joe Guinn appeals from his conviction of conspiring to commit multiple acts in violation of Ark. Code Ann. § 5-3-401 (1987) (formerly Ark. Stat. Ann. § 41-

707 (Repl. 1977)). *See also* Ark. Code Ann. § 5-3-403 (1987) (formerly Ark. Stat. Ann. § 41-709 (Repl. 1977)). We find sufficient merit in one point raised to warrant remand for further proceedings in the trial court.

The evidence presented at trial established that appellant offered to burn a dwelling belonging to Doyle Hall to enable him to collect insurance proceeds. Hall informed the authorities, and an undercover agent, posing as a relative of Hall's, thereafter met with appellant to discuss the plan. An agreement was entered into under which the appellant would burn Hall's buildings for the purpose of collecting insurance proceeds and would purchase from the undercover officer ten pounds of marijuana for resale at other places. Overt acts in furtherance of the agreement were thereafter committed.

MOTIONS TO DISMISS

Appellant first contends that the trial court erred in denying his motion to dismiss the conspiracy charge because the only alleged co-conspirators were police officers and their agents. This argument was presented and decided adversely to appellant on the first appeal of this case. *See Guinn* v. *State*, 23 Ark. App. 5, 740 S.W.2d 148 (1987). Our decision on the issue became the law of the case, and we will not address it again. *Hickerson* v. *State*, 286 Ark. 450, 693 S.W.2d 58 (1985); *Mode* v. *State*, 234 Ark. 46, 350 S.W.2d 675 (1961).

Appellant next contends that the trial court erred in denying his motion to dismiss because he had been charged by a felony information filed by the prosecuting attorney rather than by an indictment returned by a grand jury, and because no probable cause determination was ever made prior to the issuance of a warrant for appellant's arrest. We find no error.

Appellant makes three separate arguments in support of his contention that his prosecution could not go forward in the absence of a grand jury indictment. Appellant's first and third arguments are that the grand jury indictment requirement of the fifth amendment to the United States Constitution should be made applicable to the states by virtue of the due process clause of the fourteenth amendment, and that, even apart from the fifth amendment, allowing one to be charged by a prosecutor's

information without the safeguard of a grand jury indictment is "unconstitutional." We could not hold in favor of either argument even if we were so inclined. The United States Supreme Court has specifically held otherwise with respect to both arguments. *See Woon* v. *Oregon*, 229 U.S. 586 (1913); *Bolln* v. *Nebraska*, 176 U.S. 83 (1900); *Hurtado* v. *California*, 110 U.S. 616 (1884). The Arkansas Supreme Court has also repeatedly upheld the constitutionality of this State's practice of charging people by information. *See Higgins* v. *State*, 270 Ark. 19, 603 S.W.2d 401 (1980); *McCree* v. *State*, 266 Ark. 465, 585 S.W.2d 938 (1979); *Moore* v. *State*, 229 Ark. 335, 315 S.W.2d 907 (1958) *cert. denied* 358 U.S. 946 (1959). Although a state court may interpret its own constitutional prohibitions and requirements more restrictively against the prosecution than its federal counterparts have under federal constitutional standards, it cannot impress a greater restriction as a matter of *federal constitutional law* when the Supreme Court of the United States has specifically refrained from doing so. *Oregon* v. *Haas*, 420 U.S. 714 (1975). *See also Kidd* v. *State*, 24 Ark. App. 55, 748 S.W.2d 38 (1988). Nor is it within our province to overrule decisions of the Arkansas Supreme Court.

Appellant's second argument is that amendment twenty-one to the Arkansas Constitution, which specifically allows criminal charges to be brought by a prosecutor's information, is unconstitutional under the Arkansas Constitution. We cannot agree. Appellant makes no contention that amendment twenty-one was not validly adopted, and, absent a showing of invalid adoption, a state constitutional amendment *is* the state constitution with regard to the subject matter it addresses.

Nor do we find merit in appellant's contention that the issuance of a warrant for his arrest without a neutral magistrate's determination of probable cause required that his prosecution be dismissed. In the first place, a law enforcement officer may arrest a person *without* a warrant if he has reasonable cause to believe that person had committed a felony. Ark. R. Crim. P. 4.1(a). However, even were we to assume for the sake of this argument that appellant's arrest was not based upon reasonable cause, that would not mandate dismissal of the charge against him. The appellant cannot challenge his own presence at trial or claim immunity to prosecution simply because his appearance

was precipitated by an unlawful arrest. An illegal arrest, without more, has never been viewed as either a bar to subsequent prosecution or a defense to a valid conviction. *United States* v. *Crews*, 445 U.S. 463 (1980); *Van Daley* v. *State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987). In *Crews*, 445 U.S. at 474, the Supreme Court stated:

> The exclusionary principle of *Wongsun* and *Silverthorne Lumber Company* delimits that proof the Government may offer against the accused at trial, closing the courtroom door to evidence secured by official lawlessness. Respondent is not himself a suppressible "fruit," and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by police misconduct.

Here, appellant does not contend that any evidence should have been suppressed because obtained as a result of an illegal arrest but only that the charge against him should have been dismissed.

SUFFICIENCY OF *MIRANDA* WARNINGS

Appellant next contends that the trial court erred in admitting evidence of incriminating statements he made to police because the *Miranda* warnings given him were constitutionally insufficient on their face. The rights forms used in this case included the following:

> Q. Do you understand that you have the right to talk to a lawyer for advice before we ask you any questions and have him/her with you during your questioning?
>
> A. Yes.
>
> Q. Do you understand that *if you cannot afford a lawyer, one will be appointed for you by the court before any questioning*, if you so desire?
>
> A. Yes.

(Emphasis added.) Relying on *Mayfield* v. *State*, 293 Ark. 216, 736 S.W.2d 12 (1987), appellant contends that the above warning failed to inform him that an attorney would be appointed for him "free of charge" if he could not afford to hire one, and that that failure required that any statements he made be suppressed.

We construe *Mayfield* to hold to the contrary.

In *Trotter* v. *State*, 290 Ark. 269, 719 S.W.2d 268 (1986), the court did hold that *Miranda* warnings must inform an accused that, if he cannot afford one, an attorney will be appointed at absolutely no cost to him and that warnings that do not so inform the accused are constitutionally defective. However, in subsequent cases culminating in *Mayfield*, the court stated that *Trotter* went too far. *Mayfield* holds that, while an accused person must be informed of his right to appointed counsel if he cannot afford to hire one, there are no magic words which must be used. There, the court concluded:

> While we are not holding that specific words are required, we suggest that it would be very simple for the warning to say that the person being warned has the right to have an attorney present and that he may either retain one himself or, *if he cannot afford one, have one appointed by the court.*

Mayfield, 293 Ark. at 223, 736 S.W.2d at 15 (emphasis added). The warnings given here fully conform to that requirement.

VOLUNTARINESS OF APPELLANT'S CONFESSION

Appellant next contends that the trial court should not have admitted evidence of an inculpatory statement appellant made to police officers following his arrest because, despite appellant's request, the trial court never held a *Denno* hearing to determine the voluntariness of that statement. *See Jackson* v. *Denno*, 378 U.S. 368 (1964); Ark. Code Ann. § 16-89-107(b)(1) (1987) (formerly Ark. Stat. Ann. § 43-2105 (Repl. 1977)). That statute provides that, when a defendant raises an issue of fact concerning the voluntariness of a confession, the trial court is to conduct a hearing and determine that issue outside the presence of the jury.

On the day of trial, appellant orally moved to suppress the statement in question and requested a *Denno* hearing. The trial court refused to conduct a hearing at that time because the jury was already in the courtroom. As good cause was shown for the motion's lack of timeliness, *see* Ark. R. Crim. P. 16.2, it was decided that a hearing might be had at some other point in the trial. Over appellant's objection, evidence of his incriminating

statement was subsequently introduced. The State concedes that no *Denno* hearing was ever held and that the trial court never ruled on whether the statement was voluntary.

We agree with appellant that this was error. However, this failure on the part of the trial court does not in and of itself entitle appellant to a new trial. Instead, the case should be remanded to the trial court with instructions to hold a hearing and rule on the issue of the voluntariness of appellant's confession. *Jackson* v. *Denno*, *supra*; *Harris* v. *State*, 271 Ark. 568, 609 S.W.2d 48 (1980). A new trial should be ordered only if the trial court finds the confession to have been involuntary. *Id.*

TESTIMONY OF DOYLE HALL

Over appellant's objection, Doyle Hall was permitted to testify that in January of 1985, while residing in Tyler, Texas, he was approached on several occasions by appellant with regard to purchasing property owned by Hall in Van Buren County. He testified that appellant offered to buy the property and guaranteed payment within one year, indicating that he would obtain the funds with which to make payment by burning its structures. Hall informed him that he would have to think about it. Hall testified that the appellant then made the counter-proposal that he would burn the property for Hall for a price to be agreed upon. Hall stated that he would have to think about it. Appellant contends on appeal that the trial court erred in admitting this testimony because he was surprised that the prosecutor intended to use it, because the trial court had granted a motion *in limine* prohibiting its introduction prior to his first trial, and because it was hearsay, irrelevant, and highly prejudicial. We find no error in the trial court's ruling.

At appellant's second trial, he pled the affirmative defense of entrapment, which is said to occur when a law enforcement officer, or any person acting in cooperation with him, induces the commission of an offense by using persuasion or other means likely to cause a normally law-abiding person to commit the offense. Ark. Code Ann. § 5-2-209 (1987) (formerly Ark. Stat. Ann. § 41-209 (Repl. 1977)). The conduct of a law enforcement officer or his agent which merely affords the accused an opportunity to do that which he is otherwise ready, willing, and able to do is not entrapment. *Id.*; *Spears* v. *State*, 264 Ark. 83, 568

S.W.2d 492 (1978); *Webber* v. *State*, 15 Ark. App. 261, 692 S.W.2d 255 (1985). A defendant's conduct and predisposition, both prior to and concurrent with the transactions forming the basis of the charges, are still material and relevant on the question of whether the government agents merely afforded the opportunity to commit the offense with which he is charged. *Spears* v. *State*, *supra*; *Harper* v. *State*, 7 Ark. App. 28, 643 S.W.2d 585 (1982). Here, the evidence of the events that took place in Texas was relevant to the issue of appellant's predisposition to commit arson and tended to show that the idea of the conspiracy was born in the mind of the appellant. We cannot conclude that the trial court abused its discretion in finding the evidence relevant and its probative value not substantially outweighed by any danger of unfair prejudice.

Appellant next argues that the evidence was inadmissible hearsay under Rule 801(a)(2)(v) of the Arkansas Rules of Evidence because the statements attributed to him were made before the alleged conspiracy began. We do not address this argument because appellant did not object to Hall's testimony on hearsay grounds at trial and cannot raise the issue for the first time on appeal. *Johnson* v. *State*, 289 Ark. 589, 715 S.W.2d 441 (1986).

Nor can we agree with appellant that the trial court was required to exclude the evidence of appellant's conversations with Hall because the prosecutor had previously indicated to appellant's counsel that he would not seek to introduce it. Apparently, in light of entrapment becoming a defense, the prosecutor later decided to use the evidence and informed defense counsel of that fact on the day before trial. Appellant argues that he might have been able to secure a witness to rebut that appellant ever made such statements had he known earlier that they were to be used. Appellant has cited no authority and made no convincing argument as to why the court was required to exclude this evidence. *See Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977). Counsel for the appellant concedes that he does not believe the prosecutor intentionally misled him. He is apparently arguing that the prosecutor committed a discovery violation. We cannot agree. Rule 17.1 of the Arkansas Rules of Criminal Procedure requires that, upon request, the prosecuting attorney must furnish defense counsel with a list of the witnesses he intends

to call and the substance of any oral statements made by the defendant. Here, it is not denied that long before trial counsel was made aware of the content of these statements and that Hall would be called to testify.

However, even were we to assume that a discovery violation had been committed, we could not conclude that the trial court abused its discretion in refusing to exclude the evidence. Under Ark. R. Crim. P. 19.7, a number of options in addition to exclusion of evidence are open to the trial court, including granting a continuance. Here, it would seem that a continuance could have cured any prejudice appellant may have suffered. Appellant did not request a continuance in order to give himself time to locate the witness he thought could rebut Hall's evidence but asked only that the evidence be excluded. He also conceded that he was unsure whether the witness he had in mind could rebut Hall's testimony.

Appellant finally argues that the trial court had entered an order prohibiting introduction of this evidence at his first trial and that he had a right to rely on that ruling in his second trial. We cannot agree. Again, appellant has failed to make any convincing argument or cite any authority for his proposition. We note, however, that the evidence in question was not inadmissible *per se*; it was excluded at the first trial because it was found to be irrelevant. Pleading and submitting to the jury at the second trial the affirmative defense of entrapment, however, made the evidence relevant. Furthermore, it is clear that:

> [U]pon appellate reversal of a conviction the Government is not limited at a new trial to evidence presented at the first trial, but is free to strengthen its case in any way it can by the introduction of new evidence.

Pickens v. *State*, 292 Ark. 362, 370, 730 S.W.2d 230, 235 (1987) (quoting *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233, 243 (1957)).

CROSS-EXAMINATION OF DOYLE HALL

Appellant next contends that the trial court erred in limiting the scope of his cross-examination of Doyle Hall. Appellant alleged that the jury in his prior trial had recommended that Doyle Hall be indicted. On cross-examination of Hall in the

present case, the court would not permit appellant's counsel to ask Hall if he was aware that "a previous jury recommended that he be indicted." Appellant argues that he should have been permitted to ask the question in order to establish bias or a motive for Hall's giving testimony favorable to the State. We find no prejudicial error in the court's refusal to allow the question.

[redacted] Evidence of grants of immunity, promises of leniency, and other consideration given to a witness to secure his testimony are proper subjects for cross-examination. *See Giglio* v. *United States*, 405 U.S. 150 (1972). Here, appellant was permitted to explore these issues before the jury and was permitted to ask the witness whether he had been granted immunity from prosecution in exchange for his testimony, whether he had had any discussions with the prosecutor regarding immunity, and whether he understood that he could be charged with conspiracy to commit arson. It is not, however, within the province of the members of a petit jury in one case to bring criminal charges against a witness testifying before them, and their private opinions as to Hall's criminality would not be relevant to the issue of bias. We cannot conclude that the trial court abused its discretion in refusing to allow the witness to be asked if he was aware of such a recommendation or, if that ruling was error, that it was anything more than harmless in light of what appellant was allowed to ask the witness and the other evidence in this case. *See Hoback* v. *State*, 286 Ark. 153, 689 S.W.2d 569 (1985).

JURY INSTRUCTIONS

Over appellant's objection, the trial court gave Arkansas Model Criminal Instruction 108, which told the jury that the filing of an information by the State is not evidence and is not to be considered by the jury in "determining the guilt or innocence of the [appellant]." The trial court refused to give appellant's modified instruction, which would have told the jury that it was not evidence and was not to be considered "in determining whether the State has proven the guilt of [appellant] beyond a reasonable doubt." Appellant contends that the instruction given left the jury with the erroneous impression that it was required to find him either guilty or innocent and placed an unconstitutional burden on him to prove his innocence. We find no merit in this

contention.

The court first charged the jury that the State must prove beyond a reasonable doubt each and every element of the offense charged, and "[o]n the other hand, the defendant is not required to prove his innocence." The court then instructed the jury that the filing of the information was not to be considered in the determination of guilt or innocence. This instruction was followed by one stating that the appellant was presumed to be innocent, and that the presumption of innocence protects him throughout the trial and should continue to prevail in the jurors' minds until they were convinced of his guilt beyond a reasonable doubt. The court also properly defined "reasonable doubt." When all of the instructions are considered, we cannot conclude that there is any merit in the contention that the instruction objected to created an improper impression in the minds of these jurors.

CONCLUSION

As appellant has failed to demonstrate any error other than with respect to the required hearing and finding as to the voluntariness of his confession, the cause is remanded to the trial court for further proceedings on that issue. A new trial is to be ordered only if the trial court finds the confession to have been involuntary. *Jackson* v. *Denno*, 378 U.S. 368 (1964); *Harris* v. *State*, 271 Ark. 568, 609 S.W.2d 48 (1980).

MAYFIELD and ROGERS, JJ., agree.

ARKANSAS FARM BUREAU INSURANCE COMPANIES *v.* Lance JACKSON, et al.

CA 88-360 770 S.W.2d 178

Court of Appeals of Arkansas
Division I
Opinion delivered May 10, 1989

David Hodges, for appellant.

Sherman & James, for appellee.

JAMES R. COOPER, Judge. On July 4, 1986, the appellee Lance Jackson, the seven-year-old grandson of the appellee Walter Gentry, was injured when the gas-powered three-wheel vehicle Gentry had allowed him to ride went out of control, left Gentry's property, and collided with a vehicle driven by Jerry Miller. Lance Jackson, by his parents, filed a negligence suit against Gentry. The appellant insurance company filed a declaratory judgment action against Gentry alleging that there was no coverage under Gentry's homeowner's policy under the facts of the case as related by Gentry in a deposition. The trial court found Gentry had been negligent, that Lance Jackson had been injured in the amount of $25,000.00 as a result of Gentry's negligence,

and that Jackson's injuries were covered under Gentry's homeowner's policy. From that decision, comes this appeal.

For its only point for reversal, the appellant contends that the trial court erred in concluding that there was coverage under the terms of Gentry's homeowner's policy. The issue involved is one of contract rather than tort, and our jurisdiction is proper under Ark. R. Sup. Ct. 29(1).

The record shows that Gentry acquired a Tricub three-wheeled motor vehicle in 1985. Gentry completely rebuilt the vehicle, including the engine, frame, and hand brake. There was no throttle on the three-wheeler when Gentry acquired it, and the throttle mechanism in place when the accident occurred had been built by Gentry. Gentry stated in his deposition that the accident took place at a Fourth of July gathering held at his home. Gentry permitted his grandson to ride the three-wheeler after inserting a screw in the throttle mechanism to prevent the throttle from being opened completely. The grandson was injured when the mechanism failed, the throttle opened completely, and the boy was unable to control the three-wheeler, which left the property, shot into the air across a highway, and was hit by Miller's vehicle. Gentry admitted responsibility for the accident, and stated that, in his opinion, it occurred because the governing mechanism he designed and installed was defective: once the screw came out and the throttle opened wide, the mechanism prevented the boy from closing the throttle to slow the vehicle. Finally, the record shows that Gentry's grandson was not a member of Gentry's household at the time of the accident.

The homeowner's policy in question provides, in pertinent part, as follows:

SECTION II

PERSONAL LIABILITY PROTECTION

PERSONAL LIABILITY — COVERAGE E

Subject to the limits of liability shown on your declaration, we will pay all sums, except punitive damages, arising out of any loss which you become legally obligated to pay as damages because of bodily injury or property damage

covered by this policy.

. . .

MEDICAL PAYMENTS TO OTHERS — COVERAGE F

We will pay for the fair expenses because of an accident, for necessary medical [services].

. . .

Each person who sustains bodily injury is entitled to this protection when that person is:

1. on an insured premises with your permission or
2. elsewhere, if the bodily injury:
   (a) arises out of a condition in the residence premises or the adjoining ways;
   (b) is caused by the activities of you or any employee in the course of employment by you or in your care;

. . .

The appellant does not contend that the above-quoted provisions of the homeowner's policy preclude coverage of Gentry's liability for his grandson's injuries, but instead argues that the claim is excluded by the following language:

EXCLUSIONS

Unless special permission for coverage is granted by endorsement, certain types of losses are not covered by your policy. Under Personal Liability Coverage and Medical Payments to Others, we do not cover:

1. bodily injury or property damage arising out of the ownership, maintenance, or use of:
   (a) aircraft:
   (b) a motor vehicle operated by, rented or loaned to you. This exclusion does not apply to golf carts while used for golfing purposes, or motorized law (sic) mowers when used to service your

residence premises;

(c) watercraft not located on the residence premises when owned by or rented to you, powered by one or more motors with more than 25 total horsepower.

The policy definition of motor vehicle includes a "three-wheeler, quadracycle, all-terrain cycle (ATC), all-terrain vehicle (ATV) and any similar vehicle." The words "you" and "yours" refer to the named insured, his spouse, and dependent relatives if living in the same household.

The appellant asserts that the trial court misconstrued the exclusion, adopting a construction under which the exclusion would apply only if Gentry had himself been operating the three-wheeler when the accident occurred. The appellant further argues that the clear purpose of the provision is to exclude coverage for liabilities arising out of the ownership, maintenance, or use of a motor vehicle by the insured without restricting the exclusion to cases in which the motor vehicle was operated by the homeowner. We do not agree.

Exclusionary clauses in insurance policies are strictly interpreted, with all reasonable doubts resolved in favor of the insured. *State Farm Mutual Automobile Ins. Co.* v. *Traylor*, 263 Ark. 92, 562 S.W.2d 595 (1978). Here the policy excludes coverage for injuries arising out of the ownership, maintenance, or use of certain conveyances under specified circumstances. Coverage for injuries arising out of the operation, maintenance, or use of aircraft is excluded absolutely. Coverage for injuries arising out of the ownership, maintenance, or use of certain powered watercraft is excluded when the watercraft is owned by or rented to the insured, and the watercraft is not located on the residence premises. Coverage for injuries arising out of the operation, maintenance, or use of motor vehicles is excluded when that motor vehicle is operated by, rented, or loaned to the insured.

We think it significant that the drafter of the policy specifically mentioned ownership as a circumstance excluding coverage with respect to watercraft, but omitted ownership from the circumstances excluding coverage for motor vehicles. Although the three-wheeler involved in the accident falls under the

definition of "motor vehicle" and is therefore in the category of conveyances covered by the exclusion, the circumstances under which the policy excludes coverage for injuries arising out of the ownership, maintenance, or use of a motor vehicle do not exist: the record clearly shows that the three-wheeler was not being "operated by, rented or loaned" to Gentry when the loss occurred. The cases cited by the appellant involve the policy language which differs from the terms of the policy in the present case and are not on point. *See Aetna Casualty & Surety Co.* v. *American Manufacturers Mutual Ins. Co.*, 261 Ark. 326, 547 S.W.2d 757 (1977) (excluded coverage for ownership, maintenance, or use of recreational vehicle owned by the insured where the injury occurred off the residence premises; exclusion applied where accident, arising out of the use of the vehicle, occurred off-premises); *O'Quinn* v. *Wedlock*, 428 So.2d 873 (La. Ct. App. 1983) (excluded coverage where the vehicle was owned or operated by, rented, or loaned to the insured; exclusion applied where the vehicle was owned by the insured). We hold that the trial court correctly concluded that the loss in this case was covered by Gentry's homeowner's policy, and we affirm.

Affirmed.

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

ARKANSAS OKLAHOMA GAS CORPORATION
v. ARKANSAS PUBLIC SERVICE COMMISSION

CA 88-260 770 S.W.2d 180

Court of Appeals of Arkansas
En Banc
Opinion delivered May 10, 1989

Rose Law Firm, A Professional Association, by: *Charles W. Baker*, for appellant.

Arthur H. Stuenkel, Asst. Counsel, for appellee Arkansas Public Service Commission.

JOHN E. JENNINGS, Judge. This is an appeal from an order of the Arkansas Public Service Commission denying Arkansas Oklahoma Gas Company's proposed surcharge under Ark. Code Ann. Sections 23-4-501 *et seq.* (1987) (Act 310 of 1981) for expenditures associated with asbestos removal from two of appellant's buildings in Fort Smith, Arkansas. Appellant, AOG, filed an Interim Rate Schedule for a surcharge pursuant to Ark. Code Ann. Section 23-4-501 *et seq.* (1987) on September 30, 1987. The application sought permission to surcharge its Arkansas ratepayers a $106,869.00 jurisdictional share of asbestos removal and related costs[1] for its main office building and a garage in Fort Smith, Arkansas. Appellant contends that it incurred those costs as a direct result of 40 C.F.R. Sections 61.140 through 61.153 and 29 C.F.R. Section 1926.58. Those federal regulations establish specific standards, procedures, and guidelines to be followed with regard to handling of asbestos materials.

The Commission established Docket Number 87-149-U for the purpose of considering the application, and hearings were held in December of 1987. Appellant amended its application to increase the amount it desired to surcharge its customers, and the Commission in May entered Order Number 9, which denied the application entirely. This appeal followed.

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[1] Related costs include consultant fees, air monitoring, some special equipment purchases, reinsulating costs, and attorney's fees and witness fees for the Commission hearings.

Arkansas Code Annotated Sections 23-4-501 through 23-4-509 (1987) were enacted for the following purposes, as stated in Section 23-4-501:

> (a) It is recognized that legislative or administrative regulations impose certain legal requirements upon public utilities relating to the protection of the public health, safety, or the environment; and that:
>
> (1) In order to comply with such legislative or regulatory requirements, utilities are required to make substantial additional investments or incur additional expenses with respect to existing facilities used and useful in providing service to the utility's customers; and
>
> (2) Although such additional investments and expenses are necessary in order to provide service to the utility's customers, such additional investments and expenses are not included in the utility's rate and cannot be recovered in a prompt and timely fashion under existing regulatory procedures.
>
> (b) It is intended by the General Assembly that utilities be permitted to recover in a prompt and timely manner all such costs incurred by utilities in order to comply with such legislative or regulatory requirements through an interim surcharge which, if approved, shall be effective until the implementation of new rate schedules in connection with the next general rate filing of the utility wherein such additional investments or expenses can be included in the utility's base rate schedules. However, the costs to be recovered through such interim surcharge shall not include increases in the cost for employment compensation or benefits as a result of legislative or regulatory action.

It is undisputed that the insulation material appellant spent money to remove was asbestos as that term is defined in 40 C.F.R. 61 Subpart M, Section 61.141. The parties agree that the primary point of controversy in this case involves a dispute about whether the asbestos was "friable." Section 61.141 provides the

definition: "*[f]riable asbestos* material means any material containing more than 1 % asbestos by weight that hand pressure can crumble, pulverize, or reduce to powder when dry." Section 61.147 provides that friable asbestos material must be removed during "demolition" or "renovation" work (defined at 61.141), or that other measures be taken to prevent the release of asbestos fibers into the outside air during the renovation or demolition. Appellant argues that the insulation material was friable and, therefore, federal regulations mandated the expenditures to remove it. The appellee contends that the asbestos was not in fact friable and, even if it were, removal was not the only alternative available under the law and other less costly abatement procedures may have been available. The Commission's order, however, does not address whether removal, as opposed to other abatement procedures, was a reasonable course of action.

Three witnesses for appellant testified at the hearing on the surcharge application. One witness testified for AOG as to the costs of the asbestos removal and the allocation of those costs based on customer class and jurisdiction. AOG's attorney and risk manager, Michael J. Callan, testified as to the circumstances giving rise to the asbestos removal expenses. He said that AOG had employed an asbestos consulting firm to analyze insulating materials in its buildings and found that some of the materials contained up to thirty percent (30%) chrysotile, a form of asbestos.

There was evidence that AOG needed to install a new chiller for its main office building in order to keep its air conditioning unit working, and this project might necessitate disturbing asbestos insulating material on pipes and ducts. When asbestos insulation is disturbed, its particles or fibers can become airborne and, when inhaled or ingested, can cause cancer and other serious diseases. Callen testified that the asbestos was not in good condition and that the insulation was "friable," which means that it could be pulverized by hand pressure. He said the asbestos removal was accomplished over the Thanksgiving weekend of 1987.

Thomas W. Rimmer, a consultant for AOG, also testified as to the necessity of removing the asbestos. He stated that the insulation was in "fair to good condition" in both buildings, but that it had been damaged in some locations and appeared to be

coming loose and could fall in other spots. Rimmer testified in detail as to the various health hazards posed by exposure to asbestos fiber. He testified that removal of the asbestos material in conjunction with AOG's renovation work was prudent and that it was his opinion that Section 61.147 of the National Emissions Standards for Hazardous Air Pollutants (NESHAPS)[2] mandated removal.

An accounting witness for the PSC staff testified as to the proposed allocation of costs if the Commission allowed recovery, but stated her testimony was limited only to that issue and was not to be construed as support for the recovery thereof. An engineer for the PSC staff, Ralph W. Sandage, testified in opposition to the application. He said that there was no detectable level of asbestos found in air samples taken by appellant and, consequently, no danger. He also testified, in essence, that it was the renovation and repair work which necessitated the asbestos removal and that the removal was not a direct result of legislative or regulatory mandate. Sandage testified that some of the asbestos removed by the Company was not necessary at all in connection with the work. He testified that he had visited the renovation sites and had personally observed that the ACM did not disintegrate when touched and that it seemed solid. The witness testified that he had no problem with AOG removing the asbestos but objected to the recovery of expenses therefor under Act 310.

The PSC found in its order that the asbestos was not friable. The dispositive question before us in this appeal is whether that finding is supported by substantial evidence.

Arkansas Code Annotated Section 23-2-423(c)(3), (4), and (5) (1987) defines and limits our review of actions of the Public Service Commission as follows:

> (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 Commis-

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[2] Promulgated pursuant to the Clean Air Act and codified at 40 C.F.R. 61(m).

> sion 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.

On appeal, we give due regard to the expertise of the Commission, which derives its authority from the Arkansas General Assembly. *City of Fort Smith* v. *Arkansas Public Service Commission*, 278 Ark. 521, 648 S.W.2d 40 (1983). The Arkansas Public Service Commission has broad discretion in exercising its regulatory authority. *Associated Natural Gas Co.* v. *Arkansas Public Service Commission*, 25 Ark. App. 115, 752 S.W.2d 766 (1988); *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission*, 19 Ark. App. 322, 720 S.W.2d 924 (1986); *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission*, 18 Ark. App. 260, 715 S.W.2d 45 (1986); *Walnut Hill Telephone Co.* v. *Arkansas Public Service Commission*, 17 Ark. App. 259, 709 S.W.2d 96 (1986). Judicial inquiry terminates if the action of the Commission is supported by substantial evidence and its action is not unjust, unreasonable, unlawful or discriminatory. *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission*, 24 Ark. App. 142, 751 S.W.2d 8 (1988). It is the province of the Commission as the trier of fact, to assess the credibility of the witnesses, the reliability of their testimony, and the weight to be accorded the evidence presented. *Arkansas Public Service Commission* v. *Continental Telephone Co.*, 262 Ark. 821, 561 S.W.2d 645 (1978); *Associated Natural Gas Co., supra; General Telephone Company of the Southwest* v. *Arkansas Public Service Commission*, 23 Ark. App. 73, 744 S.W.2d 392 (1988).

> To establish an absence of substantial evidence to support the decision the appellant must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded men could not reach its conclusion. [citation omitted] . . . [T]he question is not whether the

> testimony would have supported a contrary finding but whether it supports the finding that was made.

Williams v. *Scott*, 278 Ark. 453, 455, 647 S.W.2d 115, 116 (1983). A decision of an administrative agency may be supported by substantial evidence even though this court might have reached a different conclusion had we heard the case *de novo* or sat as the trier of fact. *Fouch* v. *State, Alcoholic Beverage Control Division*, 10 Ark. App. 139, 662 S.W.2d 181 (1983).

On the record before us, we cannot say the finding of the Commission that the asbestos material in appellant's buildings was not friable is not supported by substantial evidence. Since this issue is dispositive and we affirm the Commission's finding in this regard, the other issues before us need not be reached.

Affirmed.

ROGERS, J., concurs.

COOPER, J., and CORBIN, C.J., dissent.

JUDITH ROGERS, Judge, concurring. I concur with the majority's decision in keeping with our standard of review. Our standard gives due deference to the Commission's expertise, and therefore I cannot disagree with the findings of fact made by the Commission. Even though we might have reached a different conclusion as the trier of fact, it is not our place on appellate review to substitute our judgment for that of the Commission, which exercises authority given it by the General Assembly. I do not share the view argued by appellant's attorney that, if we do not apply this statute to the facts in this case, we are in any way deciding that this statute does not mean exactly what it says.

However, I am troubled by one aspect of the Commission's analysis of the federal regulations involved in this case. The Commission correctly observed in its order that the Occupational Safety and Health Act (OSHA), 29 U.S.C. Sections 651 *et seq.*,[1] was enacted to promote the protection of workers from industrial injury, and that the Clean Air Act, 42 U.S.C. Sections 7401 *et seq.*,[2] was enacted for the broad purpose of protecting and

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[1] Pursuant to which 29 U.S.C. Sections 651 *et seq.* were promulgated.

[2] Pursuant to which 40 C.F.R. 61, Subpart M Sections 61.141 *et seq.* were

promoting the health of the general public. The Commission concluded that the OSHA regulations apply only for the protection of workers in the workplace and not for the protection of the general public. Therefore, it concluded that those regulations could not apply in an Act 310 surcharge case because Act 310 is only designed to allow recovery of expenditures due to regulations designed to protect the general public. The Commission also found that the general public was not in any danger from exposure to asbestos at appellant's facilities and that any risk of any exposure whatsoever was only to employees of appellant, who are not members of the "general public." The Commission therefore concluded that, since there was no danger to members of the "general public," the provisions of 40 C.F.R. do not apply and Act 310 is again not an appropriate mechanism for cost recovery.

I find these views inconsistent, unrealistic, and too narrow. Under the logic employed by the Commission, the broad protective purposes of regulations pertaining to asbestos exposure cannot be fairly met in an appropriate case. I am extremely troubled by the Commission's position that employees of appellant are not members of the "general public' and thus are not entitled to the elementary protections afforded other citizens by the Clean Air Act. In my view, the fact that the appellant's employees are members of a "subclass" of the general public by virtue of their employment does not affect the undeniable fact that the "general public" includes everyone.

JAMES R. COOPER, Judge, dissenting. I dissent. It is my view that the Commission's finding that the asbestos was not friable is not supported by substantial evidence; further, I disagree with the Commission's view that federal regulations did not mandate removal of the asbestos in this case and that the expenditures are not recoverable under Act 310 of 1981.

The majority bases its decision on the Commission's finding that the asbestos in appellant's buildings was not friable. "Friable asbestos" is defined in 40 C.F.R. 61, Subpart M, Section 61.141, to be material that "hand pressure can crumble, pulverize, or

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promulgated.

reduce to powder when dry." It seems to me that the evidence is considerable that the asbestos in appellant's facilities was indeed friable, and its removal was therefore mandated under federal law. We should be cognizant of powerful public policy considerations which should encourage the safe removal of this dangerous material whenever possible. One court has observed the following about the material with which the appellant here found itself confronted:

> Asbestos, a family of inorganic fibrous mineral substances once thought to be "wonder materials" and commonly used in building construction, has been identified in recent years as a formidable public health threat. Exposure to airborne asbestos fibers—often one thousand times thinner than a human hair—may induce several deadly diseases: asbestosis, a nonmalignant scarring of the lungs that causes extreme shortness of breath and often death; lung cancer; gastrointestinal cancer; and mesothelioma, a cancer of the lung lining or abdomen lining that develops 30 years after the first exposure to asbestos and that, once developed, invariably and rapidly causes death.

Environmental Encapsulating Corporation v. *City of New York*, 855 F.2d 48, 50 (1988). Clearly, our interpretation of federal regulations and Act 310 of 1981 should be done in keeping with both the letter and spirit of laws written to protect our citizens from catastrophic illnesses caused by asbestos.

Two witnesses, one of whom had extensive experience in dealing with asbestos, testified with regard to the friability of the asbestos in the appellant's buildings. Michael J. Callan, an attorney who serves as the appellant's risk manager, testified in detail about the appellant's buildings and said that the asbestos was in poor condition and was friable. He testified that the renovation work necessarily involved disturbing the asbestos and that removal of the asbestos was necessary in order to prevent its release into the atmosphere. Thomas W. Rimmer, a consultant for the appellant whose qualifications include training in the area of industrial hygiene and who has considerable expertise with asbestos, testified in detail as to the condition of the asbestos in the appellant's facilities. It was his unequivocal opinion that the asbestos should be removed. The only witness who offered

contradictory testimony was an engineer for the PSC staff, who candidly admitted that he had no particular expertise with regard to asbestos material. The PSC's witness initially testified that the asbestos was "not as friable as AOG suggests." However, on cross-examination, he altered his position and stated, "I will agree, either the material is friable or not friable." I simply cannot agree that the PSC staff's evidence from a single witness with no particular asbestos expertise can be said to be substantial in light of the clear, unequivocal, and convincing testimony of the appellant's witnesses.

I also disagree with the Commission's position that 40 C.F.R. Section 61.140 *et seq.* and 29 C.F.R. Section 1926.58 do not mandate the removal of friable asbestos in this case. Both sections clearly state that friable asbestos must be dealt with in a cautious and thoughtful manner when encountered. Various handling procedures are set forth, and the language of the regulations is mandatory. When one encounters friable asbestos material, the regulations leave no room for quarrel; the regulations require compliance. I simply cannot see how it can be said that these regulations with regard to an undeniably hazardous material can be lightly ignored in this case. I read the clear language of the federal regulations as leaving the appellant no option but to comply with their mandates, and, because the appellant chose to remove the asbestos material rather than take other steps to conform to the regulations, the only inquiry the PSC should have made was as to the reasonableness of the expenditures and the alternatives available in lieu of removal. The PSC did not make such an inquiry.

Finally, and in consideration of the above, I disagree that Act 310 of 1981 does not allow the appellant recovery through a surcharge of the expenditures in connection with the asbestos removal. Because the pertinent federal regulations mandated removal of the asbestos in the circumstances encountered by the appellant, the expenses were incurred as a "direct" result of regulatory requirements and are therefore recoverable through a surcharge under the plain language and legislative intent of Ark. Code Ann. Section 23-4-501 *et seq.* (1987). I would reverse and remand with directions that the PSC calculate the appropriate surcharge the appellant should be allowed to impose on its customers to recover the expenses incurred in connection with the

removal of asbestos from its facilities.

I am authorized to state that Chief Judge Corbin joins in this dissent.

George W. MARSHALL *v.* STATE of Arkansas

CA CR 88-186 770 S.W.2d 177

Court of Appeals of Arkansas
Division II
Opinion delivered May 10, 1989

William R. Simpson, Jr., Public Defender, *Jerry Sallings*, Deputy Public Defender, by: *Bret Qualls*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., *Lynley Arnett*, Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. George Marshall was convicted by a jury in Pulaski County Circuit Court of conspiracy to commit aggravated robbery and was sentenced to thirty years imprisonment. The conviction was supported by the testimony of Larry Mickel and Terry Wilkins, both of whom were officers with the North Little Rock Police Department. Both were working undercover when they first met Mr. Marshall at the Bel-Air Motel. Not long afterwards, the appellant asked Mickel and Wilkins to help him commit a burglary at the Otter Creek Pharmacy in Little Rock. Mickel and Wilkins pretended to agree and drove with the appellant to the pharmacy at night. Because there was a security guard on duty, the appellant decided against burglarizing the pharmacy. Instead, he invited the officers to join him in an armed robbery of a convenience store, and asked them to steal a getaway car. The officers had a vehicle used in undercover work brought to a North Little Rock parking lot and, with Marshall present, they pretended to steal it. After the appellant was unsuccessful in obtaining a .44 magnum pistol he suggested that the three of them buy a toy pistol, which they did. The three then drove around in the Southwest Little Rock area looking for a store to rob. Mr. Marshall picked out an Exxon station as the target and told Mickel to stay in the car. Appellant left with the toy pistol, but was arrested before any robbery was committed.

On appeal the sole argument is that the trial court erred in refusing to submit to the jury the status of Officers Mickel and Wilkins as accomplices. We find no error and affirm.

[redacted] Where a law enforcement officer feigns friendship or complicity in the commission of a crime in order to obtain incriminating evidence, he is not an accomplice. 3 C. Torcia, *Wharton's Criminal Evidence* § 611, at 750 (14th ed. 1985). The absence of mens rea precludes it. *Id.* at 750. "The case of a *pretended confederate*, who as detective, spy, or decoy, associates with the wrongdoers in order to obtain evidence is distinct from that of an accomplice, although the distinction may sometimes be difficult of application." J. Wigmore, *Wigmore on Evidence* § 2060, at 447 (Chadbourn rev. 1978).

[redacted] One's status as an accomplice is a mixed question of law and fact and the issue must be submitted to the jury where there is

any evidence to support a jury's finding that the witness was an accomplice. *Earl* v. *State*, 272 Ark. 5, 612 S.W.2d 98 (1981). But where there is no conflict in the evidence as to a witness's participation in a crime, or where his participation therein is conceded, the question whether the witness is an accomplice is one of law for the trial judge to determine. *Wharton's Criminal Evidence, supra,* at 752. *See also Brizendine* v. *State*, 4 Ark. App. 19, 627 S.W.2d 26 (1982).

In the case at bar, the evidence was undisputed that Officers Mickel and Wilkins were merely "feigned" accomplices. Indeed, it is conceded on appeal that both were operating as undercover police officers. Under these circumstances, we hold that the trial court did not err in refusing to submit their status as accomplices to the jury.

Affirmed.

MAYFIELD and ROGERS, JJ., agree.

Andy VENABLE *v.* STATE of Arkansas

CA CR 88-200 770 S.W.2d 170

Court of Appeals of Arkansas
En Banc
Opinion delivered May 10, 1989

Donald R. Huffman, Public Defender, for appellant.

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

JOHN E. JENNINGS, Judge. On April 14, 1987, Andy Venable entered a guilty plea to five counts of burglary and two counts of theft of property. On April 23, 1987, the Benton County Circuit Court sentenced Venable to fifteen years in the Department of Correction, but suspended five years, conditioned, among other things, upon Venable's not committing an offense punishable by imprisonment. The court remanded the defendant to the custody of the sheriff for transportation to the department.

By mid-May, Venable still had not been transported to the Department of Correction, and was being held in the Washington County Jail on other burglary charges. On May 17, 1987, the Washington County Circuit Court released Venable for five days

to take care of personal business. On September 30, 1987, the State filed a petition to revoke, alleging that Venable had burglarized Hobo Joe's Restaurant in Springdale on the 17th of May.

On April 25, 1988, the Benton County Circuit Court held a hearing on the petition and revoked the defendant's five-year suspended sentence. On appeal, Venable contends that the evidence was insufficient to support the revocation and that the court lacked jurisdiction to revoke his suspended sentence. We find no error and affirm.

We first consider defendant's second argument which is based on Ark. Code Ann. § 5-4-307(c) (1987):

> If the court sentences the defendant to a term of imprisonment and suspends imposition of sentence as to an additional term of imprisonment, the period of suspension commences to run from the day the defendant is lawfully set at liberty from the imprisonment.

Venable's argument is that because the period of suspension had not yet "commenced" the trial court was without jurisdiction to revoke it. The New Mexico Court of Appeals recently dealt with this issue in *State* v. *Padilla*, 106 N.M. 420, 744 P.2d 548 (Ct. App. 1987). Padilla was convicted of forgery and burglary and sentenced to three years with two years suspended. After his incarceration, Padilla escaped from a work-release center. The trial court then revoked his suspended sentence. The New Mexico court said that the overwhelming weight of authority supports the trial court's authority to revoke probation and suspended sentences for violations occurring prior to the commencement of the probationary period. The court held:

> [T]hat a defendant who commits a probation violation while still serving the custodial portion of his sentence should be treated no differently than a defendant who has served his custodial sentence but commits a violation while on probation. The suspension or deferment of a sentence is not a matter of right, but a decision reserved to the sound discretion of the sentencing court.

744 P.2d at 550.

The facts in *United States* v. *Ross*, 503 F.2d 940 (5th Cir. 1974), were virtually identical to those of the case at bar. Ross was convicted of a drug offense and was sentenced to three years in prison with all but four months suspended. It was also ordered that Ross be placed on five years probation following his release from prison. The trial court stayed execution of the sentence for one week to permit Ross to put his business in order. Almost immediately Ross was arrested for another drug offense, and the court revoked his suspended sentence.

On appeal, Ross argued that the district court could not revoke his probation for an offense committed after sentencing but before service of the sentence of probation had begun. 18 United States Code Section 3653 (1948) authorized termination of probation for a violation occurring "at any time within the probation period."

Judge Wisdom, speaking for the court, said:

> Aside from the fact that Section 3653 is not by its terms exclusive, case law and sound policy reject Ross's contentions . . . .
>
> * * *
>
> Sound policy requires that courts should be able to revoke probation for a defendant's offense committed before the sentence commences; an immediate return to criminal activity is more reprehensible than one which occurs at a later date.

503 F.2d at 943.

Most other jurisdictions agree. *Tiitsman* v. *Black*, 536 F.2d 678 (6th Cir. 1976); *People* v. *Shults*, 254 Cal. App. 2d 876, 63 Cal. Rptr. 667 (1967); *Wright* v. *United States*, 315 A.2d 839 (D.C. 1974); *State* v. *Stafford*, 437 So.2d 232 (Fla. Dist. Ct. App. 1983); *State* v. *Morris*, 98 Idaho 328, 563 P.2d 52 (1977); *Brown* v. *Commonwealth*, 564 S.W.2d 21 (Ky. Ct. App. 1978); *Commonwealth* v. *Wendowski*, 278 Pa. 453, 420 A.2d 628 (1980); *see also* Annotation, *Power of Court to Revoke Probation for Acts Committed After Imposition of Sentence but Prior to Commencement of Probation Term* 22 A.L.R. 4th 755 (1983).

Like the New Mexico Court of Appeals in *Padilla, supra,* we can find only two cases that arguably support the defendant's position here, and we agree that both are distinguishable. In *State* v. *DeAngelis*, 257 S.C. 44, 183 S.E.2d 906 (1971), the contention was that the sentencing order was ambiguous and the South Carolina Supreme Court held that any ambiguity must be resolved in the defendant's favor. In *Bell* v. *State*, 656 S.W.2d 502 (Tex. Crim. App. 1982), the trial court revoked the defendant's probation for an offense that occurred before the judgment, placing the defendant on probation, had been entered.

[redacted] Our conclusion is that the trial court had jurisdiction to revoke Venable's suspended sentence.

We also think the evidence was sufficient to support the revocation. At about 2:00 a.m. on May 18, 1988, Brian Freeman, a patrolman with the Springdale Police Department passed Hobo Joe's Restaurant on Highway 71. He noticed a beige-colored car parked by the business. Shortly thereafter, Freeman received a dispatch that the burglar alarm had gone off at Hobo Joe's. When he arrived he saw Venable getting into the car. Freeman tried to stop the car, but Venable fled and turned off his headlights during the ensuing chase. Freeman finally stopped and arrested him. At the hearing, Venable testified that he was intoxicated and had just stopped to use the bathroom.

There was evidence that a window was found open in the storage room of the restaurant and that the window screen had been pried out. The burglar alarm had been activated by the opening of an inside door from the storage room to the kitchen. The cash register was found open. No stolen property was found on Venable.

On these facts, the State concedes that the evidence was insufficient to establish the offense of burglary, but contends that it was sufficient to establish the offense of criminal trespass and that therefore the revocation was appropriate. We agree.

[redacted] Criminal trespass is a lesser included offense of burglary. *Bongfeldt* v. *State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982). The facts of *Self* v. *State*, 264 Ark. 197, 570 S.W.2d 256 (1978), relied on by the State, are similar to those in the case at bar. In *Self* a petition for revocation of the defendant's suspended

sentence was based on an allegation that he had committed burglary. The supreme court held that although the evidence was insufficient to show the offense of burglary it was sufficient to show the lesser included offense of breaking or entering, which itself constituted a violation of the terms of Self's suspended sentence, and that therefore the trial court did not err in revoking the suspension.

In the case at bar, the trial court expressly found that the defendant broke into the restaurant and that finding is not clearly against a preponderance of the evidence. The fact that evidence is circumstantial does not render it insufficient as a matter of law. *See Needham* v. *State*, 270 Ark. 131, 640 S.W.2d 118 (Ark. App. 1980). The trial court was justified in revoking the defendant's suspended sentence.

Affirmed.

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

CRACRAFT, J., concurs.

DONALD L. CORBIN, Chief Judge, dissenting. The majority opinion is the result logically desired but given the present status of statutory language and cases, this court cannot accomplish that goal. Other than citing the applicable statute (Ark. Code Ann. § 5-4-307(c) (1987)), the majority does not address the statute's plain meaning. Unfortunately, the defendant is correct in his assertion that the trial court improperly revoked the suspended five year portion of his sentence. The trial court sentenced him to 15 years in the Arkansas Department of Correction with five years suspended on certain conditions. The sentence was pronounced in open court and a written Judgment and Commitment, Partial Suspension of Sentence was filed. The defendant was remanded to the custody of the sheriff on April 23, 1987 to be delivered to the Department of Correction. While awaiting delivery to the Department of Correction, the sheriff released the defendant on May 17, 1987, for five days to take care of personal business. In support of his argument, appellant relies on Arkansas Code Annotated Section 5-4-307(c) (1987) which provides:

> If the court sentences the defendant to a term of imprisonment and suspends imposition of sentence as to an addi-

> tional term of imprisonment, the period of suspension commences to run on the day the defendant is lawfully set at liberty from the imprisonment.

Arkansas cases have interpreted the above code section to mean that a suspended sentence commences to run at the time the defendant is released from the Arkansas Department of Correction. *See, Matthews* v. *State*, 265 Ark. 298, 578 S.W.2d 30 (1979); *Vann* v. *State*, 16 Ark. App. 199, 698 S.W.2d 814 (1985).

Appellant contends that because a suspended sentence does not commence until one is released from a term of imprisonment, it cannot be revoked until he is actually serving his suspended sentence and commits some act during that period of time for which the suspended portion of sentence could be revoked. I agree.

The purpose of attaching the conditions to a period of suspension is to assist a defendant in leading a law-abiding life. Ark. Code Ann. § 5-4-303(a) (1987). Arkansas Code Annotated Section 5-4-303(b) (1987) establishes that the period within which a defendant may not commit an offense punishable by imprisonment is "during the period of suspension or probation." Thus, a defendant has a definable period (a beginning and an ending) to apprise him of the time within which he must lead a law-abiding life and comply with the written conditions of suspension. Therefore, because the appellant had not been set at liberty to begin serving the suspended portion of his sentence, the court erred in revoking his suspended sentence.

Furthermore, the defendant in the instant case had been "remanded to the sheriff for delivery to the Department of Correction," the executive branch of government. The courts have no inherent authority to modify a sentence after execution of that sentence has begun because, at that time, the power to exercise discretion has passed to the executive branch of government. *Nelson* v. *State*, 284 Ark. 156, 680 S.W.2d 91 (1984).

In *Redding* v. *State*, 293 Ark. 411, 738 S.W.2d 410 (1987) our supreme court stated:

> A sentence is placed into execution when the court issues a commitment order unless the trial court grants appellate bond or specifically delays execution of sentence upon

> other valid grounds. Once a valid sentence has been put into execution, the trial court is without jurisdiction to modify, amend or revise it. *Shipman* v. *State*, 261 Ark. 559, 550 S.W.2d 424 (1977). After the sentence is put into execution the power to change the sentence passes from the trial court to the executive branch of government. *Nelson* v. *State*, 284 Ark. 156, 680 S.W.2d 91 (1984).

Id. at 413, 738 S.W.2d at 411. Under *Redding*, the trial court in the instant case lost jurisdiction over appellant when it issued the commitment order. The trial court would not regain jurisdiction over appellant until he was released from prison. Ark. Code Ann. § 5-4-307(c) (1987).

The majority relies upon a New Mexico case and other cases around the country for its authority. None of the *foreign* cases cited by the majority have a statute containing the exact wording we have in Arkansas Code Annotated Section 5-4-307(c). In essence, the majority is engaged in legislating the desired result, completely ignoring the plain meaning of an Arkansas statute and by implication overrules a host of Arkansas case law.

JAMES R. COOPER, Judge, dissenting. I agree with Judge Corbin's dissent in that I, too, am convinced that the plain meaning of Ark. Code Ann. § 5-4-307(c) (1987) requires that this case be reversed. I write separately only to note that I do not think it necessary to further confound an area of the law which is already unnecessarily complex by applying *Redding* v. *State*, 293 Ark. 411, 738 S.W.2d 410 (1987). The *Redding* Court held that a trial court lacks jurisdiction to modify, amend, or revise a valid sentence after a commitment order is issued. In the present case, there was no modification, amendment, or revision of the appellant's sentence. Instead, the appellant's suspended sentence was simply revoked. The issue is not whether the trial court has jurisdiction to revoke suspended sentences, but whether § 5-4-307(c) was properly applied under the facts of this case. *See Banning* v. *State*, 22 Ark. App. 144, 737 S.W.2d 167 (1987).

MAYFIELD, J., joins in this dissent.

Betty Castle JONES, Personally and as Executor of the Estate of D.J. Jones, Deceased *v.* Roger JONES, et al.

CA 88-186 770 S.W.2d 174

Court of Appeals of Arkansas
Division II
Opinion delivered May 10, 1989

Cross, Kearney & McKissic, by: *Jesse L. Kearney*, for appellant.

Ben Johnson III, for appellee Roger Jones.

Jones & Petty, for appellee Pine Bluff National Bank.

JUDITH ROGERS, Judge. This appeal involves a dispute over the ownership of a certificate of deposit purchased by D.J. Jones from appellee Pine Bluff National Bank. D.J. Jones died on February 25, 1987, and his widow, appellant Betty Castle Jones, is contesting the chancellor's decision determining that a mutual mistake had been made and reforming the certificate of deposit to indicate that the decedent's son, appellee Roger Jones, was the payee instead of appellant. Appellant raises six points for reversal. We find no error and affirm.

On March 29, 1985, D.J. Jones purchased three certificates of deposit from Pine Bluff National Bank: (1) #9649 in the sum of $8,000 and payable to D.J. Jones or Betty Jones; (2) #9650 in the sum of $8,000 and payable to D.J. Jones or Roger Jones; and (3) #9651 in the sum of $2,000 payable to D.J. Jones or Betty Jones. All three certificates of deposit matured on March 29, 1986, and D.J. Jones returned to the bank on March 31, 1986. He left with three certificates of deposit: (1) #10912 in the sum of $8,000; (2) #10913 in the sum of $8,000; and (3) #10915 in the sum of $2,000. All three of the originals that he took with him were in the names of D.J. or Betty Jones.

Appellant went to the bank to cash in the certificates of deposit on April 27, 1987. The bank refused to pay #10913, the replacement of #9650, since its records indicated that Roger Jones was the payee. The bank filed this action for interpleader in chancery court for the determination of the rightful ownership of certificate #10913.

Appellant's first argument on appeal is that the evidence was insufficient to support a decree for reformation. Reformation is an equitable remedy which is available when the parties have reached a complete agreement but, through mutual mistake, the terms of the agreement are not correctly reflected in the written instrument purporting to evidence that agreement. *Delone* v. *U.S.F.& G.*, 17 Ark. App. 229, 707 S.W.2d 329 (1986). In reformation cases, the burden of proof is by clear and convincing evidence. *Turner* v. *Pennington*, 7 Ark. App. 205, 646 S.W.2d 28 (1983). However, we review the evidence to determine whether the chancellor's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous. *Akin* v. *First Nat'l Bank*, 25 Ark. App. 341, 758 S.W.2d 14 (1988); *Freeman* v. *Freeman*, 20 Ark. App. 12, 722 S.W.2d 877 (1987).

In a well-reasoned and thorough opinion, the chancellor found that a mutual mistake was made by D.J. Jones and the bank. The chancellor quoted extensively from the deposition of Emma Lou Bennett, the bank employee who waited on Mr. Jones on March 31, 1986. Ms. Bennett testified that Mr. Jones came in and stated that he wanted the certificates of deposit renewed. Ms. Bennett further testified that this was his only instruction and that he did not tell her of any changes that he wanted made in

them. Ms. Bennett further stated that the name change from D.J. or Roger Jones to D.J. or Betty Jones on #10913, which replaced #9650, was evidently a typographical error. She related that she went to lunch after Mr. Jones left, and upon her return from lunch, she was told to see her supervisor, Jan Mills. Ms. Bennett stated that Ms. Mills told her that she had typed the wrong name on one of the certificates of deposit and that Mr. Jones would bring it in the next day and have it corrected.

Mr. Jones never returned the certificate of deposit to the bank for correction. The copy of the certificate of deposit in the bank's possession was changed to indicate that it was payable to D.J. Jones or Roger Jones, while the original in the decedent's possession remained unchanged.

The chancellor considered extensive testimony and apparently believed that of Ms. Bennett. The mistake of a draftsman, whether he is one of the parties or merely a scrivener, is adequate grounds for relief provided only that the writing fails to reflect the parties' true understanding. *Kohn* v. *Pearson*, 282 Ark. 418, 670 S.W.2d 795 (1984). As the court stated in *Akin*, 25 Ark. App. at 346, 758 S.W.2d at 17 (1988), "[t]he fact that it was a bank employee who drafted the instrument wrong, does not render the mistake a unilateral one in a legal sense." We defer to the chancellor's superior position to evaluate the evidence and cannot say that he was clearly wrong in finding that a mutual mistake had been established by clear and convincing evidence. Ark. R. Civ. P. 52(a).

Appellant's second argument for reversal is that the trial court erred in admitting evidence at trial to establish what the decedent intended, since the certificate of deposit was purchased pursuant to Ark. Code Ann. § 23-32-1005 (1987). At trial, evidence of the decedent's intent was admitted without objection, specifically the deposition of Emma Lou Bennett. We have long held that assignments of error may not be raised for the first time on appeal. *Wasp Oil Inc.* v. *Ark. Oil & Gas, Inc.*, 280 Ark. 420, 658 S.W.2d 397 (1983). Even so, we note the statute cited by appellant refers to the creation of a survivorship interest in a deposit or certificate of deposit. No one has argued that a survivorship interest was not created and there is no authority indicating that the equitable remedy of reformation is barred by

this statute.

Appellant's third point for reversal is that the court's decree is not supported by any pleadings of the parties. At trial, appellee Roger Jones moved to amend the pleading to conform to the proof to include the theory of contract reformation. The chancellor asked appellant if she had any objections. Appellant replied that she had none. Appellant cannot now complain after waiving any objection. It is well settled that an objection not raised in the trial court cannot be raised for the first time on appeal. *Gregory* v. *Gordon*, 243 Ark. 635, 420 S.W.2d 825 (1967). Therefore, the decree is supported by the pleadings as amended.

Appellant's fourth point of asserted error is that the bank is barred by the equitable doctrines of estoppel and laches from the relief given. Laches and estoppel are affirmative defenses which must be pled. *Beeson* v. *Beeson*, 11 Ark. App. 79, 667 S.W.2d 368 (1984). From our review of the record before us, appellant neither pled nor even raised this defense before the chancellor and we need not consider this argument on appeal.

Appellant's fifth point on appeal is that even if there was a mutual mistake, it was ratified as written. The chancellor found that there was no credible evidence that would indicate that D.J. Jones ever intended for anyone other than his son, Roger Jones, to have the disputed certificate at the time of his death. We cannot say that finding was clearly erroneous.

Finally, appellant argues that the court erred in failing to grant appellant's motion testing the sufficiency of the evidence at the close of the appellee bank's case. In equity cases, a party may challenge the sufficiency of the evidence at the conclusion of the opponent's evidence by moving either orally or in writing to dismiss the opposing party's claim for relief. Ark. R. Civ. P. 50(a). However, in a non-jury trial, a party who does not challenge the sufficiency of evidence does not waive the right to do so on appeal. *Harpole* v. *Harpole*, 10 Ark. App. 298, 664 S.W.2d 480 (1984). As we have already discussed, upon review of the sufficiency of the evidence, we cannot say that the chancellor's decision was clearly erroneous. Ark. R. Civ. P. 52. In moving to challenge the sufficiency of the evidence, appellant seemed to argue that the appellee bank had offered insufficient evidence to support a finding that it was entitled to bring an action for

interpleader. We note that the bank's interpleader action was brought to avoid double liability for payment of the certificate of deposit. Such action was available under Ark. R. Civ. P. 22, which generally provides that persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. Therefore, we cannot say that an interpleader was improper for the bank to use to determine who was the correct payee, nor are we able to say that the chancellor's decision granting reformation was clearly erroneous.

AFFIRMED.

JENNINGS and MAYFIELD, JJ., agree.

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